



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

CALIFORNIA CASES IN THIS VOLUME

(160 PACIFIC REPORTER)

SUPREME COURT

	Page		Page
Armstrong v. Board of Education of City of Vallejo (Cal.).....	414	Jones v. California Development Co. (Cal.).....	823
Atchison, T. & S. F. R. Co. v. Railroad Commission of State of California (Cal.).....	828	Kern Valley Bank v. Sunset Road Oil Co. (Cal.).....	545
Baird's Estate, In re (Cal.).....	1078	Kimbol v. Industrial Accident Commission (Cal.).....	150
Bank of California, Nat. Ass'n v. Roberts (Cal.).....	225	Kowalsky v. Kimberlin (Cal.).....	673
Baxter v. Boege (Cal.).....	1072	Lupton v. Domestic Utilities Mfg. Co. (Cal.).....	241
Brigham v. Hughson (Cal.).....	548	McArthur v. Goodwin (Cal.).....	679
City of San Bernardino v. Horton (Cal.).....	231	Mellor v. Bank of Willows (Cal.).....	567
Connolly v. Industrial Accident Commission of California (Cal.).....	239	Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co. (Cal.).....	545
Cook's Estate, In re (Cal.).....	553	Molera v. Cooper (Cal.).....	231
Cummings v. Laughlin (Cal.).....	833	Mumford's Estate, In re (Cal.).....	607
Edwards v. Arp (Cal.).....	551	Narver v. Jordan (Cal.).....	245
Finch's Estate, In re (Cal.).....	556	Newby v. Times-Mirror Co. (Cal.).....	233
First Christian Church of Fresno v. Industrial Accident Commission of State of California (Cal.).....	675	Palermo Land & Water Co. v. Railroad Commission of State of California (Cal.).....	228
French v. Cook (Cal.).....	411	People v. Visconti (Cal.).....	411
Friedman's Estate, In re (Cal.).....	237	People v. Wilt (Cal.).....	561
Garner v. Purcell (Cal.).....	682	San Diego County v. Utt (Cal.).....	657
Half Moon Bay Land Co. v. Cowell (Cal.).....	675	Schader v. White (Cal.).....	557
Halsted v. First Sav. Bank (Cal.).....	1075	Southern Surety Co. v. Industrial Accident Commission of State of California (Cal.).....	884
Hebrew Home for the Aged Disabled v. Friedman (Cal.).....	237	Spivok v. Independent Sash & Door Co. (Cal.).....	565
Holland v. McCarthy (Cal.).....	1069	Vath v. Hallett (Cal.).....	1065
Hughson's Estate, In re (Cal.).....	548	White v. Schader (Cal.).....	557
Humphries v. Western Pac. R. Co. (Cal.).....	415	Williams v. Southern Pac. Co. (Cal.).....	660
Jameson v. Chanslor-Canfield Midway Oil Co. (Cal.).....	1066		

COURT OF APPEALS

Ainsworth v. Morrill (Cal. App.).....	1080	Merwin v. Shaffner (Cal. App.).....	684
Arundell v. American Oilfields Co. (Cal. App.).....	159	More v. Board of Sup'rs of San Bernardino County (Cal. App.).....	702
Baxter v. Chico Const. Co. (Cal. App.).....	1084	Pacific Mfg. Co. v. Perry (Cal. App.).....	246
Bellinger v. Hughes (Cal. App.).....	838	People v. Ambrose (Cal. App.).....	840
Blanchard v. Keppel (Cal. App.).....	690	People v. Carder (Cal. App.).....	686
Bosch v. Waldmann (Cal. App.).....	180	People v. Finali (Cal. App.).....	850
Breslau v. McCormick-Saeltzer Co. (Cal. App.).....	251	People v. Gish (Cal. App.).....	1198
Bryan Elevator Co. v. Law (Cal. App.).....	170	People v. Goodrum (Cal. App.).....	690
Bryan Elevator Co. v. Law (Cal. App.).....	174	People v. Howard (Cal. App.).....	697
Cencinino, Ex parte (Cal. App.).....	167	People v. Martinez (Cal. App.).....	868
Central Pac. R. Co. v. Riley (Cal. App.).....	844	People v. Preciado (Cal. App.).....	1090
Colton v. Anderson (Cal. App.).....	843	People v. Visconti (Cal. App.).....	410
Cory v. Hotchkiss (Cal. App.).....	841	People v. Winner (Cal. App.).....	689
Cuthbert Burrell Co. v. People's Ditch Co. (Cal. App.).....	845	People's Water Co. v. Boromeo (Cal. App.).....	574
Daniel v. Calkins (Cal. App.).....	1082	Reclamation Dist. No. 730 v. Inglin (Cal. App.).....	1098
Doerr v. Fandango Lumber Co. (Cal. App.).....	406	Reese v. G. B. Amigo Co. (Cal. App.).....	837
Earl v. San Francisco Bridge Co. (Cal. App.).....	570	Richmond Dredging Co. v. Atchison, T. & S. F. R. Co. (Cal. App.).....	862
Eaton v. Southern Pac. Co. (Cal. App.).....	687	Rittel v. Letts (Cal. App.).....	845
Fee v. McPhee Co. (Cal. App.).....	397	Saul, Ex parte (Cal. App.).....	695
Foreman v. Industrial Accident Commission (Cal. App.).....	857	Sellers v. Solway Land Co. (Cal. App.).....	175
Gardner v. Steadman (Cal. App.).....	834	Shelton v. Michael (Cal. App.).....	578
Grant v. Warren (Cal. App.).....	847	Stimson Canal & Irrigation Co. v. Lemoore Canal & Irrigation Co. (Cal. App.).....	845
Haub v. Coustette (Cal. App.).....	836	Stimson Canal & Irrigation Co. v. People's Ditch Co. (Cal. App.).....	845
Jennings v. Jordan (Cal. App.).....	576	Tidewater Southern R. Co. v. Vance (Cal. App.).....	1097
Lynip v. Alturas School Dist. of Modoc County (Cal. App.).....	175	Tormey v. Miller (Cal. App.).....	858
Machado v. Machado (Cal. App.).....	684	Valencia v. Milliken (Cal. App.).....	1086
Mack v. Eummelen (Cal. App.).....	1096	Waters v. Nevis (Cal. App.).....	1081
		Youtz v. Farmers' & Merchants' Nat. Bank of Los Angeles (Cal. App.).....	855

State Report Citation of Cases in the PACIFIC REPORTER, VOL. 160.

The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Lane v. Ball*, is in Pac. Rep., vol. 160, p. 144. It can be cited as from the State Report by giving the citation opposite "144" (Reporter page column) in this table; i. e., "83 Or. 404."

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
1	93 Wash. 103	201	98 Kan. 768	373	82 Or. 58	567	173 Cal. 454	782	40 Nev. 282
4	93 Wash. 67	203	98 Kan. 773	375	81 Or. 545	570	81 Cal. App. 339	786	40 Nev. 66
7	93 Wash. 88	204	98 Kan. 790	376	82 Or. 586	574	31 Cal. App. 270	798	40 Nev. 103
7	93 Wash. 87	206	98 Kan. 720	380	82 Or. 108	578	31 Cal. App. 336	796	98 Kan. 778
8	93 Wash. 89	207	98 Kan. 744	382	81 Or. 548	578	31 Cal. App. 328	796	99 Kan. 187
11	93 Wash. 697	207	98 Kan. 801	385	24 Wyo. 408	581	99 Kan. 1	801	81 Or. 646
11	93 Wash. 74	208	98 Kan. 729	387	24 Wyo. 183	583	82 Or. 71	803	81 Or. 658
12	93 Wash. 69	209	98 Kan. 775	391	22 N. M. 262	586	58 Okl. 497	807	81 Or. 670
14	93 Wash. 48	211	98 Kan. 715	397	31 Cal. App. 296	589	61 Okl. 221	808	81 Or. 673
18	40 Nev. 20	213	99 Kan. 215	406	31 Cal. App. 318	592	61 Okl. 224	811	40 Nev. 89
22	40 Nev. 385	213	98 Kan. 800	410	31 Cal. App. 169	594	61 Okl. 129	815	48 Utah, 516
23	40 Nev. 1	213	98 Kan. 756	411	31 Cal. App. 169	594	61 Okl. 125	820	62 Mont. 585
25	18 Ariz. 34	214	98 Kan. 718	411	173 Cal. 126	596	82 Or. 329	823	173 Cal. 565
26	12 Okl. Cr. 538	214	98 Kan. 710	414	173 Cal. 217	596	58 Okl. 667	828	173 Cal. 577
27	12 Okl. Cr. 540	217	98 Kan. 808	415	173 Cal. 428	598	61 Okl. 102	833	173 Cal. 561
30	12 Okl. Cr. 548	219	98 Kan. 707	420	93 Wash. 217	601	61 Okl. 98	834	31 Cal. App. 447
33	12 Okl. Cr. 558	220	98 Kan. 787	421	93 Wash. 200	604	61 Okl. 121	836	31 Cal. App. 424
34	12 Okl. Cr. 560	221	98 Kan. 750	423	93 Wash. 192	606	58 Okl. 654	837	31 Cal. App. 450
36	12 Okl. Cr. 566	223	98 Kan. 804	424	93 Wash. 231	606	61 Okl. 122	838	31 Cal. App. 464
38	90 Okl. 242	225	173 Cal. 398	425	93 Wash. 221	606	61 Okl. 130	840	31 Cal. App. 460
38	61 Okl. 49	228	173 Cal. 380	429	93 Wash. 209	610	58 Okl. 586	841	31 Cal. App. 443
46	61 Okl. 85	231	173 Cal. 396	432	93 Wash. 184	614	58 Okl. 666	843	31 Cal. App. 397
48	55 Okl. 280	232	173 Cal. 259	435	93 Wash. 204	617	61 Okl. 215	844	31 Cal. App. 394
51	61 Okl. 72	233	173 Cal. 387	436	93 Wash. 194	621	61 Okl. 219	845	31 Cal. App. 396
53	61 Okl. 16	237	173 Cal. 413	438	48 Utah, 481	622	58 Okl. 313	845	31 Cal. App. 426
54	61 Okl. 47	239	173 Cal. 406	441	48 Utah, 488	625	61 Okl. 196	847	31 Cal. App. 453
56	61 Okl. 43	241	173 Cal. 415	441	48 Utah, 496	629	61 Okl. 106	850	31 Cal. App. 479
57	61 Okl. 26	246	173 Cal. 424	444	48 Utah, 490	635	61 Okl. 112	855	31 Cal. App. 370
58	61 Okl. 46	246	31 Cal. App. 274	448	Okl.	643	93 Wash. 229	857	31 Cal. App. 441
60	61 Okl. 82	251	31 Cal. App. 284	448	61 Okl. 93	646	93 Wash. 236	858	31 Cal. App. 469
60	61 Okl. 17	253	Nev.	450	61 Okl. 88	647	29 Idaho, 526	862	31 Cal. App. 399
64	61 Okl. 21	253	29 Idaho, 399	451	62 Okl. 49	654	29 Idaho, 473	868	31 Cal. App. 413
64	61 Okl. 75	260	29 Idaho, 516	453	61 Okl. 83	654	62 Mont. 578	872	49 Utah, 1
67	61 Okl. 38	262	29 Idaho, 412	454	58 Okl. 581	655	52 Mont. 583	874	61 Okl. 236
68	61 Okl. 45	265	29 Idaho, 421	455	58 Okl. 637	657	173 Cal. 554	875	61 Okl. 189
69	61 Okl. 27	270	48 Utah, 452	455	58 Okl. 462	660	173 Cal. 525	877	61 Okl. 62
75	61 Okl. 21	275	48 Utah, 464	457	58 Okl. 651	667	173 Cal. 511	878	61 Okl. 174
79	61 Okl. 37	280	48 Utah, 444	457	58 Okl. 443	673	173 Cal. 506	880	61 Okl. 176
82	61 Okl. 33	283	48 Utah, 434	462	61 Okl. 88	675	173 Cal. 552	883	60 Okl. 247
83	61 Okl. 40	287	48 Utah, 480	466	58 Okl. 470	675	173 Cal. 543	884	173 Cal. 678
85	61 Okl. 35	289	93 Wash. 160	467	58 Okl. 653	679	173 Cal. 499	886	61 Okl. 200
87	62 Colo. 269	290	93 Wash. 167	468	58 Okl. 639	683	173 Cal. 496	890	58 Okl. 672
87	61 Okl. 267	291	93 Wash. 143	468	58 Okl. 583	684	31 Cal. App. 378	893	61 Okl. 184
88	61 Okl. 254	292	93 Wash. 148	469	58 Okl. 508	684	31 Cal. App. 374	896	61 Okl. 182
88	Okl.	295	93 Wash. 179	481	61 Okl. 92	686	31 Cal. App. 356	896	61 Okl. 236
92	61 Okl. 123	297	93 Wash. 164	482	58 Okl. 466	687	31 Cal. App. 379	898	Okl.
94	58 Okl. 392	298	93 Wash. 156	483	58 Okl. 645	689	31 Cal. App. 352	901	61 Okl. 231
109	62 Okl. 51	299	93 Wash. 171	486	58 Okl. 639	690	31 Cal. App. 351	903	61 Okl. 238
111	48 Utah, 421	303	93 Wash. 145	488	58 Okl. 641	690	31 Cal. App. 340	906	61 Okl. 171
115	48 Utah, 396	304	93 Wash. 697	489	58 Okl. 550	696	31 Cal. App. 382	908	61 Okl. 186
117	48 Utah, 410	304	93 Wash. 115	493	58 Okl. 442	697	31 Cal. App. 358	910	61 Okl. 241
121	48 Utah, 839	307	93 Wash. 124	496	58 Okl. 545	702	31 Cal. App. 388	912	61 Okl. 233
124	82 Or. 27	309	93 Wash. 111	498	58 Okl. 560	706	61 Okl. 206	914	61 Okl. 226
124	81 Or. 489	310	93 Wash. 128	502	58 Okl. 598	712	61 Okl. 145	917	61 Okl. 191
126	81 Or. 497	316	98 Kan. 812	505	58 Okl. 604	713	54 Okl. 655	920	61 Okl. 179
130	81 Or. 510	317	61 Okl. 61	512	52 Mont. 569	716	61 Okl. 124	922	61 Okl. 279
132	81 Or. 517	317	61 Okl. 62	513	52 Mont. 562	719	61 Okl. 163	924	61 Okl. 194
135	82 Or. 29	318	61 Okl. 59	515	52 Mont. 572	722	61 Okl. 166	924	58 Okl. 694
140	82 Or. 46	319	58 Okl. 265	517	81 Or. 556	724	61 Okl. 196	928	61 Okl. 155
144	83 Or. 404	328	61 Okl. 64	527	81 Or. 598	727	61 Okl. 154	933	58 Okl. 723
150	173 Cal. 351	331	12 Okl. Cr. 570	530	81 Or. 607	728	61 Okl. 154	939	12 Okl. Cr. 575
159	31 Cal. App. 218	332	12 Okl. Cr. 571	532	81 Or. 626	730	61 Okl. 139	941	29 Idaho, 521
167	31 Cal. App. 238	333	24 Wyo. 359	534	81 Or. 614	734	61 Okl. 156	942	29 Idaho, 546
170	31 Cal. App. 204	334	24 Wyo. 400	536	83 Or. 662	736	61 Okl. 146	944	29 Idaho, 553
174	31 Cal. App. 216	336	24 Wyo. 222	538	81 Or. 621	737	61 Okl. 148	945	93 Wash. 324
175	30 Cal. App. 794	338	24 Wyo. 253	539	81 Or. 625	741	29 Idaho, 473	946	93 Wash. 326
175	31 Cal. App. 259	345	52 Mont. 586	539	81 Or. 644	746	29 Idaho, 494	946	93 Wash. 699
180	31 Cal. App. 245	346	52 Mont. 560	540	81 Or. 632	751	29 Idaho, 608	946	93 Wash. 352
186	62 Colo. 73	348	52 Mont. 558	542	81 Or. 639	752	93 Wash. 233	950	93 Wash. 350
188	62 Colo. 96	349	52 Mont. 561	543	81 Or. 640	754	93 Wash. 698	950	93 Wash. 314
189	62 Colo. 101	349	22 N. M. 207	543	81 Or. 641	754	93 Wash. 698	952	93 Wash. 306
189	62 Colo. 93	351	22 N. M. 198	543	82 Or. 67	755	93 Wash. 267	954	93 Wash. 291
190	62 Colo. 76	352	22 N. M. 211	545	173 Cal. 487	757	93 Wash. 248	960	93 Wash. 344
193	62 Colo. 67	354	22 N. M. 210	548	173 Cal. 449	760	93 Wash. 257	962	93 Wash. 317
195	62 Colo. 99	354	22 N. M. 203	551	173 Cal. 472	764	48 Utah, 406	965	93 Wash. 274
195	62 Colo. 354	356	22 N. M. 267	553	173 Cal. 465	765	48 Utah, 503	971	98 Kan. 732
196	62 Colo. 86	359	22 N. M. 215	556	173 Cal. 462	769	48 Utah, 511	971	99 Kan. 73
198	98 Kan. 723	362	22 N. M. 223	567	173 Cal. 441	770	22 N. M. 226	976	99 Kan. 22
199	98 Kan. 726	367	22 N. M. 241	561	173 Cal. 477	772	40 Nev. 110	977	99 Kan. 36
200	98 Kan. 759	370	81 Or. 538	565	173 Cal. 438	776	40 Nev. 35	977	99 Kan. 34

*Not reported in State Reports.

†For corrected opinion see 184 Pac. 810, 40 Nev. 55.

(CONTINUED OFF. PAGE.)

State Report Citation of Cases in the PACIFIC REPORTER, VOL. 160—Cont'd.

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
978.....	99 Kan. 115	1014.....	99 Kan. 140	1051.....	93 Wash. 387	1106.....	29 Idaho, 557	1151 ²	81 Or. 683
979.....	99 Kan. 60	1015.....	99 Kan. 101	1052.....	93 Wash. 388	1112.....	29 Idaho, 609	1152.....	81 Or. 686
980.....	99 Kan. 80	1016.....	99 Kan. 57	1053.....	93 Wash. 380	1116.....	58 Okl. 707	1154.....	81 Or. 692
982.....	99 Kan. 138	1017.....	99 Kan. 171	1055.....	93 Wash. 384	1120.....	60 Okl. 183	1158.....	81 Or. 707
983.....	99 Kan. 131	1019.....	99 Kan. 65	1056.....	93 Wash. 371	1124.....	61 Okl. 152	1160.....	82 Or. 1
984.....	99 Kan. 99	1021.....	99 Kan. 103	1060.....	62 Colo. 131	1126 ²	62 Colo. 324	1166.....	82 Or. 650
985 ¹	99 Kan. 7	1024.....	99 Kan. 143	1062.....	62 Colo. 136	1128 ²	61 Okl. 302	1167.....	82 Or. 22
985 ²	99 Kan. 52	1025.....	99 Kan. 167	1065.....	31 Cal. App. 290	1128.....	60 Okl. 46	1168.....	82 Or. 461
987.....	99 Kan. 49	1027.....	99 Kan. 123	1066.....	173 Cal. 612	1128.....	61 Okl. 60	1170.....	24 Wyo. 417
988.....	99 Kan. 38	1029.....	98 Kan. 631	1069.....	173 Cal. 587	1129.....	12 Okl. Cr. 579	1171.....	24 Wyo. 423
990.....	99 Kan. 29	1030.....	62 Colo. 123	1072.....	173 Cal. 589	1131.....	12 Okl. Cr. 584	1181.....	48 Utah, 663
992.....	99 Kan. 128	1031.....	62 Colo. 112	1075.....	173 Cal. 605	1134.....	12 Okl. Cr. 593	1185.....	48 Utah, 598
993.....	99 Kan. 133	1032.....	62 Colo. 128	1078.....	173 Cal. 617	1135.....	98 Kan. 589	1188.....	48 Utah, 587
995.....	99 Kan. 43	1033.....	62 Colo. 114	1081.....	31 Cal. App. 511	1137.....	99 Kan. 118	1192.....	48 Utah, 578
997 ¹	99 Kan. 113	1034.....	62 Colo. 105	1082.....	31 Cal. App. 514	1138.....	98 Kan. 611	1195.....	48 Utah, 544
997 ²	99 Kan. 110	1035.....	62 Colo. 116	1084.....	31 Cal. App. 492	1139.....	98 Kan. 143	1198 ¹	31 Cal. App. 802
999 ¹	99 Kan. 85	1036.....	62 Colo. 119	1086.....	31 Cal. App. 533	1141.....	99 Kan. 23	1198 ²	62 Colo. 255
999 ²	99 Kan. 87	1037.....	62 Colo. 109	1089.....	31 Cal. App. 509	1144.....	98 Kan. 624	1198 ³	62 Colo. 254
1000.....	99 Kan. 14	1038.....	62 Colo. 125	1090.....	31 Cal. App. 519	1145.....	99 Kan. 159	1198 ⁴	62 Colo. 236
1002.....	99 Kan. 89	1039.....	62 Colo. 102	1096.....	31 Cal. App. 506	1147.....	99 Kan. 176	1198 ⁵	40 Nev. 8
1006.....	99 Kan. 45	1041.....	93 Wash. 392	1097.....	31 Cal. App. 503	1149.....	99 Kan. 18	1198 ⁶	61 Okl. 188
1008.....	99 Kan. 135	1042.....	93 Wash. 326	1098.....	31 Cal. App. 495	1150.....	81 Or. 682	1199.....	12 Okl. Cr. 627
1009.....	99 Kan. 151	1046.....	93 Wash. 361	1102.....	22 N. M. 348	1151 ¹	87 Or. 824	1199 ²	93 Wash. 699
1012.....	99 Kan. 180	1048.....	93 Wash. 338						

[End of Table.]

The
page o
illa
port b:

Repr.	Page
1.....	
4.....	
7.....	
7 ²	
8.....	
11 ¹	
11 ²	
12.....	
14.....	
18.....	
22.....	
23.....	
25.....	
26.....	
27.....	
30.....	
33.....	
34.....	
36.....	
38 ¹	
38 ²	
46.....	
48.....	
51.....	
53.....	
54.....	
56.....	
57.....	
58.....	
60 ¹	
60 ²	
64 ¹	
64 ²	
67.....	
68.....	
69.....	
75.....	
79.....	
82.....	
83.....	
85.....	
87 ¹	
87 ²	
88 ¹	
88 ²	
92.....	
94.....	
100.....	
111.....	
115.....	
117.....	
121.....	
124 ¹	
124 ²	
126.....	
130.....	
132.....	
135.....	
140.....	
144.....	
150.....	
158.....	
167.....	
170.....	
174.....	
175 ¹	
175 ²	
180.....	
186.....	
188.....	
189 ¹	
189 ²	
190.....	
193.....	
195 ¹	
195 ²	
196.....	
198.....	
199.....	
200.....	

☞ Paste this sheet on the inside of the FRONT cover of vol. 160 Pac. ☛

Official Report Citation of CALIFORNIA Supreme and Appellate Court Cases in the PACIFIC REPORTER, VOL. 160.

The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Boscut v. Waldmann* is in Pac. Rep., vol. 160, p. 180. It can be cited as from the State Report by giving citation opposite "180" (Reporter page column) in this table, i. e., "31 Cal. A. 245."

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
150.....	173 Cal. 351	414.....	173 Cal. 217	684 ² ..	31 Cal. A. 374	850...31	Cal. A. 479
159...31	Cal. A. 218	415.....	173 Cal. 428	686...31	Cal. A. 355	855...31	Cal. A. 370
167...31	Cal. A. 238	545.....	173 Cal. 487	687...31	Cal. A. 379	857...31	Cal. A. 441
170...31	Cal. A. 204	548.....	173 Cal. 448	689...31	Cal. A. 352	858...31	Cal. A. 469
174...31	Cal. A. 216	551.....	173 Cal. 472	690 ¹ ..	31 Cal. A. 351	862...31	Cal. A. 399
175 ¹ ..	30 Cal. A. 794	553.....	173 Cal. 465	690 ² ..	31 Cal. A. 430	868...31	Cal. A. 413
175 ² ..	31 Cal. A. 259	556.....	173 Cal. 462	695...31	Cal. A. 382	884.....	173 Cal. 678
180...31	Cal. A. 245	557.....	173 Cal. 441	697...31	Cal. A. 358	1065...31	Cal. A. 290
225.....	173 Cal. 398	561.....	173 Cal. 477	702...31	Cal. A. 388	1066.....	173 Cal. 612
228.....	173 Cal. 380	565.....	173 Cal. 438	823.....	173 Cal. 565	1069.....	173 Cal. 597
231 ¹ ..	173 Cal. 396	567.....	173 Cal. 454	828.....	173 Cal. 577	1072.....	173 Cal. 589
231 ² ..	173 Cal. 259	570...31	Cal. A. 339	833.....	173 Cal. 561	1075.....	173 Cal. 605
233.....	173 Cal. 387	574...31	Cal. A. 270	834...31	Cal. A. 447	1078.....	173 Cal. 617
237.....	173 Cal. 411	576...31	Cal. A. 335	836...31	Cal. A. 424	1081...31	Cal. A. 511
239.....	173 Cal. 405	578...31	Cal. A. 328	837...31	Cal. A. 450	1082...31	Cal. A. 514
241.....	173 Cal. 415	657.....	173 Cal. 554	838...31	Cal. A. 464	1084...31	Cal. A. 492
245.....	173 Cal. 424	660.....	173 Cal. 525	840...31	Cal. A. 460	1086...31	Cal. A. 533
246...31	Cal. A. 274	667.....	173 Cal. 511	841...31	Cal. A. 443	1089...31	Cal. A. 509
251...31	Cal. A. 284	673.....	173 Cal. 506	843...31	Cal. A. 397	1090...31	Cal. A. 519
297...31	Cal. A. 295	675 ¹ ..	173 Cal. 552	844...31	Cal. A. 394	1096...31	Cal. A. 506
406...31	Cal. A. 318	675 ² ..	173 Cal. 543	845 ¹ ..	31 Cal. A. 396	1097...31	Cal. A. 503
410...31	Cal. A. 169	679.....	173 Cal. 499	845 ² ..	31 Cal. A. 426	1098...31	Cal. A. 495
411 ¹ ..	31 Cal. A. 169	682.....	173 Cal. 495	847...31	Cal. A. 453	1198...31	Cal. A. 802
411 ² ..	173 Cal. 126	684 ¹ ..	31 Cal. A. 378				

[End of Table.]

ALL MATERIAL NONCIRCULATING

CALL NUMBER

VOLUME

COPY

160

COPY 3

AUTHOR

TITLE

PACIFIC REPORTER

NAME AND ADDRESS

COPY 3



This is a Key-Numbered Volume

Each syllabus paragraph in this volume is marked with the topic and Key-Number section \Rightarrow under which the point will eventually appear in the American Digest System.

The lawyer is thus led from that syllabus to the exact place in the Digests where we, as digest makers, have placed the other cases on the same point---*This is the Key-Number Annotation.*

NATIONAL REPORTER SYSTEM—STATE SERIES

THE
PACIFIC REPORTER
VOLUME 160

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE
SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA
AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

NOVEMBER 6 — DECEMBER 18, 1916

ST. PAUL
WEST PUBLISHING CO.
1917

**COPYRIGHT, 1916
BY
WEST PUBLISHING COMPANY**

**COPYRIGHT, 1917
BY
WEST PUBLISHING COMPANY**

(160 PAGES)

**JURISPRUDENCE
SATHI**

JUDGES

OF THE COURTS REPORTED DURING THE PERIOD COVERED
BY THIS VOLUME

ARIZONA—Supreme Court.

HENRY D. ROSS, CHIEF JUSTICE.

JUDGES.

D. L. CUNNINGHAM.
ALFRED FRANKLIN.

CALIFORNIA—Supreme Court.

F. M. ANGELLLOTTI, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

F. W. HENSHAW.
LUCIEN SHAW.
W. G. LORIGAN.
M. C. SLOSS.
HENRY A. MELVIN.
WILLIAM P. LAWLOR.

District Courts of Appeal

First District.

THOS. J. LENNON, PRESIDING JUSTICE.
F. H. KERRIGAN.¹
JOHN E. RICHARDS.

Second District.

N. P. CONREY, PRESIDING JUSTICE.
VICTOR E. SHAW.
W. P. JAMES.

Third District.

N. P. CHIPMAN, PRESIDING JUSTICE.
E. C. HART.
A. G. BURNETT.

COLORADO—Supreme Court.

WILLIAM H. GABBERT, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

S. HARRISON WHITE.
WILLIAM A. HILL.
JAMES E. GARRIGUES.
TULLY SCOTT.
JAMES H. TELLER.
MORTON S. BAILEY.

IDAHO—Supreme Court.

ISAAC N. SULLIVAN, CHIEF JUSTICE.

JUSTICES.

ALFRED BUDGE.
WILLIAM M. MORGAN.

KANSAS—Supreme Court.

WILLIAM A. JOHNSTON, CHIEF JUSTICE.

JUSTICES.

ROUSSEAU A. BURCH.
HENRY F. MASON.
SILAS PORTER.
JUDSON S. WEST.
JOHN MARSHALL.
JOHN S. DAWSON.

MONTANA—Supreme Court.

THEO. BRANTLY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SYDNEY SANNER.
WM. L. HOLLOWAY.

NEVADA—Supreme Court.

F. H. NORCROSS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

P. A. MCCARRAN.
BEN W. COLEMAN.

NEW MEXICO—Supreme Court.

CLARENCE J. ROBERTS, CHIEF JUSTICE.

JUSTICES.

RICHARD H. HANNA.
FRANK W. PARKER.

OKLAHOMA—Supreme Court.

MATTHEW J. KANE, CHIEF JUSTICE.
J. F. SHARP, VICE CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN B. TURNER.
SUMMERS HARDY.
CHAS. M. THACKER.

SUPREME COURT COMMISSIONERS.

Division No. 1.

WM. A. COLLIER.
NESTOR RUMMONS.
JEAN P. DAY.²
A. M. STEWART.³

Division No. 2.

C. A. GALBRAITH.
FRANK B. BURFORD.
D. D. BRUNSON.⁴

Division No. 3.

GEO. B. RITTENHOUSE.⁵
W. R. BLEAKMORE.
SAM HOOKER.
HUNTER L. JOHNSON.⁶

Division No. 4.

FRANK MATHEWS.⁷
PRESTON S. DAVIS.
THOS. A. EDWARDS.
R. P. DE GRAFFENRIED.⁸

Division No. 5.

W. J. CAMPBELL.
CHAM JONES.
JOHN W. HAYSON.

¹ J. D. Murphy served as judge pro tem.
² Resigned.
³ Appointed October 24, 1916.

⁴ Appointed September 19, 1916.
⁵ Resigned September 25, 1916.
⁶ Appointed to take effect September 25, 1916.

OKLAHOMA—Supreme Court (Cont'd).**SUPREME COURT COMMISSIONERS (Cont'd).***Division No. 8.*

J. C. ROBERTS.
W. F. FREEMAN.
R. W. HIGGINS.

Criminal Court of Appeals.

THOMAS H. DOYLE, PRESIDING JUDGE.

ASSOCIATE JUDGES.

JAS. R. ARMSTRONG.
RUTHERFORD BRETT.

OREGON—Supreme Court.

FRANK A. MOORE, CHIEF JUSTICE.

Department 1.

GEORGE H. BURNETT, PRESIDING JUDGE.

ASSOCIATE JUDGES.

THOMAS A. MCBRIDE.
HENRY L. BENSON.

Department 2.

ROBERT EAKIN, PRESIDING JUDGE.

ASSOCIATE JUDGES.

HENRY J. BEAN.
LAWRENCE T. HARRIS.

UTAH—Supreme Court.

D. N. STRAUP, CHIEF JUSTICE.

JUSTICES.

J. E. FRICK.
WM. M. MCCARTY.

WASHINGTON—Supreme Court.*

GEORGE E. MORRIS, CHIEF JUSTICE.

*Department 1.***ASSOCIATE JUSTICES.**

JOHN F. MAIN.
STEPHEN J. CHADWICK.
OVERTON G. ELLIS.
J. STANLEY WEBSTER.

*Department 2.***ASSOCIATE JUSTICES.**

EMMETT N. PARKER.
MARK A. FULLERTON.
O. R. HOLCOMB.
WALLACE MOUNT.

WYOMING—Supreme Court.

CHARLES N. POTTER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

CYRUS BEARD.
RICHARD H. SCOTT.

* Beginning October 9, 1916.

CASES REPORTED

	Page		Page
Adams v. Gunnison (Colo.)	1033	Beck, Fisher v. (Kan.)	1012
Attna Life Ins. Co., Curtis & Gartside Co. v. (Okl.)	465	Beckley v. Beckley (Kan.)	999
Ahnert v. Ahnert (Kan.)	201	Beidleman, Spaulding v. (Okl.)	1120
Ahnert v. Ahnert (Kan.)	203	Bell v. Fleming (Or.)	1150
Ainsworth v. Morrill (Cal. App.)	1089	Bell, Sinopoulo Oil Co. v. (Okl.)	448
Aldread v. Northern Pac. R. Co. (Wash.)	429	Bellinger v. Hughes (Cal. App.)	838
Alexander, Northwest Light & Water Co. v. (Idaho)	1106	Bergman, Paulson v. (Colo.)	189
Allen, State v. (Kan.)	795	Berlin Mach. Works v. Dehlhom Lumber Co. (Idaho)	748
Alturas School Dist. of Modoc County, Lynip v. (Cal. App.)	175	Bernard v. Metropolis Land Co. (Nev.)	811
Ambrose, People v. (Cal. App.)	840	Berryhill v. Miller (Okl.)	87
American Cent. Ins. Co. of St. Louis, Mo., v. Sinclair (Okl.)	60	Berryhill v. Thrallkill (Okl.)	874
American Gas Co., City of Scammon v. (Kan.)	816	Big Horn Power Co. v. Martin (Wyo.)	334
American Ins. Co. of Newark, N. J., v. Sinclair (Okl.)	64	Bishop Randall Hospital v. Hartley (Wyo.)	385
American Land & Cattle Co., Edwards v. (Kan.)	205	Black, Kendall v. (Kan.)	1015
American Oilfields Co., Arundell v. (Cal. App.)	159	Blackwell v. Kercheval (Idaho)	741
Amigo Co., Reese v. (Cal. App.)	837	Blackwell Lumber Co. v. Empire Mill Co. (Idaho)	265
Anderson, Brown v. (Okl.)	724	Blake v. State (Okl. Cr. App.)	30
Anderson, Colton v. (Cal. App.)	843	Blanchard v. Keppel (Cal. App.)	690
Aplin, State v. (Or.)	588	Bloom v. Rugb (Kan.)	1135
Aplin, State v., four cases (Or.)	539	Blue, Missouri, K. & T. R. Co. v. (Okl.)	594
Archer, Ardizzone v. (Okl.)	446	Board of Com'rs of Greeley County v. Davis (Kan.)	581
Ardizzone v. Archer (Okl.)	446	Board of Com'rs of Latah County, Potlatch Lumber Co. v. (Idaho)	258
Ardmore Brick & Tile Co., Bucy v. (Okl.)	1126	Board of Com'rs of Latah County, Potlatch Lumber Co. v. (Idaho)	260
Arkansas Valley Ry., Light & Power Co. v. Ebeling (Colo.)	1084	Board of Com'rs of Muskogee County v. Dudding (Okl.)	109
Armour & Co., Sillix v. (Kan.)	1021	Board of Com'rs of Republic County, Hill v. (Kan.)	987
Armstrong v. Board of Education of City of Vallejo (Cal.)	414	Board of Education of City of Vallejo, Armstrong v. (Cal.)	414
Armstrong v. Modern Woodmen of America (Wash.)	946	Board of Education of Independent School Dist. No. 15 of Atoka County, Cook v. (Okl.)	1124
Arp, Edwards v. (Cal.)	551	Board of Sup'rs of San Bernardino County, More v. (Cal. App.)	702
Arundell v. American Oilfields Co. (Cal. App.)	159	Boege, Baxter v. (Cal.)	1072
Aspinwall v. Aspinwall (Nev.)	253	Bonnors Ferry Lumber Co., Wiesner v. (Idaho)	647
Assessment of First Nat. Bank, In re (Okl.)	469	Borah v. State (Okl. Cr. App.)	27
Atchison, T. & S. F. R. Co. v. Railroad Commission of State of California (Cal.)	828	Boromeo, People's Water Co. v. (Cal. App.)	574
Atchison, T. & S. F. R. Co., Richmond Dredging Co. v. (Cal. App.)	862	Boscut v. Waldmann (Cal. App.)	180
Atchison, T. & S. F. R. Co., Talliaferro v. (Okl.)	69	Botts, Miami Trust & Savings Bank v. (Okl.)	727
Avery v. Hays (Okl.)	712	Bouckaert v. Burwell & Morford (Wash.)	7
Babcock v. Orcutt (Okl.)	729	Bourne, Meridianal Co. v. (Or.)	1151
Babcock, Wallace v. (Wash.)	1041	Boyd v. Lambert (Okl.)	588
Bacon v. Lederbrand (Kan.)	1029	Braden v. Panther Creek Oil Co. (Okl.)	317
Badovinac, McCartney v. (Colo.)	190	Bradstreet v. Gill (N. M.)	354
Bailey v. Western Union Tel. Co., two cases (Kan.)	985	Breaks v. Spokane Auto Co. (Wash.)	291
Baird's Estate, In re (Cal.)	1078	Breen v. Davis (Kan.)	997
Ball, Lane v. (Or.)	144	Breslauer v. McCormick-Saeltzer Co. (Cal. App.)	251
Bank of California, Nat. Ass'n v. Roberts (Cal.)	225	Brayman Leather Co., Lieblin v. (Or.)	1167
Bank of Mount City, Shufeldt v. (Okl.)	923	Brigham v. Hughson (Cal.)	548
Bank of Nashville, Matheny v. (Okl.)	92	Broadbent v. Denver & R. G. R. Co. (Utah)	1185
Bank of Pleasanton, Chamberlain Metal Weather Strip Co. v. (Kan.)	1138	Brook v. Wertz (Okl.)	903
Bank of Willows, Mellor v. (Cal.)	567	Brown v. Anderson (Okl.)	724
Barnard Mfg. Co. v. Ralston Milling Co. (Wash.)	309	Brown, Garvey v. (Kan.)	1027
Bashor, Farmers' & Drovers' Bank v. (Kan.)	208	Brown, People v. (Colo.)	1038
Baxter v. Boege (Cal.)	1072	Brown v. Wilson (Okl.)	94
Baxter v. Chico Const. Co. (Cal. App.)	1084	Brown's Estate, In re (Wash.)	945
Bearden, Long v. (Okl.)	467	Brune, Schaake v. (Kan.)	207
Beauregard v. Gunnison City (Utah)	815	Bryan Elevator Co. v. Law (Cal. App.)	170
		Bryan Elevator Co. v. Law (Cal. App.)	174
		Buchanan, Ward v. (N. M.)	356
		Bucy v. Ardmore Brick & Tile Co. (Okl.)	1126
		Buford, Mutual Life Ins. Co. of New York v. (Okl.)	928
		Bunger v. Bunker (Kan.)	976
		Burkert, In re (Nev.)	1198
		Burling, Moore & Co. v. (Wash.)	420

	Page		Page
Burney v. Burney (Okl.)	85	City of Seattle, Kessler v. (Wash.)	423
Burwell & Morford, Bouckaert v. (Wash.)	7	City of Seattle, MacDermid v. (Wash.)	290
Butson v. Misz (Or.)	530	City of Seattle, Seattle Seed Co. v. (Wash.)	304
Buzzard, Oklahoma State Bank of Cushing v. (Okl.)	462	Clarke, Security State Bank of Rosedale v. (Kan.)	1149
Cabell v. McLish (Okl.)	592	Clarke & Eaton Co. v. Warden Inv. Co. (Wash.)	1199
California Development Co., Jones v. (Cal.)	823	Cleveland, Chicago, R. I. & P. R. Co. v. (Okl.)	328
Calkins, Daniel v. (Cal. App.)	1082	Clift v. Hart (Okl.)	912
Campbell v. Saratoga State Bank, two cases (Wyo.)	333	C. M. Keys Commission Co. v. Robinette (Okl.)	38
Canadian Valley Const. Co., Purcell Mill & Elevator Co. v. (Okl.)	485	Coates v. Smith (Or.)	517
Capital Iron Works Co. v. Maryland Casualty Co. (Kan.)	1006	Cofer v. State (Okl. Cr. App.)	1199
Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins (Wyo.)	1171	Colburn v. Winchell (Wash.)	1052
Caples v. Morgan (Or.)	1154	Colonial Trust Co., Shields v. (Okl.)	719
Carbon County v. Hamilton (Utah)	765	Coltharp v. Coltharp (Utah)	121
Carder, People v. (Cal. App.)	686	Colton v. Anderson (Cal. App.)	843
Carey, Lombard, Young & Co. v. Hamm (Okl.)	878	Columbia Underwriters, Graves v. (Wash.)	436
Carstens Packing Co., Flessner v. (Wash.)	14	Commercial Nat. Bank of Checotah v. Phillips (Okl.)	920
Carter, Cook v. (Okl.)	877	Conn, Snyder v. (Idaho)	654
Carter v. Prairie Oil & Gas Co. (Okl.)	819	Connolly v. Industrial Accident Commission of California (Cal.)	239
Casey, Toomey v. (Or.)	583	Continental Gin Co. v. Fannell (Okl.)	598
Caton v. State (Okl. Cr. App.)	26	Cook v. Board of Education of Independent School Dist. No. 15 of Atoka County (Okl.)	1124
Cavanagh, Chilson v. (Okl.)	601	Cook v. Carter (Okl.)	877
C. C. Jones Inv. Co. v. Lowrey (Kan.)	999	Cook, French v. (Cal.)	411
Cencinino, Ex parte (Cal. App.)	167	Cook's Estate, In re (Cal.)	553
Central Grain & Commission Co., Maney Export Co. v. (Okl.)	1198	Cooper, Molera v. (Cal.)	231
Central Pac. R. Co. v. Riley (Cal. App.)	844	Coos Bay Times Pub. Co. v. Coos County (Or.)	532
Cerro Cobre Development Co. v. Duvall (Ariz.)	25	Coos County, Coos Bay Times Pub. Co. v. (Or.)	532
Chamberlain Metal Weather Strip Co. v. Bank of Pleasanton (Kan.)	1138	Cormack v. Cormack (Or.)	380
Chancellor-Canfield Midway Oil Co., Jameson v. (Cal.)	1066	Cory v. Hotchkiss (Cal. App.)	841
Chapman, Chupco v. (Okl.)	88	Coustette, Haub v. (Cal. App.)	836
Charles Wolff Packing Co., Roberts v. (Kan.)	221	Covington, State v. (Kan.)	1009
Charlton, Day v. (Okl.)	606	Cowell, Half Moon Bay Land Co. v. (Cal.)	675
Chase & Baker Co. v. Olmsted (Wash.)	952	Cox, O. K. Bus and Baggage Co. v. (Okl.)	455
Cherry v. City Nat. Bank (Okl.)	896	Cox v. State (Okl.)	895
Chicago, B. & Q. R. Co., Loope v. (Kan.)	214	Cragin, Hume v. (Okl.)	621
Chicago, M. & St. P. R. Co., Jim v. (Wash.)	295	Crandall, Hutchison v. (Or.)	124
Chicago, M. & St. P. R. Co., Pohl v. (Mont.)	515	Crawford, Mitchell-Crittenden Tie Co. v. (Okl.)	917
Chicago, R. I. & P. R. Co. v. Cleveland (Okl.)	828	Cribb v. Hudson (Kan.)	1019
Chicago, R. I. & P. R. Co. v. Disney (Okl.)	880	Crist, Hall Lithographing Co. v. (Kan.)	198
Chicago, R. I. & P. R. Co. v. Jackson (Okl.)	736	Crump, Grisso v. (Okl.)	453
Chicago, R. I. & P. R. Co. v. Reinhart (Okl.)	51	Crump, State v. (Okl.)	454
Chico Const. Co., Baxter v. (Cal. App.)	1084	Cummings v. Laughlin (Cal.)	833
Chilson v. Cavanagh (Okl.)	601	Curtis & Gartside Co. v. Aetna Life Ins. Co. (Okl.)	465
Choate v. Stander (Okl.)	737	Cuthbert Burrell Co. v. People's Ditch Co. (Cal. App.)	845
Choate v. State (Okl. Cr. App.)	34	Cyclohome Amusement Co. v. Hayward-Larkin Co. (Wash.)	1051
Chupco v. Chapman (Okl.)	88		
Church, Welsh v. (Okl.)	922	Daniel v. Calkins (Cal. App.)	1082
Citizens' Bank & Trust Co. v. Lampright (Wash.)	1046	Davies v. Thompson (Okl.)	75
Citizens' Nat. Bank of Chickasha, Gilbert v. (Okl.)	635	Davis, Board of Com'rs of Greeley County v. (Kan.)	581
City Nat. Bank, Cherry v. (Okl.)	896	Davis, Breen v. (Kan.)	997
City of Bonner Springs, White v. (Kan.)	1024	Davis, Keller v. (Wash.)	946
City of Bremerton, Spear v. (Wash.)	946	Davis, Rantoul Rural High School Dist. No. 2, Franklin County, v. (Kan.)	1008
City of Cœur D'Alene v. Public Utilities Commission (Idaho)	751	Day v. Charlton (Okl.)	606
City of Hood River, Parker v. (Or.)	1158	Day, Strong v. (Okl.)	722
City of Hoyt, Klipp v. (Kan.)	1000	Dayton, Drumheller v. (Idaho)	944
City of Portland v. Grahs (Or.)	375	Dehlbom Lumber Co., Berlin Mach. Works v. (Idaho)	746
City of Roseburg, Giles v. (Or.)	543	De Lor v. Symons (Wash.)	424
City of Salem, Moffitt v. (Or.)	1152	Denny-Renton Clay & Coal Co. v. National Surety Co. (Wash.)	1
City of San Bernardino v. Horton (Cal.)	231	Denver & R. G. R. Co., Broadbent v. (Utah)	1185
City of Sapulpa, State v. (Okl.)	489	De Soto State Bank v. Randall (Kan.)	207
City of Scammon v. American Gas Co. (Kan.)	816	Despain v. Despain (Kan.)	219
City of Seattle, Imperial Candy Co. v. (Wash.)	303	De Vine, Swanson v. (Utah)	872
City of Seattle, Jacobs v. (Wash.)	299	Devlin, Langley v. (Wash.)	646
		De Vork, Folsom-Morris Coal Mining Co. v. (Okl.)	64
		Dibbens, Waugh v. (Okl.)	589

	Page		Page
Dingman, Grounds v. (Okla.).....	883	First Nat. Bank v. Wich (Colo.).....	1036
District Court in and for Phillips County, State v. (Mont.).....	346	First Sav. Bank, Halsted v. (Cal.).....	1075
Ditmars, Magness v. (Or.).....	527	Fisher v. Beck (Kan.).....	1012
Disney, Chicago, R. I. & P. R. Co. v. (Okla.).....	880	Fleming, Bell v. (Or.).....	1150
Doerr v. Fandango Lumber Co. (Cal. App.).....	406	Flesher v. Carstens Packing Co. (Wash.)	14
Dolby v. Dolby (Wash.).....	950	Folsom-Morris Coal Mining Co. v. De Vork (Okla.).....	64
Domestic Utilities Mfg. Co., Lupton v. (Cal.).....	241	Ford Motor Co. v. Livesay (Okla.).....	901
Doran v. First Nat. Bank (N. M.).....	770	Foreman v. Industrial Accident Commission (Cal. App.).....	857
Douglas Creditors' Ass'n v. Hutchason (Or.).....	539	Fouts, Moffatt v. (Kan.).....	1137
Douglas, Freedom Tp. of Republic County v. (Kan.).....	1147	Francisco, State v. (Kan.).....	217
Drainage Dist. No. 3, Niblo v. (Okla.).....	468	Franklin, Thero v. (Utah).....	1188
Drumheller v. Dayton (Idaho).....	944	Fredenhagen v. Nichols & Shepard Co. (Kan.).....	997
Dudding, Board of Com'rs of Muskogee County v. (Okla.).....	109	Frederick, Gardner v. (Wash.).....	754
Dunn, Hushaw v. (Colo.).....	1037	French v. Cook (Cal.).....	411
Dunn, Marshall v. (Wash.).....	298	French v. McKean (Or.).....	1151
Duval, Cerro Cobre Development Co. v. (Ariz.).....	25	Friedman, Hebrew Home for the Aged Disabled v. (Cal.).....	237
Eagle v. Matthews (Kan.).....	211	Friedman's Estate, In re (Cal.).....	237
Earl v. San Francisco Bridge Co. (Cal. App.).....	570	Friend v. Southern States Life Ins. Co. (Okla.).....	457
Earley v. Johnson (Okla.).....	482	Fruitland Irr. Co. v. Thayer (Wash.).....	1048
Eaton v. Southern Pac. Co. (Cal. App.).....	687	Gabbert v. State (Okla. Cr. App.).....	83
Eaves, Records v. (Colo.).....	1126	Galbert v. State (Okla. Cr. App.).....	332
Ebeling, Arkansas Valley Ry., Light & Power Co. v. (Colo.).....	1034	Gardner v. Frederick (Wash.).....	754
Edlund, State v. (Or.).....	534	Gardner v. Steadman (Cal. App.).....	834
Edmonds, Maine v. (Okla.).....	483	Garner v. Purcell (Cal.).....	682
Edwards v. American Land & Cattle Co. (Kan.).....	205	Garrison v. Spencer (Okla.).....	493
Edwards v. Arp (Cal.).....	551	Garvey v. Brown (Kan.).....	1027
Eggleston v. Pantages (Wash.).....	425	Gasch v. Rounds (Wash.).....	962
Ehrke v. Tucker (Kan.).....	985	G. B. Amigo Co., Reese v. (Cal. App.).....	837
El Paso & S. W. Co., Shipp v. (N. M.).....	354	German-American Ins. Co., Greenberg v. (Or.).....	536
El Paso & S. W. Co., Simon v. (N. M.).....	352	German-American Trust Co. v. Ten Winkel (Colo.).....	188
Elly Walker Dry Goods Co. v. Smith (Okla.).....	898	Gibson, Veatch v. (Idaho).....	1112
Empire Mill Co., Blackwell Lumber Co. v. (Idaho).....	285	Gilbert v. Citizens' Nat. Bank of Chickasha (Okla.).....	635
English v. Severns (Okla.).....	893	Giles v. Roseburg (Or.).....	543
Enkhouse, State v. (Nev.).....	23	Gill, Bradstreet v. (N. M.).....	354
Equitable Life Assur. Soc. of United States v. Weightman (Okla.).....	629	Gilliam, State v. (Wash.).....	757
Eummelen, Mack v. (Cal. App.).....	1096	Gillies v. Linscott (Kan.).....	213
Evans, State v. (Or.).....	140	Gish, People v. (Cal. App.).....	1198
Everding & Farrell v. Toft (Or.).....	1160	Glasgow & Western Exploration Co., Warren v. (Nev.).....	793
Falls City Clothing Co. v. Sweazea (Okla.).....	728	Glass, State v. (Kan.).....	1143
Fandango Lumber Co., Doerr v. (Cal. App.).....	406	Glen Lumber Co., Pearson v. (Okla.).....	48
Farmers' State Bank of Glencoe v. Harris (Okla.).....	317	Godbe, Stinson v. (Utah).....	280
Farmers' State Bank of Jefferson v. Jordan (Okla.).....	58	Godefroy v. Hupp (Wash.).....	1056
Farmers' & Drovers' Bank v. Bashor (Kan.).....	208	Goldsworthy v. Oliver (Wash.).....	4
Farmers' & Merchants' Nat. Bank of Los Angeles, Youts v. (Cal. App.).....	855	Goodall, State v. (Or.).....	595
Farrin, State v. (Or.).....	124	Goodrum, People v. (Cal. App.).....	690
Faucett v. Northern Clay Co. (Wash.).....	643	Goodwin, McArthur v. (Cal.).....	679
Fee v. McPhee Co. (Cal. App.).....	897	Goss, Peterman v. (Wash.).....	432
Fenn v. Latour Creek R. Co. (Idaho).....	941	Graha, City of Portland v. (Or.).....	375
Fessler v. State (Okla. Cr. App.).....	1129	Grant v. Warren (Cal. App.).....	847
Fidelity Nat. Bank of Spokane v. Hosea (Wash.).....	960	Graves v. Columbia Underwriters (Wash.).....	436
Fidelity & Deposit Co. of Maryland, Sarbach v. (Kan.).....	990	Great Northern R. Co. v. King County (Wash.).....	11
Finali, People v. (Cal. App.).....	850	Green, Thomas v. (Colo.).....	1031
Finch's Estate, In re (Cal.).....	556	Greenberg v. German-American Ins. Co. (Or.).....	536
Flinnigan, State v. (Or.).....	370	Grisso v. Orump (Okla.).....	453
Firenast, Reed v. (Wash.).....	292	Grosteit v. Miller (Utah).....	769
First Christian Church of Fresno v. Industrial Accident Commission of State of California (Cal.).....	675	Grounds v. Dingman (Okla.).....	883
First Nat. Bank, Doran v. (N. M.).....	770	Groundwater v. Town (Wash.).....	1055
First Nat. Bank, Model Clothing Co. v. (Okla.).....	450	Grubb v. House (Wash.).....	421
First Nat. Bank v. School Dist. No. 49 of Hughes County (Okla.).....	68	Gunnison City, Beauregard v. (Utah).....	815
First Nat. Bank v. Sensebaugh (Okla.).....	455	Gunter, Leeper Bros. Lumber Co. v. (Okla.).....	606
		Haas v. Washington Water Power Co. (Wash.).....	954
		Half Moon Bay Land Co. v. Cowell (Cal.).....	675
		Hall Lithographing Co. v. Crist (Kan.).....	198
		Hallett, Vath v. (Cal.).....	1066
		Halsted v. First Sav. Bank (Cal.).....	1075
		Hamilton, Carbon County v. (Utah).....	765
		Hamm, Carey, Lombard, Young & Co. v. (Okla.).....	878
		Hankins, State v. (Wash.).....	307
		Hanson, In re (Kan.).....	1141

	Page		Page
Hanson, Studebaker Corp. of America v. (Wyo.)	336	Inglin, Reclamation Dist. No. 730 v. (Cal. App.)	1098
Harn v. Patterson (Okl.)	924	Jackisch v. Quine (Colo.)	186
Harris, Farmers' State Bank of Glencoe v. (Okl.)	317	Jacks v. Masterson (Kan.)	1002
Harris v. Owenby (Okl.)	596	Jackson, Chicago, R. I. & P. R. Co. v. (Okl.)	736
Harris v. Sansom (Colo.)	1193	Jackson, Helper State Bank v. (Utah)	287
Hart, Clift v. (Okl.)	912	Jacobs v. Seattle (Wash.)	299
Hart v. New State Bank (Okl.)	605	Jameson v. Chanslor-Canfield Midway Oil Co. (Cal.)	1066
Hartley, Bishop Randall Hospital v. (Wyo.)	385	Janeway v. Norton (Okl.)	908
Hartley, Harvester Bldg. Co. v. (Kan.)	971	Jennings v. Jordan (Cal. App.)	576
Hartung's Estate, In re (Nev.)	782	Jim v. Chicago, M. & St. P. R. Co. (Wash.)	295
Harvester Bldg. Co. v. Hartley (Kan.)	971	Johnson, Earley v. (Okl.)	482
Haub v. Coustette (Cal. App.)	836	Johnson State Bank v. Raney (Kan.)	980
Hauber, Menke v. (Kan.)	1017	Jones v. California Development Co. (Cal.)	823
Hawn v. Yakima County (Wash.)	7	Jones v. Jones (Colo.)	87
Hayes, Schaap v. (Kan.)	977	Jones v. Reser (Okl.)	53
Hays, Avery v. (Okl.)	712	Jones Inv. Co. v. Lowrey (Kan.)	999
Hayward-Larkin Co., Cyclohome Amusement Co. v. (Wash.)	1061	Jordan, Jennings v. (Cal. App.)	576
Haywood v. Nichols (Kan.)	982	Jordan, Narver v. (Cal.)	245
Heaverne, McCully v. (Or.)	1160	Jordon, Farmers' State Bank of Jefferson v. (Okl.)	53
Hebrew Home for the Aged Disabled v. Friedman (Cal.)	237	Joseph A. Strowbridge Estate Co., Myers v. (Or.)	135
Hedgpath v. Hudson (Okl.)	604	Junior Coal & Mining Co., Stothard v. (Kan.)	218
Helper State Bank v. Jackson (Utah)	287	J. W. Wolverton Hardware Co. v. Porter (Okl.)	906
Hendershott, St. Martin v. (Or.)	373	Kansas City v. Seaman (Kan.)	1139
Hessen v. Sapp (Kan.)	220	Kansas City Southern R. Co. v. Hurley (Okl.)	910
Hill, Ex parte (Mont.)	849	Kansas City Southern R. Co. v. Langley (Okl.)	451
Hill v. Board of Com'rs of Republic County (Kan.)	987	Kapp v. Levyson (Okl.)	457
Hill v. Hill (Okl.)	1116	Keller v. Davis (Wash.)	946
Hill, State v. (Nev.)	772	Kelly v. Robertson (Okl.)	46
Hinkle, Willmering v. (Okl.)	60	Kemp Lumber Co. v. Stanley (N. M.)	351
Hirsh v. Ogden Furniture & Carpet Co. (Utah)	283	Kendall v. Black (Kan.)	1015
Hladky v. Hladky (Kan.)	902	Keppel, Blanchard v. (Cal. App.)	690
Holland v. McCarthy (Cal.)	1069	Kercheval, Blackwell v. (Idaho)	741
Hornburg v. Larson (Wash.)	11	Kessler v. Seattle (Wash.)	423
Horton, City of San Bernardino v. (Cal.)	231	Kern Valley Bank v. Sunset Road Oil Co. (Cal.)	545
Hosea, Fidelity Nat. Bank of Spokane v. (Wash.)	960	Keylor, Villa v. (Wash.)	297
Hotchkiss, Cory v. (Cal. App.)	841	Keys Commission Co. v. Robinette (Okl.)	38
House, Grubb v. (Wash.)	421	Klipp v. Hoyt (Kan.)	1000
Howard, People v. (Cal. App.)	697	Kimberlin, Kowalsky v. (Cal.)	673
Howard v. People (Colo.)	1060	Kimbol v. Industrial Accident Commission (Cal.)	150
Howard v. Tourbier (Kan.)	1144	King v. Stroup (N. M.)	367
Howell, State v. (Wash.)	760	King County, Great Northern R. Co. v. (Wash.)	11
Hubbard v. Meek (Okl.)	1128	King County, Northern Pac. R. Co. v. (Wash.)	8
Hudson, Cribb v. (Kan.)	1019	Kitts v. Woods (Mont.)	512
Hudson, Hedgpath v. (Okl.)	604	Kosciulek v. Portland Ry., Light & Power Co. (Or.)	132
Hudson, Southern Surety Co. v. (Kan.)	209	Kowalsky v. Kimberlin (Cal.)	673
Huffine v. Lincoln (Mont.)	820	Kreitzer, Pens v. (Kan.)	200
Hughes, Bellinger v. (Cal. App.)	838	Krieger v. State (Okl. Cr. App.)	36
Hughson, Brigham v. (Cal.)	548	Krotter, Neef Bros. Brewing Co. v. (Colo.)	1039
Hughson's Estate, In re (Cal.)	548	Kyla-Kierola v. Stanley-Smith Lumber Co. (Or.)	542
Hume v. Cragin (Okl.)	621	Kytka v. Weber County (Utah)	111
Humphres v. Western Pac. R. Co. (Cal.)	415	Lambert, Boyd v. (Okl.)	586
Hupp, Godefroy v. (Wash.)	1056	Lane v. Ball (Or.)	144
Hurley, Kansas City Southern R. Co. v. (Okl.)	910	Langley v. Devlin (Wash.)	646
Hushaw v. Dunn (Colo.)	1037	Langley, Kansas City Southern R. Co. v. (Okl.)	451
Hutchason, Douglas Creditors' Ass'n v. (Or.)	539	Larson, Hornburg v. (Wash.)	11
Hutchison v. Crandall (Or.)	124	Latour Creek R. Co., Fenn v. (Idaho)	941
Illinois Life Ins. Co. v. Rogers (Okl.)	56	Laughlin, Cummings v. (Cal.)	833
Imperial Candy Co. v. Seattle (Wash.)	303	Law, Bryan Elevator Co. v. (Cal. App.)	170
Independent Sash & Door Co., Spivok v. (Cal.)	565	Law, Bryan Elevator Co. v. (Cal. App.)	174
Industrial Accident Commission, Forman v. (Cal. App.)	857	Lederbrand, Bacon v. (Kan.)	1029
Industrial Accident Commission, Kimbol v. (Cal.)	150	Lee v. Pasco Theater Co. (Wash.)	435
Industrial Accident Commission of California, Connolly v. (Cal.)	239	Leeper Bros. Lumber Co. v. Gunter (Okl.)	606
Industrial Accident Commission of State of California, First Christian Church of Fresno v. (Cal.)	675		
Industrial Accident Commission of State of California, Southern Surety Co. v. (Cal.)	884		
Industrial Building & Loan Ass'n, Routt County Sentinel Pub. Co. v. (Colo.)	1198		

	Page		Page
Lemoore Canal & Irrigation Co., Stimson Canal & Irrigation Co. v. (Cal. App.)...	845	Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co. (Cal.).....	545
Letts, Riffel v. (Cal. App.).....	845	Meridianal Co. v. Bourne (Or.).....	1151
Levy v. Nevada-California-Oregon Ry. (Or.)	808	Merritt v. Merritt (Nev.).....	22
Levyson, Kapp v. (Okl.).....	457	Merwin v. Shaffner (Cal. App.).....	684
Lichtenstein, Stephenson v. (Wyo.).....	1170	Metropolis Land Co., Bernard v. (Nev.)...	811
Lieblin v. Breyman Leather Co. (Or.).....	1167	Miami Trust & Savings Bank v. Botts (Okl.).....	727
Lillard, Render v. (Okl.).....	705	Michael, Shelton v. (Cal.App.).....	578
Limpwright, Citizens' Bank & Trust Co. v. (Wash.).....	1048	Midland Savings & Loan Co. v. Summers (Okl.).....	488
Lincoln, Huffine v. (Mont.).....	820	Miller, Berryhill v. (Okl.).....	67
Linseott, Gillies v. (Kan.).....	213	Miller, Grostelt v. (Utah).....	769
Liston, Texmo Cotton Exch. Bank v. (Okl.)	82	Miller, State v. (Mont.).....	513
Livesay, Ford Motor Co. v. (Okl.).....	901	Miller v. Thompson (Nev.).....	775
Long v. Bearden (Okl.).....	467	Miller, Tormey v. (Cal.App.).....	858
Long, United States Fidelity & Guaranty Co. v. (Okl.).....	467	Milliken, Valencia v. (Cal.App.).....	1086
Loope v. Chicago, B. & Q. R. Co. (Kan.)...	214	Mishler, State v. (Or.).....	382
Louthan, Watts v. (Colo.).....	1198	Missouri, K. & T. R. Co. v. Blue (Okl.)...	594
Lowery v. Westheimer (Okl.).....	498	Missouri, K. & T. R. Co. v. Rose (Okl.)	734
Lowrey, O. C. Jones Inv. Co. v. (Kan.)...	999	Missouri, K. & T. R. Co. v. Skinner (Okl.)	875
Lowrey, St. Louis, I. M. & S. R. Co. v. (Okl.).....	718	Missouri, O. & G. R. Co. v. Overmyre (Okl.)	933
Lukich v. Utah Const. Co. (Utah).....	270	Missouri Pac. R. Co., McCullough v. (Kan.)	214
Lukins v. Traylor (N. M.).....	849	Miaz, Butson v. (Or.).....	530
Lupton v. Domestic Utilities Mfg. Co. (Cal.).....	241	Mitchell-Crittenden Tie Co. v. Crawford (Okl.).....	917
Lynip v. Alturas School Dist. of Modoc County (Cal. App.).....	175	Modal Clothing Co. v. First Nat. Bank (Okl.).....	450
Lytle v. Springston Lumber Co. (Idaho)...	942	Modern Woodmen of America, Armstrong v. (Wash.).....	946
Lytle, Taylor v. (Idaho).....	942	Moffatt v. Fouts (Kan.).....	1137
McArthur v. Goodwin (Cal.).....	679	Moffitt v. Salem (Or.).....	1152
McBain v. Northern Pac. R. Co. (Mont.)...	654	Molera v. Cooper (Cal.).....	281
McCarthy, Holland v. (Cal.).....	1069	Montoya, State v. (N.M.).....	359
McCartney v. Badovinac (Colo.).....	180	Moore & Co. v. Burling (Wash.).....	420
McCarty Furniture Co., White Sewing Mach. Co. v. (Okl.).....	495	More v. Board of Sup'rs of San Bernardino County (Cal. App.).....	702
Machado v. Machado (Cal.App.).....	684	Morgan, Caples v. (Or.).....	1154
McClard, State v. (Or.).....	130	Morgan, Parker v. (Utah).....	764
McCorkle v. Red Star Mill & Elevator Co. (Kan.).....	983	Morgan v. Ruble (Or.).....	543
McCormick-Saeltzer Co., Breslauer v. (Cal. App.).....	251	Morgan, Vick Roy v. (Colo.).....	1030
McCullough v. Missouri Pac. R. Co. (Kan.)...	214	Morrill, Ainsworth v. (Cal.App.).....	1089
McCully v. Heaverne (Or.).....	1166	Mote, Ex parte (Kan.).....	223
MacDonald, New York Life Ins. Co. v. (Colo.).....	193	Mowery, Seysler v. (Idaho).....	262
MacDermid v. Seattle (Wash.).....	290	Mullen, Robert v. (Okl.).....	83
McGrail, Van Tassel v. (Wash.).....	1053	Mumford's Estate, In re (Cal.).....	667
Mack v. Eummelen (Cal. App.).....	1066	Municipal Excavator Co., Southern Surety Co. v. (Okl.).....	617
McKean, French v. (Or.).....	1151	Musgrave v. Studebaker Bros. Co. of Utah (Utah).....	117
McLish, Cabell v. (Okl.).....	592	Mutual Life Ins. Co. of New York v. Buford (Okl.).....	928
MacMillan, Walker v. (Colo.).....	1062	Myers, Ex parte (Okl. Cr. App.).....	939
McPhee Co., Fee v. (Cal.App.).....	397	Myers v. Joseph A. Strowbridge Estate Co. (Or.).....	135
Magness v. Ditmars (Or.).....	527	Myers, Marion County Bank v. (Kan.)...	979
Maine v. Edmonds (Okl.).....	483	Narver v. Jordan (Cal.).....	245
Malott v. Union Pac. R. Co. (Kan.).....	978	Nash, In re (Colo.).....	189
Maney Export Co. v. Central Grain & Commission Co. (Okl.).....	1198	National Surety Co., Denny-Renton Clay & Coal Co. v. (Wash.).....	1
Mangold & Glandt Bank v. Utterback (Okl.).....	718	Natwick v. Terwilliger (Wyo.).....	338
Manny, State v. (Kan.).....	1014	Neef Bros. Brewing Co. v. Krotter (Colo.)...	1039
March, Underwood Typewriter Co. v. (Okl.)	594	Nevada-California-Oregon Ry., Levy v. (Or.).....	808
Marion County Bank v. Myers (Kan.)...	979	Nevis, Waters v. (Cal.App.).....	1081
Marks v. Stein (Okl.).....	318	Newby v. Times-Mirror Co. (Cal.).....	233
Marks' Estate, In re (Or.).....	540	New Era Irr. Co. v. Warren Irr. Co. (Utah).....	1195
Marks' Estate, In re (Or.).....	542	New State Bank, Hart v. (Okl.).....	605
Marron, In re (N. M.).....	391	New York Life Ins. Co. v. MacDonald (Colo.).....	193
Marshall v. Dunn (Wash.).....	298	New York Plate Glass Ins. Co. v. Wright (Okl.).....	54
Martin, Big Horn Power Co. v. (Wyo.)...	334	Niblo v. Drainage Dist. No. 8 (Okl.).....	468
Martin v. Saxton (Utah).....	441	Nichols, Haywood v. (Kan.).....	982
Martindale v. Oregon Short Line R. Co. (Utah).....	275	Nichols & Shepard Co., Fredenhagen v. (Kan.).....	997
Martinez, People v. (Cal.App.).....	868	Norris Safe & Lock Co. v. Weaver (Or.)...	807
Maryland Casualty Co., Capital Iron Works Co. v. (Kan.).....	1006	Northcutt, In re (Or.).....	801
Masterson, Jacks v. (Kan.).....	1002	Northern Clay Co., Faucett v. (Wash.)...	643
Matheny v. Bank of Nashville (Okl.).....	92	Northern Pac. R. Co., Aldread v. (Wash.)	429
Mathews, Eagle v. (Kan.).....	211	Northern Pac. R. Co. v. King County (Wash.).....	8
Mauldin, Simpson v. (Okl.).....	481		
Meek, Hubbard v. (Okl.).....	1128		
Mellor v. Bank of Willows (Cal.).....	567		
Menke v. Hauber (Kan.).....	1017		

	Page		Page
Northern Pac. R. Co., McBain v. (Wash.)	654	Prior v. Simonson (Colo.)	1035
Northwest Light & Water Co. v. Alexander (Idaho)	1106	Pruett, State v. (N.M.)	362
Norton, Janeway v. (Okl.)	908	Public Utilities Commission of Idaho, City of Cœur D'Alene v. (Idaho)	751
O'Donnell v. Parker (Utah)	1192	Pugh, Stone v. (Kan.)	988
Ogden Furniture & Carpet Co., Hirsh v. (Utah)	283	Puget Mill Co. v. State (Wash.)	310
Ogden Rapid Transit Co., Sharp v. (Utah)	438	Purcell, Garner v. (Cal.)	682
O. K. Bus & Baggage Co. v. Cox (Okl.)	455	Purcell Mill & Elevator Co. v. Canadian Valley Const. Co. (Okl.)	485
Oklahoma State Bank of Cushing v. Buzard (Okl.)	462	Quine, Jackisch v. (Colo.)	196
Oliver, Goldsworthy v. (Wash.)	4	Quintanilla v. Quintanilla (Colo.)	195
Olmsted, Chase & Baker Co. v. (Wash.)	952	Railroad Commission of State of California, Atchison, T. & S. F. R. Co. v. (Cal.)	828
Olsson v. Lawrence Tp. of Cloud County (Kan.)	995	Railroad Commission of State of California, Palermo Land & Water Co. v. (Cal.)	228
Orcutt, Babcock v. (Okl.)	729	Rainey v. Rudd (Or.)	1168
Oregon Short Line R. Co., Martindale v. (Utah)	275	Rainey, Rull v. (Kan.)	1016
Ostrander, Snider v. (Colo.)	195	Ralston Milling Co., Barnard Mfg. Co. v. (Wash.)	309
Overmyre, Missouri, O. & G. R. Co. v. (Okl.)	933	Ramer, People v. (Colo.)	1032
Owenby, Harris v. (Okl.)	596	Randall, De Soto State Bank v. (Kan.)	207
Pacific Mfg. Co. v. Perry (Cal. App.)	246	Raney, Johnson State Bank v. (Kan.)	980
Pacific Telephone & Telegraph Co., Roberts v. (Wash.)	753	Rantoul Rural High School Dist. No. 2, Franklin County, v. Davis (Kan.)	1008
Pacific Telephone & Telegraph Co., Roberts v. (Wash.)	965	Rasmussen v. Sevier Valley Canal Co. (Utah)	444
Padgett v. Trent (Okl.)	38	Rawlins Nat. Bank of Rawlins, Capitol Hill State Bank v. (Wyo.)	1171
Palermo Land & Water Co. v. Railroad Commission of State of California (Cal.)	228	Reclamation Dist. No. 730 v. Inglin (Cal. App.)	1096
Palm, Ex parte (Mont.)	348	Records v. Eaves (Colo.)	1126
Pannell, Continental Gin Co. v. (Okl.)	598	Red Buttes Land & Live Stock Co., Van Buskirk v. (Wyo.)	387
Pantages, Eggleston v. (Wash.)	425	Red Star Mill & Elevator Co., McCorkle v. (Kan.)	983
Panther Creek Oil Co., Braden v. (Okl.)	317	Reed v. Firestack (Wash.)	292
Parker v. Hood River (Or.)	1158	Reese v. G. B. Amigo Co. (Cal. App.)	837
Parker v. Morgan (Utah)	764	Reinhart, Chicago, R. I. & P. R. Co. v. (Okl.)	51
Parker, O'Donnell v. (Utah)	1192	Reliable Mut. Hail Ins. Co. v. Rogers (Okl.)	914
Pasco Theater Co., Lee v. (Wash.)	435	Render v. Lillard (Okl.)	705
Patterson, Harn v. (Okl.)	924	Render, Wingate v. (Okl.)	614
Paulson v. Bergman (Colo.)	189	Reser, Jones v. (Okl.)	58
Payne v. Williams (Colo.)	196	Rice, Slimmer v. (Kan.)	984
Pearson v. Glen Lumber Co. (Okl.)	48	Richmond Dredging Co. v. Atchison, T. & S. F. R. Co. (Cal. App.)	862
Peck, Su Lee v. (Nev.)	18	Riffel v. Letts (Cal. App.)	845
Pens v. Kreitzer (Kan.)	200	Riggs, Sunal v. (Wash.)	950
People v. Ambrose (Cal. App.)	840	Riley, Central Pac. R. Co. v. (Cal. App.)	844
People v. Brown (Colo.)	1038	Robert v. Mullen (Okl.)	83
People v. Carder (Cal. App.)	686	Roberts, Bank of California, Nat. Ass'n v. (Cal.)	225
People v. Finali (Cal. App.)	850	Roberts v. Charles Wolff Packing Co. (Kan.)	221
People v. Gish (Cal. App.)	1198	Roberts v. Pacific Telephone & Telegraph Co. (Wash.)	753
People v. Goodrum (Cal. App.)	690	Roberts v. Pacific Telephone & Telegraph Co. (Wash.)	965
People v. Howard (Cal. App.)	697	Robertson, Kelly v. (Okl.)	46
People, Howard v. (Colo.)	1060	Robinette, O. M. Keys Commission Co. v. (Okl.)	38
People v. Martinez (Cal. App.)	868	Rogers, Illinois Life Ins. Co. v. (Okl.)	56
People v. Preciado (Cal. App.)	1090	Rogers, Reliable Mut. Hail Ins. Co. v. (Okl.)	914
People v. Ramer (Colo.)	1032	Rose, Missouri, K. & T. R. Co. v. (Okl.)	734
People v. Visconti (Cal.)	411	Roth v. Union Nat. Bank of Bartlesville (Okl.)	505
People v. Visconti (Cal. App.)	410	Rounds, Gasch v. (Wash.)	962
People v. Wilt (Cal.)	561	Routt County Sentinel Pub. Co. v. Industrial Building & Loan Ass'n (Colo.)	1198
People v. Winner (Cal. App.)	689	Ruble, Morgan v. (Or.)	543
People's Ditch Co., Cuthbert Burrell Co. v. (Cal. App.)	845	Rudd, Rainey v. (Or.)	1168
People's Ditch Co., Stimson Canal & Irrigation Co. v. (Cal. App.)	845	Rugh, Bloom v. (Kan.)	1135
People's Water Co. v. Boromeo (Cal. App.)	574	Rull v. Rainey (Kan.)	1016
Perry, Pacific Mfg. Co. v. (Cal. App.)	246	Russell, State v. (Mont.)	655
Peterman v. Goss (Wash.)	432	St. Louis, I. M. & S. R. Co. v. Lowrey (Okl.)	716
Phillips, Commercial Nat. Bank of Checotah v. (Okl.)	920	St. Louis & S. F. R. Co. v. Taliaferro (Okl.)	610
Phillips v. Snowden Placer Co. (Nev.)	786	St. Louis & S. F. R. Co. v. Walker (Okl.)	79
Pohl v. Chicago, M. & St. P. R. Co. (Mont.)	515	St. Martin v. Hendershott (Or.)	373
Porter, J. W. Wolverton Hardware Co. v. (Okl.)	906		
Portland Ry., Light & Power Co., Kosciolk v. (Or.)	132		
Potlatch Lumber Co. v. Board of Com'rs of Latah County (Idaho)	256		
Potlatch Lumber Co. v. Board of Com'rs of Latah County (Idaho)	260		
Powell, State v. (Kan.)	213		
Prairie Oil & Gas Co., Carter v. (Okl.)	319		
Preciado, People v. (Cal. App.)	1090		

	Page		Page
Sale v. Shipp (Okl.).....	502	Stanley-Smith Lumber Co., Kyla-Kierola v. (Or.).....	542
San Diego County v. Utt (Cal.).....	657	State v. Allen (Kan.).....	795
San Francisco Bridge Co., Earl v. (Cal. App.).....	570	State v. Aplin (Or.).....	538
Sansom, Harris v. (Colo.).....	1198	State v. Aplin, four cases (Or.).....	539
Sapp, Hessen v. (Kan.).....	220	State, Blake v. (Okl. Cr. App.).....	30
Saratoga State Bank, Campbell v., two cases (Wyo.).....	333	State, Borah v. (Okl. Cr. App.).....	27
Sarbach v. Fidelity & Deposit Co. of Maryland (Kan.).....	990	State, Caton v. (Okl. Cr. App.).....	26
Satterthwaite, Ex parte (Mont.).....	346	State, Choate v. (Okl. Cr. App.).....	34
Saul, Ex parte (Cal. App.).....	695	State, Cofer v. (Okl.).....	1189
Saxton, Martin v. (Utah.).....	441	State v. Covington (Kan.).....	1009
Schaake v. Brune (Kan.).....	207	State, Cox v. (Okl.).....	895
Schaap v. Hayes (Kan.).....	977	State v. Crump (Okl.).....	454
Schader v. White (Cal.).....	557	State v. District Court in and for Phillips County (Mont.).....	346
School Dist. No. 49 of Hughes County, First Nat. Bank v. (Okl.).....	68	State v. Edlund (Or.).....	534
Seaman, Kansas City v. (Kan.).....	1139	State v. Enkhous (Nev.).....	23
Seattle Seed Co. v. Seattle (Wash.).....	304	State v. Evans (Or.).....	140
Security State Bank of Rosedale v. Clarke (Kan.).....	1149	State v. Farrin (Or.).....	124
Sellers v. Solway Land Co. (Cal. App.).....	175	State, Fessler v. (Okl. Cr. App.).....	1129
Sensebaugh, First Nat. Bank v. (Okl.).....	455	State v. Finnigan (Or.).....	370
Severns, English v. (Okl.).....	893	State v. Francisco (Kan.).....	217
Sevier Valley Canal Co., Rasmussen v. (Utah.).....	444	State, Gabbert v. (Okl. Cr. App.).....	33
Seydler v. Mowery (Idaho).....	262	State, Galbert v. (Okl. Cr. App.).....	332
Shafer, Simmons v. (Kan.).....	199	State v. Gilliam (Wash.).....	757
Shaffner, Merwin v. (Cal. App.).....	684	State v. Glass (Kan.).....	1145
Shannon v. State (Okl. Cr. App.).....	1131	State v. Goodall (Or.).....	595
Sharp v. Ogden Rapid Transit Co. (Utah).....	438	State v. Hankins (Wash.).....	307
Shawnee Life Ins. Co. v. Taylor (Okl.).....	622	State v. Hill (Nev.).....	772
Shelton v. Michael (Cal. App.).....	578	State v. Howell (Wash.).....	760
Shelton v. Union Traction Co. (Kan.).....	977	State, Krieger v. (Okl. Cr. App.).....	36
Shields v. Colonial Trust Co. (Okl.).....	719	State v. McClard (Or.).....	130
Shipley, White v. (Utah).....	441	State v. Manny (Kan.).....	1014
Shipp v. El Paso & S. W. Co. (N. M.).....	354	State v. Miller (Mont.).....	513
Shipp, Sale v. (Okl.).....	502	State v. Mishler (Or.).....	382
Showalter v. Spangle (Wash.).....	1042	State v. Montoya (N. M.).....	359
Shufeldt v. Bank of Mound City (Okl.).....	923	State v. Powell (Kan.).....	213
Sillix v. Armour & Co. (Kan.).....	1021	State v. Pruett (N. M.).....	362
Simmons v. Shafer (Kan.).....	199	State, Puget Mill Co. v. (Wash.).....	810
Simon v. El Paso & S. W. Co. (N. M.).....	352	State v. Russell (Mont.).....	655
Simonson, Prior v. (Colo.).....	1035	State v. Sapulpa (Okl.).....	489
Simpson v. Mauldin (Okl.).....	481	State, Shannon v. (Okl. Cr. App.).....	1131
Sinclair, American Cent. Ins. Co. of St. Louis, Mo., v. (Okl.).....	60	State v. Sorensen (Utah).....	1181
Sinclair, American Ins. Co. of Newark, N. J., v. (Okl.).....	64	State v. Stiles (Or.).....	126
Sinopoulo Oil Co. v. Bell (Okl.).....	448	State v. Superior Court of Washington in and for King County (Wash.).....	755
Skinner, Missouri, K. & T. R. Co. v. (Okl.).....	875	State, Tinsley v. (Okl. Cr. App.).....	331
Slimmer v. Rice (Kan.).....	984	State, Upton v. (Okl. Cr. App.).....	1134
Smith, Coates v. (Or.).....	517	State v. Wales (Kan.).....	204
Smith, Ely Walker Dry Goods Co. v. (Okl.).....	898	State, Whitaker v. (Okl.).....	890
Smith, Union Securities Co. v. (Wash.).....	304	State v. Will (Kan.).....	1025
Smith, Witherspoon v. (Okl.).....	57	Steadman, Gardner v. (Cal. App.).....	834
Snider v. Ostrander (Colo.).....	195	Stein, Marks v. (Okl.).....	318
Snowden Placer Co., Phillips v. (Nev.).....	786	Stephenson v. Lichtenstein (Wyo.).....	1170
Snyder, In re (Wash.).....	12	Stiles, State v. (Or.).....	126
Snyder v. Conn (Idaho).....	654	Stimson Canal & Irrigation Co. v. Lemoore Canal & Irrigation Co. (Cal. App.).....	845
Solway Land Co., Sellers v. (Cal. App.).....	175	Stimson Canal & Irrigation Co. v. People's Ditch Co. (Cal. App.).....	845
Sorensen, State v. (Utah).....	1181	Stinson v. Godbe (Utah).....	280
Southern Pac. Co., Eaton v. (Cal. App.).....	687	Stone v. Pugh (Kan.).....	988
Southern Pac. Co., Williams v. (Cal.).....	660	Stothard v. Junior Coal & Mining Co. (Kan.).....	213
Southern States Life Ins. Co., Friend v. (Okl.).....	457	Strong v. Day (Okl.).....	722
Southern Surety Co. v. Hudson (Kan.).....	209	Stroup, King v. (N. M.).....	367
Southern Surety Co. v. Industrial Accident Commission of State of California (Cal.).....	884	Strowbridge Estate Co., Myers v. (Or.).....	135
Southern Surety Co. v. Municipal Excavator Co. (Okl.).....	617	Studebaker Bros. Co. of Utah, Musgrave v. (Utah).....	117
Southern Surety Co. v. Turnham (Okl.).....	468	Studebaker Corp. of America v. Hanson (Wyo.).....	336
Spangle, Showalter v. (Wash.).....	1042	Su Lee v. Peck (Nev.).....	18
Spaulding v. Beidleman (Okl.).....	1120	Summers, Midland Savings & Loan Co. v. (Okl.).....	488
Spear v. Bremerton (Wash.).....	946	Sunel v. Riggs (Wash.).....	950
Spencer, Garrison v. (Okl.).....	493	Sunset Road Oil Co., Kern Valley Bank v. (Cal.).....	545
Spivok v. Independent Sash & Door Co. (Cal.).....	565	Sunset Road Oil Co., Mercantile Trust Co. of San Francisco v. (Cal.).....	545
Spokane Auto Co., Breaks v. (Wash.).....	291	Superior Court of Washington in and for King County, State v. (Wash.).....	755
Springston Lumber Co., Lytle v. (Idaho).....	942	Supple, Wakefield v. (Or.).....	376
Stander, Choate v. (Okl.).....	737	Swanson v. De Vine (Utah).....	872
Stanley, Kemp Lumber Co. v. (N. M.).....	351	Sweazea, Falls City Clothing Co. v. (Okl.).....	728
		Symons, De Lor v. (Wash.).....	424

	Page		Page
Taliaferro, St. Louis & S. F. R. Co. v. (Okl.)	610	Visconti, People v. (Cal.)	411
Talkington v. Washington Water Power Co. (Wash.)	754	Visconti, People v. (Cal. App.)	410
Taliaferro v. Atchison, T. & S. F. R. Co. (Okl.)	69	Wakefield v. Supple (Or.)	376
Taylor v. Lytle (Idaho)	942	Waldmann, Boscus v. (Cal. App.)	190
Taylor, Shawnee Life Ins. Co. v. (Okl.)	622	Wales, State v. (Kan.)	204
Ten Winkel, German-American Trust Co. v. (Colo.)	188	Walker v. MacMillan (Colo.)	1062
Terwilliger, Natwick v. (Wyo.)	338	Walker, St. Louis & S. F. R. Co. v. (Okl.)	79
Tetzner v. Wulf (Wash.)	289	Walker Dry Goods Co. v. Smith (Okl.)	898
Texmo Cotton Exch. Bank v. Liston (Okl.)	82	Wallace v. Babcock (Wash.)	1041
Thayer, Fruitland Irr. Co. v. (Wash.)	1048	Ward v. Buchanan (N. M.)	356
Thero v. Franklin (Utah)	1188	Warden Inv. Co., Clarke & Eaton Co. v. (Wash.)	1199
Thomas v. Green (Colo.)	1031	Warner v. Wickizer (Okl.)	885
Thompson, Davies v. (Okl.)	75	Warren v. Glasgow & Western Exploration Co. (Nev.)	793
Thompson, Miller v. (Nev.)	775	Warren, Grant v. (Cal. App.)	847
Thompson v. Vaught (Okl.)	625	Warren Irr. Co., New Era Irr. Co. v. (Utah)	1195
Thrallkill, Berryhill v. (Okl.)	874	Washington Water Power Co., Haas v. (Wash.)	954
Tidewater Southern R. Co. v. Vance (Cal. App.)	1097	Washington Water Power Co., Talkington v. (Wash.)	754
Times-Mirror Co., Newby v. (Cal.)	233	Waters v. Nevis (Cal. App.)	1081
Tinsley v. State (Okl. Cr. App.)	331	Watters v. Treasure Mining & Reduction Co. (N. M.)	1102
Toft, Everding & Farrell v. (Or.)	1160	Watts v. Louthan (Colo.)	1198
Toomey v. Casey (Or.)	583	Waugh v. Dibbens (Okl.)	589
Tormey v. Miller (Cal. App.)	858	Weaver, Norris Safe & Lock Co. v. (Or.)	807
Tourbier, Howard v. (Kan.)	1144	Weber County, Kytk v. (Utah)	111
Town, Groundwater v. (Wash.)	1055	Weightman, Equitable Life Assur. Soc. of United States v. (Okl.)	629
Town of Gunnison, Adams v. (Colo.)	1033	Welsh v. Church (Okl.)	922
Township of Lawrence, Cloud County, Olson v. (Kan.)	995	Wertz, Brook v. (Okl.)	903
Township of Freedom, Republic County, v. Douglas (Kan.)	1147	Western Pac. R. Co., Humphres v. (Cal.)	415
Traylor, Lukins v. (N. M.)	349	Western Union Tel. Co., Bailey v., two cases (Kan.)	985
Treadgold v. Willard (Or.)	803	Westheimer, Lowery v. (Okl.)	496
Treasure Mining & Reduction Co., Watters v. (N. M.)	1102	Whitaker v. State (Okl.)	890
Trent, Padgett v. (Okl.)	38	White v. Bonner Springs (Kan.)	1024
Tucker, Ehrke v. (Kan.)	985	White v. Schader (Cal.)	557
Turnham, Southern Surety Co. v. (Okl.)	468	White v. Shipley (Utah)	441
Underwood Typewriter Co. v. March (Okl.)	594	White v. White (Kan.)	993
Union Nat. Bank of Bartlesville, Roth v. (Okl.)	505	White Sewing Mach. Co. v. McCarty Furniture Co. (Okl.)	495
Union Pac. R. Co., Malott v. (Kan.)	978	Wich, First Nat. Bank v. (Colo.)	1036
Union Securities Co. v. Smith (Wash.)	304	Wickizer, Warner v. (Okl.)	885
Union Traction Co., Shelton v. (Kan.)	977	Wiesner v. Bonners Ferry Lumber Co. (Idaho)	647
United States Fidelity & Guaranty Co. v. Long (Okl.)	467	Will, State v. (Kan.)	1025
Upton v. State (Okl. Cr. App.)	1134	Willard, Treadgold v. (Or.)	803
Utah Const. Co., Lukich v. (Utah)	270	Williams, Payne v. (Colo.)	198
Utah Ore-Sampling Co., Virend v. (Utah)	115	Williams v. Southern Pac. Co. (Cal.)	660
Utt, San Diego County v. (Cal.)	657	Willmering v. Hinkle (Okl.)	60
Utterback, Mangold & Glandt Bank v. (Okl.)	713	Wilson, Brown v. (Okl.)	94
Valencia v. Milliken (Cal. App.)	1086	Wilt, People v. (Cal.)	561
Van Buskirk v. Red Buttes Land & Live Stock Co. (Wyo.)	887	Winchell, Colburn v. (Wash.)	1032
Vance, Tidewater Southern R. Co. v. (Cal. App.)	1097	Wingate v. Render (Okl.)	614
Van Tassel v. McGrail (Wash.)	1053	Winner, People v. (Cal. App.)	689
Vath v. Hallett (Cal.)	1065	Witherspoon v. Smith (Okl.)	57
Vaught, Thompson v. (Okl.)	625	Wolff Packing Co., Roberts v. (Kan.)	221
Veatch v. Gibson (Idaho)	1112	Wolverton Hardware Co. v. Porter (Okl.)	906
Vick Roy v. Morgan (Colo.)	1030	Woods, Kitts v. (Mont.)	512
Villa v. Keylor (Wash.)	297	Wright, New York Plate Glass Ins. Co. v. (Okl.)	54
Virend v. Utah Ore-Sampling Co. (Utah)	115	Wulf, Tetzner v. (Wash.)	289
		Yakima County, Hawn v. (Wash.)	7
		Youts v. Farmers' & Merchants' Nat. Bank of Los Angeles (Cal. App.)	855

REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

OKLAHOMA.		Hadley v. Hadley, 155 P. 195.
Oklahoma Gin Co. v. State, 158 P. 629. petition for rehearing denied.	Second	Leslie v. McNeil, 154 P. 884.
		Spady v. Spady, 155 P. 169.
OREGON.		
Carlson v. O'Connor, 154 P. 755.		Stevens v. Taylor, 154 P. 895. Thielke v. Albee, 153 P. 793.

See End of Index for Tables of Pacific Cases in State Reports
160 P. (xv)†

THE PACIFIC REPORTER VOLUME 160

**DENNY-RENTON CLAY & COAL CO. v.
NATIONAL SURETY CO. et al.**
(No. 12958.)

(Supreme Court of Washington. Oct 5, 1916.)

**1. MUNICIPAL CORPORATIONS — 347(2)—IM-
PROVEMENTS—CONTRACTOR'S BOND—RIGHT
OF ACTION—TIME.**

Rem. & Bal. Code, § 1161, provides that no materialman shall have any right of action on a bond unless, within 30 days from and after completion of the contract, with an acceptance of the work by the board, council, etc., he files a notice in writing in substantial compliance with the form in the statute prescribed. A contract for a city improvement provided that the work should be done under the superintendence of the city engineer, subject to acceptance and approval of the city council; that on about the 10th day of the month following the engineer's estimate, the city clerk should deliver to the contractor a warrant equal to 90 per cent. of such estimate, and that the balance of the contract price, being 10 per cent. of the estimate, should be retained for 30 days after the final completion of the improvement, and that no improvement should be deemed complete until the city engineer should file with the city clerk a statement that it had been completed, and that no part of the reserve should be paid until the engineer certified that 30 days had elapsed since the completion of the work, and that if there were no claims by the city for defective work or any lien claims within such time, the reserve should be paid to the contractor. The engineer, on November 25th, furnished the contractor a certificate that the contract was completed, and that the reserve would be due 30 days later, and the same day the council allowed the estimate and ordered a warrant drawn for the amount, and 28 days later, the engineer filed his "final estimate," showing the reserve balance which the council allowed, and within 30 days thereafter, a materialman filed a claim against the contractor's statutory surety bond. Held, that the council's action on November 25th was such an affirmative action and recognition of the work as complete as to amount to an acceptance, so that the claim was filed too late.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. — 347(2).]

**2. MUNICIPAL CORPORATIONS — 347(1) —
CONTRACTOR'S BOND—RIGHT OF ACTION—
TIME—ACCEPTANCE.**

In such case a legal acceptance, binding as between the city and the principal contractor, was binding also upon a materialman.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 876; Dec. Dig. — 347(1).]

**3. MUNICIPAL CORPORATIONS — 347(1)—MA-
TERIALMEN—FILING CLAIM—TIME.**

Under the statute (Rem. & Bal. Code, § 1161) a materialman is not required to wait for the completion or acceptance of the work, but may file his claim as soon as he finishes furnishing materials.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 876; Dec. Dig. — 347(1).]

**4. JUDGMENT — 17(1) — DEFAULT JUDGMENT
—PROCESS.**

In a materialman's action on the surety bond given by the contractor, the court, unless the contractor was personally served, had no jurisdiction to enter a personal judgment against him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 25; Dec. Dig. — 17(1).]

**5. APPEAL AND ERROR — 914(1)—JUDGMENT
—PRESUMPTION.**

In such case, and in the absence of anything in the record showing that the contractor had been personally served, the Supreme Court could not assume that the court below had committed error in not entering a personal judgment against him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8693-8696; Dec. Dig. — 914(1).]

Department 1. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by the Denny-Renton Clay & Coal Company against the National Surety Company, Ed. S. Russell, and others. Judgment for defendants National Surety Company and Ed. S. Russell, dismissing the action as against them, and plaintiff appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts, of Seattle, and Reeves, Crollard & Crollard, of Wenatchee, for appellant. Williams & Corbin, of Wenatchee, and John W. Roberts, of Seattle, for respondents.

ELLIS, J. Plaintiff, as a materialman, brought this action upon the bond given by the original contractor under the provisions of Rem. & Bal. Code, c. 6 (§§ 1159-1161), as security for labor and materials furnished in the prosecution of a public work.

The material facts are not seriously disputed. The contract was let to defendant McNerney by the city of Wenatchee for the improvement of Wenatchee avenue and other

streets in that city on April 24, 1913. Defendant National Surety Company became his surety on the statutory bond, which in form and amount complied with the statute. Plaintiff furnished to the contractor brick blocks which went into the work and for which there is a balance due from the contractor amounting to \$4,489.19. The contract contains provisions as follows:

"Section 1. * * * Said improvements shall be made under the superintendence of the city engineer of said city, and subject to the acceptance and approval of the city council, and the same shall be completed within the time fixed in the annexed specifications, and stipulations under the penalty therein provided. Said party of the second part shall furnish all skill, labor and material required for the complete performance of this contract and shall produce a completed improvement."

"Sec. 6. That during the time allowed in the contract for the completion of the work and on or about the 10th day of the month following the issuance of the estimate by the city engineer, the city clerk shall deliver to the contractor a warrant in an amount equal to ninety per cent. of such estimate, and the balance of said contract price being ten per cent. of such estimate, shall be retained for a period of thirty days after the final completion of the improvement, and no improvement shall be deemed completed until the city engineer shall have filed with the city clerk a statement declaring the same to have been completed. But neither said statement nor any acceptance of said work by the city council shall prevent the city from thereafter making claim for uncompleted or defective work if the same is discovered within two years from the completion and acceptance of the work. No payment shall be issued to the contractor in any event for any part of said ten per cent. reserve until the city engineer shall certify to the city clerk that the thirty days since the completion of the work have elapsed, and that no uncompleted or defective work has been discovered for which the city makes claim. * * *

"Sec. 7. That in case no lien is claimed against said ten per cent. so reserved during said thirty days, and no uncompleted or defective work shall have been discovered and reported by the city engineer during said time, then the ten per cent. required to be held as a reserve to protect laborers and materialmen shall, at the expiration of said thirty days, be paid to the contractors in warrants. But in case notice of such liens is given the city during said period, by or on behalf of any person claiming such lien, or in case the city engineer shall report any claim of the city by reason of uncompleted or defective work, then the amount of all liens so claimed shall be reserved by the city until final determination of such lien claims, and the cost of perfecting such uncompleted or defective work shall be retained until such uncompleted or defective work shall have been perfected or arranged to the satisfaction of the city engineer. * * *

"Sec. 8. That no estimate will be issued after the time allowed in the contract for the completion of the work, except the complete and final estimates."

The specifications provided that the work should be done and fully completed "in accordance with the plans and specifications and to the satisfaction of the city engineer"; that the contractor shall conform to the directions of the city engineer; that if changes be made—

"the city engineer shall estimate the amount to be allowed therefor and his decision shall be final and conclusive."

Many other provisions appear in the specifications, as well as in the contract, showing that the fullest authority of supervision and control of the work was vested in the city engineer.

The last piece of brick pavement was laid, grouted with cement, and covered with tarpaulin on the afternoon of November 25, 1913. On the same evening the city engineer furnished to the contractor what is designated as the "complete estimate," certifying in terms that the job was then "one hundred per cent. completed," and that the contractor was entitled to \$10,041.57. This sum was 90 per cent. of the contract price then remaining unpaid. This complete estimate, or certificate of completion, also conveyed the information that a final payment of \$16,856.17 would be due December 25, 1913. This sum, it is admitted, was the 10 per cent. stipulated in sections 6 and 7 of the contract to be held up by the city for 30 days after completion of the work to meet any defective work or claims for labor or material which might arise during such 30 days. Though the city clerk at first intimated that this was never filed in his office, he afterwards admitted that it was, and that it was the usual and only form of certificate of completion ever filed in any local improvement proceeding in the city. Moreover, the evidence is conclusive that, on the evening of November 25th, it was presented to and acted upon by the city council by an order as follows:

"Moved and seconded, that the engineer's estimate of work completed by J. J. McNerney on Wenatchee avenue, and other streets, amounting to the sum of \$10,041.57, be allowed, and that a warrant be drawn for the amount. Carried."

The city engineer testified, in substance, that he then explained to the city council that the work was then completed, but that the 10 per cent. should be held up for the further period of 30 days.

On December 23, 1913, the city engineer filed his so-called "final estimate," referring to the complete estimate of November 25, 1913, for the details, and showing the same final balance due of \$16,856.17, and stating that warrants should not be issued for that sum until December 25, 1913, when the 30-day period would expire. The council thereupon made the following order:

"Moved and seconded that the final estimate of work done on Wenatchee avenue and other streets by Contractor McNerney, amounting to the sum of \$16,856.17, be allowed and a warrant drawn for the amount, the surrender of said warrant to J. J. McNerney to be subject to the approval of the city attorney. Carried."

On January 2, 1914, plaintiff filed with the city clerk its claim against the bond. This was within 30 days after the filing of the final estimate, but more than 30 days after the filing of the complete estimate.

The trial court found, in substance, that the contract was completed and the work accepted by the city council on November 25, 1913, and that the plaintiff's notice was

tardy. A decree was accordingly entered, dismissing the action as against Ed. S. Russell and National Surety Company. Plaintiff appeals.

[1, 2] The sole question is this: When was the contract completed and the work accepted by the city council? The statute in force when this bond was given and when the action was tried and judgment rendered (Rem. & Bal. Code, § 1161,) provided that no laborer or materialman shall have any right of action on the bond "unless within thirty [(30)] days from and after the completion of the contract with an acceptance of the work by the board, council," etc., he shall present and file with such board, council, etc., a notice in writing in substantial compliance with the form in the statute prescribed. The statute as amended in 1915 requires acceptance by "affirmative action" of the board or council. Laws of 1915, p. 62; Rem. Code, § 1161. The amending act of 1915 provides that the amendments shall be retroactive. We entertain grave doubt as to the constitutionality of this retroactive provision, but in any event the amendments were not the law when the judgment here assailed was rendered; hence cannot affect it.

It will be noted that the statute makes no provision for the holding up of any portion of the contractor's pay for any time after the completion of the contract and acceptance of the work. That provision is found only in the contract. The holding up of the 10 per cent. estimated in both the complete estimate and the final estimate therefore must be referred to the contract, not to the statute. Both the bond and every right which can be asserted under it is referable solely to the statute. There can be no question but that on November 25, 1913, the date of the engineer's complete certificate, the work was in fact substantially completed. The evidence shows that nothing further was done, except what is called "clean-up work," such as removing unused bricks, removing the tarpaulins and sand from the pavement, and removing tools and lumber used in the work. The engineer then certified that the work was completed—"one hundred per cent. complete." Upon his finding that it was completed, he based his estimate of the sum then due, 90 per cent. of the entire balance of the contract price, and certified this to the council for approval and payment by warrant. In the same certificate he included an estimate of the 10 per cent. to be held up under the terms of sections 6 and 7 of the contract until "thirty days since the completion of the work has expired." The order of the council based upon this certificate and estimate referred to the matter as "work completed." The action of the council in ordering the complete estimate of 90 per cent. paid as certified by the engineer was the only action of the council ever taken directly upon this certificate of completion. That

action necessarily implied an acceptance of the work as then completed as certified. If affirmative action be held now necessary, we think that this was such an affirmative recognition of the work as completed as to constitute an acceptance. The very fact that the 10 per cent. was held up for only 30 days after this affirmative action upon the engineer's complete estimate, when interpreted in the light of the contract (to which alone the holding up is referable, since the statute contains no authority for holding up anything for any time), is in itself a recognition by the city council that the contract had been completed 30 days before the final estimate was to be paid.

Even aside from any affirmative action on the part of the city council, this case is controlled by our decision in the case of Wheeler, Osgood Co. v. Fidelity & Deposit Co., 78 Wash. 328, 139 Pac. 53. In that case we held that, because the contract gave the architect control of the work and provided for the payment on the architect's certificate, an acceptance by the architect was an acceptance by the board of control, in that the contract itself, by reason of the broad powers which it gave to the architect, made him the board's agent to accept the work. A comparison of the contract there with the contract here convinces us that the powers conferred on the city engineer in this case were fully as broad as those conferred on the architect in that case. In other respects the case here is much stronger on the facts in favor of respondent than was the case in favor of the bondsmen there. In that case there was no affirmative action of the board on the final estimate of the architect, which was made on December 6, 1912, except to pass the final estimate voucher on December 23d, yet we held that the work was accepted on December 6th because on that date the architect had certified completion. In the case now in hand the city council actually approved the complete estimate of November 25, 1913, which also included the final 10 per cent. estimate of \$16,856.17, on the same day that it was made. The so-called final estimate furnished on December 23d was no more than the final estimate voucher involved in the Wheeler, Osgood Company Case for the percentage which, under the contract alone, not under any provision of the statute, had been held up. Clearly, under the contract, the council's order to pay this balance recognized the work as completed 30 days before. Every element of acceptance found in the Wheeler, Osgood Company Case is found here with an added element of the affirmative action of the city council approving and paying the 90 per cent. estimate based upon the engineer's certificate and advice that the contract was then 100 per cent. completed.

The facts and the law involved in the Wheeler, Osgood Company Case were passed

upon by this court in three cases, in that case, in the case of *Union Iron Works v. Strauser*, 82 Wash. 51, 143 Pac. 446, and in the case of *McGowan Bros. Hardware Co. v. Fidelity & Deposit Co.*, 84 Wash. 470, 147 Pac. 44. In the first two of those cases exhaustive petitions for rehearing were filed, which after mature consideration were denied. The only possible material distinction between the facts of those cases and the facts here is as we have noted in favor of respondent here. There is no distinction whatever between the law of those cases and the law of the case here. All arose under the same statute. From a reading of those cases it is too clear for cavil that on the facts here either the certificate of completion made by the city engineer on November 25, 1913, was a final acceptance in law which the city could not dispute, or the action of the council on the same evening in passing and paying the 90 per cent. complete estimate was such an affirmative action recognizing the work as completed, as to meet the express terms of the statute as an acceptance. In either event, as pointed out in the *Wheeler, Osgood Company Case*, a legal acceptance, binding as between the city and the principal contractor, is binding also upon the materialman. The fact that the "clean-up work" was done after the engineer certified that the work was 100 per cent. completed is immaterial. As we said of a similar insignificant item in the *McGowan Bros. Hardware Company Case*: "It could not impeach the certificate, in the absence * * * of fraud on the architects' part."

[3] No fraud or collusion on the part of the city engineer in the present case is claimed. We are clear that the court's finding that the contract was completed and the work accepted by the council on November 25, 1913, is correct under the law and the evidence. This works no hardship upon a reasonably prudent laborer or materialman. He is not required to wait for completion or acceptance of the work. He can file his claim as soon as he finishes furnishing labor or materials. Such has been our liberal construction of the statute since January 8, 1910. *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626; *Washington Monumental, etc., Co. v. Murphy*, 81 Wash. 266, 142 Pac. 665.

[4, 5] Appellant argues that in any event the court erred in not entering a personal judgment against the contractor, *McNerney*. It is asserted that he defaulted, but there is nothing in the record to show that he was served personally with summons, or that an order of default was ever entered against him. Obviously, unless he was personally served, the court had no jurisdiction to enter a personal judgment against him. In the absence of anything in the record show-

ing that fact, we cannot assume that the court has committed the error complained of. The judgment is affirmed.

MORRIS, C. J., and MOUNT, FULLERTON, and CHADWICK, JJ., concur.

GOLDSWORTHY et al. v. OLIVER et ux.
(No. 13312.)

(Supreme Court of Washington. Sept. 27, 1916.)

1. WITNESSES \S 164(3) — COMPETENCY — "TRANSACTIONS" WITH PERSONS SINCE DECEASED.

The identification of signatures by a decedent to receipts does not come within Rem. & Bal. Code, \S 1211, providing that where the adverse party sues or defends as administrator, executor, or legal representative of a deceased person, a party in interest shall not be admitted to testify in his own behalf as to any "transaction" with or statement made to him by the deceased.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 685; Dec. Dig. \S 164(3).]

For other definitions, see *Words and Phrases*, First and Second Series, *Transaction*.]

2. WITNESSES \S 164(3)—RECEIPTS—ADMISSIBILITY.

In an action by executors for the price of notes sold to defendants, receipts by the decedent, the signatures to which were identified by defendant and also by other witnesses, were properly admitted in evidence.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 685; Dec. Dig. \S 164(3).]

3. WITNESSES \S 164(2) — COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.

In an action by executors, testimony of defendant as to a receipt given by decedent, which had been lost and was therefore not produced, was inadmissible as showing a transaction with the decedent.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 684; Dec. Dig. \S 164(2).]

4. EVIDENCE \S 354(12)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—"SHOPBOOK."

A book kept by defendant containing only an account between him and the plaintiff's intestate, though defendant had been in the grocery business, was a man of affairs and was director in a bank, and apparently a careful business man, is not admissible in evidence as a shopbook when the items were apparently all made at the same time.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 1456; Dec. Dig. \S 354(12).]

5. WITNESSES \S 159(13) — COMPETENCY — TRANSACTION WITH PERSONS SINCE DECEASED.

The payment of amounts due by defendant to decedent constituted transactions as to which defendant could not testify.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 681; Dec. Dig. \S 159(13).]

6. APPEAL AND ERROR \S 893(1)—REVIEW—TRIAL DE NOVO.

An action by executors for the price of notes sold the defendants is triable de novo on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3626, 3628, 4620; Dec. Dig. \S 893(1).]

Department 1. Appeal from Superior Court, Kitsap County; Walter M. French, Judge.

Action by Samuel Goldsworthy and others against R. J. Oliver and wife. From a judgment for plaintiffs for a sum less than that demanded, plaintiffs appeal. Reversed and remanded, with instructions.

Thomas Stevenson, of Bremerton, and Lewis & Legg, of Seattle, for appellants. F. W. Moore, of Bremerton, for respondents.

MOUNT, J. This action was brought by the executors of the estate of Peter Mack, deceased, against R. J. Oliver and wife, to recover \$6,868.50, alleged to be due upon the purchase by the defendants of a promissory note which was owned by Mr. Mack in his lifetime. The answer of the defendants admitted the purchase of the note, but denied that it had not been paid, and alleged payment. The court upon these issues proceeded to the trial of the case, and concluded from the evidence submitted that the defendants were indebted to the estate of Peter Mack, deceased, in the sum of \$89.75, and entered a judgment therefor. The plaintiffs have appealed from that judgment.

It appears without dispute that in November, 1911, Peter Mack held a note for \$10,000 signed by William Bremer and A. G. Benbennick. At that time several payments had been made upon the note, so that there was then due thereon \$8,468.50. Mr. Mack agreed with Mr. Oliver that if he would take the note and collect it, he might retain from the amount collected \$500, and whatever costs and expenses he was to in making collection. This was agreed to, and on November 2, 1911, Mr. Mack executed a power of attorney authorizing Mr. Oliver to receive and collect the note. Mr. Oliver thereupon collected the amount due upon the note, viz. \$8,468.50.

It is not claimed that any of this money was paid to Mr. Mack at that time. But Mr. Oliver on November 6th deposited in the Citizens' Bank of Bremerton \$100 to the credit of Mr. Mack. From that time on until January 6, 1914, Mr. Oliver made a number of deposits in the bank to the credit of Mr. Mack. These deposits altogether amounted to \$950. Mr. Mack in the meantime drew checks against these deposits.

On March 19, 1914, Mr. Mack died, leaving \$55 in the bank to his credit. He left a will, leaving his estate to the plaintiffs herein, who are the executors of his estate.

At the trial Mr. Oliver, in order to show payment, which was then the only issue in the case, testified that he had made these deposits in the bank. He was shown a receipt for \$220, dated January 8, 1912. He testified that he was acquainted with the signature of Mr. Mack, and that Mr. Mack had signed the receipt. He was also shown another receipt dated May 28, 1912, for \$1,650, and identified the signature thereto as the signature of Mr. Mack. He also testified that he had another receipt for \$1,000, dated April 5, 1912, which bore the same signature

as the receipts already offered, but that this receipt had been lost. Objections were made to the introduction of the two receipts of January 8 and May 28, 1912, upon the ground that the defendant was incompetent to testify because the receipts involved a transaction between the deceased and the defendant which was prohibited by section 1211, Rem. & Bal. Code, to the effect that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, then a party in interest shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, such deceased or insane person.

[1, 2] We are of the opinion that the identification of the signatures to these receipts does not come within the terms of the statute because such identification is not a transaction with the deceased or statement made by him. Furthermore, even if the identification of these signatures may be held to be a transaction between a deceased person and the witness, other witnesses upon the trial identified the signatures of Mr. Mack. We are satisfied, therefore, that as to the receipt for \$220 and the receipt for \$1,650, the court properly admitted them in evidence.

[3] The receipt for \$1,000 was not produced. The witness testified that this receipt was lost. We are satisfied that the court erred in receiving this evidence. No other person testified to having seen the receipt. The giving of the receipt for \$1,000 to Mr. Oliver by Mr. Mack, if it was so given, was clearly a transaction between these two persons. The receipt itself, if in existence, would be evidence of the fact that it was given. But we think in the absence of the receipt, it would not be competent for Mr. Oliver to testify that such a receipt had been given, or was in existence.

This court, in *White v. Walker*, 84 Wash. 652, 147 Pac. 409, held in an action brought to establish a lost deed, that the person to whom the deed was given could not testify that she had received it, because that would be a transaction between such person and the deceased person. For the same reason it is clear that the receipt in this case could not be proven by the person to whom the receipt was given without production of the receipt itself. We are of opinion, therefore, that the court erred in receiving this evidence in regard to the lost receipt.

[4] In order to show further payments, Mr. Oliver produced a book in which he testified he kept the account between himself and Mr. Mack. He testified that the entries made in this book were made about the times therein stated, and that they were correct. This book contained no other account. It shows upon its face that the items therein entered were all made in the same handwriting, in green ink, and apparently all made at the same time. The account begins, according to the statement contained in the book, on

June 9, 1911. It extended, upon its face, over dates up to March 2, 1914. It shows upon its face only cash debits against Mr. Mack, and that between these dates Mr. Mack had received more than the amount owing from Mr. Oliver by some \$24. This book was received in evidence over the objection of the appellant. In receiving the book in evidence the trial court was controlled by the rule in *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639. In that case *Ah How*, who had been working for the estate of *Yesler*, deceased had kept the account of his work, and of moneys received from Mr. *Yesler*. His account book was received in evidence in that case; and this court held that such book was not within the statute. The account there referred to was kept by *Ah How*, who apparently had no other business than the business of cooking for Mr. *Yesler*. The account book probably showed the dates on which he labored, and the pay which he had received from Mr. *Yesler*.

We think that case goes to the limit of the rule, and that the rule ought not to be further extended. In this case the book offered in evidence was kept by a man who was engaged in business in the city of *Bremerton*. If he was not at the time this transaction occurred, he had been before in the grocery business. He was a man of affairs, was director in the Bank of *Bremerton*, and was apparently a careful business man.

The book contained one item of credit for \$8,468.50, obtained upon the note. The debits were all cash items varying from \$5 to more than \$1,000. A number of items are for \$100; several are for \$500, and \$400, and \$300. There was no evidence that any of these payments were made by the defendant *Oliver* except the book itself.

As we have said, this book does not appear upon its face to be a tradesman's book, kept in the line of business of Mr. *Oliver*, but is at most a private account, kept by him for moneys advanced to Mr. *Mack* during his lifetime.

The rule is stated in 17 Cyc. at page 381, as follows:

"But as a general rule books of account of a party are not admissible in his own favor to prove charges for 'money paid' or 'money lent,' or cash items or dealings between the parties generally, since these charges are not usually such as are made in the ordinary course of business, and since other and better evidence of the transaction usually exists or might reasonably be called for by the party making the advance. This rule has been modified by some of the decisions, however, and it is held that where money charges are made in the banking business, or otherwise as a matter of fact in the ordinary course of business, the accounts will be admissible under the shopbook rule. Moreover the effect of the decisions in some jurisdictions is to extend the rule permitting proof of the delivery of goods sold and the performance of labor by shopbooks so as to include charges of sums of money not exceeding a certain sum, or small sums not definitely fixed by law.

"To be admissible under the shopbook rule the book must as a general rule contain charges by one party to the action against the other and

the entry must be made with the intent to make a charge. Thus books of entries of work done have been held inadmissible where the primary object of the entries was to enable the party to settle with his employees in the work and not to charge the work against the adverse party. So a book of credits and not of charges kept by a purchaser or employer is inadmissible. So a party's books are inadmissible to establish a negative in his favor by showing the absence of affirmative entries."

We think under this rule that the book here offered was not admissible because it was clearly not a shopbook. It appears upon its face that it was not a book kept in the ordinary business of Mr. *Oliver*. It does not appear true upon its face by reason of the fact that it appears to have been drawn up all at one time and not extending over a period of two years. We think it appears upon its face to be a self-serving declaration. There was opportunity here for better evidence of the transactions than the book itself. It appears from the record beyond dispute that Mr. *Oliver*, as we have seen above, was a man of affairs. He was a business man of ability, accustomed to banks and banking business. He was a director in a bank. *Peter Mack*, during his lifetime, was a bachelor. He lived in filth. He was intoxicated a great portion of his time. In short, *Peter Mack*, during the last years of his life, was irresponsible on account of his habits and mode of living. It seems to us incompatible with good business judgment, which we must attribute to Mr. *Oliver*, that he would advance \$400 and \$500 at a time to Mr. *Mack* without issuing his check therefor, or without taking a receipt from Mr. *Mack*. And yet, if this book is admissible in evidence, and may be received, we must conclude that Mr. *Oliver* advanced as much as \$3,000 to Mr. *Mack* in that way.

[5] It is plain from the statute itself that the payment of these different amounts would be transactions between the deceased and Mr. *Oliver*. He cannot upon the witness stand testify that he made these payments. To admit this book in evidence would, in effect, authorize a person before the trial of an action to write a statement upon a paper or in a book, and then by testifying that the statement was correct and the items were entered at the time of the different dates therein, make a book admissible in evidence as a trade book. In other words, to declare this book, under the circumstances, admissible, is to declare an easy mode of avoiding the statute. We are satisfied that the rule in the *Ah How* Case should not control this case, and that the admission of this book in evidence was error.

[6] This case is triable here de novo. The record is before us. It shows upon its face, and is admitted, that the defendant was to deduct \$500 from the amount collected on the note. He was also to receive \$151.20 in costs of collection. The evidence besides his own testimony shows that the defendant

deposited in the bank \$950 to the credit of Mr. Mack. The evidence further shows that at the time the money was collected Mr. Mack in the presence of Mr. Moore agreed that Mr. Oliver should deduct from the amount collected \$900 then owing by Mr. Mack to Mr. Oliver. The record shows that Mr. Mack gave to Mr. Oliver a receipt for \$220 and \$1,650. It was not shown, and is not claimed, that there was any other transaction on which Mr. Oliver was indebted to Mr. Mack. It can therefore be presumed that these receipts were given for money advanced from this \$8,468.50 owing by Oliver to Mack.

It was also shown by disinterested witnesses that during the last sickness of Mr. Mack, and after his death, Mr. Oliver advanced money to pay for articles furnished to Mr. Mack before his death, for doctor bills, etc., and after his death, for funeral expenses, the sum of \$726.50. These added together make a total payment from Mr. Oliver to Mr. Mack of \$5,097.70. Deducting this from the amount of money Mr. Oliver owed to Mr. Mack upon the note, leaves \$3,370.80. We think it plain from the record here that the plaintiffs are entitled to a judgment against the respondents for that amount.

The judgment is therefore reversed, and the cause remanded, with instructions to the superior court to enter a judgment against the defendants for \$3,370.80, with interest from the date the complaint was filed.

MORRIS, C. J., and ELLIS and CHADWICK, JJ., concur.

BOUCKAERT et ux. v. BURWELL & MORFORD, Inc. (No. 13405.)

(Supreme Court of Washington. Sept. 30, 1916.)

FRAUD \S 59(1)—ACTION—MEASURE OF DAMAGES.

In an action for damages for false representations as to the value of land for which plaintiff was induced to trade his equity in certain lots, the measure of plaintiff's damage was the actual loss sustained by him and no more, and was to be measured not by the market value of the lots, but only by the value of the interest he lost.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 60; Dec. Dig. \S 59(1).]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by George Bouckaert and wife against Burwell & Morford, Incorporated. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded for a new trial.

Byers & Byers, of Seattle, for appellant. E. M. Farmer, of Seattle, for respondents.

MORRIS, C. J. Appeal from a judgment upon a verdict in favor of the plaintiffs in an action to recover damages for false representations in a trade of real estate. Respondents authorized appellant, a real estate broker, to dispose of their equity in ten Seattle lots. Under this authority appellant secured a trade for 40 acres of land in Yakima county. Respondents, alleging that they were induced to make the trade through fraudulent representations as to the character and value of the Yakima county land, brought this action against the broker and recovered judgment, from which this appeal is taken.

Several questions are raised by the appeal, but as our conclusion as to one necessitates a new trial this only will be noted. In instructing the jury as to the measure of damages the lower court charged that such measure would be the difference between the market value of the Seattle lots and the market value of the 40 acres in Yakima county on the day of the trade. This was clearly error. The measure of respondents' damage would be the actual loss sustained by them and no more.

"Actual damages means a just compensation for the wrong suffered." *Scribner v. Palmer*, 81 Wash. 471, 142 Pac. 1166.

The wrong suffered by respondents, if any, was not to be measured by the market value of the Seattle lots, but only by the value of the interest they lost. The appellant alleges that respondents authorized it to sell their equity in the Seattle lots, and the value of such equity is the only loss complained of. The damages suffered then would be based upon the value of respondents' equity, since that is all that they lost; not the market value of the entire holding.

For this error the judgment is reversed, and the cause remanded for a new trial.

MOUNT, CHADWICK, ELLIS, and FULLERTON, JJ., concur.

HAWN v. YAKIMA COUNTY. (No. 13337.)

(Supreme Court of Washington. Sept. 30, 1916.)

APPEAL AND ERROR \S 97(2) — NEW TRIAL \S 70—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL.

The trial court is vested with discretion to order a new trial on the ground of the insufficiency of the evidence to justify the verdict, and its order will not be disturbed on appeal, where there is no manifest abuse of its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3871; Dec. Dig. \S 97(2); New Trial, Cent. Dig. \S 97; Dec. Dig. \S 70.]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge. Action by G. W. Hawn against Yakima

County. Judgment for plaintiff, and defendant appeals. Affirmed.

Harold Gilbert and Sydney Livesay, both of North Yakima, for appellant. H. J. Snively and I. J. Bounds, both of North Yakima, for respondent.

PER CURIAM. Appeal from an order granting a new trial upon the ground of insufficiency of the evidence to justify the verdict. We have held in an unbroken line of decisions that the discretion to so order is vested in the lower court, and that its judgment, when so entered, will not be disturbed on appeal, unless there is a manifest abuse of such discretion. The record presents no such abuse.

The judgment is affirmed.

NORTHERN PAC. RY. CO. v. KING COUNTY. (No. 13289.)

(Supreme Court of Washington. Oct. 4, 1916.)

1. TAXATION \S 390(1) — RAILROAD COMMISSION—CONCLUSIVENESS OF FINDINGS—OPERATING PROPERTY—STATUTES.

Laws 1907, p. 536, created a railroad commission to ascertain the value of railroad property in the state and made its findings conclusive. Laws 1911, p. 538, made the railroad commission a public service commission with substantially the same powers, and section 92 thereof as amended by Laws 1913, p. 665, provided that the findings of the commission should be admissible in evidence in any action, "excepting with respect to matters of assessment and taxation" and should be conclusive evidence of the facts stated therein "except as a basis for taxation." Laws 1907, p. 132, required the state board of tax commissioners to make an annual assessment of the operating property of all railroads, and by section 2, subd. 3, defined railroad property and provided that real estate not used in operation should be assessed the same as the property of individuals, and section 12 declared that railroad operating property including real property, and its rolling stock, etc., should be taxed as personal property. Laws 1913, p. 438, required railroad property to be assessed at not exceeding 50 per cent. of its real value. *Held*, that it was the duty of the Public Service Commission to determine not only the value but the property used by the railroad as operating property, and that its determination as to value for taxation until modified by the commission or the courts was conclusive, and that the state board of tax commissioners had no authority to reclassify railroad property as nonoperating property after the Public Service Commission had classified it as operating property; the amendment by Laws 1913 referring only to the right of the tax commission to put a different value upon railroad property than that fixed by the Public Service Commission.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 652; Dec. Dig. \S 390(1).]

2. TAXATION \S 391f—RAILROADS—"OPERATING PROPERTY."

Under Laws 1907, p. 132, \S 2, subd. 3, providing that the term "property of a railroad company" should include all its franchises, right of way, tracks, terminals, and other real and personal property used or employed in its operations, but that realty not used in operating the railroad should be assessed the same as the property of an individual, and section 12, pro-

viding that in assessing operating property all land occupied as a right of way, all tracks, stations, etc., used in the operation thereof should be assessed and taxed as real property, realty owned by a railroad and occupied by side tracks and by telegraph lines adjoining its terminals was to be assessed as "operating property."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 660-666; Dec. Dig. \S 391.]

Department 1. Appeal from Superior Court, King County; J. R. Ralston, Judge.

Action by the Northern Pacific Railway Company against King County to cancel a tax. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred H. Lundin and Robert H. Evans, both of Seattle, for appellant. Geo. T. Reid, J. W. Quick, L. B. Da Ponte, and C. A. Murray, all of Tacoma, for respondent.

MOUNT, J. This action was brought by the respondent to cancel a tax upon three blocks of Seattle tidelands, which blocks had been assessed by the county assessor for the year 1914 as commercial or nonoperating property of the railway company. Upon a trial of the issues to the lower court a judgment was entered as prayed for in the complaint. The county has appealed.

[1, 2] It appears that these blocks are adjoining its tracks, stations, and terminal grounds, and were purchased and held by the railway company for terminal grounds. They have been occupied by a telegraph line and a side track. By reason of the fact that these blocks were not entirely occupied by the railway company for the purposes of side tracks and terminal grounds, the state board of tax commissioners classified the portion of the blocks not occupied by the railway company as commercial property, and they were so assessed. The railway company has paid the taxes upon its operating property and claims that the order of the tax commission classifying these blocks as commercial property is void because the tax commission had no authority to classify these lands as commercial property when they were held for the use of the railway company as operating property, and were so classified by the Public Service Commission.

So that the controlling question in the case is whether the state board of tax commissioners is authorized to reclassify railroad property as nonoperating property when this same property has been classified by the Public Service Commissioner as operating property. The trial court was of the opinion that the board of tax commissioners had no such authority, and therefore granted the relief prayed for.

In the year 1907 the Legislature passed an act providing for the regulation of railroads within the state. Section 5 of that act provided that it should be the duty of the railroad commission as early as practicable to—

"ascertain the total market value of the line, equipment and property of each railroad operating in this state used for a public convenience within the state. * * * It shall also ascertain whether the expenditures already made in the construction and equipment of each railroad were such as were justified by the then existing conditions and such as might reasonably be expected in the immediate future; it shall also ascertain whether the money expended by each railroad is reasonable for the present needs of the company and for such as may reasonably be expected in the immediate future."

The section then provided that the commission should make findings of fact upon all matters concerning which it was directed to inquire into, and that such findings should be filed. It then provided:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any proceeding or hearing in which the public and the railroad or express company affected thereby is interested, and such findings, when so introduced, shall be conclusive evidence of the facts stated in such finding or findings as of the date of filing under conditions then existing, and such facts can only be controverted or contradicted by showing a subsequent change in conditions bearing upon the facts therein determined."

Afterward in the case of *State ex rel. O. R. & N. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7, this court in substance held that a finding of value by the railroad commission was binding upon the tax commission, which had no power to fix any other value upon railroad property for the purposes of taxation.

Afterwards in the year 1911, a new act was passed, making the railroad commission the Public Service Commission, with substantially the same powers with reference to railroads that it had under the old act. Laws 1911, p. 601.

In the year 1913 the Legislature amended section 92 of the act to read as follows:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined." Laws 1913, p. 665.

It is claimed by the appellant that this amendment authorizes the state board of tax commissioners to reclassify railroad property as operating or nonoperating property for purposes of taxation because of the amendment excepting the conclusiveness of the findings with respect to matters of assessment and taxation.

The duties of the tax commission are found in chapter 78, p. 132, Laws 1907. This chapter provides:

"That the state board of tax commissioners shall make an annual assessment of the operating property of all railroad companies within this state, for the purpose of levying and collecting taxes as hereinafter provided."

Subdivision 3 of section 2 is as follows:

"The term 'property of the railroad company' as used in this act, shall include all franchises, right of way, roadbed, tracks, terminals, rolling stock equipment and all other real and personal property of such company, used or employed in the operation of the railroad, or in conducting its business, and shall include all title and interest in such property, as owner, lessee or otherwise. Real estate not adjoining its tracks, stations or terminals, and real estate not used in operating the railroad, is excepted, and shall be assessed in the same manner as like property of individuals."

Section 12 of the same act (page 139) is as follows:

"In making the assessments of the operating property of railroads, and in the apportionment of the values and the taxation thereof, as hereinbefore provided, all land occupied and claimed exclusively as the right of way for railroads, with all the tracks, and substructures and superstructures which support the same, together with all side tracks, second tracks, turnouts, station houses, depots, roundhouses, machine shops, or other buildings belonging to the road, used in the operation thereof, without separating the same into land and improvements, shall be assessed and taxed as real property. And the rolling stock and other movable property belonging to any railroad company or corporation shall be considered personal property and shall be assessed and taxed as such."

This last section was amended in the year 1911, Laws 1911, c. 21, p. 62, by adding to that section the following:

"Provided, that all of the operating property of street railroads shall be assessed and taxed as personal property."

It is plain that the Public Service Commission was authorized to classify the property of railroads. We find no authority conferring upon the state board of tax commissioners authority to classify railroad property into operating and nonoperating property. So far as the board of tax commissioners is concerned, the statute itself defines the duties of that commission with reference to operating and nonoperating, or commercial property of railroads, for it says at subdivision 3 of section 2 (Laws 1907, c. 78, p. 132):

"The term 'property of the railroad company' as used in this act, shall include all franchises, right of way, roadbed, tracks, terminals, rolling stock equipment and all other real and personal property of such company, used or employed in the operation of the railroad, or in conducting its business, and shall include all title and interest in such property, as owner, lessee or otherwise."

That is clearly a definition of operating property of railroads, which is assessed by the state board of tax commissioners and not by the assessors of the counties. That subdivision continues:

"Real estate not adjoining its tracks, stations or terminals, and real estate not used in operating the railroad, is excepted, and shall be assessed in the same manner as like property of individuals."

Operating property and commercial property of railroads are distinctly defined. The nonoperating or commercial property is defined definitely as property not adjoining tracks, stations, or terminals, and not used in operating the railroad.

Section 12 above quoted declares that:

"In making the assessments of the operating property of railroads, and in the apportionment of the values and the taxation thereof, as hereinbefore provided, all land occupied and claimed exclusively as the right of way for railroads, with all the tracks, and substructures and superstructures which support the same, together with all side tracks, second tracks, turnouts, station houses, depots, roundhouses, machine shops, or other buildings belonging to the road, used in the operation thereof, without separating the same into land and improvements, shall be assessed and taxed as real property."

This section and section 2 should be read together, and when so read, we think it is plain that where the real estate is used in the operation of the railroad, and where it adjoins its tracks, stations, or terminals, such property is to be assessed as operating property of the railway company.

It is conceded in this case, as we understand the record, that prior to the year 1914 these blocks were classified by the public service or railroad commission as operating property of the railway company, and up to that time were assessed as such; and the taxes apportioned to the different counties through which the railroad runs, as required by the statute. *State ex rel. Hellar v. Jackson*, 82 Wash. 351, 144 Pac. 48.

But in that year the tax commission concluded that this property was not used as operating property, and therefore classified the same as commercial property. We think the amendment of the Public Service Commission Act in the year 1913 to the effect that the findings of the Public Service Commission "shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation," refers only to the right of the tax commission to put a different value upon railroad property than that fixed by the Public Service Commission; and that the amendment intended only to avoid the rule theretofore announced in *State ex rel. O. R. & N. Co. v. Clausen*, supra. This is plain when we come to consider that at the same session of the Legislature, by chapter 140, Laws 1913, the Legislature provided that property should be assessed at not to exceed 50 per cent. of its true and fair value in money. It was clearly not the intention of the Legislature to

require railroad property to be assessed at its true value in money, and at the same time to permit other property to be assessed at 50 per cent. of its value. In referring to this question in *Northern Pacific Ry. Co. v. State*, 84 Wash. 510, we said at page 529, 147 Pac. 45, at page 51:

"The county assessors are not, however, the assessors of railway operating property; that duty being committed by law to the state board of tax commissioners. The statute so providing, we think renders it plain that the assessed valuation is to be placed upon the entire operating property of each railway company as a unit."

Then after quoting sections 9141 and 9148 of Rem. & Bal. Code, we said:

"This language of the latter section manifestly refers to operating property, or as termed in the railroad and public service commission laws, 'property used for the public convenience,' and is the same class of property which it was the duty of the railroad commission in 1908 to determine the 'total market value of,' which duty later devolved upon the Public Service Commission. This, we think, is rendered plain by a reading of section 9148, above quoted, in connection with the provisions of the railroad commission law, especially as amended by the public service commission law of 1911 touching the duty of the commission and the effect of its finding of value of such property. * * *

"In *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7, and *Spokane & I. E. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688, we held, in effect, that the property to be assessed by the state board of tax commissioners and the property to be valued by the Railroad and Public Service Commission is the same property. We are prompted to make this observation so that it may be rendered plain that the organized entity consisting of appellant's operating property, so valued for purposes of taxation, did not include any property other than the property of appellant 'used for the public convenience,' and that whatever other property may have been owned by appellant in that year was not valued for taxation by the state board of tax commissioners, but by the county assessors, and was not regarded as entering into or forming part of appellant's operating property."

From the reasoning in that case it seems to follow that the duty of the Public Service Commission was to determine, not only the value, but the property used by the railway company as operating property, and that when the Public Service Commission determines those questions, such determination is binding except as to value for taxation until modified by that commission or by the courts.

As we have seen above, there is no express provision in the law authorizing the board of tax commissioners to classify property, except for purposes of valuation for taxation. Where it is found by the Public Service Commission that property is used by the railway company as operating property, we think it is the duty of the tax commission to abide by that decision. We have no doubt of the right of the tax commission to value different classes of railroad property. But that is entirely different from classifying property as operating and nonoperating, when that authority is not expressly given to that commission, and is expressly given to the Public Service Commission. Operating

property is valued or assessed by the state board of tax commissioners. It is assessed as a unit, according to the provisions of section 2 and section 12 of chapter 78 of Laws 1907. The use of the property is, we think, determined by the Public Service Commission. The act of 1907 relating to the duties of the tax commission, and the act of 1911, relating to the Public Service Commission, must be construed with reference to each other in order to be harmonious.

We are satisfied, therefore, that the trial court properly concluded that the state board of tax commissioners had no authority to reclassify railroad property as operating and nonoperating property when the Public Service Commission had done so, but must take it as the Public Service Commission has determined it to be.

The judgment is therefore affirmed.

MORRIS, C. J., and FULLERTON, ELLIS, and CHADWICK, JJ., concur.

GREAT NORTHERN RY. CO. v. KING COUNTY et al. (No. 13302.)

(Supreme Court of Washington. Oct. 4, 1916.)

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by the Great Northern Railway Company against King County and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Alfred H. Landin, Robert H. Evans, and S. M. Brackett, all of Seattle, for appellants. F. V. Brown and F. G. Dorety, both of Seattle, for respondent.

PER CURIAM. The questions presented in this case are identical with the questions presented in Northern Pac. Ry. Co. v. King County, 160 Pac. 8, just decided, and, for the reasons therein stated, the judgment is affirmed.

HORNBURG v. LARSON et ux. (No. 13269.)

(Supreme Court of Washington. Sept. 28, 1916.)

1. BILLS AND NOTES §537(3) — ACTION — QUESTION FOR JURY—CONSIDERATION.

In an action on a note, *held*, that the failure of consideration for the note was a question for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1866-1870; Dec. Dig. § 537(3).]

2. BILLS AND NOTES §452(3)—INVALIDITY—CONSIDERATION — RIGHTS OF BONA FIDE PURCHASERS.

The mere fact that the payee of a note had agreed with his indorsee that it should be redelivered to the makers, and had signed the note, would not deprive the makers of the defense of failure of consideration of which the indorsee had notice, as a failure of consideration avoids a note in the hands of persons purchasing with notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1367-1376; Dec. Dig. § 452(3).]

3. BILLS AND NOTES §503—RENUNCIATION —EVIDENCE—STATUTE.

In an indorsee's action on a note, evidence that he had agreed with the payee and indorser to return the note to the makers was competent, as a showing of facts in regard to the making and delivery of the note showing want of consideration or failure thereof, making the note unenforceable; Rem. & Bal. Code, § 3512, providing that the holder of a negotiable instrument may renounce his rights against a party, and that such renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon, applying to valid enforceable instruments.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1733-1739; Dec. Dig. § 503.]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by C. H. Hornburg, doing business under the name and style of C. H. Hornburg Automobile Company, against E. O. Larson and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Barker & Barker, of Spokane, for appellant. Mulligan & Bardsley, of Spokane, for respondents.

MOUNT, J. This action was brought to recover upon a promissory note for \$1,500, executed by the defendants in favor of one Rice. For answer to the complaint the defendants admitted executing the note, but alleged that there was a failure of consideration which was known to the plaintiff at the time he acquired the note. There were other affirmative defenses not necessary to mention. Upon these issues the case was tried to the court and a jury, resulting in a verdict and judgment in favor of the defendants. The plaintiff has appealed.

It appears that on July 26, 1912, the defendants entered into an agreement with John D. Rice, to purchase 13 acres of land belonging to Rice. At that time there was a mortgage against the land for \$1,500. The defendants agreed to purchase Rice's equity for the sum of \$1,500, and to pay for the same by a note secured by a second mortgage upon the land. The note and mortgage were executed and delivered to Mr. Rice. A deed was executed by Mr. Rice to defendants and signed by him, but was not signed by his wife, who at that time was in Oregon. It was agreed between them that Mr. Rice should take the note and mortgage and the deed, have his wife sign the deed, and not file the mortgage for record until after the deed had been signed and delivered by Mr. Rice to the defendants. Thereafter, before the deed was signed, Mr. Rice desired to purchase from the appellant Hornburg an automobile. The transaction between Mr. Rice and the defendants was explained to Mr. Hornburg, and he agreed to take the note and mortgage of \$1,500 in payment for the automobile and to repay Mr. Rice \$300 when

the \$1,500 was collected. Thereafter Mr. Rice and these defendants agreed to rescind the sale of the property, and Mr. Rice informed Mr. Hornburg of that fact, and it was then agreed that Mr. Rice should execute a note and mortgage for \$1,500 upon the real estate direct to Mr. Hornburg in payment of the automobile. It was further agreed that the note and mortgage executed by the defendants should be returned to them. The deed from Mr. Rice to the defendants was never delivered. The mortgage executed by the defendants to Mr. Rice was returned to the defendants, but the note was not returned.

[1] It is claimed by the appellant that there was no evidence, sufficient to go to the jury, of the failure of consideration for the note sued upon. But we are satisfied from a careful reading of the record that the evidence is conclusive to the effect that there was an entire failure of consideration of the note from the defendants Larson and wife to Mr. Rice, and that Hornburg had notice of that fact at the time he took the note sued upon, and, in its stead, agreed to take Mr. Rice's note direct secured by a mortgage upon the real estate. Upon the question of failure of consideration of the note sued upon there was sufficient evidence to go to the jury.

[2] It is argued by the appellant that, because the note bears the signature of Mr. Rice in addition to the signatures of the Larsons, this is evidence that the note itself was not rescinded. The defendants testified that the agreement was that a new note was to be made by Mr. Rice to Mr. Hornburg. Mr. Rice also testifies that a new note was to be made, and that it was made, signed by himself personally, and delivered to Mr. Hornburg in payment of the purchase price of the automobile. The appellant argues that Mr. Rice simply signed the note payable to him by the Larsons and delivered that to Mr. Hornburg. Whatever the fact may be with reference thereto, it is plain that Mr. Rice is liable. But the mere fact that Mr. Rice signed the note payable to him by the Larsons, and which he and the appellant had agreed should be redelivered to the Larsons, clearly would not deprive the Larsons of the defense of failure of consideration in an action to enforce the note against them. The rule is well settled that a failure of consideration avoids a note in the hands of persons who purchase with notice. 3 R. C. L. p. 942 et seq., § 138.

[3] At the trial of the case the defendants were permitted to testify, over the objection of the plaintiff, that the plaintiff Hornburg agreed to return to them the note executed by them to Mr. Rice. Appellant contends that this was error, and cites 2 Rem. & Bal. Code, § 3512, which provides that the holder of a negotiable instrument may renounce his rights against a party, but that such renun-

ciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. That statute applies to valid enforceable instruments. As we have seen above, in this case the note sued upon was not an enforceable instrument, if it was made without consideration or if the consideration failed and the holder knew of such failure at the time he acquired the note. We think it was competent for the defendants to show by oral proof the facts in regard to the making and delivery of the note in order to show what the consideration was or whether there was a failure of consideration. 3 R. C. L. p. 943, § 139. We think the statute relied upon has no application to this case.

We find no error in the record. The judgment is therefore affirmed.

MORRIS, C. J., and CHADWICK, ELLIS, and FULLERTON, JJ., conchr.

In re SNYDER. (No. 13384.)

(Supreme Court of Washington. Sept. 26, 1916.)

CONSTITUTIONAL LAW § 103—INFANTS § 12—MOTHER'S PENSIONS—VESTED RIGHTS.

The granting of pensions to mothers is a matter of largess or bounty, and no one can acquire a vested right to pension, so that Laws 1915, p. 364, which fails to authorize pensions to abandoned mothers, is not objectionable because Laws 1913, p. 644, which, if repealed, made such allowance.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 193; Dec. Dig. § 103; Infants, Cent. Dig. § 13; Dec. Dig. § 12.]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Application by Mrs. Rose Snyder for a mother's pension. From a judgment dismissing the application, the applicant appeals. Affirmed.

G. Wright Arnold, of Seattle, for appellant. Alfred H. Lundin, W. F. Meier, and Joseph A. Barto, all of Seattle, amici curiæ.

FULLERTON, J. The act of March 24, 1913 (Laws 1913, p. 644), commonly known as the Mother's Pension Act, provided for an allowance out of the county treasury to certain destitute mothers whose husbands were dead, or were inmates of penal institutions, or who had been abandoned by their husbands and such abandonment had continued for a period of more than one year. In 1915 (Laws 1915, p. 364) the act was repealed and a new act passed, which provided for allowances only in cases where the husband is dead or confined in a penal institution or insane hospital, or whose husband through total disability is unable to support his family, making no provision for a case of abandonment.

While the act of 1913 was in force the petitioner, Rose Snyder, made application to

the proper authorities of King county for an allowance, basing her claim upon the fact that she had been abandoned by her husband, which abandonment had continued for more than one year. Her claim was allowed, and she was paid a fixed allowance until the repeal of the statute by the going into effect of the act of 1915. After that time she applied by petition to the juvenile court for a renewal of the allowance, again basing her claim upon the ground that she had been abandoned by her husband. The petition was disallowed, and a judgment rendered dismissing the application. This appeal is prosecuted therefrom.

The appellant attacks the law of 1915 on the ground of constitutionality. She argues that it contravenes section 12 of article 1 of the state Constitution, which provides that no law shall be passed granting to any citizen or class of citizens, or corporations other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens or corporations, and, also, that part of the fourteenth amendment to the Constitution of the United States which provides that no state shall make or enforce laws which shall abridge the privileges or immunities of the citizens of the United States or deny to any person within its jurisdiction the equal protection of the laws. The specific objection is that the law makes an arbitrary selection of its beneficiaries, since it includes indigent mothers whose husbands are dead, or incarcerated in penal or insane institutions, or whose husbands are unable because of total disability to support their families, but excludes mothers whose husbands have abandoned them.

In support of the objections her attorney presents an able brief on the principles to be applied by the courts in determining whether or not an act of the Legislature falls under the constitutional ban of class legislation. But while we agree with his presentation in the abstract we cannot think the principles contended for have application here. In the first place the act of 1913 did not provide pensions for all classes of indigent mothers, and is in consequence as susceptible to the constitutional objection of class legislation as is the act of 1915. Any rule of law, therefore, which would destroy the act of 1915 on this ground would destroy all previous legislation on the subject, thus leaving the applicant utterly without remedy in any event.

In the second place, the state may care for its indigent and poor in any manner it pleases. What scheme will be adopted is wholly within the discretion of the Legislature. That body may provide, without violating any provision of the Constitution, that certain classes shall be cared for by regular allowances from the county treasury, while others may receive intermittent allowances, or be cared for at almshouses or poor farms maintained for the purpose. No

individual or class of individuals can acquire a vested right to be cared for in any particular manner. Indeed, the state is under no legal obligation to care for its poor at all. While it undoubtedly has a moral obligation to do so, there is no such obligation as can be enforced in law. Such relief as it does provide is legally in the nature of a largess or bounty, which may be discontinued at the legislative will.

In the case before us the Legislature probably discontinued pensions to indigent mothers whose husbands had abandoned them because it concluded that to grant such pensions was not in accord with sound public policy. But whatever may have been its motive, there is no question as to its right and power to discontinue such pensions, and no former beneficiary can legally complain.

The judgment is affirmed.

MORRIS, C. J., and MOUNT and ELLIS, JJ., concur.

CHADWICK, J. (concurring). The suggestion that the act of the Legislature amending the Mother's Pension Bill violates article 1, § 12, of the state Constitution, and the fourteenth amendment to the Constitution of the United States will not bear discussion. Those sections of our Constitutions apply only to rights sounding in contract, or which become vested rights under some rule of the common law or a statute which partakes of the nature of a contract.

"* * * Vested rights never grow out of gratuitous favor. Only those who can ground their claims in some contract, express or implied, or upon some right guaranteed by the common law, are heard to assert such rights. Neither element exists in this case." Whitaker v. Clausen, 57 Wash. 263-271, 106 Pac. 745, 107 Pac. 832.

"No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion." U. S. v. Teller, 107 U. S. 64-68, 2 Sup. Ct. 39, 27 L. Ed. 352.

"The right of recovery being dependent upon the statute, it is within the power of the Legislature to limit the amount of the recovery to any sum it sees fit." Longfellow v. Seattle, 76 Wash. 509-514, 136 Pac. 855.

And we may add, to any person it sees fit, for, as said in Frisbie v. U. S., 157 U. S. 160-166, 15 Sup. Ct. 586, 39 L. Ed. 657:

"Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension. * * * The whole control of that matter is within the domain of congressional power. U. S. v. Hall, 98 U. S. 343 [25 L. Ed. 180]."

The Supreme Court of Illinois refused to give a similar statute the character of a remedial statute in the absence of clear and apt language, notwithstanding the contention that in construing an act that may have been intended to be retrospective in its application, the courts will resolve the doubt in fa-

vor of the individual, resorting to contemporaneous construction if necessary, saying:

"Appellees argue this case as though it were a matter of contract or vested right, while, in fact, it is a mere matter of largess or bounty. A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease." *Eddy v. Morgan*, 216 Ill. 437-449, 75 N. E. 174.

FLESSHER v. CARSTENS PACKING CO.
(No. 13235.)

(Supreme Court of Washington. Sept. 26, 1916.)

1. ACTION \S 27(1) — NATURE OF REMEDY — GROUND OF ACTION.

Where there is a positive duty created by implication of law independent of contract, though arising out of a relation or state of facts created by contract, an action on the case as for a tort will lie for violation or disregard of that duty.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-176, 195; Dec. Dig. \S 27(1).]

2. SALES \S 274—FOOD—IMPLIED WARRANTY.
The implied warranty of the wholesomeness of food placed on sale, where it exists, arises as an implication of the common law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 777-779; Dec. Dig. \S 274.]

3. FOOD \S 25 — LIABILITIES FOR INJURIES — ACTIONS—PLEADING.

In an action for injuries from unwholesome food purchased for immediate consumption, it is sufficient to set forth the facts from which the duty to furnish wholesome food springs, the neglect of the duty, and the resulting injury, and it is not necessary to aver in terms the relation which in law casts the duty upon the vendor, or that he knew of the injurious quality of the food.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. \S 25.]

4. PLEADING \S 9 — FORM OF ALLEGATIONS — CONCLUSIONS OF LAW.

In an action for injuries from unwholesome food purchased for immediate consumption, where the plaintiff pleaded facts raising an implied warranty, it was not necessary to plead the warranty as a legal conclusion in order to rely on it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. \S 9.]

5. SALES \S 274—FOOD—IMPLIED WARRANTY.
On a retail sale of articles of food by a dealer directly to the consumer for domestic use and for immediate consumption, where the particular articles are selected by the dealer, the law implies a warranty that the articles are sound and wholesome, especially where the dealer also manufactures and prepares the food.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 777-779; Dec. Dig. \S 274.]

6. FOOD \S 25 — LIABILITIES FOR INJURIES — ACTIONS—QUESTIONS FOR JURY.

In an action for injuries from unwholesome meat sold to plaintiff for immediate consumption, evidence held to present a question for the jury as to the unwholesomeness of the meat, and whether it caused plaintiff's sickness.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. \S 25.]

7. FOOD \S 25 — LIABILITIES FOR INJURIES — ACTIONS—PRESUMPTION.

Where meat sold for immediate consumption was in fact unwholesome and caused the purchaser's sickness, scienter on the part of the dealer is presumed as a matter of law, especially where the vendor is not only the dealer, but also the manufacturer.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. \S 25.]

8. EVIDENCE \S 553(2)—OPINION EVIDENCE—EXAMINATION OF WITNESS—HYPOTHETICAL QUESTION.

That a hypothetical question to an expert witness did not include matters subsequently adduced by the defendant was not a fault.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2370; Dec. Dig. \S 553(2).]

9. EVIDENCE \S 548—OPINION EVIDENCE—EXAMINATION OF WITNESS — BASIS OF TESTIMONY.

That the testimony of physicians, expressing the opinion that the sickness of plaintiff was caused by eating meat purchased from defendant, was based partly on the history of the case as detailed to them by the plaintiff is not ground for its exclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2346, 2365; Dec. Dig. \S 548.]

10. DAMAGES \S 132(4) — PERSONAL INJURIES — EXCESSIVE DAMAGES.

Though up to the time of trial plaintiff has lost no great amount of time from his work, where he has chronic and uncontrollable diarrhea, rendering him offensive to his family and friends, and recurrent spasms, and there is evidence that his condition is permanent and progressive, an award of \$3,600 damages is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 375; Dec. Dig. \S 132(4).]

Department 1. Appeal from Superior Court, King County; J. R. Ralston, Judge.

Action by Charles Flesscher against the Carstens Packing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 81 Wash. 241, 142 Pac. 694.

Kerr & McCord, of Seattle, for appellant. Garland & McLane, of Bremerton, for respondent.

ELLIS, J. Action for damages for injuries to plaintiff claimed to have been caused by eating diseased dried beef, prepared and sold by defendant to plaintiff for immediate consumption as human food.

It is alleged that, as a part of its business, defendant prepares and sells at retail flesh of animals for human food; that on or about October 15, 1912, defendant negligently and carelessly sold and delivered to plaintiff certain dried beef, which was poisonous, decayed, unhealthful, and unfit for human food, which fact was unknown to plaintiff, who believed that the meat was sanitary and fit for food, and that he purchased it for food for himself and family, which fact was known to defendant; that plaintiff ate of the meat soon after purchasing it, and that it caused him to become ill, to be thrown into fits and spasms; that his digestive system

has become so impaired as to render his life a burden to himself and family; that he has lost control of his excretory organs, has frequent spasms; and that his health has become permanently impaired—all because of eating the meat so sold to him by defendant. On the first trial a verdict was returned and judgment entered in favor of plaintiff. On defendant's appeal the judgment was reversed on the ground that, the action being a common-law action for negligence, the trial court committed error in reading to the jury certain of the provisions of the pure food statute (Rem. & Bal. Code, §§ 5453, 5455). *Fletcher v. Carstens Packing Co.*, 81 Wash. 241, 142 Pac. 694.

The evidence was voluminous, resulting in a statement of facts of nearly 500 pages. Lack of space forbids more than a mention of its salient features. The evidence adduced on behalf of plaintiff shows that about the middle of October, 1912, he purchased a small quantity of dried beef from the defendant at its market in Bremerton, Kitsap county, late in the afternoon; that he placed it on a shelf in the family cupboard in the original paper in which it was delivered to him by the salesman; that next morning he placed a piece of it between two slices of bread, wrapped the sandwich so made in a napkin, took it with him to his work in the navy yard, and at noon ate the sandwich, and soon after became very sick, was attacked with violent vomiting, retching, spasms, nausea, running off of the bowels, and became unconscious; that since that time to the time of trial there has been a frequent recurrence of these symptoms, and he has since been subject to frequent fits, spasms, convulsions, and periods of unconsciousness. Several physicians who had examined him, and others from hypothetical questions, expressed the opinion that his condition is the result of meat poisoning, is permanent, and will be progressive. Others testified that in their opinion his condition is not the result of meat poisoning but is produced by other causes.

Plaintiff's daughter ate of the same meat during the noon hour following the day of its purchase, and a few minutes afterwards became sick with nausea and diarrhea, exhibiting the same symptoms as those of plaintiff, but in a slighter degree. Other members of plaintiff's family, including his son, another daughter and his wife, ate of the same food eaten by plaintiff and his daughter on the day in question, excepting the dried beef, and did not become sick. The bread used by the plaintiff and his daughter in the sandwiches was part of a considerable quantity made by plaintiff's wife, all of which was eaten by the members of the household, both before and after the time in question, with no bad results. One Edmondson purchased dried beef at the same time of plaintiff's purchase, cut from the same larger

piece, took it home with him, ate a part of it without bread or anything else, and in a few moments became violently sick, exhibiting the same symptoms as those of the plaintiff. Two other men near the same time purchased dried beef from defendant which the evidence tends to show was cut from the same larger piece. Both of them became sick soon after eating of the meat exhibiting symptoms similar to those of the plaintiff. Evidence was adduced, on behalf of the defendant, covering the whole process of its preparation of dried meats and its care of the meats, all tending to show that the meat in question was free from decay, filth, or impurities, and that no deleterious or poisonous preservatives were used in its preparation. It was also shown that all meats prepared by defendant are subjected to inspection by United States government inspectors, and that no meat prepared by defendant is offered for sale without being submitted to and passing such inspection. There was also evidence that two or three other persons ate of meat cut from the same large piece as that sold to plaintiff without injurious results. Some of the same piece was also submitted to two chemists for examination. Both of whom testified that they found no putrefactive bacteria or other impurities which would produce ptomaine poisoning. The jury returned a verdict for plaintiff in the sum of \$3,600, on which judgment was entered after defendant's motions for judgment non obstante verdicto and for a new trial had been denied. Defendant appeals.

It is first contended that the court erred in refusing to grant appellant's motion for judgment non obstante verdicto. This contention is apparently based upon a twofold ground: (1) That the complaint as construed on the former appeal, sounded in tort through negligence, and respondent was permitted to recover only on the theory of implied warranty resting in contract, which was not specifically pleaded; (2) that in any event no negligence was established, in that there was neither allegation nor proof that appellant knew that the meat was unwholesome.

[1] As to the first ground, it is a sufficient answer to say that where there is a positive duty created by implication of law independent of the contract, though arising out of a relation or state of facts created by the contract, an action on the case as for a tort will lie for a violation or disregard of that duty. *Sharpe v. National Bank of Birmingham*, 87 Ala. 644, 7 South. 106; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688; *Hinks v. Hinks*, 46 Me. 423; 6 Cyc. 688.

[2] The implied warranty of the wholesomeness of food placed on sale, whenever it exists at all, arises as an implication of the common law. "The liability does not rest so much upon an implied contract as upon a violation or neglect of a duty voluntarily as-

sumed." *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Tomlinson v. Armour & Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.

[3] In such a case it is sufficient to set forth the facts from which the duty springs, the neglect of that duty, and resulting injury. It is not necessary to aver in terms the existence of the relation which in law casts the duty upon the vendor, or that he knew of the injurious quality of the food. The negligence consists in the violation of the duty to know under such circumstances what he should have known and refrained from causing the injury. *Bishop v. Weber*, supra.

[4] Respondent, having pleaded the facts, was not required to plead the warranty as a legal conclusion in order to rely upon it.

[5] As to the second ground it is clear from the foregoing that, if respondent had the right to rely upon an implied warranty that the meat was sound and wholesome, it was not incumbent upon him, either to plead or prove that appellant actually knew that the meat was unwholesome. He was only required to plead and prove such facts to the satisfaction of the jury, from which the law raises the implied warranty. *Scienter* need not be pleaded, and it follows that it need not be proven. *Tomlinson v. Armour & Co.*, supra; *Parks v. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C, 179. It is said in the case last cited:

"The degree of care required of a manufacturer or dealer in human food for immediate consumption is much greater, by reason of the fearful consequences which may result, from what would be slight negligence in manufacturing or selling food for animals. In the latter a higher degree of care should be required than in manufacturing or selling ordinary articles of commerce. A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically he must know it is fit, or take the consequences if it proves destructive."

See, also, to the same effect *Neiman v. Channellene Oil & Manufacturing Co.*, 112 Minn. 11, 127 N. W. 394, 140 Am. St. Rep. 458; *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441.

It is true that the Minnesota cases were actions brought under the pure food statute, but it is obvious that where there is an implied warranty at common law, the same rule as to the plea and proof of *scienter* must prevail. This court inferentially approved the same rule in the case of *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915C, 140, a common-law action grounded in negligence, in which actual *scienter* was neither pleaded nor proved, yet we extended the doctrine of implied warranty to a suit by a purchaser from the retailer against the manufacturer.

Appellant cites one case to the contrary

(*Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076). But in that case, which involved the sale of a fowl, it was held that there was no implied warranty, because the purchaser selected the fowl himself from a number offered without reliance upon the skill and judgment of the vendor, and that in such a case the maxim *caveat emptor* applies. Even in that case it was said:

"If the selection is left to the dealer, due care by him is no defense. He is liable for latent unsoundness that could not be discovered."

In the case before us respondent did not select the beef. He took what the dealer cut from a single large piece in stock and gave it to him. True he saw the larger piece from which the pieces given to him were cut, but there is no pretense that he examined it or selected any particular cut for himself. If the mere seeing and purchasing food on sale makes the purchaser take *caveat emptor*, there can be no such thing as an implied warranty except in case of canned goods. This is the position to which appellant seems to be driven, but it is not the law. It is a general rule, supported by the decided weight of authority, that, upon a retail sale of articles of food by a dealer directly to the consumer for domestic use and for immediate consumption, the law implies a warranty that such articles are sound and wholesome. Such is the rule of the common law, and it is strengthened rather than impaired by the more modern decisions. *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Chapman v. Roggenkamp*, 182 Ill. App. 117; *Race v. Krum*, 163 App. Div. 924, 147 N. Y. Supp. 818; *Leahy v. Essex Co.*, 184 App. Div. 903, 148 N. Y. Supp. 1063; *Rinaldi v. Mohican Co.*, 157 N. Y. Supp. 561; *Hoover v. Peters*, 18 Mich. 51; 15 Am. & Eng. Ency. Law, p. 1238. See note to *McQuaid v. Ross* (Wis.) 22 L. R. A. 195, and many cases there cited. The same rule prevails under the civil law. *Doyle v. Fuerst & Kraemer*, 129 La. 838, 56 South. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913B, 1110.

The writer of the opinion in the *Rinaldi* Case expresses the personal view that this common-law rule is no longer suitable to modern conditions, but nevertheless follows the general rule as recognized by the New York court in the *Race* Case. He expresses no reason for that view, and we can conceive of none, except in the case of canned goods not purchased directly from the manufacturer, in which case for the reasons stated in the *Mazetti* Case the manufacturer is liable directly to the purchaser, even for an injury to his business, and it would seem, a fortiori, for injury to the health of a purchaser for immediate consumption. In one case it has been held that a retail dealer who sells canned food, which the buyer knows he did not prepare, does not impliedly warrant its wholesomeness. *Julian v. Laubenberger*, 16-

Misc. Rep. 646, 88 N. Y. Supp. 1052. But this is far from holding that as to other than canned goods a retail vendor for immediate consumption is not a warrantor, and especially far from holding that a retail vendor who sells goods of his own preparation directly to the consumer for immediate use, as in the case here, is not a warrantor.

We are persuaded that the general rule of implied warranty as we have stated it is the sound one. It rests, as we said in the *Mazetti Case*, not alone on privity of contract, but upon "the demands of social justice." It has its ethical basis in the reasonable presumption that the vendor, if a regular retail dealer, and especially if he be also the manufacturer, has the better means of knowledge of the character of the food which he offers for sale. As said in *Wiedeman v. Keller*, supra:

"In this case, however, the appellee was a regular retail dealer, and as such he sold the meat to appellant for domestic use, and, under the law as it seems to be settled in this country, as the meat turned out to be unwholesome, he was liable, although he was not aware that it was diseased when he sold it to appellant. In an ordinary sale of goods the rule of caveat emptor applies, unless the purchaser exacts of the vendor a warranty. Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased. It may be said that the rule is a harsh one; but, as a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk."

Whether the action be called one on warranty or of negligence it comes to the same thing. It sounds in tort. From the dealer's, and especially the manufacturer's, better means of knowledge arises the implication of a warranty and the attendant presumption of scienter. The negligence consists in offering stuff not known to be wholesome for sale, to the purchaser's injury.

It is next contended that the motion for a new trial should have been granted. Four grounds are urged: (1) That the evidence was insufficient to justify the verdict; (2) that certain testimony was erroneously admitted; (3) that certain instructions were erroneously given and certain requested instructions were erroneously refused; (4) that the verdict was excessive.

[6] Respondent's evidence, the salient points of which we have endeavored to set out in our statement of the case, was clearly sufficient to take the case to the jury on the question of the unwholesomeness of the meat and as to whether it was the cause of respondent's sickness. Whether the evidence adduced by appellant was sufficient to over-

come that of respondent was a question for the jury. The claim that the fact that parts of the same larger piece of meat from which that purchased by respondent was cut were examined by chemists and no putrefactive or other bacteria found was conclusive of its purity is not tenable. There was no satisfactory evidence that it was not possible that a part of the larger piece of meat might have been infected, or infected in a dangerous degree, and another part not infected, or only slightly infected. It is elementary that it is not the province of this court to weigh the evidence. We cannot say that the trial court abused its discretion in denying the motion for a new trial upon the record before us.

[7] What we have said of the motion for judgment non obstante disposes of the question of appellant's knowledge. If the jury believed that the meat was in fact unwholesome and caused respondent's sickness, scienter is presumed as a matter of law, especially where, as here, the vendor for immediate consumption is not only the dealer, but also the manufacturer.

[8] The contention that improper testimony was admitted is based upon the claim that a long, hypothetical question propounded to certain physicians included elements not established by other evidence. We have read the question and we have read all of the evidence. We are convinced that the question included no improper elements. That it did not include matters subsequently adduced by appellant in defense was not a fault. Appellant had every opportunity to cross-examine and include such elements.

[9] It is also urged that the court erred in admitting the testimony of two physicians, who expressed the opinion that respondent's sickness was caused by eating the meat, because their opinion was based partly upon the history of the case as detailed to them by respondent. It is asserted that this should have been excluded as hearsay. But neither of the physicians repeated what respondent had said. It is obvious that no intelligent examination could have been made, nor any intelligent opinion expressed, without taking into consideration both the subjective and objective symptoms. The evidence was not objectionable as being hearsay.

The instructions offered and the instructions given are long. We cannot review them in detail. It must suffice to say that we have read them all with much care. Those requested by appellant were largely based upon the theory that the vendor of provisions other than canned goods is not a warrantor of their wholesomeness, and that the purchaser for immediate consumption takes caveat emptor. The objections to the instructions given are based upon the same theory. If our view of the law be correct, it is manifest that the requested instructions were properly refused. In so far as the instructions requested correctly stated the law, they

were sufficiently covered by the instructions given, which we find correctly covered the law applicable to the evidence.

[10] In support of the claim that the verdict was excessive appellant mainly relies upon the fact that respondent, up to the time of trial, had lost no great amount of time from his work. But if, as the evidence shows, he has chronic and uncontrollable diarrhea, rendering him offensive to his family and friends, and recurrent spasms, and if the jury believed, as there was evidence tending to show, that this condition is permanent and progressive, and results from eating the meat, we cannot say that the verdict is excessive. The assessment of damages in such a case is a matter peculiarly within the province of the jury. We find no warrant in the evidence for reducing it.

Two juries have found for respondent on practically the same evidence. We find no error in the record now before us calling for a reversal.

The judgment is affirmed.

MORRIS, C. J., and FULLERTON and CHADWICK, JJ., concur.

SU LEE et al. v. PECK et al. (No. 2212.)
(Supreme Court of Nevada. Oct. 4, 1916.)

1. GIFTS \S 49(4) — LAND — SUFFICIENCY OF EVIDENCE.

Evidence in a suit to quiet title to land occupied by a joss house held to show a gift of such land to a joss house society.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. \S 95; Dec. Dig. \S 49(4).]

2. TRIAL \S 165 — QUESTION OF FACT — NON-SUIT.

On a motion for a nonsuit, the evidence should be construed in favor of the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 373, 374; Dec. Dig. \S 165.]

3. RELIGIOUS SOCIETIES \S 16 — PROPERTY — CAPACITY TO TAKE GIFT.

An unincorporated joss house society can take title to real estate in this state, under the common-law rule that land may be given to pious uses before there is a grantee competent to take, and that in the meantime, the fee lies in abeyance and vests when the grantee exists.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. \S 103-108; Dec. Dig. \S 16.]

4. RELIGIOUS SOCIETIES \S 16 — GIFT — CAPACITY TO TAKE — ESTOPPEL.

Where a lot was given to a joss house society in consideration that the Chinese inhabitants would locate in the vicinity of the lot, and of the society's improvements on the lot, the donor and his grantee are estopped from asserting the society's incapacity to take title to the lot.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. \S 103-108; Dec. Dig. \S 16.]

Norcross, C. J., dissenting.

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

Suit by Su Lee and Charley Bi Yen, suing

for themselves and others as members and on behalf of the Lin Hing Gungsha, or Joss House Society of Reno, Nev., against F. J. Peck and others. From a judgment of nonsuit and from an order denying a motion for a new trial, plaintiffs appeal. Reversed, and cause remanded for new trial.

Cole L. Harwood, of Reno, for appellants. M. B. Moore and Hoyt, Gibbons & French, all of Reno, for respondents.

COLEMAN, J. This is an appeal from a judgment of nonsuit and from an order denying a motion for a new trial.

[1] Su Lee and Charley Bi Yen, suing for themselves and others as members of and on behalf of the Lin Hing Gungsha, or Joss House Society of Reno, Nev., an unincorporated society, brought suit against the defendants to quiet title to certain real estate. The pleadings are in the usual form. At the conclusion of the evidence offered on the part of the plaintiffs, a motion for a nonsuit was interposed. The court sustained the motion, upon the ground that an unincorporated society cannot take title to real estate in Nevada. In denying the motion for a new trial the court adhered to its original view, and also held that plaintiffs had failed to prove a gift of the property in question to the society, but that the evidence showed only a license to occupy the premises in question without rent, and that possession under such conditions was not such an adverse possession in the society as could ripen into title.

We will consider the last proposition first. Ong Chee, a witness in behalf of plaintiffs, testified:

"Q. Well, did you have anything to do with the location of that joss house over there? A. Yes; that time when I was put up money, me help to build that building. * * * Q. Well, now, state what you had to do, if anything, with the location of the joss house in Chinatown? A. * * * Well, when—first after the fire burn up the town and Mr. Manning asked these Chinamen to move down that place, first place Chinamen think that place is too low; didn't want to move down in the first place. After that they come talk to me and try to get these Chinamen to move down there and he willing to give them a place, a lot of land to build a church, joss house, and then I told him I will move up to Carson—I ain't got anything to do with this town—and you better go down there and talk to Su Lee and Quong Ah Moon, that is the store name, man's name keeps the store here. Q. Well, did you have a further talk with Mr. Manning and Mr. Haskell about it? A. Then I take Mr. Manning—you see, that time Chinatown burn, and that fellow Quong Ah Moon and Su Lee had a laundry house on this side of the depot, and I take him up there and show him the place where Su Lee is and Quong Ah Moon is, and he have a talk with them. So I didn't talk to him afterwards. * * * Q. State exactly, as near as you can remember, what either Mr. Manning or Mr. Haskell said about giving this land, if anything? A. Well, he says he give—he willing to give that piece of land to build joss house, a lot of land. Q. Who did he say that to? A. He say that to me first place. And then I tell

him I move my store up to Carson City, and I ain't got nothing to do with it, and then I take them up to talk to Su Lee and Quong Ah Moon. Q. Did you have—did you hear what they said to him? A. Yes; I hear him. I haven't time to wait for them, and after that they stay there and talk a long while, I suppose; I didn't wait for them. I tell him to go up there and explain it to Su Lee and Quong Ah Moon. Q. When was this? What year was this conversation that you refer to? A. That was on the '78. Q. About '78? A. In 1878. Q. Do you know how soon after that the joss house was built that you described, the two-story building, the first one? A. That joss house built in '79. I suppose on about between April and May, I think. Q. In '79? A. In '79 I think; about in the summer time. Q. Were you ever in that building after it was built? A. Oh, yes. I was here when he build him; they had lots of fun there, lots of people from Winnemucca and Truckee and all those places come here. Q. Had a kind of ceremony? A. Yes; had some kind of ceremony. Q. And were you ever in—That building you have said was burned. Were you ever in the building that is there now? A. Oh, yes. Q. When did you move to San Francisco? When did you leave Nevada? A. I leave Nevada about 26 years ago. Q. About 26 years ago? A. Yes. Q. And how many times were you in that building; say that is there now? A. Well, the time that he build it I think many times; many times when he build it before I went to San Francisco, and then when I come back from San Francisco mostly 2 or 3 years time I come up here and sometimes drop in. Many times I been in there. Q. And do you know what the building that was put on there first, the two-story building, what it was used for? A. Joss house. Q. Well, what do you mean by that? What is a joss house used for? A. Joss house, you know, what the Chinese please God, see. Q. Use like a church? A. Just the same like a church, yes. Q. Well, just describe how it was used? A. Well, joss house the same as people—you people please the same, all the same people same as church, all the same; nearly the same. Q. Well, what do the Chinamen do that go there? A. Well, sometimes Chinamen go there, you know, please God, some Chinamen, you know always please God. Anything he want to do anything he go ask God. And then any Chinamen sometimes have a dispute from the other, then all go there and try to have compromise make out, make him come and man decide the business there sometime. Any of the Chinamen or one of them have a dispute one to the other, you know, and they try to make compromise, settle it, anything of that kind, business men all go there to meet him, get him settle it, you know. Any poor man dead, anything of that kind, always that society they help him out. Anybody got no money to bury it, anything of that kind, they pay out money to bury them. Any sick man, anything of that kind, they try to help him. Q. Well, do they take sick men there sometimes? A. Yes; sick man in behind little place hospital before; right behind joss house. Q. Right behind the joss house? A. Yes. Q. Are you acquainted with the customs of Chinese people? A. This Chinatown here? Q. Do you know the customs and manners of Chinese people? A. China people here in town? Q. Yes. A. Oh, yes. Q. And are you acquainted with the customs of Chinese people in San Francisco and in China? A. Yes. Q. Then I will ask you whether this building called the joss house here was used as a joss house according to the customs of Chinese people? A. Yes."

Su Lee, one of the plaintiffs, testified in part as follows:

"Q. Ask him if he knew a man named Manning and a man named Haskell. A. Yes, sir.

Q. Ask him if he ever had any conversation with Mr. Manning or Mr. Haskell about the joss house and Chinatown. A. Yes, sir. Q. Let him state what they said to him. A. He says since the Chinatown burn people in Reno went—the Chinese move out and find a new location, and some fellow, white fellow, ask the Chinese want to move another way, so the Chinese don't like it. So Mr. Manning said, 'Why don't you move down here?' The same now as the Chinatown here. Q. All right. Go ahead. A. Then Mr. Manning and Haskell call all the Chinamen and interview the new Chinatown, view the place, and all Chinese like that place, so Mr. Manning build two houses, one or two wooden buildings, to rent to all Chinese. And now one brick building, as some now occupy, and he contract with Mr. Manning to build that store. Q. All right. Go ahead. A. Since Mr. Manning build that two house, and some Chinamen they went to build some more cabin on the Chinatown by themselves, by Chinamen, and a year later the Chinese want to build a church, the so-called joss house. And he is with Mr. Manning to build that joss house. Q. Well, ask him if Mr. Manning said anything, or Mr. Haskell, about giving him or the China boys a lot for a joss house. A. Yes, sir. Q. What did they say? A. So he asked Mr. Manning, Mr. Haskell, if he could give the lot to the Chinamen to build a joss house. Then Mr. Manning take him down to Chinatown; told him that he could have the lot. He give the lot to him, and say he could build joss house any size he want, and he charge no rent and pay no tax, and give it to him to protect all Chinese sick people; was forever Chinese. Q. Ask him if Mr. Manning or Mr. Haskell went with him and he marked out the lot, put stakes down, or anything like that. A. Mr. Manning take him down and measure and show him the lot, stuck up square all of the corner and show him that is the place going to build for joss house. That is what Mr. Manning said. Q. And ask him if they set up stakes, stick stakes on the corners. A. Yes, sir. Q. Ask him if that was the same place they build the joss house. A. Same place. * * * Q. Ask him if Mr. Manning or Mr. Haskell, or any other person, ever said they owned the property, or said anything about the property, about the title to the property after that time. A. He said he asked Mr. Manning. Manning said give to him; this belong to the joss house property."

Charley Bi Yep, a witness called in behalf of plaintiff, seemed to have given a portion of his testimony direct and some through an interpreter. In answering directly, when asked what was said by Mr. Manning, the witness replied:

"Yes, I give China boy for the joss house. I tell him Mr. Peck no use lawsuit, row. No use row about that. I tell him Mr. Peck * * * Manning tell him Mr. Peck, he say."

The following seems to have been the testimony which the witness gave through an interpreter:

"Mr. Manning did tell Mr. Peck I give that joss house to the Chinamen. Don't bother with it. Leave it alone."

The testimony upon which it is claimed that a license was granted to use the lot in question for a joss house is that of the witness John Fraser, wherein he testified relative to a conversation with Mr. Manning, and said:

"And we got to talking about old times in Reno, and this China question was brought up, and I says, 'There ain't much left down in Chinatown now except the joss house on the south side.' And he says, 'No.' He says he guessed they will keep that as long as they don't

have to pay anything on the rent of the ground. He didn't tell me that he gave them the ground or anything of that kind. But he said they had never paid any rent on it."

[2] We cannot see that there is anything in the testimony of the witness Fraser which is in conflict with the evidence of the other witnesses. He simply related that Manning had said that the society did not have to pay rent; but Manning did not say that he had or had not given the ground to the society. If he had given the ground to the society "forever," as testified by Su Lee, they certainly would not have to pay rent. The language used by Manning was in no way contradictory of the testimony given by the witnesses who appeared in behalf of the plaintiffs. It is an elementary rule that on a motion for a nonsuit the evidence should be construed strongly in favor of the plaintiff. *McCafferty v. Flinn*, 32 Nev. 269, 107 Pac. 225.

[3] This brings us to a consideration of the question whether an unincorporated religious society can take title to real estate in Nevada. We think it can. Counsel for respondents, in support of their contention, rely upon the following language from 34 Cyc. p. 1149, to sustain their position:

"Mere voluntary religious associations are incapable of taking or holding real property in their society name."

Some of the cases cited in support of the text rely upon *Trustees of Baptist Ass'n v. Hart*, 4 Wheat. 1, 4 L. Ed. 499, to sustain the position taken, while the case of *Goesele v. Bimeler*, Fed. Cas. No. 5503, 5 McLean, 223, affirmed, *Id.*, in 14 How. 589, 14 L. Ed. 554, was not a case of a gift for charitable uses. Some of the other cases cited do not give the question the consideration which it merits. The case which most strongly sustains the position of respondents is that of *Baptist Ass'n v. Hart*, *supra*, but that case was overruled by a unanimous court in *Vidal v. Girard's Ex'rs*, 2 How. 127, 11 L. Ed. 205, the opinion having been written by Story, J., who was a member of the court when *Baptist Ass'n v. Hart* was decided. After some consideration of the common law and the statute of 43 Elizabeth, known as the "Statute of Charitable Uses," the opinion proceeds:

"There are, however, dicta of eminent judges (some of which were commented upon in the case of 4 Wheat. 1 [4 L. Ed. 499]) which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the statute of 43 Elizabeth, and that the jurisdiction had been acted upon, not only subsequent, but antecedent, to that statute. Such was the opinion of Sir Joseph Jekyll in *Eyre v. Countess of Shaftsbury*, 2 P. Will. 103, 2 Equity Abridg. 710, pl. 2, and that of Lord Northington in *Attorney General v. Tancred*, 1 Eden, 10 (S. C. Ambler, 351, 1 Wm. Black. 90), and that of Lord Chief Justice Wilmot in his elaborate judgment in *Attorney General v. Lady Downington*, *Wilmot's Notes*, p. 1, 26, given after an examination of all the leading authorities. Lord Eldon, in the *Attorney General v. Skinner's Company*, 2 Russ. 407, intimates in clear terms his doubts whether the jurisdiction of chancery

over charities arose solely under the statute of Elizabeth, suggesting that the statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable purposes were sustained. Sir John Leach, in the case of a charitable use before the statute of Elizabeth (*Attorney General v. Master of Brentwood School*, 1 Mylne and Keen, 376) said: 'Although at his time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute.' In point of fact the charity was so decreed in that very case, in the twelfth year of Elizabeth. But what is still more important is the declaration of Lord Redesdale, a great judge in equity, in *Attorney General v. Mayor of Dublin*, 1 Bligh New R. 312, 347 (1827), where he says: 'We are referred to the statute of Elizabeth, with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law. It created a new and ancillary jurisdiction, a jurisdiction created by commission, etc.; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute; and there can be no doubt that by information by the Attorney General the same thing might be done.' He then adds: 'The right which the Attorney General has to file an information is a right of prerogative. The King, as *parens patrie*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases.' So that Lord Redesdale maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of chancery independently of the statute of 43 Elizabeth. In addition to these dicta and doctrines, there is the very recent case of the *Incorporated Society v. Richards*, 1 Drury and Warren, 258, where Lord Chancellor Sturgen, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.

"Mr. Justice Baldwin, in the case of the will of Sarah Zane, which was cited at the bar and pronounced at April term of the circuit court in 1838 (see *Brightly's N. F. Repts. Magill & Brown*, 346, note), after very extensive and learned researches into the ancient English authorities and statutes, arrived at the same conclusion in which the district judge, the late lamented Judge Hopkinson, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

"But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some 50 of these cases, extracted from the printed calendars, have been laid before us. They establish, in the most satisfactory and conclusive manner, that cases of

charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in, the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do, in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the Trustees of the Philadelphia Baptist Association v. Hart's Executors, 4 Wheat. 1 [4 L. Ed. 499], was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

From the quotation it will be seen that the case of Baptist Ass'n v. Hart is completely overthrown, and the rule that a gift to an unincorporated religious society of property to be dedicated to pious uses was held to be good at common law. We know of no decision wherein the opinion in *Vidal v. Girard* has been criticized. In *Ould v. Washington Hospital*, 95 U. S. (5 Otto) on page 313, 24 L. Ed. 450, it is said:

"At common law, lands may be granted to pious uses before there is a grantee competent to take. In the meantime, the fee will lie in abeyance. It will vest when the grantee exists. *Town of Pawlet v. Clark*, 9 Cranch, 292 [3 L. Ed. 735]. See, also, *Beatty v. Kurtz*, 2 Pet. 566 [7 L. Ed. 521], and *Vincennes University v. Indiana*, 14 How. 268 [14 L. Ed. 416]."

See, also, *Russell v. Allen*, 107 U. S. 163-167 [2 Sup. Ct. 327, 27 L. Ed. 397]; *Werlein v. New Orleans*, 177 U. S. 390 [10 Sup. Ct. 682, 44 L. Ed. 817]; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *St. Peter's Church v. Brown*, 21 R. I. 367, 43 Atl. 642; *Lewis Estate*, 1 Pa. Dist. Ct. R. 423; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Washburn v. Sewall*, 9 Metc. (Mass.) 280; *Swazey v. Am. Bib. Soc.*, 57 Me. 523; *Tranton Soc. v. Howell* [N. J.] 63 Atl. 1110; *Miller v. Chittenden*, 4 Iowa, 252; *Hornbeck v. Am. Bible Soc.*, 2 Sandf. Ch. 133; *Paschal v. Acklin*, 27 Tex. 173; *Pennoyer v. Wadhams*, 20 Or. 274, 25 Pac. 720 [11 L. R. A. 210].

In *Schmidt et al. v. Hess et al.*, 60 Mo. at page 595, the rule is laid down as follows:

"No doubt is entertained that the gift under consideration is a charity, and falls within the meaning of the rules of chancery. 2 Sto. Eq. Jur. § 1164, and cases cited. And although in consequence of the nonincorporation of the church for whose benefit the grant was made, there was no one in esse, at the time of making the donation, capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation. 2 Sto. Eq. Jur. §§ 1165, 1166, and cases cited; *Potter v. Chapin*, 6 Paige (N. Y.) 639, and cases cited; *St. Louis County Court v. Griswold*, 58 Mo. 175."

In considering the question involved here, it is said in 6 Cyc. 903:

"They are construed as valid when possible, and are often upheld where private trusts would fail. A gift in trust for a charity not existing at the date of the gift and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that probably will not

happen within a life or lives in being and 21 years afterwards, is valid if there is no gift of the property meanwhile to or for the benefit of any private person. In consequence of such favor gifts of this character are sustained, though vaguely expressed, and when a gift is clearly for a charitable use, the trustees named therein take the legal estate in fee, though the deed does not in terms run to their heirs and assigns; and though the instrument of gift makes no provision for the conveyance to trustees, the donated property becomes immediately charged with the trust in the hands of either the executors or heirs. Equity will not permit these trusts to fail because its particular purposes are uncertain, or for want of a trustee, though no existing donee is named, from which it results at common law that though the gift to a charitable use is to a voluntary association or an unincorporated society which is uncertain, indefinite, and fluctuating in its membership, the court will nevertheless, under the common-law rule, at least uphold it and appoint a trustee to take and administer the fund according to the terms of the grant."

The most recent decision sustaining our position is that of *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315, from which we quote:

"It is contended, however, that the trust is void because the parties named as trustees are incapable of taking the property. The trustees of the orphans' home, it is true, do not constitute a corporation. It was organized under the auspices of the Grand Lodge of the Independent Order of Good Templars of the State of California, which is a corporation, and it is under the management and control of a continuous board of trustees, consisting of eight persons, one-half of whom are selected every two years by the order. These trustees seem to be appropriate persons to take charge of this charitable fund, and manage it for the purposes of the trust; but even if it should be held that in a strict legal sense they are not capable of taking, yet the charity would not fail for that reason. A court will not allow a charitable trust to fail for want of a legal trustee. Of course in this country courts of equity will not go so far in executing indefinite charities as the courts of equity went in England under the statute of 43 Elizabeth for there if it could be discovered from a deed or will that anything in the nature of a charity was intended, however vague or indefinite, the Chancellor would devote it to some sort of a charity. But in this country courts have been extremely liberal in construing charities, and under principles analogous to the doctrine of cy-pres have enforced trusts far more indefinite and inexact than the one here involved."

[4] We are of the opinion that not only is the contention of appellants sustained by the great weight of authority, but by sound reason as well, and, in view of the fact that the lot was given to the society in consideration of the locating in the vicinity of the lot in question of the Chinese inhabitants of Reno, and of the making of the improvements which were made by the society upon the lot, that equity and good conscience should for all time close the mouth of Manning and his grantees to assert the incapacity of the society to take title to the property in question.

It is ordered that the judgment be reversed, and that the case be remanded for a new trial.

McCARRAN, J., concurs. NORCROSS, O. J., dissents.

MERRITT v. MERRITT. (No. 2230.)

(Supreme Court of Nevada. Sept. 19, 1916.)

1. DOMICILE \S 5—**EFFECT OF MARRIAGE.**

At common law, it was a well-founded rule that a woman on her marriage lost her own domicile and acquired that of her husband.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. \S 24-35; Dec. Dig. \S 5.]

2. HUSBAND AND WIFE \S 3(1)—**DOMICILE — WIFE'S RIGHT TO ACQUIRE.**

A wife may acquire and maintain a domicile separate from that of her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 7; Dec. Dig. \S 3(1).]

3. DIVORCE \S 62(5)—**JURISDICTION.**

A complaint in divorce alleging plaintiff's residence in W. county, that defendant is within the jurisdiction of the court and can be served in W. county, gives the court jurisdiction under Act Feb. 23, 1915 (Laws 1915, c. 28), \S 1, amending Laws 1861, c. 33, \S 22, giving jurisdiction if defendant can be found in the county.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. \S 200-202, 215; Dec. Dig. \S 62(5).]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

Action for divorce by Evelyn Woods Merritt against Fred Charles Merritt. From a judgment that the court was without jurisdiction and an order denying plaintiff's motion for new trial, plaintiff appeals. Judgment and order reversed.

M. B. Moore, of Reno, for appellant. Hoyt, Gibbons & French, of Reno, *amici curiæ*.

McCARRAN, J. This is an appeal from a judgment rendered by the district court of the Second judicial district and from an order denying appellant's motion for a new trial.

The action in the lower court was one for divorce. The judgment and decree rendered by the court below was as follows:

"It is therefore ordered, adjudged and decreed that the court is without jurisdiction in said cause; and it is therefore ordered, adjudged and decreed that the plaintiff take nothing by this action."

By this decree as entered and found in the records, it must be assumed that the court dismissed the proceedings for want of jurisdiction.

While it might appear that the court attempted to make findings on the merits of the case, it will not be presumed here on review that such was in reality the intention of the court, inasmuch as the court by its judgment and decree found itself without jurisdiction to entertain the cause. If the court was without jurisdiction, either by reason of the subject-matter of the action or by reason of the failure of the parties to bring themselves within that jurisdiction, it will not be contended, we apprehend, that the court had any power to determine the merits of the action. Nor do we assume, in view of the form of the judgment, that the court in

reality attempted to determine the case on its merits.

In this proceeding, we are confronted with a situation that brings before us again the much-discussed divorce statute of our state.

Section 1 of appellant's complaint in the court below sets forth:

"That plaintiff resides in the city of Reno, county of Washoe, state of Nevada; and that said defendant is at the time of signing and filing of this complaint within the jurisdiction of this court and that service of the summons and other process may be made upon him in Washoe county, Nev."

Our divorce statute, enacted by the Legislature of 1915, approved February 23, 1915, is in part as follows:

"Sec. 22. Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes. * * * Stat. 1915, p. 26, amending St. 1861, c. 33.

The power of our Legislature to enact this statute, and others of similar nature, wherein that body, representing the people of the state, seeks to regulate marriage and divorce, will, we apprehend, not be questioned. As was said by Mr. Chief Justice Talbot in his concurring opinion in the case of *Tiedemann v. Tiedemann*, 36 Nev. 501, 137 Pac. 826:

"Generally speaking, the marital status of the citizen, the age of consent, the manner in which marriage may be solemnized, the obligations it imposes affecting personal or property rights, the time, condition of residence and causes required for obtaining divorce, are all within the control of the state and subject to her laws as enacted by the Legislature."

We have here before us, then, the policy of our state applicable to the subject of divorce as that policy is framed and enacted by the Legislature, the representatives of the people. The courts have neither the power nor the right to read into that statute anything not there found, nor to strike therefrom that which is there presented. The Legislature in enacting this statute sought to prescribe certain jurisdictional prerequisites, in view of which or on the presentation of which the district courts of the state might take jurisdiction where parties sought to secure dissolution from the bonds of matrimony. Any one of five conditions presented in a verified complaint would, as we view this statute, be sufficient to give the district court jurisdiction. The district court might take jurisdiction: (1) If the cause of action therefor accrued in the county; (2) if the defendant resides in the county; (3) if the defendant may be found in the county; (4) if the plaintiff reside in the county, if such county be the one in which the parties last cohabited; (5) if the plaintiff reside in the county for a period of six months before suit be

brought. Time of residence is not essential to any of the conditions, save and except the fifth; and in that case a residence of six months is a part of the condition.

The complaint in this action makes the specific allegation that plaintiff resides in the city of Reno, county of Washoe, state of Nevada; and further that the defendant at the time of signing and filing of the complaint was within the jurisdiction of the court and that service of summons and other process might be made upon him in Washoe county, Nev. The return of the sheriff shows that the summons was personally served upon the defendant, Frederick Charles Merritt, within Washoe county. The appellant in this action sought to confer jurisdiction upon the district court of Washoe county under the third condition as we have above enumerated them, namely, by the allegation that the defendant was to be found within Washoe county and hence within the jurisdiction of the Second judicial district court.

[1] In the case at bar, as in all cases of a similar character, the important question to determine is that of jurisdiction. In determining this we must look to the status of the parties. This brings us to the question of domicile or residence. At common law, it was a well-founded rule that a woman on her marriage loses her own domicile and acquires that of her husband. *Barber v. Barber*, 16 U. S. (21 How.) 582, 16 L. Ed. 226; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530; *Ann. Cas.* 1912D, 400, see note.

[2] That she may acquire a separate and distinct domicile from that of her husband is a rule established by the courts of England (2 Bish., *Marriage and Divorce*, § 63), as well as by the courts of the several jurisdictions in the United States (*Frery v. Frery*, 10 N. H. 61, 32 Am. Dec. 395; *Tolen v. Tolen*, 2 Blackf. [Ind.] 21 Am. Dec. 742; *Moffatt v. Moffatt*, 5 Cal. 280; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; *Succession of Benton*, 106 La. 494, 31 South. 123, 59 L. R. A. 135). The right of the wife to acquire and maintain a separate domicile from that of her husband arises out of the necessity presenting itself in the case and is based upon the assertion on the part of the complaining wife of grounds or causes by reason of which the matrimonial unity no longer exists in fact. *Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; *Frery v. Frery*, supra; *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88, *Ann. Cas.* 1912D, 395, see note; *Duxstad v. Duxstad*, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. Rep. 1138; *Jenness v. Jenness*, supra.

[3] The allegation of those causes which of themselves indicate that the marriage

unity no longer exists constitutes the basis for the rule that recognizes the right of the wife to prosecute her suit for divorce in a domicile other than that of her husband. Coupled with such allegations, an averment of residence constitutes the basis of jurisdiction.

This entire matter, in so far as the wording of the statute is concerned and its meaning, force, and significance, was gone into at length by this court in the case of *Tiedemann v. Tiedemann*, supra, and the decision of this court in that instance, in so far as it dwells upon the particular provision of the statute here mentioned, will not be disturbed.

It will be remembered that so far as the courts are concerned, they have nothing to do with the establishment of public policy or the question of expediency; those are matters for the legislative branch of the government exclusively. It is but for the courts to interpret a statute and enforce it in the light of constitutional provisions. There is nothing in either international law or in the organic law of our state that prohibits or restricts the Legislature from enacting a provision such as the statute here in question, wherein it seeks to deal with the matter of divorce between citizens or residents.

The question of fraud or collusion does not arise here. It is not presented to us in any form. If it is present in the case, the trial court, when the matter comes up anew, can determine that for itself upon the merits.

Viewing it as we do, that the case of *Tiedemann v. Tiedemann*, supra, was determinative of the matter as to the jurisdiction of the trial court, it follows that the judgment of the court and the order denying the motion for a new trial must be reversed.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

STATE v. ENKHOUSE. (No. 2231.)

(Supreme Court of Nevada. Oct. 2, 1918.)

1. INDICTMENT AND INFORMATION § 110(3)—OBJECTION TO SUFFICIENCY—TIME.

An information charging mayhem in the language of Rev. Laws, § 6416, defining the offense as unlawfully depriving a human being of a member of his body, or disfiguring or rendering it useless, such as slitting the ear, without charging permanent disfigurement, which, under section 6418, is necessary to conviction, is nevertheless good in the absence of demurrer.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 291-294; Dec. Dig. § 110(3).]

2. MAYHEM § 4—INFORMATION—SUFFICIENCY—"SLIT."

Under Rev. Laws, § 6416, defining mayhem to include slitting the ear of a human being, and in view of section 6417, stating that it is immaterial how the injury is inflicted, an information charging that accused bit off a portion of an

ear of one C. is sufficient, though "slit" may be broader than "bite."

[Ed. Note.—For other cases, see *Mayhem*, Cent. Dig. § 8; Dec. Dig. ¶4.]

3. MAYHEM ¶5—EVIDENCE—SUFFICIENCY.

Evidence held to show permanent disfigurement so as to support conviction of mayhem.

[Ed. Note.—For other cases, see *Mayhem*, Cent. Dig. § 9; Dec. Dig. ¶5.]

4. CRIMINAL LAW ¶814(20)—INSTRUCTIONS—INCLUDED OFFENSES.

Under conclusive evidence of permanent disfigurement, it is not error to refuse instruction permitting conviction of the lesser offense of assault, under Rev. Laws, § 6418, which applies only if permanent disfigurement is not shown.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1924, 1979; Dec. Dig. ¶814(20).]

5. CRIMINAL LAW ¶1172(1)—INSTRUCTIONS—PERMANENT DISFIGUREMENT—PREJUDICE.

An instruction to convict if permanent disfigurement is shown, though incomplete, in failing to define permanent disfigurement, is not prejudicial, where the evidence is without conflict as to extent of the injury which manifestly was a permanent disfigurement, especially in the absence of request for further instruction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3128, 3154; Dec. Dig. ¶1172(1).]

6. MAYHEM ¶7—SENTENCE—MINIMUM.

Since Rev. Laws, § 6416, providing a maximum punishment for mayhem of 14 years, does not provide a minimum, the judge may fix the minimum at 5 years, under section 7260, as amended by St. 1915, c. 157, providing that if no minimum is fixed, the court may fix it at 1 to 5 years.

[Ed. Note.—For other cases, see *Mayhem*, Cent. Dig. § 11; Dec. Dig. ¶7.]

Appeal from District Court, Humboldt County; Edward A. Ducker, Judge.

J. F. Enkhous was convicted of mayhem, and he appeals. Affirmed.

Salter & Robins, of Winnemucca, and Frame, Humphrey & Harcomb, of Reno, for appellant. George B. Thatcher, Atty. Gen., and H. C. Price, Deputy Atty. Gen., for the State.

NORCROSS, C. J. This is an appeal from a judgment of conviction of the crime of mayhem.

It is contended by appellant that the information does not state facts sufficient to constitute the offense for which the defendant was convicted; that the court below erred in the giving and refusal of certain instructions and in fixing the minimum of punishment at 5 years' imprisonment; that the evidence is insufficient to support the verdict.

The charging part of the information reads as follows: .

"That the said defendant, J. F. Enkhous, did then and there willfully, unlawfully, and feloniously deprive one J. A. Cavaney, a human being, of a member of his body, and did disable and disfigure said member in the manner following: That the said defendant, at the county of Humboldt, state of Nevada, on the date aforesaid, did then and there willfully, unlawfully, and feloniously bite off with his teeth a portion of the

right ear of the said J. A. Cavaney, then and there being, and thereby disabled and disfigured said ear."

[1] The crime of mayhem is defined and governed by sections 151 to 153, inclusive, of the Crimes and Punishments Act (Rev. Laws, §§ 6416-6418), which read:

"Sec. 151. Mayhem consists of unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily, or of purpose, put out an eye or eyes, every such person shall be guilty of mayhem. * * *

"Sec. 152. To constitute mayhem it is immaterial by what means or instrument or in what manner the injury was inflicted.

"Sec. 153. Whenever upon a trial for mayhem it shall appear that the injury inflicted will not result in any permanent disfiguration of appearance, diminution of vigor, or other permanent injury, no conviction for maiming shall be had, but the defendant may be convicted of assault in any degree."

The information was not demurred to. We think the objections to the information ought not to be regarded as well taken, at least in the absence of demurrer. The crime of mayhem is defined in section 151, supra, and it is sufficient that the offense be charged in the language of the statute or its equivalent. While it is essential, under the provisions of section 153, supra, that the proof show that the injury or disfiguration is permanent, in order to warrant a conviction for mayhem, the definition of the crime prescribed in section 151 makes no reference to the permanency of the injury or disfiguration. Possibly this is because there is a presumption that a condition once shown to exist will continue unless the contrary is made to appear. We are clearly of the opinion that if there is any merit in the contention that the information should specifically allege the injury or disfiguration to be permanent in character, that the objection is of a nature which should be taken advantage of by demurrer.

[2] It is conceded by counsel for appellant that if the information had charged appellant with unlawfully and maliciously slitting the ear of the said Cavaney, the information would have charged the crime per se, but because it is only charged that the appellant bit off a portion of the right ear, such allegation is not the equivalent of charging a slitting of the ear. While the word "slit" may have a broader definition than the word "bite" (*People v. Demasters*, 105 Cal. 689, 39 Pac. 35), the information in question here charges that the appellant did "bite off with his teeth a portion of the right ear * * * and thereby disabled and disfigured said ear." The information, therefore, charges a completed act, which completed act is equivalent to a slitting of the ear, for, by the provisions of section 152, it is immaterial by

what means the injury or disfigurement is effected.

[3] There is no conflict in the testimony in so far as it showed that the defendant bit off a portion of the right ear of the said Cavaney during a personal encounter between the two following a dispute over a card game. There is no conflict in the evidence relative to the extent of the injury inflicted. The injured ear was submitted to the personal inspection of the jury. Dr. Wilson, a witness for the state, who attended Cavaney immediately after the injury was inflicted, testified that:

"About a fourth of the cartilage of the ear was off; all of what you call the top of the external ear is off and the posterior part of the ear is off down to about the middle of the outer edge."

The evidence is conclusive that, by the act of appellant in biting off the portion of the ear described, a permanent injury or disfigurement of the member was effected. The contention that the evidence is insufficient to support the verdict and judgment is therefore without merit.

[4] It is contended that the court erred in refusing defendant's requested instruction which in effect advised the jury that in accordance with the provisions of section 153, supra, the jury could find the defendant guilty of assault. We think the court did not commit error in the refusing of this instruction. The evidence, without conflict and without question, showed that the injury inflicted resulted in a permanent disfigurement of appearance. There was no room for any question as to whether a lesser offense might have been committed. In such cases it is not error to refuse an instruction that a verdict for a lesser offense may be returned. *State v. Johnny*, 29 Nev. 203, 223, 87 Pac. 3.

[5] Appellant assigns error in the giving of instruction No. 8, given by the court of its own motion. The portion of the instruction to which exception is taken reads:

"And then if you should further find from the evidence herein beyond a reasonable doubt that such injury to the said ear of said J. A. Cavaney will result in a permanent disfigurement of the appearance of said ear, then you should convict the defendant of the crime of mayhem."

It is contended that the law is correctly stated in the case of *Green v. State*, 151 Ala. 14, 44 South. 194, 125 Am. St. Rep. 17, 15 Ann. Cas. 81, as follows:

"In this instance the disfigurement, necessary to justify conviction, must have been such as would afford to the casual observer of the person injured, and not such as requires a close or unusual inspection to detect. In other words, the injury to the ear must be such as disfigures to ordinary observation, as distinguished from a wounding which simply mars the member."

We may concede the law to be correctly stated in the Alabama case, supra.

The objection to instruction No. 8 goes rather to the question of the extent of the injury necessary to constitute a permanent

disfigurement. The instruction states the law correctly. It may be conceded that it could very properly have gone farther and pointed out specifically what was necessary to constitute a permanent disfigurement. There was, however, no request for further instruction upon this phase of the law of mayhem. Even if it be conceded that the instruction is technically erroneous as not fully advising the jury as to the degree of proof necessary to constitute the offense charged, it would not be regarded as prejudicial error, where the evidence is without conflict as to the extent of the injury, which injury manifestly causes a permanent disfigurement.

[6] The contention that the court erred in fixing the minimum sentence of appellant at 5 years' imprisonment is without merit. Where the statute prescribes no minimum sentence, it is within the discretion of the court to fix such minimum at not less than 1 nor more than 5 years. Rev. Laws, § 7260, as amended, St. 1915, p. 192.

The judgment is affirmed.

McCARRAN and COLEMAN, JJ., concur.

CERRO COBRE DEVELOPMENT CO. v. DUVALL (No. 1424.)

(Supreme Court of Arizona. Oct. 17, 1916.)

1. APPEAL AND ERROR ⇐832(1)—REHEARING—GROUNDS.

The grounds stated in the motion, amounting to only an argument with the court as to the law applicable to the facts stated, present no grounds for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3218, 3220, 3223-3225; Dec. Dig. ⇐832(1).]

2. CORPORATIONS ⇐116—OFFER TO SELL STOCK—ACCEPTANCE.

There was no contract of transfer of corporate stock where offer to exchange it on condition was met by counter conditional offer, which was not accepted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. ⇐116.]

Appeal from Superior Court, Santa Cruz County; W. A. O'Connor, Judge.

On rehearing. Affirmed.

For former opinion, see 16 Ariz. 485, 147 Pac. 695.

Selim M. Franklin, of Tucson, and Cass & Sames, of Douglas, for appellant. Eugene S. Ives, of Tucson, and Frank J. Duffy, of Nogales, for appellee.

CUNNINGHAM, J. The motion for rehearing construes the decision heretofore rendered as a decision reaching the conclusion:

"That the offer of an agent to turn over to his principal property received by him upon the sale of the principal's property, and which proceeds of sale belong to the principal, is an offer which must be accepted according to the terms and conditions made by the agent, or no contract is created and the principal therefore forfeits his right to the proceeds so received by his agent."

That the conclusion reached by the court is the wrong conclusion under the facts:

"For the reason that the facts in this case show that said sale was ratified by the acts and acquiescence of the principal; and, particularly, by its bringing suit to recover from the agent, the proceeds received by him upon said sale, being the present suit."

That for a further reason the court's conclusions are erroneous, in holding:

"That the principal * * * by not accepting the proceeds of the sale, burdened with the conditions which the agent imposed thereon, which conditions were no part of the terms of the sale itself, failed to ratify the sale, and having for that reason * * * failed to ratify the sale, it cannot recover the proceeds of such sale."

[1] While the grounds stated amount to nothing more than an argument with this court as to the law applicable to the facts stated, and for that reason present no grounds for a rehearing (*Territory v. Delinquent Tax List*, 3 Ariz. 69, 89, 21 Pac. 888; *Copper Queen, etc., Co. v. Arizona Prince, etc., Co.*, 2 Ariz. 169, 11 Pac. 396), yet, believing as I do that an error committed by an appellate court is a tragedy, I have carefully reconsidered the record in view of the objections raised by the said action, and am satisfied that the decision is right.

In the first place Duvall did not sell the equitable interest of plaintiff in the mines. He did not purport to sell such interest either as agent, trustee, or otherwise. What he actually did in the premises was to attempt without authority to surrender an optional contract, standing in his name, but in equity and right belonging to the Sierra de Cobre Development Company, S. A., and substitute for such surrendered option another optional contract having the identical terms and conditions with such former contract, with the exception of the total amount payable as the purchase price of the mines. The sum named in the last contract is \$95,000. The sum named in the surrendered option was \$100,000, and the record discloses that of this last-named sum, the appellant through the Sierra de Cobre Development Company, S. A., and Duvall, paid the sum of \$5,000, thereby conclusively refuting the idea that Duvall made a sale of plaintiff's equitable rights in the property.

This conclusively answers the second contention of appellant's motion, because if no sale was made of the principal's property, no ratification or acquiescence of the principal was in question. It lost no rights by that transaction, and the transaction affected no rights except such as were beyond and in addition to appellant's equities.

[2] For the same reason, Duvall, in offering to transfer the 1,000,000 shares of stock to appellant, made the offer, not as agent to principal, but as owner to owner, to exchange property, and had the right to burden the offer made with such conditions as he chose.

The party receiving the offer accepted con-

ditionally; that is, it made a counter offer to waive its equity in the mines, on condition that Duvall would transfer to it the stock unconditionally. This offer was not accepted by Duvall, and hence no contract of transfer resulted. The appellant acquired no property right in the stock by reason of such negotiations which failed. It had no equitable right in the property represented by the stock, because that property was not subject to appellant's equity owing to the fact that such stock only represented the property of the Aguilars and Torres remaining in the mines after appellant had acquired an equity therein. Hence my conclusion that under the uncontroverted facts, the appellant could not recover the stock sued for. I remain of that opinion notwithstanding the objections of the appellant.

No error appearing in the record, the judgment is affirmed.

FRANKLIN, J., concurs. ROSS, C. J., not participating.

CATON v. STATE. (No. A-2653.)
(Criminal Court of Appeals of Oklahoma. Oct. 7, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1130(4)—APPEAL—AFFIRMANCE—WANT OF PROSECUTION.

When an appeal is filed in this court, and no briefs are filed on behalf of plaintiff in error, and no appearance made for oral argument, a motion interposed by the Attorney General in open court to affirm the judgment of the trial court on the ground that the appeal has not been prosecuted as provided by law will be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2970, 3205; Dec. Dig. § 1130(4).]

2. CRIMINAL LAW §1130(4) — APPEAL — BRIEFS—EFFECT OF FAILURE TO FILE.

The members of this court are not required to brief cases and search the record diligently for defects upon which to base a criticism of the judgment of the trial court. When counsel fail to file briefs as provided by the rules of the court and also fail to appear for oral argument when causes are assigned, this court will examine the record in felony cases for fundamental error only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2970, 3205; Dec. Dig. § 1130(4).]

Appeal from District Court, Murray County; F. B. Swank, Judge.

Jim Caton was convicted of assault with intent to kill, and appeals. Affirmed.

T. N. Robnett, of Davis, and E. W. Fagan, of Lexington, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. Jim Caton was convicted at the August, 1915, term of the district court of Murray county on a charge of assault with intent to kill, and his punishment assessed at imprisonment in the state penitentiary for two years. The appeal was filed in this court on the 26th day of February,

1916. No briefs have been filed on behalf of the plaintiff in error, and no appearance was made for oral argument. The Attorney General, in open court, moved the affirmation of the judgment of the trial court on the ground that the appeal had not been prosecuted as provided by law.

[1] When an appeal is filed in this court, and no briefs filed within the time provided by the rules of the court, and no appearance made for oral argument, a motion upon the part of the Attorney General to affirm the judgment of the trial court on the ground that the appeal has been abandoned and has not been prosecuted as provided by law is tenable.

[2] The court is not required to brief cases and search diligently the record to see if they can find some flaw upon which to base a criticism of the judgment of the trial court. If any error has been committed in the trial court, it is the duty of counsel to file briefs pointing out the same and support their contention with proper arguments and authorities. If this is not done, the court will only examine the record for fundamental error, and when none appears, the motion of the Attorney General to affirm will be sustained.

An examination of this record discloses no fundamental error. The motion of the Attorney General to affirm the judgment of the trial court is therefore sustained.

The judgment is affirmed. Mandate ordered forthwith.

DOYLE, P. J., and BRETT, J., concur.

BORAH v. STATE. (No. A-2261.)
(Criminal Court of Appeals of Oklahoma. Oct. 7, 1916.)

(Syllabus by the Court.)

1. HOMICIDE \S 250 — EVIDENCE — SUFFICIENCY.

Where the evidence shows that a husband had virtually abandoned his wife and child, making only occasional visits to them, and had courted and engaged himself to marry another woman, and was arranging to marry her in September, 1913, and that on August 30, 1913, while he was on a visit to his family, the house in which they slept was burned, that he made no sort of effort to rescue the family from the flames, and refused to allow others to enter the house to rescue them, that no screams or cries for help came from the building, though the flames in the wife's bedroom were scarcely noticeable when the first neighbors arrived, and the condition of the wife's body showed she was dead before the body was burned, *held*, that these facts, in connection with other incriminating facts and circumstances, are sufficient to sustain a verdict finding the husband guilty of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 515-517; Dec. Dig. \S 250.]

2. HOMICIDE \S 166(7) — EVIDENCE — ADMISSIBILITY.

Where the husband attempts to explain his unseemly relations with another woman, to whom

he was engaged to marry, on the ground that he and his wife had for years had a mutual agreement, that when his child reached the age of 12, he should obtain a divorce, and that in anticipation of obtaining the divorce when the child was 12, he courted this woman, and expected to marry her in September, *held*, that a letter written by the wife on August 3d, prior to her death on August 30th, which shows that she had no thought of a divorce proceeding, or even suspected that the time had come when she should surrender her place as a wife to another woman, is competent to show her frame of mind, and to rebut the husband's statement as to the anticipated divorce.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 326; Dec. Dig. \S 166(7).]

3. HOMICIDE \S 228(2) — EVIDENCE — WEIGHT AND SUFFICIENCY.

Where a father made no effort himself to rescue his child from a burning building, made no outcry for help, and even when a friend, at the peril of his own life, said, "By God! I am going in that building," the father replied, "No, you can't go in there," and no cries from the child are heard, *held*, that the jury was warranted in believing that that child's voice had been hushed and its form stilled before it was touched by the flames.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 472; Dec. Dig. \S 228(2).]

4. CRIMINAL LAW \S 700, 1171(3) — TRIAL — CONDUCT OF COUNSEL.

Counsel for the state must be fair. The state is as much interested in the vindication and acquittal of the innocent as it is in the conviction of the guilty; and nothing must be relied upon, or resorted to, to obtain a conviction, except the law and the evidence, and the reasonable deductions therefrom. But *held*, that the things complained of in this case, as improper, do not appear in the record, and if they actually occurred, could not have prejudiced the defendant, in view of his own admissions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1653, 1659, 3127; Dec. Dig. \S 700, 1171(3).]

5. CRIMINAL LAW \S 683(1) — TRIAL — RECEPTION OF EVIDENCE — ORDER OF PROOF.

Where the husband attempted to create the impression that his wife had committed suicide, *held*, that it was proper to admit in rebuttal of his statements the evidence of a chemist that the stomach and lungs of the wife contained no poison.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1615, 1617; Dec. Dig. \S 683(1).]

Error from District Court, Atoka County; Robert M. Rainey, Judge.

W. A. Borah was convicted of murder, and brings error. Affirmed.

James H. Mathers, of Ardmore, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. Plaintiff in error in this case, who will be referred to as defendant, was charged and convicted of murdering his wife, and was sentenced to life imprisonment.

The facts are among the most revolting in the annals of crime.

The defendant was born in the state of Kentucky, of worthy parents, and was reared in an atmosphere which should have produced a true and noble character, and we

hesitated to believe he could be guilty of the atrocities charged. But the record forces us to the conclusion that the jury made no mistake.

[1] In early manhood the defendant courted and won a young woman of his native state, whom the record shows, though mistreated and deserted by him, was true to him to the day of her death. She was the mother of his child, a little girl, and the testimony is, that this wife not only loved but "idolized him." In 1910 he virtually abandoned her and took up his abode in Sapulpa, and had her to remain at Tishomingo in the little home he had provided for her during the days he loved her. At first he visited her and his little child about every 60 days, but as time went by his visits grew farther and farther apart, until he got to making only about two visits a year. And only a few days before her death her weary, submissive soul breathed its agony in a letter to him as follows:

"My dear husband we are disappointed to tears to-day, we looked for you so hard last night, and we did not even get a letter of explanation.

"It is just one month from the 1st of Aug before Gwendoline starts to school, then if I look wholly to her interest as I have always done, I will be tied another 9 months. Are we to stay here alone, and you home once or twice in a whole twelve months?

"Of course if you will it, we will do it, but do wish some other arrangements could be made.

"Poor 'Peter' how he must have longed for his loved ones when he was exiled. We watch every 'auto' & train, but still we catch no glimpse of you. Perhaps as 'Annie Lee' in 'Enoch Arden' says, we can not adjust our spy-glass properly, so we wait a year? Then a month, and still you do not come. Now wont you sit down this minute and write us a long letter all about your business, and come home as soon as you can leave without too great a loss.

"You never tell me anything about your affairs, but here is the way I have it studied out, I do not see any profit in what you are doing more than you could make here.

"I do not think I am asking too much of you, when I ask you to come home for a while.

"With oceans of love Ellie Borah."

This letter was written the 3d day of August, 1913, and on the 28th day of August, 1913, the husband came home. But between the time the wife penned this letter and the homecoming of the husband the record shows he received eight most affectionate letters from another woman, whom he had promised to marry in September. In the first of these letters, this woman sent him a sample of the goods of which she expected to make her wedding dress. On August 10th, in a later letter, she says a friend "asked me my name now, so that she could introduce me to her friends, and was surprised to hear me say, Miss Hewey. Had taken you for my husband. So many people do that, we won't be taken for newly-weds next month." On August 11th she writes:

"* * * Yes, dear we are going to be happy—life will begin with another measure of happiness when you make me your bride. Will

write you again real soon. Loving you very much I kiss you good-bye.

"Ever yours, Ethel."

On August 15th another letter says:

"* * * A mighty nice letter came from Bartlesville this morning—I know you have been busy, but I have been well remembered all the time. Do so hope your deal will go thru—not so much for our trip, but to feel we could do as we wish, but darling, deal or no deal I am expecting you about the middle of September. Know you will try your best to please me—I want you then. * * *"

On August 16th in another letter she says:

"* * * Mama is saving our chickens for the wedding breakfast. Maybe I'll see how much chicken I can make you eat.

"Don't you think I was real good to you last week; wrote you more letters than you have had in many a week. Felt you were busy and perhaps my letters would bring me nearer to you. * * *

"Dear 'twas only two weeks ago this evening since we went up the river for supper—but it seems months ago since I ate supper with you. Would you like for me to take breakfast with you—just take the car and come up—how I wish you were coming—but dearest, I know you are mighty busy and am going to leave it to you to decide our next visit—maybe I could wait until you come to stay—say you come several days before our wedding—I'd make you work, but you won't object will you—

"Loving you very tenderly and to-morrow I shall be very near you

"Ever yours, Ethel."

On the 18th she again writes:

"* * * "My special letter came about ten thirty and brought you very near me—your love seemed to fill the entire day with a certain measure of happiness (never complete with you miles away). * * *

"Loving you more than I did when I let you go home last Sunday week and trusting every thing will go as we wish, believe me to be

"Ever yours, Ethel."

On August 20th the last of the letter says:

"* * * Mrs. Gibson gives me a party so dearest, you see, you have a very busy girl.

"Yes, I think we could enjoy a car very much. But dear even walks are lovely with you. We seem to enjoy everything when shared with one another. Remember a walk we had one happy Christmas day? * * *

"Will tell you good bye now, with a life that is yours and love enuf for happiness. I kiss the dearest boy in the world good bye

"Lovingly yours, Ethel."

On August 23d a letter closes:

"* * * Dearest, I am hoping you will be home Sunday. Think you can work better for having one days rest—no one expects you to be very busy that day. When you are away on Sunday I am going with you then the day won't seem so long. Darling I am wanting to make your life happy—think I can if I am near you—Loving you oh so much, accept my love and all my kisses for I am,

"All yours, Ethel."

With these letters in his possession the husband goes through the mockery of visiting his wife, the wife of his youth, the mother of his child. About 6 o'clock on the morning of the 30th the neighbors' attention was attracted by human groans. They saw the defendant on the porch in night garments, wringing his hands and groaning: "Oh! Oh!" Before any one reached him he turned and walked back into the house, and closed the

door behind him. One after another of his neighbors arrived, but the defendant did not tell any one what the trouble was, or call upon any of them for help. Some of them rushed to the window of the wife's bedroom, and looking through the glass saw a fire slowly kindling near the bed. Soon the room was enveloped in flames. About that time a Mr. Wheeler came; and defendant was standing in the yard groaning. Wheeler asked him where his folks were, and the defendant pointed toward the house and said, "I reckon they are in there." Wheeler said, "My God! Let's see if anybody is in that house." The defendant replied, "Do not go in there." Wheeler said, "I am going in there;" to which the defendant replied, "No, you can't go in there." No one heard any screams or cries for help proceeding from the building, although the flames were scarcely noticeable when the first neighbors arrived. The voices of the wife and baby were silent. No call for help came from them, and the husband and father, though denying responsibility for their death, did not call for help for them, although he says he saw his child enveloped in flames, and admitted that he did not make any effort himself to rescue his family from the flames. The fire department was called by the neighbors, but the child was burned beyond recognition. The side on which the wife lay was badly burned, but not charred. There were no blisters upon that side, which the physicians testify shows that she was dead before the body was burned. Her mouth was open and her charred tongue was protruding from it. A neighbor asked defendant to go over to her house and put on some clothes. He went, and before dressing stated that his hands were soiled, and asked for a pan of water in which to wash them. He left his night garments on the bed in the room where he dressed, and the arresting officer 30 minutes later examined them and testified they had the smell of coal oil upon them. A five-gallon can was found in the room where the wife and child were burned. After the discovery of the letters from the woman he had promised to marry, an officer visited him at the jail and asked him if he knew this woman, and he denied knowing her. Yet, on the witness stand, when confronted by these letters, he admitted his relations with her, that he received the letters from her, that he had given her a \$185 diamond ring, and a \$65 set of furs, and that he had expected to marry her in September. He also admitted that his affection for his wife had grown cold, that he respected her as a good woman, and as the mother of his child, but that his affection for her had waned. There are many other incriminating circumstances, but these are the substantial facts upon which the jury found their verdict. And in our judgment they preclude every other reasonable hypothesis than that

of the defendant's guilt. But in addition to this we think the defendant's own testimony condemns him.

[2] His explanation of his unseemly relations with his fiancée is, that in 1910 he and his wife mutually agreed to a separation, and that they also had an agreement that when the child was 12 years old that he should obtain a divorce; that she reached her twelfth birthday on the 14th of July, 1913, and that relying on this agreement, which was well understood between him and his wife, and in anticipation of obtaining the divorce when the child was 12, he courted this woman, and expected to consummate that engagement by a wedding in September. The wife's lips were sealed, but that letter of August 3d is a more complete refutation of his statement than if she had appeared in person and denied his statement from the witness stand. No one can gather from that letter that she anticipated a divorce proceeding, or that she even suspected that the time had come when she was to surrender her place as a wife to another woman. No thought was further from her mind as she penned those words, and closed that touching missive, "with oceans of love."

The defendant complains because the court allowed this letter to be introduced in evidence, and insists that it should have been excluded on the ground that the defendant was not quite sure that he had ever received it. But he identified the handwriting and admitted that it was penned by his wife. And whether he received it or not it was competent to show the frame of her mind, and to rebut his statement as to the anticipated divorce. And it does rebut it as effectually as though it were a voice from the dead.

[3] Again the defendant states that on the morning of the 30th he was waked up suddenly, and heard his child cry, "Oh! papa, we are about to burn up!" that he opened the door and saw his child wrapped in flames; and he says she "seemed to fall over, and it occurred to me that my wife had committed suicide or done something awful. I was just dazed or, as the lady said a while ago, I lost my presence of mind. It was the awfulest sight I ever saw, and I never had such a feeling in my life. I saw poor little Gwendoly there in the flames." And according to his own statement, at that time the flames did not extend over more than one-third or one-half of the room. She had an open space into which to flee. Yet he made no sort of effort to rescue the child; made no outcry for help; and even when later a friend, at the peril of his own life, said, "By God! I am going in that building," he told him, "No, you can't go in there." The flames had not yet done their work. They had not yet concealed the deeds he intended they should cover. It would be but natural that if this father saw his child wrapped in

flames that he should lose his presence of mind; but it would be equally as natural that in his desperation he would go to the rescue, regardless of danger or death. But under the evidence the jury was justified in believing that the child's voice had been hushed and its form stilled before it was enveloped in flames.

Defendant complains of alleged misconduct on the part of counsel for the state. But the matters complained of do not appear in the record, and no objections were made at the time.

[4] Counsel for the state must be fair. The state is as much interested in the vindication and acquittal of the innocent as it is in the conviction of the guilty, and nothing should be relied upon for conviction except the law and the evidence and the reasonable deductions from the same. While the things complained of are not properly presented for our consideration and cannot be considered, yet, even if they were before us they could not work a reversal of this case. One of the most serious complaints is, that the county attorney intimated to the jury that if a certain witness, who was sick, was present he would be able to show improper relations between the defendant and a young lady in Sapulpa. That intimation, if made, was improper; but its only effect could have been to show a motive for the commission of the crime charged, and surely no stronger motive was needed or could have been shown along that line than the admitted relations of the defendant and his fiancée.

[5] The defendant complains because the state was allowed to use in rebuttal Professor Williams, of the State University, who testified that he, as a chemist, examined the stomach and lungs of Mrs. Borah, and found no traces of poison in them; the complaint being that this testimony should have been introduced by the state in its case in chief. But we think it was logically and properly offered in rebuttal of the attempted effort of the defendant to make it appear that his wife had committed suicide.

We have examined the record, including the instructions, in this case with the care that its importance deserves, and feel that the defendant was awarded a fair trial, and that the judgment should be affirmed.

The judgment is therefore affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

BLAKE v. STATE. (No. A-2267.)
(Criminal Court of Appeals of Oklahoma.
Sept. 23, 1916.)

(Syllabus by the Court.)

1. EMBEZZLEMENT §11(1)—ELEMENTS—CONVERSION.

(a) A fraudulent conversion is an essential element of the crime of embezzlement, and such

conversion must be shown by proof that the embezzler appropriated the money to his own personal use or that he placed it to some other use than the purpose for which it was received by him, or that he failed to account for and pay over the same on proper and lawful demand.

(b) Proof of a mere failure to pay over money, standing alone, will not support a judgment of conviction for embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 9; Dec. Dig. §11(1).]

2. CRIMINAL LAW §935(2)—TRIAL—VERDICT CONTRARY TO EVIDENCE.

When the proof introduced at the trial fails to establish the commission of the offense charged, the verdict of guilty and judgment rendered thereon, as a matter of law, are contrary to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2193, 2194, 2298; Dec. Dig. §935(2).]

Appeal from District Court, Wagoner County; R. C. Allen, Judge.

Harrie Blake was convicted of embezzlement, and appeals. Reversed and remanded for new trial.

Sponsler & Graves, of Wagoner, and Owen & Stone and Sumner J. Lipscomb, all of Muskogee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Harrie Blake, was convicted in the district court of Wagoner county, on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a term of two years and a fine of \$1,000.

The indictment is a lengthy document, and no good purpose can be served by setting the same out in full. It contains, however, allegations to the effect that:

Certain funds "were paid to and received by the said Harrie Blake for the purpose of satisfying a certain judgment in favor of the plaintiff in said action, L. W. Clapp, by virtue of his office as clerk of the district court of Wagoner county, state of Oklahoma. And being then and there by virtue of his office the clerk of the district court, the proper person to receive said sum of money for the use and benefit of the judgment creditor, L. W. Clapp, and having so received said sum of two thousand one hundred forty-two and 63-100 dollars, the property of and belonging to said L. W. Clapp, he, the said Harrie Blake, did in Wagoner county, state of Oklahoma, then and there unlawfully, willfully, feloniously and fraudulently, and not in the due and lawful execution of the trust of him, the said Harrie Blake, as clerk of the district court of Wagoner county, state of Oklahoma, aforesaid, embezzle, convert and appropriate said sum of two thousand one hundred forty-two and 63-100 dollars * * * to the use of him, the said Harrie Blake, contrary to the form of the statutes," etc.

It appears that L. W. Clapp brought a suit in the district court of Wagoner county against C. S. Roach and others and recovered a judgment of \$2,142.63. The allegation against the plaintiff in error is to the effect that this money was paid to him, received by him, and embezzled by him.

The testimony introduced by the state was

from five witnesses: C. M. Bryant, clerk of the district court at the time of the trial; L. E. Cahill, deputy state examiner and inspector; T. O. Harrill, president of a bank in Wagoner; T. H. Hammett, deputy clerk of the district court under Harrie Blake; and County Attorney, C. E. Castle.

In addition, certain admissions were made and certain facts agreed upon by counsel. Witness Bryant testified that after he became clerk of the district court of Wagoner county he received about \$2,100 through County Attorney Castle, and paid the same to the attorneys of record for L. W. Clapp in satisfaction of the judgment. He knew nothing further about the facts in the case. He also said that the county never lost anything by reason of the transaction. In fact, that no one lost any money on account of the same. Witness L. E. Cahill did not testify to any incriminating fact. Witness T. O. Harrill testified to no incriminating fact. He was asked about the bank account of Harrie Blake subsequent to December 30, 1911, and said that from and after this date the account of Harrie Blake did not include any item of \$2,100 or more. Witness Hammett testified to no incriminating fact. Witness Castle testified to no incriminating fact.

Counsel for the state and for the accused agreed upon a statement of certain facts, to wit, that Harrie Blake received \$2,142.68 in the manner as alleged in the indictment; that he was clerk of the district court of Wagoner county at the time.

Section 5327, R. L. 1910, provides:

"Where there is no execution outstanding, the clerk of the court in which the judgment was rendered may receive the amount of the judgment and costs, and receipt therefor, with the same effect as if the same had been paid to the sheriff on an execution; and the clerk shall be liable to be amerced in the same manner and amount as a sheriff for refusing to pay the same to the party entitled thereto, when requested, and shall also be liable on his official bond."

This is the section of the statute which authorizes the clerk, under certain conditions, to receive money in satisfaction of judgments. There is no allegation in the information to the effect that plaintiff in error, as clerk, received this money and failed to pay the same over upon proper demand therefor.

The proof falls to show that any demand was ever made at any time upon the plaintiff in error for the payment of the money in question.

Section 2243, R. L. 1910, among other things, provides that:

"Any sheriff, coroner, clerk of a court, constable or other ministerial officer, and any deputy or subordinate of any ministerial officer who * * * fraudulently appropriates to his own use or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property entrusted to him in virtue of his office—is guilty of felony."

[1] This is the statute under which the conviction in this case was had. It is contended by counsel for plaintiff in error that the judgment in this case should be reversed upon the ground that the verdict is contrary to the evidence. The crime charged in this case was embezzlement. The only proof in the record bearing upon the question of guilt is that the plaintiff in error received the sum of money as charged, and that his successor in office paid the judgment with funds received from the county attorney. Whether or not the same identical funds finally paid this judgment is a question upon which there is no light thrown by proof. It is fundamental that the crime of embezzlement cannot exist without there be a fraudulent conversion. The burden is on the state to show this conversion beyond a reasonable doubt. A felonious conversion under the embezzlement statute should be proved either by proof of an appropriation of the money to the personal use of the accused; that is, that he disposed of the same for his own personal benefit and his own private business, or by putting it to some other use than a proper discharge of the trust imposed, or by proving that the accused, after obtaining lawful possession of the funds, failed to account for or to pay the same over on proper or lawful demand. There was no proof offered of either in this case. If a proper demand had been made upon the accused to pay over or account for the money in question and he had failed to do so the law would presume a conversion. This the state not only failed to prove, but did not even attempt to prove. The county attorney, in his opening statement to the jury, stated that he expected to prove these facts, but wholly failed to do so. A fraudulent act of conversion is essential to the validity of a conviction under the statute. A mere failure to pay over the money will not justify the same. See *Fitzgerald v. State*, 50 N. J. Law, 475, 14 Atl. 746; *Henderson v. State*, 105 Ala. 82, 16 South. 931; *Id.*, 129 Ala. 104, 29 South. 799.

This question is discussed at some length in the case of *People v. Wyman*, 102 Cal. 552, 36 Pac. 932. Among other things, the court, in the discussion in that case, said:

"The only other facts relied upon to sustain the verdict are: First, that defendant neglected up to the time of his arrest, a period of 13 days, to cash the orders sent him and to pay for the land which his client desired to purchase from the government; and secondly, that, when arrested, he did not have on his person all of the money which had been intrusted to him for the purpose of making such payment, and did not offer to account for the same. These facts are clearly insufficient to prove that defendant had fraudulently appropriated the money of the client to his own use prior to the filing of the complaint upon which he was arrested. The fact that he did not have upon his person all of the money sent to him by his client was not of itself sufficient to justify the jury in finding or believing that he had fraudulently appropriated such money to his own use before his arrest, because such fact is not necessarily inconsistent with the fact that he

may still have retained such money under his control, or subject to his order. The circumstance, to say the least, is inconclusive, affording only slight, if any, ground for suspicion, and is not strengthened by the other evidence in the case. Nor can the failure of the defendant to pay for the land prior to his arrest be regarded as a conversion by him of his client's money, much less as evidence of the fraudulent appropriation of such money to his own use."

In the case of *Fitzgerald v. State*, cited supra, the court, among other things, said:

"When the owner of goods which have been intrusted to another seeks redress for their conversion in a civil action, he is compelled to establish the fact of conversion by proof of the exercise of some dominion over the goods inconsistent with the right of the true owner. Proof that the owner had demanded the goods, and that the person in possession had refused to return them, is accepted as evidence of conversion. But mere neglect to return, in the absence of a demand, has never been admitted as proof of conversion. Still less will the mere neglect to pay over proceeds lawfully received prove a fraudulent conversion thereof."

In *Almand v. State*, 110 Ga. 883, 36 S. E. 215, 78 Am. St. Rep. 140, the Supreme Court of Georgia discussed the principle here involved, and, among other things, said:

"There can be no question that, under the evidence, the check was delivered to the accused for the purpose of purchasing cotton seed for the oil company, and it cannot be denied that this specific check was delivered by the accused to one of his creditors and went to pay a personal debt. It must be noted, however, that it takes more than this to constitute the offense with which the accused was charged. Undoubtedly the check was technically converted from the use to which it was intended by the owner to have been put; but it is only when a fraudulent conversion has been made that a criminal offense is committed."

See, also, *State v. Hunnicutt*, 34 Ark. 562; *State v. O'Kean*, 35 La. Ann. 901; *State v. Flournoy*, 46 La. Ann. 1519, 16 South. 454; *State v. Smith*, 47 La. Ann. 432, 16 South. 938; *State v. Pellerin*, 118 La. 547, 43 South. 161; *People v. Page*, 116 Cal. 366, 48 Pac. 326.

In this latter case the court, among other things, said:

"On May 28th defendant did not appear, and an order was then made removing him as guardian of the said estate. 'No other order was made, and no person was appointed guardian in his place and stead, and no demand was made upon him for the moneys and goods in his possession and belonging to the said estate of Louis Lichtneger.' The minute order of removal, containing the recital 'and it appearing to the satisfaction of the court that said Page has appropriated to his own use the funds of the said insane person, and that he has rendered no account thereof,' was next introduced in evidence, against the objection of defendant that it was immaterial, irrelevant, incompetent, and hearsay. In January, 1893, defendant was arrested in the city of New York, and he stated at the time to the officer arresting him 'that he was anxious to return to stand his trial for the offense of which he was accused.' The above is in substance all the evidence introduced by the prosecution, and at the conclusion of it the defendant by his counsel moved the court to instruct the jury to acquit 'upon the ground that the facts proven by the prosecution were not sufficient to establish the guilt of the defendant of embezzlement; that there was nothing in the proof to show that Mr. Page had

fraudulently misappropriated any of his ward's money or property; that no demand had ever been made upon him for the money or property of his ward; and that no person had ever been designated by any court or by any person in authority to whom the defendant, Mr. Page, could have delivered the money or property of his ward.' The court overruled the motion, and thereupon the case was submitted without further testimony. It is very evident that the recital above quoted from the order removing defendant from the position of guardian did not constitute any evidence tending to support the charge of embezzlement. At most it was mere hearsay, and Judge Slack, who made the order and was on the stand as a witness, was not asked and did not attempt to state upon what ground the recital was based. It must therefore be entirely disregarded. Leaving out this recital, it will be observed that there was no evidence showing that defendant ever spent, wasted, or appropriated to his own use any of the money of his ward. It is true he drew from the savings and loan society most of the money which was on deposit there to the credit of Lichtneger, but this was not a criminal act and did not show a criminal intent to misappropriate the money. He may have intended to deposit the money in some other bank, or to invest it in safe securities. The cashier of the savings and loan society, who testified to the withdrawal, stated: 'I do not know what Mr. Page did with the money which he withdrew. He may have deposited it in some other bank or some safe deposit box.' So far as appears the defendant at the time of the trial may have still had all the money ready to be paid over on demand to any one authorized to receive it. The fact that he did not pay to the insane asylum the \$475 ordered to be paid by Judge Levy does not tend to show a misappropriation of that money. He may have believed that Lichtneger was in the 'pauper ward,' and that the asylum was not entitled to demand pay for keeping and caring for him.

"It is urged for respondent that while 'the fact that a defendant does not take the witness stand on his own behalf cannot be taken against him by the jury, yet it is in our judgment a fact that should be taken into consideration by this court on the point of the sufficiency of the evidence to justify the verdict.' We do not think so. A person accused of crime is presumed to be innocent until he is proved to be guilty; and facts and circumstances which cannot be considered by the trial court or the jury in determining as to the guilt or innocence of the accused cannot be resorted to in this court to support a verdict not otherwise authorized."

In the case of *People v. Royce*, 106 Cal. 173, 39 Pac. 524, the Supreme Court of California, in another case involving the principle herein discussed, said:

"The fact that the treasurer of an association deposits a check drawn in its favor in a bank, and has the amount credited to his personal account, does not justify a conviction, in the absence of evidence of a demand by the association, or of inability to respond to a demand.

"In the opinion delivered in department (106 Cal. 173, 37 Pac. 630), it is said that, 'the errors complained of are based upon rulings upon questions of evidence, and upon instructions to the jury;' and, as to such errors and questions, we are satisfied with that opinion. But a hearing in banc was ordered on account of a grave doubt whether, under any proper view of the law, there was evidence sufficient to warrant a conviction of the crime charged; and, from further consideration of the case, we are satisfied that there was not such evidence.

"The facts shown by the evidence are these: On February 21, 1893, the appellant was treasurer of the Veterans' Home Association, a corporation, and on that day received a certain

draft for the benefit of said association for \$10,350. On the same day he deposited said draft with the Crocker-Woolworth National Bank of San Francisco, and the amount of the draft was credited to appellant's personal account. The president of the bank testified that he 'did not hear him [appellant] give any direction as to whose credit it should be placed,' and that 'we did not place it to the credit of the association because we have not had any such account on our books.' Appellant informed the bookkeeper of the association that he had received this draft, and the amount of it was entered by the bookkeeper on his ledger of the date of February 21st. On February 24th * * * the association received from appellant \$8,310.35 of this money; and the charge against appellant is the embezzlement of the balance of said draft, amounting to about \$2,050. What became of this balance does not appear. Appellant may have had it ready to be produced whenever called for. The by-laws of the association required the treasurer to deposit all funds over a certain amount 'in such bank as the board [of directors] may direct'; but it does not appear that the board ever made such direction, or named any bank in which the deposits should be made. The by-laws also provide that all moneys in the hands of the treasurer should be 'turned over to his successor in office'; but it does not appear that appellant ever had a successor in office. It is also provided in the by-laws that the treasurer shall make reports of moneys received and expended 'to the association at its annual meeting,' and also 'at each quarterly meeting of the board of directors'; but there is no evidence of any such yearly or quarterly meeting between February, 1898, and the date of the indictment, which was June 2, 1899, or that appellant failed to report said money, or made any report in which it was not mentioned. There is no evidence that any demand was ever made upon appellant for said money by the association, or by any officer or agent thereof, or by any other person. The conviction rests, therefore, solely upon the fact that the money was deposited with the bank on February 21st to the personal account of appellant, under the circumstances as above stated. This was evidently the theory upon which the indictment was based, for it is alleged that the embezzlement was committed on the 24th of February, just three days after said deposit. It is true, as the court instructed the jury, that the crime charged might have been * * * committed at any time before the date of the indictment; but the deposit of the money in the bank on February 21st was the only fact proven upon which the conviction could have been based. And that fact is not sufficient to support the verdict. It does not appear that he was ever called upon to apply the money to any need of the association, or to make any particular use of it, or to put it in any special place. It is true that he drew one or two checks on the Crocker-Woolworth Bank, but it does not appear that he had not private funds there, and the testimony of the president of the bank leaves the impression that he had been keeping an account with that bank. He may have had the money all that time ready to respond to any demand of the association. In fact there is no evidence that he did not pay it over to the association. It is clear that he did not clandestinely keep it, for he reported it to the bookkeeper. No doubt embezzlement may be established, under certain circumstances, without proof of a demand, as where other evidence clearly shows an appropriation by an employé of his employer's funds, with intent to do so fraudulently and feloniously. But there is no such evidence in the case at bar. It is sometimes held in civil cases that the deposit by a trustee of trust funds to his personal account is sufficient cause for charging him with interest;

but such fact alone is not sufficient evidence to convict a man of a felony.

"For the reasons above given we are of opinion that a new trial should have been given. The judgment and order are reversed, and the cause remanded for a new trial."

In the case of *State v. Weber*, 31 Nev. 385, 103 Pac. 411, the Supreme Court of Nevada, discussing the question here being considered, among other things, said:

"The mere depositing of the check to defendant's personal account, especially in the face of a showing that the corporation had not then, and never did have, a regular depository for its money, and that the treasurer of the company was not present at the time, certainly, we think, could not be held to constitute a conversion by the defendants of the money due upon the check. Before the defendant could be legally convicted of embezzlement, it must be proven, beyond a reasonable doubt, that the money credited to his personal account upon the check of Captain Hooper belonged to the Doctor Mining Company, and that the defendant either applied the money so credited to him to his own use, or to some use or purpose other than that for which the same was intrusted to him, or that he refused to deliver it to the rightful owner upon demand. There is no showing in the evidence that the defendant applied the money, or any part of it, to his own use or to any other use whatever, or ever refused to account for the same upon demand of the Doctor Mining Company, its treasurer, or any one else, or that any demand whatever was ever made upon him. * * *

"The record contains a number of other assignments of error, but the view we have taken upon the insufficiency of the evidence makes it unnecessary to consider them."

[2] The proof disclosed by this record, subjected to the test provided by law, wholly fails to warrant the conviction, and, as a matter of law, the verdict was contrary to the evidence. We know nothing of what the real facts in connection with this transaction may be, but in order to warrant a conviction, a case must be established under the proof beyond a reasonable doubt.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

DOYLE, P. J., and BRETT, J., concur.

GABBERT v. STATE. (No. A-2850.)

(Criminal Court of Appeals of Oklahoma. Oct. 7, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1069(1)—APPEAL—TIME FOR TAKING PROCEEDINGS.

Appeals in misdemeanor cases must be filed in this court within 60 days from the date of the judgment rendered by the trial court unless that court, for good cause shown, extends the time not to exceed 60 days additional.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2694, 2698; Dec. Dig. § 1069(1).]

2. CRIMINAL LAW §1069(6)—APPEAL—EFFECT OF DELAY IN TAKING APPEAL.

The filing of an appeal in this court after the expiration of the time fixed by the orders of the trial court as limited by the statute (Rev.

Laws 1910, § 5991) is fatal to the jurisdiction of this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2899; Dec. Dig. ¶1069(6).]

Appeal from County Court, Garvin County; W. R. Wallace, Judge.

Fred Gabbert was convicted of violating the prohibitory law, and appeals. Dismissed.

A. C. Barrett, of Stratford, for plaintiff in error. R. McMillan, Asst. Atty. Gen., and R. E. Bowling, Co. Atty., of Pauls Valley, for the State.

ARMSTRONG, J. The plaintiff in error, Fred Gabbert, was convicted at the November, 1915, term of the county court of Garvin County, upon a charge of unlawfully conveying intoxicating liquor to a point in Garvin county, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a term of 60 days. Judgment was pronounced on the 1st day of November, 1915. The appeal was filed in this court on the 8th day of February, 1916.

The Attorney General filed a motion to dismiss the appeal on the ground that the same was not perfected in the time and in the manner provided by law. No answer has been filed to the motion. An examination of the record discloses the fact that the motion was well taken. It is therefore sustained.

[1, 2] It is the duty of counsel to perfect appeals from the trial court to this court within the time provided by law and the order of the court.

Appeals in misdemeanor cases must be perfected in this court within 120 days from the date of the judgment. The trial court has no power to extend the time for filing appeals beyond that period. It is uniformly held that the failure to file an appeal within the time provided by the statute and the orders of the trial court is fatal to the jurisdiction of this court, and that this court is without jurisdiction to review the record on the merits and have jurisdiction only to dismiss the same and direct the trial court to enforce the judgment and sentence.

The appeal is dismissed. Mandate ordered forthwith.

DOYLE, P. J., and BRETT, J., concur.

CHOATE v. STATE. (No. A-2208.)
(Criminal Court of Appeals of Oklahoma. Oct. 14, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶538(3), 741(6) — SUFFICIENCY OF EVIDENCE — CORPUS DELICTI — QUESTION FOR JURY.

A conviction cannot be had upon a defendant's extrajudicial admissions alone, unless the state proves in some way the corpus delicti, independent of the defendant's admission. Direct and positive proof is not essential to establish the corpus delicti, but it may be proved

by circumstantial evidence. And when it is proved by circumstantial evidence, the question should be submitted to the jury along with the other questions of fact in the case, as to whether or not the state has established the corpus delicti beyond a reasonable doubt.

(a) The danger which this rule is supposed to guard against is greatly exaggerated in common thought. Yet there are rare instances of morbid minds that need to be protected by this rule against their own perversity and morbid imagination.

(b) To prove the corpus delicti is a simple matter. If a dead body is found with marks of violence upon it, or other circumstances that indicate that deceased came to his or her death by unnatural or violent means, proof of such fact, independent of defendant's confession, establishes the corpus delicti in a murder case. And to prove the corpus delicti in a charge against a guardian for embezzlement it is only necessary to prove the relation of guardian and ward, that the guardian received certain funds belonging to the ward's estate, and to show by some fact or circumstance, independent of the defendant's admission, that he did not have the funds, or that they had been dissipated or fraudulently misappropriated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1229, 1727, 1728; Dec. Dig. ¶538(3), 741(6).]

2. CRIMINAL LAW ¶42—ADMISSIONS—VOLUNTARY CHARACTER.

The fact that one is brought into court by process to give his testimony by no means renders the statements made in such testimony involuntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45-48; Dec. Dig. ¶42.]

3. EMBEZZLEMENT ¶23—CRIMINAL LIABILITY—DEFENSES.

A claim that one charged with embezzlement appropriated the funds alleged to have been embezzled in good faith, believing the owner of the funds was indebted to him in the amount appropriated or more, is under our statute, no excuse or defense whatever. And to all intents and purposes such a claim made in open court would amount to a plea of guilty.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 81-85½; Dec. Dig. ¶23.]

Error from District Court, Garvin County; R. McMillan, Judge.

J. H. Choate was convicted of embezzlement, and brings error. Reversed.

Blanton & Andrews, W. H. Lasater, and Carr & Field, all of Pauls Valley, for plaintiff in error. S. P. Freeling, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

BRETT, J. The defendant (plaintiff in error) in this case is a full-blood Indian, and was appointed guardian of his minor children, and was subsequently prosecuted, and convicted of embezzling \$1,463.82 belonging to the estate of Phelix N. Choate, one of his wards.

[1] The defendant did not go upon the witness stand in this trial, and complains that he was convicted solely upon admissions made by him in the county court, at a hearing in the guardianship matter of Phelix N.

Choate and others, and that there was no evidence offered by the state to prove the corpus delicti before these admissions were admitted in evidence, and that these admissions could not be used in evidence against him until the state had first proved by evidence, independent of his admissions, the corpus delicti.

The letters of guardianship, the proceedings in the sale of real estate, including the order of confirmation, and the guardian's report acknowledging receipt of the funds charged to have been embezzled were all introduced in evidence, which properly established the relation of guardian and ward, and charged the guardian with the funds alleged to have been misappropriated. But there was no evidence that he had misappropriated the money, or that he did not have the total amount in hand offered by the state before introducing in evidence his admissions at the hearing in the county court; and the fact that the funds had been misappropriated was an essential of the corpus delicti in this case. To show that the relation of guardian and ward existed, and that certain funds belonging to the ward's estate had been received by the guardian, did not prove that a crime had been committed. And to prove that fact, or the corpus delicti of the offense charged, the state should have gone one step farther, and shown in some way, independent of the defendant's admissions, that he did not have the funds, or that they had been dissipated or fraudulently misappropriated. Direct and positive proof is not essential to establish the corpus delicti, but it may be proved by circumstantial evidence. And when it is proved by circumstantial evidence, the question should be submitted to the jury along with other questions of fact in the case as to whether or not the state has established the corpus delicti beyond a reasonable doubt. But it is an old and well-established rule of law that the fact must in some way be established, independent of the defendant's admissions, that the crime has been committed, before the court will permit a conviction on the extrajudicial statement of the party charged, that he committed the crime.

(a) As stated by Mr. Wigmore (Wigmore on Evidence, vol. 3, § 2070), the danger which this rule is supposed to guard against is greatly exaggerated in common thought. Yet there are rare instances of morbid minds that need to be protected by this rule against their own perversity and morbid imaginations. A notable case of this kind occurred in England in 1660 where one of two brothers confessed that he, his brother, and his mother murdered his master. They were all executed for the crime. And two years later his master returned home, and explained that he had been kidnapped by the Turks. *Perry's Case*, 14 How. St. Tr. 1312. Other similar, though not numerous cases, are on record. Hence

appellate courts, which not only deal with individual cases, but must declare rules broad enough to protect the substantial rights of every citizen, even the most unfortunate, as well as society, have guarded against the recurrence of such cases as the one above cited by requiring the state to first prove, by evidence independent of the confession, that the crime charged has been committed, before receiving the confession of the accused that he committed it. And this works no hardship on the state; for it certainly should have some tangible evidence in hand that a crime has been committed before it accuses one of its citizens of its commission. We might cite numerous authorities in support of this position, but this court is committed to the doctrine, and it is almost universal. *Shires v. State*, 2 Okl. Cr. 89, 99 Pac. 1100; *Frazier v. U. S.*, 2 Okl. Cr. 657, 103 Pac. 373; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Eldridge*, 3 Cal. App. 648, 86 Pac. 832; *People v. Grill*, 3 Cal. App. 514, 86 Pac. 613; *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Spencer*, 16 Cal. App. 756, 117 Pac. 1039; *Ashby v. State*, 124 Tenn. 684, 139 S. W. 872; *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890.

(b) To prove the corpus delicti is a very simple matter. If a dead body is found with marks of violence upon it, or other circumstances that indicate that deceased came to his or her death by unnatural or violent means, the proof of such fact established the corpus delicti in a murder case. And to prove the corpus delicti in the case at bar it was only necessary to prove the relation of guardian and ward, that the guardian received certain funds belonging to the ward's estate, and to show by some fact or circumstance, independent of the defendant's admission, that he did not have the funds, or that they had been dissipated or fraudulently misappropriated. But there was no evidence in this case of a demand on the defendant to pay the money into court, or to his successor as guardian, and that he did not do so. Not even a circumstance, independent of his admissions, to show that he did not have the money, or had misappropriated it, was offered in evidence by the state to establish the corpus delicti before offering the admissions made by the defendant at the hearing in the county court. And in failing to do this the state did not comply with the requirements of the law before offering these admissions.

[2] 2. The defendant next contends that the statements made by him at the hearing in the county court were obtained by force, threats, intimidation, and duress, and therefore could not be used against him. But we think this claim is without merit. He freely and voluntarily and without any objection made these statements at this hearing in the

county court. And the fact that he was brought into court by legal process to give his testimony by no means renders it involuntary. The county court had a right to inquire into and to know how he was handling his ward's estate; and the process by which he was called into court to give this information was only a means of informing him that the court desired to inquire into the condition of the estate and his manner of handling it. And no reasonable construction can render the statements made at that hearing involuntary. *Scribner v. State*, 9 Okl. Cr. 465, 132 Pac. 933, Ann. Cas. 1915, 381; *Faucett v. State*, 10 Okl. Cr. 111, 134 Pac. 839.

[3] 3. Again it is argued that the defendant claims "he appropriated the money in good faith, believing that the ward was indebted to him in this amount or more." And counsel ask:

"Can any reason be given why section 2678, R. L. 1910, should not apply in a case of this character, where it is provided, 'That in any prosecution for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred, in good faith, even though such claim was untenable'?"

Our answer to this question is that, under section 2678, Revised Laws 1910, quoted in part by defendant, such a claim amounts to no defense or excuse whatever. That section, in addition to the portion quoted by defendant, provides that:

"Upon any prosecution for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith even though such claim is untenable. But this provision shall not excuse the retention of the property of another, to offset or pay demand held against him."

Consequently the excuse suggested by counsel is specifically legislated against, and declared to be "no excuse for the retention of the property of another"; and to all intents and purposes such an excuse would amount to a plea of guilt. But the defendant did not take the witness stand, or offer any such excuse, or make any such admission at the trial of this case, either in person or by counsel; if he had, such a judicial admission would have presented an entirely different situation to that disclosed by the record.

There are other errors assigned, but, as the judgment must be reversed on the ground that a conviction cannot be had upon the defendant's admissions alone without some semblance of proof of the corpus delicti, independent of the defendant's admissions, we deem it unnecessary to pursue the matter further.

The judgment is reversed.

DOYLE, P. J., and ARMSTRONG, J., concur.

KRIEGER et al. v. STATE. (No. 2802.)

(Criminal Court of Appeals of Oklahoma. Oct. 18, 1916.)

(Syllabus by the Court.)

1. SUNDAY — STATUTORY PROVISIONS — THEORY.

Our Sabbath law proceeds upon the theory, entertained by most of those who have investigated the subject, that the physical, intellectual, and moral welfare of mankind requires a periodical day of rest from labor, and, as some particular day must be fixed, the one most naturally selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally devoted to religious worship, or rest and recreation, as this causes the least interference with business or existing customs.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 1; Dec. Dig. —1.]

2. SUNDAY — OBSERVANCE OF OTHER DAY.

Our Legislature has wisely and properly, however, refrained from interfering with or coercing the conscience of those who uniformly, conscientiously, and religiously keep another than the first day of the week as holy time, by exempting them from the penalties of the law; provided they work on the first day of the week in such a manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 21; Dec. Dig. —8.]

3. SUNDAY — OBSERVANCE OF OTHER DAY — "SERVILE LABOR."

In exempting persons who uniformly and conscientiously keep another than the first day of the week as holy time from the penalties of the statute, the Legislature intended to give them a substance and not a shadow; hence we hold the term "servile labor," as used in our Sunday statutes, to be used as synonymous with the term "secular labor."

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 21; Dec. Dig. —8.]

For other definitions, see *Words and Phrases*, First and Second Series, *Servile Labor*.]

4. SUNDAY — OBSERVANCE OF OTHER DAY.

Courts which hold that to require Sabbatarians to keep our Sunday does not prevent them from also keeping the seventh day overlook the fact that under the divine commandment, that these people are striving to obey, it is as imperative that they work six days as that they rest on the seventh and that if their conscience compels them to rest one day, and the law also forces them to rest another, they will thus be forced to violate the first provision of the commandment they are conscientiously attempting to keep.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 21; Dec. Dig. —8.]

Appeal from County Court, Blaine County; Ed. Baker, Judge.

G. J. Krieger and another were convicted of violating the Sabbath law, and appeal. Reversed and remanded, with directions to dismiss.

William O. Woolman, of Watonga, and Cyrus Simmons, of Knoxville, Tenn., for plaintiffs in error. R. McMillan, Asst. Atty. Gen., and Homer N. Boardman, of Oklahoma City, for the State.

BRETT, J. The plaintiffs in error in this case were prosecuted and convicted in the county court of Blaine county for violating our Sabbath or Sunday laws. It appears from the record that they were conducting a general mercantile business at Hitchcock, Okl., and exposed their merchandise for sale on Sunday; that this was done in an orderly, peaceable, and quiet way. And there is no complaint that it was done in such manner as to interrupt or disturb other persons, in observing Sunday or the first day of the week as "holy time." It also appears that plaintiffs in error are and were Seventh Day Adventists, and uniformly and religiously observed Saturday, or the seventh day of the week, as a day of rest and "holy time."

[1-3] Counsel for both plaintiffs in error and the state have filed able and elaborate briefs. But as we view the situation, the question presents a very simple proposition, and turns on the legislative intent as expressed in section 2406, Revised Laws 1910. After designating the first day of the week as the Sabbath, and declaring that Sabbath breaking shall consist: First of "servile labor, except works of necessity or charity;" and, second, "trades, manufactures and mechanical employments"—the Legislature then makes an exception, and in section 2406 provides that:

"It is a sufficient defense in proceedings for servile labor on the first day of the week, to show that the accused uniformly keeps another day of the week as holy time, and does not labor upon that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time."

Now the question is, What did the Legislature contemplate by the term "servile labor" in this exception? It is loosely stated by some courts that the term "servile labor" is infelicitous. But there is no such thing as "servile labor" in this country, and has not been for years; and the term is not only "infelicitous" but is obsolete and meaningless, as applied to present conditions. And if our statute should be limited to the literal meaning of the term, then neither the prohibition nor exception in the statute could apply to any class of labor existing to-day, either in this state or the nation. The word "servile" pertains to slaves, to those held in subjection and enslaved, and no such thing as that exists to-day in our nation. But our legislators certainly had in mind some existing character or class of labor to which they intended that both the prohibition and the exception should apply, and we think must have intended to use the word "servile" as synonymous with secular. It would be highly improper to strike down a statute so vital as this as meaningless, unless it should be impossible, by any reasonable construction, to ascertain the Legislative intent. This law, as stated by an eminent jurist—

"* * * proceeds upon the theory, entertained by most of those who have investigated the sub-

ject, that the physical, intellectual, and moral welfare of mankind requires a periodical day of rest from labor, and, as some particular day must be fixed, the one most naturally selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally devoted to religious worship, or rest and recreation, as this causes the least interference with business or existing customs."

But our Legislature, we think, wisely and properly, by the provisions of section 2406, Revised Laws, 1910, exempted any one who "uniformly keeps another day of the week as holy time, and does not labor upon that day" from the penalties of this statute; provided, such person who uniformly and religiously keeps another day as holy time works on the first day "in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time." The writer of this opinion conscientiously and religiously believes that Sunday, or the first day of the week, is the day upon which all persons should rest; and is the day that should be observed as holy time by all Christians; in commemoration of the greatest fact in our religion, the resurrection of our Lord. But I cannot, and would not if I could, make my conscience the standard of my brother. We are all fallible, and I would not assume the responsibility of forcing him to adopt my faith; for, should I be wrong, my responsibility would then be doubled. And the Legislature intended to refrain from interfering with or coercing the conscience of those who uniformly and conscientiously keep another day than the first day of the week as holy time, by the provisions of section 2406. And we think this is in harmony with the spirit and genius of our government. And when our legislators exempted persons who uniformly, conscientiously, and religiously keep another day from the penalties of the statute, they intended to give them a substance and not a shadow. Hence we think the Legislature intended to use the word "servile" as synonymous with "secular." And in this we are sustained by *Gladwin v. Lewis*, 6 Conn. 49, 16 Am. Dec. 33. But even without a precedent, we think, no other construction could give vitality to the real legislative intent.

[4] But it is facetiously argued by some courts that to say to these people they shall keep our Sunday does not prevent them from also keeping the day they regard as "holy day." But these courts overlook the fact that under the divine commandment these people are striving to obey it is just as imperative that they work six days as it is that they rest on the seventh. And if their conscience compels them to rest one day, and the law forces them to also rest another, they would thus be forced to violate the first provision of the commandment they are attempting conscientiously to keep.

For these reasons, and others that might be added, we think the judgment should be reversed.

The judgment is therefore reversed, and the cause remanded, with directions to dismiss the case.

DOYLE, P. J., and ARMSTRONG, J., concur.

C. M. KEYS COMMISSION CO. v. ROBINETTE. (No. 7018.)

(Supreme Court of Oklahoma. Sept. 19, 1916.)

(Syllabus by the Court.)

CORPORATIONS *§*414(6)—**POWERS AND LIABILITIES—REPRESENTATION BY AGENT.**

The same as in *Keys Commission Co. v. Miller* (No. 7017) 157 Pac. 1029.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. *§* 1645; Dec. Dig. *§*414(6).]

Commissioners' Opinion, Division No. 2. Appeal from County Court, Oklahoma County; John W. Hayson, Judge.

Action by J. Robinette against the C. M. Keys Commission Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Halner, Burns & Toney, of Oklahoma City, for plaintiff in error. W. H. Zwick, of Oklahoma City, and Abernathy & Howell, of Shawnee, for defendant in error.

BURFORD, C. This was an action brought by J. Robinette against C. M. Keys Commission Company to recover the purchase price of certain cattle sold to the defendant through one Gay, alleged to be the agent of the commission company, and paid for with a draft drawn on the commission company by Gay, which was dishonored. The commission company denied the agency of Gay and its liability to the plaintiff. There was a trial to a jury and judgment for the plaintiff in the full amount claimed, from which judgment the commission company brings error, alleging that there was no sufficient proof of the agency of Gay or of any other fact establishing a liability against the company.

The case is not distinguishable upon the facts or the propositions of law involved from *C. M. Keys Commission Co. v. H. R. Miller*, 157 Pac. 1029 (not yet officially reported). In fact the cattle in the instant case were sold through the same party, at about the same time, shipped in the same car, paid for in the same manner, and the relation of Gay to the commission company depended upon the same facts as in the case of *Keys Commission Co. v. Miller*, supra. The case is also closely akin, both upon the facts and the propositions of law, to *C. M. Keys Commission Co. v. Beatty*, 42 Okl. 721, 142 Pac. 1102. The discussion of the questions involved as set out in these cases render any further statement of the facts or of the propositions of law in this case unnecessary. Although in the judgment of the writer it is sounder reasoning to base the liability of the commission company upon the right of the seller of the cattle—the purchase price being unpaid—to

follow the cattle or the proceeds thereof into the hands of any one except an innocent purchaser for value, as was held in *Keys Commission Co. v. Beatty*, supra, rather than to base the liability upon the proposition of agency, as was done in *Keys Commission Co. v. Miller*, supra, yet however that may be, the ultimate liability of the commission company for the price of these cattle is definitely established by the two cases to which reference is above made.

Judgment affirmed.

PER CURIAM. Adopted in whole.

PADGETT v. TRENT et al. (No. 4175.)

(Supreme Court of Oklahoma. Sept. 12, 1916.)

Rehearing Denied Sept. 30, 1916.)

(Syllabus by the Court.)

PUBLIC LANDS *§*39(8)—**TOWN-SITE COMMISSION—PATENTS.**

A patent issued through the Town-Site Commission of the Creek Nation is impervious to attack in a court of equity, unless the Commission was induced to issue it to the wrong party by an erroneous view of the law or by a gross or fraudulent mistake of facts.

A. The petition examined, and held to state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. *§§* 95-99; Dec. Dig. *§*39(8).]

Commissioners' Opinion, Division No. 3. Error from District Court, Muskogee County; R. C. Allen, Judge.

Action by J. E. Padgett against W. C. Trent and others, Trustees of the School District of the City of Muskogee, Okl., and the Board of Education of the City of Muskogee, Okl. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

A. A. Richards, of Tulsa, and B. B. Wheeler, of Muskogee, for plaintiff in error. Irwin Donovan, of Muskogee, for defendants in error.

RITTENHOUSE, O. This action involves the title to block 209 in the city of Muskogee, Okl., alleged to be of the value of \$35,000. The tribal deed or patent for this block was issued to the trustees of the school district of Muskogee, Ind. T. The petition, to which a demurrer was sustained, contains 98 closely typewritten pages, setting out the facts, the text of the various laws of Congress and Arkansas affecting the title to the block in controversy, the correspondence between the government officials, and all the pleadings and evidence before the Creek Town-Site Commission and the Secretary of the Interior, and their decisions thereon relative to the application of plaintiff to have the block in controversy scheduled to him.

The essential facts as alleged are:

That Jane Dolman, a Creek Indian by blood, was enrolled under the name of Elizabeth Jane Dolman, opposite No. 2932, as 51 years of age in 1898. That about the year 1882, in accordance with the tribal laws and customs, she took possession of a tract of

land, consisting of about 60 acres, then being an unoccupied portion of the Creek domain, inclosing the same with a wire fence and erecting a residence thereon, and from that time until the sale thereof continued to use, occupy, till, cultivate, and raise crops thereon. That all of said land was within the limits of the town site of Muskogee, as surveyed and platted by the first Muskogee Town-Site Commission. That block 209 constituted a portion of the tract of land so enclosed. That the Missouri, Kansas & Texas Railroad was constructed through what is now the city of Muskogee in 1872, and the tract of land so taken in possession by Jane Dolman was within three miles of said line of railroad. That the National Council of the Creek Nation enacted a tribal law (Perryman's Constitution and Laws of the Creek Nation 1890, § 1, art. 4, c. XII), which was as follows:

"All citizens of this nation having improvements or residence on the line of any railroad, within three miles distance of the same, on either side, and all citizens who may hereafter make improvements or build residences on the same shall have the exclusive right to a claim of one square mile of land to each and every family."

That Jane Dolman was in the exclusive possession of said tract of land, and the owner and holder of the improvements thereon on March 18, 1898, when the town of Muskogee was incorporated and said tract of land inclosed within its corporate limits. That on June 28, 1898 (chapter 517, 30 Stat. 495), when the Curtis Act became a law, she was in the exclusive possession and owner and holder of the improvements on said land. That section 14 of said act provided:

"That owners and holders of leases or improvements in any city or town shall be privileged to transfer the same."

That on November 10, 1898, Jane Dolman, for a valuable consideration, sold the occupancy and right of possession to and improvements upon the land, now designated as block 209, to A. H. Sharum, which was evidenced by a written bill of sale, and Sharum went into possession thereof, remaining in possession until March 31, 1899, when he sold and delivered to J. E. Padgett, plaintiff herein, his occupancy and right of possession to and improvements upon said land, and that the said Padgett immediately entered upon and took possession of said land.

The plaintiff bases his claim of title upon that part of section 13 of the Original Allotment Agreement (chapter 676, 31 Stat. 861), which reads as follows:

"Also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres."

There were five different schedules made of the lot in controversy by the three successive town-site commissions, as follows:

FIRST.
Improvements on Lots.
March 24, 1900.

Lot No.	Block No.	Front.	Depth.	Owner.	Appraised Value.	Business or Residence.
	209					Public.

SECOND.
Schedule of Appraisalment of Lots Exclusive of Improvements.
May, 1900.

Lot No.	Block No.	Front.	Depth.	Owner.	Appraised Value.
1	209	School		Public use.	

THIRD.
Schedule of Appraisalment of Lots in Muskogee, Indian Territory.

Lot.	Block.	Owner.	Appraised Value.	Sec.
1	209		School Public use.	

FOURTH.
Department of the Interior, Town-Site Commission's Schedule of Appraisalment.
Town of Muskogee, in Creek Nation, Indian Territory.

Lot No.	Block No.	Improvements.		Appraised Value of Improvements.	Appraised Value of Lots.	Rate % or Sec.
		Owner.	Character and Remarks.			
	209	Incorporated city of Muskogee for school purposes.			49.20	20

FIFTH.
Department of the Interior, Town-Site Commission's Schedule of Appraisalment.
Town of Muskogee, in Creek Nation, Indian Territory.

Lot No.	Block No.	Improvements.		Appraised Value of Improvements.	Appraised Value of Lots.	Rate % or Sec.
		Owner.	Character and Remarks.			
	209	School District of Muskogee.			49.20	20

It is further alleged:

That the first Muskogee Town-Site Commission was appointed in April, 1899, and that the incorporated town of Muskogee had

no authority to receive or hold the title to real estate for school purposes, as the school district of Muskogee had been organized and established in 1898, and as the corporate limits of Muskogee had been extended, after which time the town of Muskogee and the school district of Muskogee constituted and represented different areas and population. That there was no provision of law, either in the Curtis Act or in any other law, authorizing or empowering said commission to reserve or schedule either to the town of Muskogee or the school district any portion of said town site for school purposes. That the Secretary of the Interior, on April 21, 1899, instructed the commission that:

"You will set apart for the use of all schools, churches, parsonages, charitable institutions, and other public buildings the lots or blocks within the town of Muskogee that may be now actually occupied and used by such institutions, and you need not appraise either the lands thus reserved for this purpose, nor the improvements thereon."

That block 209 was not actually occupied or used for school purposes, and had never been so used, but was then in the undisputed possession of plaintiff; that in July, 1899, one or more of the commissioners, together with certain members of the school board, selected block 209 for school purposes, which was not then being occupied or used for school purposes. That the first schedule was made showing block 209 was not appraised, but bearing the inscription "Public." That in May, 1900, the same commission made a supplemental schedule of appraisement reciting the words "School Public use." That on June 28, 1901, the second Muskogee Town-Site Commission was appointed, but no rules and regulations were ever made, issued, or promulgated relative to the surveying, platting, and disposal of town lots, nor relating to contests therefor, as provided by the terms of the act of May 31, 1900, and the Creek Allotment Agreement, until August 29, 1904. That block 209 contained less than four acres. That in July, 1901, plaintiff was more than 21 years of age and a resident of Muskogee. That on said date plaintiff did not own and never had owned or claimed any other land or lots within said town site. That in July, 1901, plaintiff appeared before the second Muskogee Town-Site Commission, presented the conveyances from Jane Dolman to A. H. Sharum and from Sharum to plaintiff, and claimed the right to have said block awarded and scheduled to him under the terms of the Creek Allotment Agreement, requesting the commission to investigate his rights to said block and to award and schedule the same to him. That thereupon the commission returned said deeds to plaintiff, and informed him that said block had not been appraised, but had been reserved for public purposes. That the same was not awarded or scheduled by said commission to any person, corporation, or body corporate, and consequently plaintiff could not institute any contest to determine

or establish his rights in and to said block. That the third schedule of appraisement was made by the commission and approved by the Secretary of the Interior on August 10, 1901, bearing the words, "School Public use." That section 20 of the Creek Allotment Agreement, under which the third schedule and approval was made, reads as follows:

"20. Henry Kendall College, Nazareth Institute, and Spaulding Institute, in Muskogee, may purchase the parcels of land occupied by them, or which may have been laid out for their use and so designated upon the plat of said town, at one-half of their appraised value, upon conditions herein provided; and all other schools and institutions of learning located in incorporated towns in the Creek Nation may, in like manner, purchase the lots or parcels of land occupied by them."

That said block was occupied by no school or institution of learning, either on March 8, 1900, when said Creek Allotment Agreement was signed, or on March 1, 1901, when said agreement was ratified by Congress, or on May 25, 1901, when said agreement was ratified by the Creek Nation, or at any time said award and schedule was made by said commission or approved by the Secretary of the Interior, and had never been, at any such times or prior thereto, occupied by any school or institution of learning, by the city of Muskogee, or by the school district of Muskogee; all of which facts, both as to the law and the occupancy of said block, were not only well known to said Muskogee Town-Site Commission at the time said award and schedule were made, but also to the Secretary of the Interior at the time he approved the same. That said block 209 was so awarded and scheduled by said commission with the full knowledge that its action in so doing was in violation and contravention of law, and with the express purpose and fraudulent intent on its part, and the members thereof, of securing the reservation of said block for school purposes, for much less than its fair appraisable value. That said block was not separately appraised by the second Muskogee Town-Site Commission. At the end of said schedule there appeared:

Area in acres, parks, etc., 56 acres @ \$20.00.. \$1,120 00
Area in acres, cemeteries, 81 acres @ \$20.00.. 1,620 00

That there was nothing in said schedule disclosing the fact that said block 209 was included in the 56 acres designated as "parks, etc." That before the plaintiff had learned that said block was included therein the second Muskogee Town-Site Commission had been abolished, and the Creek Town-Site Commission had been appointed and authorized to do and perform all acts necessary and proper under the law relative to the town site of Muskogee. That after the appointment of the Creek Town-Site Commission plaintiff filed a written application to have said block awarded and scheduled to him, setting out in full the basis of his claim, and asking that he be permitted to institute a contest before said commission to establish his rights in

and to said block. That after a hearing the commission refused to entertain jurisdiction, holding that they had no jurisdiction or power to revise or change in any manner the schedules prepared by the former commissions or to schedule and award the block to plaintiff, no matter what his rights were, and that, if plaintiff had any rights to said block, he must present his claims to the second Muskogee Town-Site Commission for adjudication, and that said Creek Town-Site Commission refused to inquire into the merits thereof or to permit plaintiff to institute a contest. That the Creek Town-Site Commission kept no minute book or record of their proceedings, and its files and papers have been lost or destroyed and cannot be found. That in May, 1902, plaintiff went before the Indian agent at the Union Agency at Muskogee, the officer designated to receive payment on lots in Muskogee, and informed him that said plaintiff desired to pay for said block 209, but was informed that the same had not been appraised, and that thereupon plaintiff tendered \$140 in gold coin as the fair appraisement and value of said block at the time the townsite of Muskogee was appraised, which tender was refused. That thereafter, but prior to October 18, 1902, the Creek Town-Site Commission prepared and certified to what they termed a schedule of certain blocks in the town site of Muskogee, which were designated on the schedule of the second Muskogee Town-Site Commission as school property, which schedule and the certificate thereto are as follows:

Department of the Interior, Town-Site Commission's
Schedule of Appraisement.

Town of Muskogee, in Creek Nation, Indian
Territory.

Lot No.	Block No.	Improvements.		Appraised Val- ue of Improve- ments.	Appraised Val- ue of Lots.	Rate % or Sec.
		Owner.	Character and Remarks.			
	209	Incorporated city of Muskogee for school purposes.			49.20	20

We hereby certify that the above and foregoing schedule is true and correct, and that the incorporated city of Muskogee is entitled to purchase, under the provisions of section 20 of the agreement with the Creek Nation, the property described, at 50 per cent. of its appraised value, which 50 per cent. will equal \$20 per acre;

Upon the original schedule of the appraisement of the town site of Muskogee the above property was simply set aside for school purposes and appraised jointly with the parks at \$20 per acre. There not being any provision in the Original Agreement for the payment of parks, it was expected when the original schedule was prepared that the town would be allowed to purchase the parks and also pay \$20 per acre for the land set aside for the school purposes. The Supplemental Agreement with the Creek Nation, ratified by the act of Congress

approved June 30, 1902, provides for the payment for parks at \$20 per acre, but leaving the disposition of school property the same as previously provided by the original agreement; therefore, in order to finally dispose of the town-site matters at this place, this supplemental schedule is prepared in order to properly show these lots to the city of Muskogee. No payments have ever been made by the city of Muskogee covering this property, as this commission has not notified them that they would be permitted to pay. Therefore, in view of the fact that it was originally contemplated that the town should pay \$20 per acre, the appraisement of each tract has been increased so that, when 50 per cent. is paid under the provisions of section 20, the Creek Nation will realize an amount for each tract equal to \$20 per acre.

We therefore respectfully recommend the approval of this schedule.

The Indian inspector forwarded to the Secretary of the Interior this schedule, which was approved November 1, 1902. Plaintiff then alleges:

That, when the schedule was made by the Creek Town-Site Commission and approved by the Secretary of the Interior, the city of Muskogee had no right, power, or authority under the law to buy, own, hold, or possess real estate for school purposes, and neither the Creek Town-Site Commission nor the Secretary of the Interior had any authority under section 20 of the Creek Allotment Agreement to award or schedule said block for school purposes to the incorporated city of Muskogee, and that their actions in so doing were null and void. That on November 15, 1902, the plaintiff, who was then in total ignorance of the schedule approved by the Secretary on November 1, 1902, forwarded a verified application to the Secretary of the Interior asking for a rehearing, which petition was referred to the Indian inspector for the Indian Territory for investigation and report. The same was thereupon referred to the Creek Town-Site Commission by the inspector, and the commission held a hearing commencing January 28, 1903, at which evidence of numerous witnesses was heard. On March 13, 1903, under instructions from J. W. Zevely, Indian inspector, the Creek Town-Site Commission made a new award and schedule of block 209 in the town site of Muskogee, which is as follows:

Department of the Interior, Town-Site Commission's
Schedule of Appraisement.

Town of Muskogee, in Creek Nation, Indian
Territory.

Supplemental.

Lot No.	Block No.	Improvements.		Appraised Val- ue of Improve- ments.	Appraised Val- ue of Lots.	Rate % or Sec.
		Owner.	Character and Remarks.			
	209	School district of Mus- kogee.			49.20	20

The above school property is re-scheduled so that the title thereto will pass to the school district instead of the incorporated town; this, in our judgment, after careful consideration, being right and proper, and is as provided by Mansfield's Digest of the Statutes of Arkansas.

I hereby certify that the foregoing supplemental schedule of the town of Muskogee, Creek Nation, Indian Territory, is true and correct, and is made for the purpose of changing the name of the owner of the property mentioned, and it does not change the appraisement in any way.

Dwight W. Tuttle,

Chairman Town-Site Commission for Creek Nation.

March 13, 1903.

That this schedule was forwarded to the Secretary of the Interior with the recommendation that the schedule be approved, and on April 16, 1903, said schedule was approved by the Secretary of the Interior.

It is alleged: That the action of J. W. Zevely in instructing the Creek Town-Site Commission to prepare a new schedule awarding and scheduling said block 209 to the school district of Muskogee, the action of said commission in making said schedule, and the action of the Secretary of the Interior in approving the same were each and all wholly unwarranted in law, null, and void, and were based upon a gross mistake and misapprehension of the law. That said award and schedule of said block to said school district of Muskogee shows to have been made under the terms of section 20 of the Creek Allotment Agreement, but there was no pretense made by said school district, by said J. W. Zevely, by said Creek Town Site Commission, or by said Secretary of the Interior that said block 209 was occupied by said school district of Muskogee, either at the time said Creek Agreement was signed, or when said agreement was ratified by the Congress, or when it was ratified by the Creek Nation, or when it was proclaimed by the President of the United States, or on April 16, 1903, when said schedule was approved, or at any other time prior to any of said dates, but that, on the other hand, it was conclusively shown by the evidence adduced before said Creek Town-Site Commission on January 28, 1903, that said block 209 had never been occupied by said school district of Muskogee or by any school or institution of learning prior to January 28, 1903, and the members of said commission so found in the opinions rendered by them on March 13, 1903. That the school district of Muskogee did not come within the classes mentioned as "all other schools and institutions of learning" specified in section 20 of the Creek Allotment Agreement, and, in awarding and scheduling said block to said school district under said section, the officers so acting did so under and by reason of a mistake of law in interpreting said section.

The petition alleges further: That two reports were filed by the Creek Town-Site Commission after hearing the evidence, both recommending that the land in question be

awarded to the city of Muskogee for school purposes, but each conflicting on material issues necessary to be found. That the reports were forwarded to the Secretary of the Interior, who on May 8, 1903, denied the petition of Padgett. That plaintiff had no knowledge of the opinions and decisions of the Creek Town-Site Commission, of J. W. Zevely as acting Indian inspector, of the Commissioner of Indian Affairs, of the Secretary of the Interior, or of the making and approval of said schedule approved April 16, 1903, until after the execution of the patent for said block. That on June 3, 1903, the school district of Muskogee paid to the Indian agent of the Union Agency at Muskogee the sum of \$24.60, being one-half of the appraised value of block 209, and on July 29, 1903, the Principal Chief of the Creek Nation signed and executed a tribal deed or patent for said block, pretending to convey the same to the "trustees of the school district of Muskogee, Ind. T.," which was approved by the Secretary of the Interior November 25, 1903, and recorded on the records of the Commission to the Five Civilized Tribes in Volume E of Deed Records, Town Lots, page 414. That thereafter said patent or deed was delivered to the defendants herein, who still have possession thereof, and that after the delivery of said patent the defendants took possession of said block for the first time. The patent contains the following recitals, among others:

"Whereas, a town-site commission, heretofore appointed and acting under authority of the act of Congress approved March 1, 1901 (31 Stat. 861), agreement ratified by the Creek Nation May 25, 1901, has appraised the lots in the town of Muskogee, Muskogee (Creek Nation, Indian Territory); and

"Whereas, the plat of said town was approved by the Secretary of the Interior on the 4th day of June, 1900, and was duly placed on file; and
 "Whereas, said commission has awarded the real estate described hereinbelow to trustees of the school district of Muskogee, Indian Territory, who has paid twenty-four and ⁶⁰/₁₀₀ (24.60) dollars, the full amount of the purchase price. * * *

It is then alleged: That there was on said June 3, 1903, no law authorizing said school district of Muskogee to purchase said block 209 for one-half of its appraised value, or for any other fixed sum, and on said day there was no law authorizing said Indian agent or any other officer or person to accept such payment from said school district. That on July 23, 1903, there was no law authorizing and empowering the Principal Chief of the Creek Nation to sign or execute the deed or patent aforesaid to said "trustees of the school district of Muskogee." That on November 25, 1903, there was no law authorizing the Secretary of the Interior to approve said deed or patent, and on December 7, 1903, there was no law authorizing the recording of said deed as aforesaid, but all of said actions were taken by the respective officers herein mentioned because said officers and

each of them were grossly mistaken in the law governing their actions in the premises and misinterpreted said law. That at all said times this plaintiff was entitled to purchase said block 209 at one-half its appraised value, and to receive a patent therefor, and that the patent or deed to said block 209 was issued and delivered to said school district instead of to this plaintiff, in fraud of the rights of this plaintiff. That the board of directors of the school district of Muskogee, the first Muskogee Town-Site Commission, and the several members thereof, the Secretary of the Interior, the second Muskogee Town-Site Commission, and the several members thereof, the Creek Town-Site Commission, and the several members thereof, Dwight W. Tuttle, Geo. A. Alexander, and H. C. Linn, each fell into error in the construction of the laws governing their respective powers and duties in the premises and regulating and controlling their respective authority, and their following respective actions were wholly unwarranted in law, utterly null and void, and in fraud of plaintiff's rights, to wit:

The action of the board of directors of the school district of Muskogee, or a committee of said board, in selecting, some time during the year 1899, said block 209 as and for a school site, which was taken by said school board and permitted by the first Muskogee Town-Site Commission.

The actions of the said first Muskogee Town-Site Commission, in so far as it reserved, or attempted to reserve, said block 209 for school purposes, either to the incorporated town of Muskogee, to the school district of Muskogee, or to the public, either by the making of plats of said town site and marking said block "School" thereon, or by certifying to said plats so made and marked as correct, or by making and certifying to the schedule of improvements upon lots in the town site of Muskogee, which was approved July 7, 1900, or by the making of the schedule of appraisement of lots irrespective of improvements, which schedule was approved June 28, 1900, and certifying to the same as correct.

The actions of the Secretary of the Interior in approving on June 4, 1900, the survey and plats of the town site of Muskogee, in approving on June 28, 1900, the schedule of the appraisement of lots exclusive of improvements in the town site of Muskogee, and in approving on July 7, 1900, the schedule of the appraisements of improvements upon lots in said town site, in so far as he may have reserved, or attempted to reserve, said block 209 for school purposes, either to the incorporated town of Muskogee, to the school district of Muskogee, or to the public.

The actions of the second Muskogee Town-Site Commission some time in July, 1901, in so far as it refused to award and schedule said block 209 to this plaintiff, and holding

that said block had been reserved for public purposes, in so far as it attempted to set forth said block 209 in the schedule approved August 10, 1901, as for "School Public use," to appraise said block as a part of the area in parks, etc., at \$20 per acre, and to certify to said schedule as correct, in fraud of plaintiff's rights, and in so far as it failed and refused to appraise said block 209 as a separate block at its actual appraisable value, as other lots and blocks were appraised.

The actions of the Secretary of the Interior in approving said schedule on August 10, 1901, so far as said approval related to said block 209, and so far as said action constituted, or was intended to constitute, an awarding and scheduling, or a reservation of said block 209 for school purposes, either to the incorporated town of Muskogee, to the school district of Muskogee, or to the public, and for the further reason that the said Muskogee Town-Site Commission and the Indian Inspector for the Indian Territory fraudulently concealed from said Secretary of the Interior the fact that said block had never theretofore been, and was not then, occupied by any school or institution of learning.

The actions of the Creek Town-Site Commission hereinbefore recited in declining and refusing to entertain, hear, or determine the application filed with it by plaintiff to award and schedule said block 209 to him, and to permit plaintiff to institute a contest for said block, and in holding and deciding that said commission had no jurisdiction to entertain, hear, or determine said application or to permit such contest, but that plaintiff must have recourse to the Muskogee Town-Site Commission, which had gone out of existence, and in making the schedule which was approved by the Secretary of the Interior on November 1, 1902, and in making the certificate and statement thereto attached, so far as said schedule, certificate, and statement refer to said block 209.

The action of the Secretary of the Interior in approving said schedule on November 1, 1902, so far as said action related to said block 209, and for the further reason that the Indian Inspector for the Indian Territory and said Creek Town-Site Commission fraudulently concealed from said Secretary the fact that said block had never been, and was not then, occupied by any school or institution of learning.

The action of said Creek Town-Site Commission in notifying the mayor or other constituted authorities of the incorporated city of Muskogee on November 11, 1902, that said city had the right to purchase said block 209 under the Creek Allotment Agreement.

The decision rendered on March 13, 1903, by Dwight W. Tuttle and Geo. A. Alexander, two members of the Creek Town-Site Commission, in which they held "That the town of Muskogee has acquired a vested right in the property in question which cannot be con-

troverted," and decided that "the former action of the Muskogee and Creek Commissions and the approval thereof by the honorable Secretary of the Interior be not disturbed," and that the property remain scheduled to the "Town of Muskogee for school purposes," and the separate decision rendered on said day by H. C. Linn, the third member of the Creek Town-Site Commission, in which he held "that, the said land having been scheduled to the town of Muskogee, under the law in existence at the time, as a park, while Sharum made no claim to the land, and as the action of the board in giving the land to the city was approved by the honorable Secretary of the Interior, I must hold that the action was final, and that the treaty could not come in afterwards and abrogate that which was done under the law in existence at the time," and recommended: "That the land in question be awarded to the city of Muskogee for school purposes, as was done by the Muskogee Town-Site Commission." That each of said findings and each of said decisions were so made and rendered by said members of said commission fraudulently, for the purpose of depriving plaintiff of his rights in and to said block 209, and for the purpose of illegally and fraudulently upholding, sustaining, and giving effect to said former void, illegal, and erroneous actions of the Secretary of the Interior, of said Creek Town-Site Commission, of the first Muskogee Town-Site Commission, and of the second Muskogee Town-Site Commission, in attempting to reserve and award said block 209 for school purposes in violation of law; that in pursuance of, and in order to carry out, said purposes and intentions to illegally and fraudulently deprive plaintiff of said block 209, and to illegally and fraudulently uphold, sustain, and give effect to the former illegal and void actions of the Secretary of the Interior and of the three town-site commissions last above mentioned, in attempting to set aside and reserve said block 209 for school purposes, the schedule was prepared on said March 13, 1903, the same day upon which the several holdings and decisions were made and rendered, by which schedule it was attempted to award and reschedule said block 209, in direct conflict with each of said decisions, not to the town of Muskogee, but to the school district of Muskogee, an entirely different body corporate, representing a distinct and different area and population from that included within the town or city of Muskogee. That the evidence taken before the Creek Town-Site Commission clearly establishes that Jane Dolman was a duly enrolled citizen of the Creek Nation. That when the Curtis Act was approved June 28, 1898, and for many years prior thereto, she had been in the actual and undisputed possession of the field of which said block constituted a part. That she had inclosed said field with a fence, and cultivated, im-

proved, and tilled said field. That the same was so inclosed, improved, and in the possession of Jane Dolman on June 28, 1898, and until she sold the same block to Sharum. That the finding of the Creek Town-Site Commission that, when the Curtis Bill (Act June 28, 1898) was passed, said block was wholly unimproved, and not in the actual possession of any person, and that the contestant had failed to establish that said field was ever inclosed or improved by any Creek citizen, was made, either by a gross mistake in said findings of fact, or said findings of fact were fraudulently made in direct and known conflict with the testimony and facts, and with the fraudulent intent to sustain and uphold the former unauthorized and illegal acts in attempting to reserve, award, and set aside said block to the city of Muskogee for school purposes, in violation of law and in fraud of plaintiff's rights in and to said block. That said report and findings were never treated, considered, regarded, or acted upon by the Secretary of the Interior as an adjudication of any rights of the plaintiff, but were "submitted for the information of the department," as shown by the letter of the Indian Inspector dated April 11, 1903. That the decision of the Secretary of the Interior was a denial of the application based upon the recommendation of the Indian Inspector of April 11, 1903, wherein it was recommended that:

"It is my opinion that this block was segregated for public purposes by the approval of the plat of Muskogee and, the block having been appraised to the town for school purposes, the department should decline to make any change or disturb the schedule as it at present stands. "I therefore submit the papers for the consideration of the department, with the recommendation that the petition be denied."

That said opinion was so expressed, and such recommendation based thereon was so made, by said acting Indian Inspector for the Indian Territory, because he fell into error in the construction of the law applicable to the premises, and the Secretary of the Interior likewise accepted said recommendation, and denied the said petition of this plaintiff because he fell into error in the construction of the law applicable to the case, which caused him to deny plaintiff's said petition instead of awarding to plaintiff said block 209, which said Secretary of the Interior would have done had it not been for such misconstruction of the law on his part.

Plaintiff prays that it may be adjudged and decreed that he is the legal and equitable owner of said block, and that the defendants are holding the legal title thereof in trust for him. The testimony taken before the Creek Town-Site Commission is attached to and made a part of plaintiff's petition. A demurrer was sustained to the petition. Motion for new trial was filed on the grounds:

"That the judgment of the court herein is contrary to law.

"Errors of law occurring at the trial and excepted to by this plaintiff, in that said court

erred in sustaining the demurrer of the defendants herein and in dismissing plaintiff's action."

The same was overruled, and the cause was brought here for review.

When the Town-Site Commissioners and officers of the Interior Department decide controverted questions of fact, in the absence of fraud, imposition, or mistake, their decisions on such questions are final. This was held in the case of *Ross v. Stewart*, 227 U. S. 530, 33 Sup. Ct. 345, 57 L. Ed. 627. But, if it clearly appears that the Town-Site Commission committed some material error of law, that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, and that as a result the patent was issued to the wrong party, then equity will decree that the title is held in trust for the party legally entitled to the same.

It was said in *Leak et al. v. Joslin*, 20 Okl. 200, 94 Pac. 518:

"When town-site commissioners, by virtue of an act of Congress otherwise known as the 'Supplemental Creek Agreement' (March 1, 1901, c. 876, 31 Stat. 861), where there is no conflict as to the facts, but by a misconstruction of the law as applied to the facts, schedule a lot to a party who is not entitled to same under the law, after title has passed to a private party, courts of equity will inquire as to whether or not such title shall be held as trustee for the party really entitled to same."

This subject has been thoroughly discussed in *Mitchell v. Bell*, 31 Okl. 117, 120 Pac. 560; *Fast v. Walcott et al.*, 38 Okl. 715, 134 Pac. 848; *Ross v. Stewart*, 25 Okl. 611, 108 Pac. 870; *Citizens' Trading Co. v. Bass*, 30 Okl. 747, 120 Pac. 1095; *James et al. v. Germania Ins. Co.*, 107 Fed. 597, 46 C. C. A. 476; *Bowen v. Carter et al.*, 42 Okl. 565, 144 Pac. 170.

It must be borne in mind that the demurrer admitted every material allegation of the petition; and if the allegations of a material error of law, misrepresentation, and fraud in the issuance and procurement of the patent are well pleaded, then the trial court erred in sustaining the demurrer. The demurrer admitted: That, when the first Muskogee Town-Site Commission was appointed, the incorporated town of Muskogee and the school district of Muskogee were separate bodies corporate, representing different areas and populations. That after August 25, 1901, no steps were ever taken to acquire title to said block under the schedules of March 24, 1900, and May, 1900. That the land now constituting block 209 was not actually occupied or used for school purposes, and had never been so used, but was then in the undisputed possession of plaintiff, and was then inclosed by and within the fence surrounding the Jane Dolman field. That the failure of the second Town-Site Commission to hear the plaintiff, or to award said block to him, was based upon a gross mistake in the interpretation of the law. That the only provision empowering the Town-Site Commission to award and schedule any portion of the said townsite of Muskogee to the public, to the city of Mus-

kogee, or to the school district, for school purposes, was section 20 of the Creek Allotment Agreement, supra. That said block was occupied by no school or institution of learning on March 8, 1900, when said Creek Allotment Agreement was signed, nor on March 1, 1900, when said agreement was ratified by Congress, nor on May 25, 1901, when said agreement was ratified by the Creek Nation, nor at the time said award and schedule was made by said commission, nor at the time said schedule was approved by the Secretary of the Interior, and had never been, at any such times or prior thereto, occupied by any school or institution of learning, by the city of Muskogee, or the school district of Muskogee; all of which facts, both as to the law and the occupancy of said block, were well known to said Muskogee Town-Site Commission at the time said award and schedule were made, and were also well known to the Secretary of the Interior at the time he approved said schedule, but said block 209 was so awarded and scheduled by said Muskogee Town-Site Commission with the full knowledge that their action in so doing was in violation and contravention of law, and with the express purpose and fraudulent intent on the part of said commission and the members thereof of securing the reservation of said block for school purposes and of permitting and enabling the city of Muskogee, in violation of law, to secure said block for school purposes for much less than its fair appraisable value. That said block 209 was not separately appraised by said second Muskogee Town-Site Commission, but, at the end of said schedule approved August 10, 1901, the following appeared:

Area in acres, parks, etc., 56 acres @ \$20.00..	\$1,120 00
Area in acres, cemeteries, 31 acres @ \$20.00..	1,620 00

That before this plaintiff had learned that said schedule, which was approved August 10, 1901, had been made or approved, the second Muskogee Town-Site Commission had been abolished by the Secretary of the Interior, and the Creek Town-Site Commission had been appointed and had been invested by law and the instructions of the Secretary of the Interior with authority to do and perform all acts necessary and proper under the law relative to the town site of Muskogee, and that the acts of J. W. Zevely, the Creek Town-Site Commission, and the Secretary of the Interior, in relation to the schedule approved April 16, 1903, were each and all wholly unwarranted in law, null, and void, and were based upon a gross mistake and misapprehension of the law, the facts showing the same to be null and void being fully set forth in the petition.

The patent shows on its face to have been issued to the trustees of the school district of Muskogee, Ind. T., reciting that the appraisal was made by the Town-Site Commission appointed under the Creek Agreement, and that such commission awarded the same to said trustees. The defendants' claim

of title comes under section 20 of the Creek Allotment Agreement, which provides that all schools and institutions of learning located in incorporated towns in the Creek Nation may purchase lots or parcels of land occupied by them, in the same manner and upon the same conditions as Henry Kendall College, Nazareth Institute, and Spaulding Institute. Under this section the schools and institutions of learning located in the school district of Muskogee could purchase lots or parcels of land occupied by them.

It is alleged that block 209 was not occupied by any school or institution of learning during any of the times mentioned in the petition, and the Creek Town-Site Commission so found, which fact was well known to the commission at the time of the award and schedule, and was also known to the Secretary of the Interior at the time of approval, and that such block was so awarded and scheduled by said commission with the full knowledge that their action in so doing was in violation and contravention of law, and with the express purpose and fraudulent intent on the part of said commission and the members thereof of securing the reservation of said block for school purposes, and of permitting and enabling the city of Muskogee, in violation of law, to secure said block for school purposes for much less than its fair appraisable value.

The evidence before the commission on the question of the occupancy of said block by any school or institution of learning at or prior to the award and schedule is silent. The Creek Town-Site Commission found that it did not occupy the same. If it did not occupy said block, then under section 20, *supra*, it did not have a preference right to the same. While all reasonable presumptions must be indulged in to support the decisions of the Interior Department and the Town-Site Commission in deciding the controversy and issuing the patent, yet an examination of the evidence, which has been attached to and made a part of the petition, leaves it very doubtful whether there was any evidence to establish the material point here involved; but the petition alleges, and the finding of the Creek Town-Site Commission shows, a want of occupancy, and, for the purpose of testing the sufficiency of the petition by demurrer, such facts are admitted; and if block 209 was not occupied by any school or institution of learning, then the same could not have been scheduled to such school district, but, under the allegations of the petition, should have been awarded to Padgett. The case at bar clearly comes within *Mitchell v. Bell*, *supra*. This petition shows that the plaintiff has availed himself of all the rights he had before the officers of the Department of the Interior and the Town-Site Commissions, and that he has performed every requirement of law and the

rules regulating the acquirement of title applicable to lots within the city of Muskogee.

We therefore conclude that the petition states a cause of action, and the court erred in sustaining the demurrer to the same. There are numerous questions raised by the brief, but, in the view we take of this case, it is only necessary for us to pass upon this one phase of the petition.

The judgment should therefore be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

KELLY v. ROBERTSON. (No. 6159.)

(Supreme Court of Oklahoma. Sept. 19, 1916.
Rehearing Denied Oct 10, 1916.)

(Syllabus by the Court.)

1. FRAUD \S 13(2, 3) — FALSE REPRESENTATIONS.

The second paragraph of the syllabi in *Garvin v. Harrell*, 27 Okl. 373, 113 Pac. 186, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744, is adopted and approved herein.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. \S 4, 5; Dec. Dig. \S 13(2, 3).]

2. FRAUD \S 23—FALSE REPRESENTATIONS.

A vendee in the exchange of real estate has a right to act on the positive representations of existent material facts made by a vendor, even though the means of knowledge were open to him. The real question in such matters is: Was the party in fact deceived by the false representations? "It is as much an actionable fraud willfully to deceive a credulous person with an improbable story as it is to deceive a cautious and sagacious person with a plausible one."

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. \S 20, 23; Dec. Dig. \S 23.]

Commissioners' Opinion, Division No. 2. Error from District Court, Blaine County; James R. Tolbert, Judge.

Action by Thomas F. Robertson against W. R. Kelly. There was judgment for the plaintiff, and defendant brings error. Affirmed.

Seymour Foose, Ed Baker, and R. O. Brown, all of Watonga, for plaintiff in error. A. L. Emery, of Watonga, for defendant in error.

GALBRAITH, O. This was an action for damages for fraud and deceit in the exchange of real estate. The plaintiff below, Thomas F. Robertson, after the formal parts of his petition, alleged that he was 84 years of age and had been totally blind for the past 30 years, and that prior to the times hereinafter alleged he had known the defendant, W. R. Kelly, for 5 or 6 years privately and in a business way, and that during a part of that time the defendant had been president of the First National Bank of Watonga, and the plaintiff had maintained business relations with him by way of depositing money and borrowing money, and the transactions had been agreeable and satisfactory, and he had

come to regard the defendant as a man of honor and integrity and a friend, and had implicit confidence in him; that the plaintiff owned 320 acres of land in Blaine county of the value of \$5,700, against which there was a mortgage of \$3,200, and some unpaid taxes and maturing interest on the mortgage, amounting to \$200, and charged:

"That on November 12, 1908, this plaintiff being on a trade of said described real estate with B. B. Bridgeford for some real property consisting of a certain red house and lot situated plaintiff believes on lot 2, block 73, in the town of Watonga, was in the defendant's office when the defendant proposed to plaintiff that this plaintiff trade with him instead of with the said B. B. Bridgeford, to which this plaintiff consented if he and the defendant could agree.

"That the said defendant then represented as follows: That he had a better house which he was building just west of the said red house, that the main building of the said house was 16x24 feet, containing three rooms, and an L which was 14x16 feet, and a lean-to, and that the said real property was worth the sum of \$2,000, the said property being lot 3, block 73, in the town of Watonga, Blaine county, Okl., which the defendant would trade for the land of the plaintiff.

"That all the information which the plaintiff had and possessed in regard to said property was derived from the above said representations made to him by the defendant. That the plaintiff believed without hesitancy or doubt that the said representation was a statement of a living, existing fact, and that the said property was exactly as represented."

It is alleged that the plaintiff and defendant agreed to exchange property, and that they passed their respective deeds, the plaintiff conveying the farm subject to the mortgage and the taxes and accruing interest to the defendant, and the defendant conveying the town property to the plaintiff. Again it is charged:

"That in the spring of 1909, the plaintiff discovered that the said property was not as represented to him by the defendant, and that the representation made to him and the description of the said property were false, and known to be false by the said defendant; and that the defendant, taking advantage of this plaintiff's blindness, by fraud and cheat, willfully misrepresented the said lot 3 in block 73 for the purpose of beating and cheating this plaintiff out of the title to the said real estate then owned by him. That in truth and in fact lot 3 in block 73, in the town of Watonga, is as follows: That the said red house is a better house than the house located on lot 3, block 73; that the main building of the said house is 14x20 and contains two rooms, and the L is 12x12 feet, and the lean-to 8x12, the L and lean-to being old buildings, and that the said property was not at the time and is not now worth to exceed the sum of \$400."

It is then charged that by such fraud and deceit the plaintiff was damaged in the sum of \$1,600, and prayed judgment for that sum, together with interest thereon from November 11, 1908. There was a general demurrer to the petition, which was overruled. The defendant then answered by way of a general denial. There was a trial to the court and a jury, and a verdict returned for the plaintiff in the sum of \$200. A motion for new trial was made and overruled and judgment entered upon the verdict, from which

an appeal has been prosecuted to this court.

There are numerous assignments of error set out in the petition in error, but it seems only necessary to examine two of these, namely, the error assigned in overruling the demurrer to the petition, and that overruling the demurrer to the evidence presented at the close of the plaintiff's evidence.

[1] The issues presented in this case are largely issues of fact, since the law controlling is statutory and is settled by the prior decisions of this court. In *Garvin v. Harrell*, 27 Okl. 373, at page 375, 113 Pac. 186, at page 187, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744, the rule is announced:

"The rule fixing the measure of proof required to establish deceit is that a party is guilty where, with intent to induce another to enter into a contract, he makes a positive assertion which is material in a manner not warranted by his information, or where he is not shown to have had reasonable grounds for believing it to be true, where the assertion so made is not true, even though believed by the party making it. In such a case the definite assertion as a fact of that which is untrue concerning that of which the party has no knowledge is tantamount to the assertion of something which the party knows to be untrue. Our statute on this matter is clear and explicit."

Section 903, Rev. Laws 1910, reads:

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract:

"First. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

"Second. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.

"Third. The suppression of that which is true, by one having knowledge or belief of the fact.

"Fourth. A promise made without any intention of performing it; or

"Fifth. Any other act fitted to deceive."

Section 905 reads:

"Actual fraud is always a question of fact."

Section 993 reads:

"One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

Section 994 reads:

"A deceit, within the meaning of the last section, is either: First, the suggestion, as a fact, of that which is not true by one who does not believe it to be true; second, the assertion, as a fact of that which is not true, by one who has no reasonable ground for believing it to be true; third, the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, fourth, a promise, made without any intention of performing."

[2] The questions raised by the demurrers set out in the assignments under consideration are practically the same. By the demurrer to the petition the question was: Were facts sufficiently alleged to constitute a cause of action in favor of the plaintiff and against the defendant, and by the demur-

rer to the evidence did the testimony on behalf of the plaintiff, assuming that an actionable wrong was sufficiently pleaded, tend to support the allegations of the petition? If the allegations of the petition disclosed that in the exchange of the property the defendant made false representations as to the value and description of the property with the purpose and intent to deceive the plaintiff and to induce him to make the exchange, and that the plaintiff believed such false representations, and relying on their truthfulness was induced thereby to make the exchange and was injured thereby, then an actionable wrong was stated and the demurrer was properly overruled, and likewise the demurrer to the evidence tending to support the allegations of the petition was properly overruled. *Prescott v. Brown*, 30 Okl. 428, 120 Pac. 991. It does not matter that Robertson acted unwisely or imprudently, or whether he was negligent in not making full investigation as to the size of the building and its construction, and in not seeking independent advice as to the value of the property. The real question remains: Was he deceived by the presentations of Mr. Kelly, and were these representations made falsely and with intent to deceive? The parts of the petition hereinbefore set out disclose that but one answer can be returned to this question. The petition clearly charged that false representations were made to Robertson by Kelly as to the dimensions of the house and the value of the property, and that he was deceived thereby, and that relying on such false representations he made the exchange and sustained damages in an amount equal to the difference in the value of the property he received and the value of such property if it had been of the value represented by Mr. Kelly. The evidence of the plaintiff tended to support the allegations of his petition. It was therefore not error in the court to overrule the demurrer thereto.

Since our statute declares that actual fraud is a question of fact, the issues in this case were questions for the determination of the jury. The testimony in behalf of the plaintiff tended to show that he was deceived and defrauded in this trade; that not only the value of the town property he received in exchange for his farm was much less than he was told and believed it to be at the time of the trade, but the dimensions of the house were different and smaller than he was told and believed them to be. It is true that the testimony on behalf of Mr. Kelly denied any misrepresentations as to the value of the description of the property, and tended to show that there was no purpose to deceive Mr. Robertson in the trade, and that as a matter of fact he was not deceived in it, but was dealt with fairly; that the trade was sought by Robertson; that he was in default in the payment of the interest due upon the mort-

gage on his land and the taxes were delinquent and the mortgagee threatening to foreclose, and he was in fear that he would lose his land, and that this exchange was greatly to his advantage; that his equity in the farm was of little, if any, value and by the exchange made he secured a little home in town, free of incumbrance; that Robertson was perfectly satisfied with his trade until some 6 or 8 months after it was made, when he learned that Kelly had disposed of the land and made a profit thereon of \$1,800, then he became dissatisfied with his trade and was advised by a lawyer that he could get a lot of money by suing Kelly, and was thereby induced to commence this action. However, the jurors, under the established procedure, are the triers of the facts. This conflicting evidence was submitted to them under instructions as to the law that seem to be fair. The jury evidently believed the testimony offered in behalf of the plaintiff, and did not believe that offered in behalf of the defendant. The verdict, being supported by sufficient evidence, is conclusive on this appeal.

We have carefully examined the other assignments of error urged in the brief, but do not consider them of sufficient importance to justify special mention.

Some complaint is made of certain instructions the court gave to the jury. However, no proper exceptions were saved to the instructions in order to bring them here for review.

No prejudicial error appearing in the record, we conclude that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

PEARSON et al. v. GLEN LUMBER CO.
(No. 5247.)

(Supreme Court of Oklahoma. Feb. 8, 1916.)

(Syllabus by the Court.)

1. USURY § 94, 138—CHATTEL MORTGAGES—FORECLOSURE IN COURT—PENALTY—CREDIT ON NOTE.

Under section 4416, Snyder's Compiled Laws 1909, which provides that when a mortgagee has commenced foreclosure of a chattel mortgage by advertisement, if it is made to appear to the satisfaction of the district judge, by the affidavit of the mortgagor, that he has a legal counterclaim or other valid defense, against the whole or any part of the amount claimed to be due, the judge may enjoin the foreclosure by advertisement, and direct that all further proceedings for foreclosure be had in a court properly having jurisdiction of the subject-matter, *held*, that when the mortgagor satisfactorily shows that a usurious rate of interest has been charged and reserved in the note, secured by the mortgage, this constitutes a valid defense to part of the amount claimed to be due. And that the judge must, under such showing, enjoin foreclosure by advertisement, and direct all further proceedings for foreclosure, to be had in a court having jurisdiction of the subject-matter, where the mortgagor may have his day in court, and be heard on his defense, before being deprived of

his property. And further that, if usury is proven, the amount actually loaned must be credited with double the amount of the interest charged or reserved in the note.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 195, 424; Dec. Dig. § 94, 138.]

2. INJUNCTION §189—ISSUANCE OF WRIT—JURISDICTION—COUNTY JUDGE.

Article 7, § 12, of the Constitution of Oklahoma, is broad enough to authorize the county judge, in the absence of the district judge from the county, to issue writs of injunction in any matter in which the district judge himself would be authorized to issue such writs.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 311; Dec. Dig. § 139.]

3. CHATTEL MORTGAGES §256—FORECLOSURE—PROCEEDINGS IN COURT.

Where there has been a showing made that the mortgagor has a legal counterclaim or other valid defense against the whole or any part of the amount claimed to be due under a chattel mortgage, the only discretion the judge has is to determine whether or not the facts pleaded constitute a legal counterclaim or valid defense against the whole or any part of the debt. And if they do he has no other alternative than to grant the remedy provided by section 4416, Snyder's Comp. Laws 1909.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 528; Dec. Dig. § 256.]

4. CHATTEL MORTGAGES §256—FORECLOSURE IN COURT—RIGHTS OF MORTGAGOR—TENDER.

Where the mortgagor is entitled to the benefit of section 4416, Snyder's Comp. Laws 1909, he is not required to tender to the mortgagee the amount admitted to be due or to offer to pay any sum that may be ascertained to be due, before availing himself of the benefit of this statute; for to require this would be to render the statute nugatory, and in many instances deprive the mortgagor of the benefit of the very remedy the statute is intended to afford.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 528; Dec. Dig. § 256.]

Commissioners' Opinion, Division No. 2. Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by J. L. Pearson and another against the Glen Lumber Company, a corporation. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

P. D. Erwin and Walter C. Erwin, both of Wellston, for plaintiffs in error. Ira E. Billingslea, of Wellston, for defendant in error.

BRETT, C. The plaintiffs in error, as plaintiffs below, commenced this action against the defendant in error, as defendant below, to enjoin the defendant from foreclosing a chattel mortgage by advertisement; and asking that the foreclosure be had in a court having jurisdiction of the subject-matter. The facts that are material to a correct determination of this case are that the defendant held a chattel mortgage against all of the personal property of the plaintiffs, and had commenced foreclosure by advertisement. The plaintiffs filed their petition in the district court admitting the execution of the note and mortgage, but alleging that

a usurious rate of interest had been charged and reserved in the note, and pleaded this as a legal defense against the collection of a part of the amount claimed to be due on the mortgage. The petition was duly verified and supported by affidavit. There was also an affidavit that the district judge was absent from the county. Under this showing the county judge made an order enjoining the defendant from foreclosing the mortgage by advertisement, and directing that further proceedings for the foreclosure of said mortgage be had in a court having jurisdiction of the subject-matter. The defendant demurred to the petition, which the court properly overruled. The defendant then answered, among other things, pleading that the plaintiffs had promised to pay the amount claimed to be due after the same had matured; and also that the plaintiffs had not tendered the amount they admitted was due the defendant, or offered to pay any amount that might be ascertained to be due. There were a number of motions filed which are immaterial to the question involved in this action. On May 27, 1913, the district judge entered a judgment and order dissolving the injunction issued by the county judge, on the ground that the judge of the county court was without jurisdiction in the premises. And from this judgment and order the plaintiffs appeal to this court. We think the court erred in dissolving the injunction, and in not granting the relief prayed for in the petition.

[1] 1. This action was brought under section 4416, Snyder's Compiled Laws 1909, and this statute is plain, clear, and unambiguous, and provides that:

"A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the article on pledge, or by proceedings under civil procedure: Provided, that when the mortgagee, his agent or assignee, has commenced foreclosure by advertisement, and it shall be made to appear by the affidavit of the mortgagor, his agent or attorney, to the satisfaction of the judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may, by an order to that effect, enjoin the mortgagee, his agent or assignee, from foreclosing such mortgage by advertisement, and direct that all further proceedings for the foreclosure of such mortgage be had in the court properly having jurisdiction of the subject-matter."

And under the showing made by the plaintiffs that usury had been charged and reserved in the note which this mortgage was given to secure, there can be no question that it was the duty of the court to enjoin the foreclosure of the mortgage by advertisement, and direct that all further proceedings for the foreclosure of such mortgage be had in a court properly having jurisdiction

of the subject-matter, where the mortgagors might set up their defense, and have their rights adjudicated before being deprived of their property. They were entitled to show how much usury had been charged and reserved in this note, and, if they proved the transaction was usurious, to have the amount actually loaned credited with double the amount of the interest so charged and reserved; for the statute provides:

"That the taking, receiving, reserving, or charging, a rate of interest greater than that allowed by the preceding section shall be deemed a forfeiture of twice the amount of interest, which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid."

The intention of this statute is to penalize the lender by requiring him to forfeit and pay to the borrower "twice the amount of interest" he has exacted of the borrower. And if it should turn out that double that amount was in excess of the principal sum loaned upon the note remaining unpaid, the plaintiffs would be entitled to a judgment, against the mortgagee, for the amount of that excess.

The Dakotas have a usury statute very similar to ours, except that it omits the penalty of double the amount of usury charged or reserved in a note. And in *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847, in construing this statute the court says:

"The latter section provides for a penalty for usurious transactions under two independent conditions: (1) When usury rests in contract, and has only been charged; (2) when it has been paid. In cases where usury has been charged and not paid, and the usurer brings an action upon his contract, the illegality of the contract may be alleged as a defense, and, if proven, the entire interest due upon the contract becomes forfeited, and no recovery can be had upon the contract, except as to the principal sum loaned."

That usury charged in a note but not paid may be pleaded as a set-off, in a suit to collect the note, seems to be the only legitimate construction that can be placed upon this statute, and is in harmony with the decisions of the courts, having statutes similar to ours, that have passed upon this particular phase of the usury law. *Farmers' & Merchants' National Bank of Buffalo v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Citizens' National Bank v. Donnell*, 195 U. S. 369, 25 Sup. Ct. 49, 49 L. Ed. 238; *McCarthy v. First National Bank*, 23 S. D. 269, 121 N. W. 853, 23 L. R. A. (N. S.) 335, 21 Ann. Cas. 437.

The foreclosure by advertisement is only contemplated where there is no controversy between the parties as to the amount due, and where the mortgagor has no counterclaim or other legal defense to the whole or any part of the debt. But where there is a controversy as to the amount due, and the mortgagor makes a proper showing that he has a counterclaim or other legal defense to any part of the amount claimed to be due,

that raises an issue which only a court of competent jurisdiction can determine. And the mortgagor has a right to be heard on this issue, and to have his day in court. This statute is susceptible of no other construction.

[2] 2. Again, we think, the court erred in holding that:

"The order of injunction was issued by the judge of the county court without jurisdiction in the premises."

Article 7, § 12, of the Constitution of Oklahoma, provides that:

"In the absence of the judge of the district court from the county, or in case of his disqualification for any reason, the county court, or judge thereof, shall have power to issue writs of injunction in matters about to be brought or pending in the district court."

This provision, we take it, was not put in the Constitution by accident, but was put there with a view of effectually protecting and safeguarding the rights of citizens; and it is broad enough to authorize the county judge, in the absence of the district judge from the county, to issue writs of injunction in any matter in which the district judge himself would be authorized to issue such writs. That is clearly the purpose and intention of the provision.

[3] 3. The plaintiffs in the case at bar were clearly entitled to the relief provided by section 4416, Snyder's Compiled Laws 1909; for, where there has been a satisfactory showing made that "the mortgagor has a legal counterclaim or other valid defense, against the collection of the whole or any part of the amount claimed to be due, under such mortgage," it is not, as the defendant argues, a matter of discretion with the judge, as to whether or not he will issue the writ; but the only discretion he has is to satisfy himself as to whether or not the facts pleaded constitute a legal counterclaim or valid defense to the whole or any part of the amount claimed to be due on the mortgage. And if they do, he has no other alternative than to grant the remedy provided by this statute.

[4] 4. And the mortgagor is not required, as the defendant contends, to tender the amount admitted to be due, or to offer to pay any balance that may be ascertained to be due, under the mortgage, before he is entitled to this remedy. If that were true, the effect of such requirement would, in many instances, be to deprive the mortgagor of the benefit of this remedy; for in many instances, just as in the case at bar, the mortgagee already has all the property that the mortgagor owns covered by his mortgage.

We recommend that the judgment be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. REINHART et al. (No. 6444.)

(Supreme Court of Oklahoma. June 20, 1916.
Rehearing Denied Oct. 10, 1916.)*(Syllabus by the Court.)*1. CARRIERS \S 318(8) — NEGLIGENCE \S 1 — WHAT CONSTITUTES — INJURIES TO PASSENGERS — "ACTIONABLE NEGLIGENCE."

Three essential elements are necessary to constitute "actionable negligence" where the wrong is not willful and intentional, namely: (1) The existence of a duty upon the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; (3) injury to the plaintiff resulting from such failure. The evidence in this case examined, and it is held that no evidence of primary negligence upon the part of the company is shown here.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1813; Dec. Dig. \S 318(8); Negligence, Cent. Dig. \S 1; Dec. Dig. \S 1.

For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

2. MASTER AND SERVANT \S 332(5) — INJURY TO PASSENGER — NEGLIGENCE OF CONDUCTOR — VERDICT.

Where the negligence complained of is primarily attributable to the agent and the responsibility of the principal is secondary in the sense that the principal has committed no wrong but under the law is accountable for the conduct of his agent, they both may be sued in a single action, but a verdict, exonerating the agent, must necessarily exonerate the principal, for the principal cannot be held responsible for an act of the agent if the agent has committed no tort."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1279; Dec. Dig. \S 332(5).]

Commissioners' Opinion. Division No. 8. Error from District Court, Atoka County; Robert M. Rainey, Judge.

Action by Robert L. Reinhart and another against the Chicago, Rock Island & Pacific Railway Company. Judgment against the railway company, and it brings error. Reversed and remanded.

R. J. Roberts, C. O. Blake, and W. H. Moore, all of El Reno, J. G. Gamble, of Des Moines, Ia., K. W. Shartel, of Oklahoma City, and J. G. Ralls, of Atoka, for plaintiff in error. D. H. Linebaugh, of Atoka, for defendants in error.

HOOKER, C. The evidence here introduced in conformity with the allegations of the petition discloses that on the 17th day of October, 1908, the plaintiff Reinhart boarded a combination train of the defendant company at Coalgate for the purpose of being transported as a passenger to Edwards, Okl., and upon entering the coach he paid to the conductor, one Hughes, his fare; that this train was the only train in operation that day between said points, and that when the train arrived at Wardville about 3 o'clock of that day the plaintiff inquired of the conductor, Hughes, how long the train would remain there, and if he would have time to go

up to the business part of Wardville to obtain a lunch, and that the conductor informed him that the train would remain at Wardville for a period of 45 minutes, and, relying upon said statement, he alighted from said train, leaving his coat on the seat in the car which he had occupied, and started to the business portion of the town, which was about 250 yards from the depot; that the road leading from said train to the business part of the town is in the same general direction, but angles from the railroad; and that when he was about 150 yards from the coach the engine attached to the train gave two sharp blasts of the whistle, and the train started to move in the general direction of Edwards, and that the plaintiff, believing it was leaving Wardville, ran diagonally across lots for the purpose of boarding said train; that when he approached the track he saw two employes of the company, one standing upon the top of a box car and the other upon the rear of the steps to the passenger coach attached to said train; that the plaintiff attempted to get on a box car in front of the passenger coach, and was thrown, but arose and made the second effort which resulted in his injuries. The evidence further discloses that the conductor Hughes was not upon the train at the time of the accident to the plaintiff, and that it was not the intention of those in charge of the train to remove the same from Wardville, but to back in upon a side track in order that a passenger train might pass at said place. This is what was done at that time and place. Under the allegations of the petition and under the instructions of the court this case was submitted to the jury solely upon the specific allegations of negligence as defined in instruction No. 9, which is as follows:

"Gentlemen of the jury, you are instructed that in this action the specific allegations of negligence recited in the plaintiff's petition control the general allegations, and the plaintiff must recover, if at all, upon the specific allegations therein contained. The court instructs you that the specific allegations of negligence are that the defendant company are negligent in not holding the train 45 minutes at Wardville, and that the employes of the company were negligent in leaving Wardville before the 45 minutes had expired. In this connection you are instructed that before the plaintiff can recover, you must find from the evidence that these specific acts of negligence must have occasioned the injury, and that these acts of negligence were the proximate cause of the injury."

It will thus be seen that it is claimed that the injuries received by the plaintiff were caused by the negligence of the defendant company and its employes in failing to hold said train at Wardville, where plaintiff alighted, a period of 45 minutes, as plaintiff was informed would be done, and the court, in its instruction aforesaid, told the jury that before they could find for the plaintiff, they must believe from the evidence that these specific acts of negligence occasioned

the injury and were the proximate cause thereof. In other words, the jury must find from the evidence that the company and its employes failed to do what they informed the plaintiff they would do; that is, that they must find from the evidence that the conductor informed the plaintiff that the train would remain at Wardville for a period of 45 minutes, and they must further find from the evidence that it was the intention of the company and its employes to move said train therefrom at the time of the injury to the plaintiff, and before the expiration of the aforesaid 45 minutes. The jury under this evidence were authorized to find that the conductor told the plaintiff that the train would remain at Wardville 45 minutes, but under this evidence the jury were not justified in finding that it was the intention of the company or its employes to remove the train from Wardville at the time of the injury, for all the evidence is to the contrary. The physical facts demonstrate that this was not their intention. The conductor whose duty and business it was to manage the train was not on the train, as he would have been, had it intended to have left Wardville; in fact there is not any evidence that supports the theory of the plaintiff that the train intended to leave Wardville at this particular time, and the verdict of the jury, finding this to be true, is not based upon the evidence, but upon conjecture or suspicion, which is insufficient to sustain a verdict. See *Ingram et al. v. Dunning*, Case No. 4852, 159 Pac. 927, not yet officially reported.

[1] The question which first presents itself in this case is whether there is any primary negligence upon the part of the company. This court has often said that to constitute actionable negligence, where the wrong is not willful and intentional, three essential elements are necessary: (1) The existence of a duty upon the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; (3) injury to the plaintiff resulting from such failure.

[2] In this case it must be held that, if the plaintiff here alighted from the train at Wardville for the purpose of obtaining a lunch some yards from the depot with the consent of the company and knowledge on the part of the conductor, the relation of carrier and passenger still existed between the plaintiff and the company here. That being true, the company owed to him the duty of protecting him in the movements of its train. When the train started to move from the depot at Wardville for the purpose of backing into the switch, the plaintiff was in a place of safety; neither the company nor its employes had any reason to anticipate that the plaintiff would leave a place of safety and voluntarily imperil himself by attempting to board a moving train when he had been informed that the train would not leave Wardville for 45 minutes. No duty to him

was violated in the movement of that train, for he was then in no peril, and it could not have been assumed when the train started that he would subsequently place himself in that condition. It is and was a well-known fact that in the operation of trains of this character much switching and moving of the train is required at the various stations along the line of railroad, and the plaintiff was at least as well presumed to know this fact as the railroad company was to anticipate that the plaintiff would imagine that the train was to depart from Wardville. As we view this record, we cannot see any evidence of primary negligence here.

If there be any negligence attributable to the company, the same is due to the fact that the conductor informed the plaintiff that the train would remain at Wardville 45 minutes, and that the conductor attempted to remove the same before the expiration of that period of time; and, under this theory of the case the negligence complained of is primarily attributable to the conductor in charge of the train. The railroad company itself is not charged with any specific act of omission or commission; the right of the plaintiff to recover being dependent solely upon the doctrine of respondent superior. And it is said in the case of *C. R. I. & P. Ry. Co. v. Austin*, 43 Okl. 698, 144 Pac. 1070:

"The rule seems to be that, for an injury caused by the negligence of an employe not directed or ratified by his employer, the employe is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment, and engaged in his master's business."

In the case at bar the responsibility of Hughes is primary. He is responsible because he committed the wrongful or negligent act, that is, he informed the plaintiff that the train would remain at Wardville 45 minutes, and he directed the movement of the train as claimed by the plaintiff, which indicated that the train was leaving Wardville before the expiration of said time. The responsibility of the railroad company is secondary in the sense that it has committed, itself, no wrong, but under the law is held accountable for the conduct and act of its agent, and in the case of *Bradley v. Rosenthal*, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171, the Supreme Court of California said:

"While both may be sued in a single action, a verdict exonerating the agent must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has committed no wrong, and the principal cannot be responsible for the agent if the agent has committed no tort."

Also in *N. O. & N. E. Ry. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919, it is said;

"If the immediate actor is free from responsibility because his act was lawful, can his em-

ployer, one taking no direct part in the transaction, be held responsible? Suppose we eliminate the employe, and assume a case in which the carrier has no servants, and himself does the work of carriage; should he assault and wound a passenger in the manner suggested by the instruction, it is undeniable that if sued as an individual he would be held free from responsibility, and the act adjudged lawful. Can it be that if sued as a carrier for the same act a different rule obtains, and he be held liable? Has he broken his contract of carriage by an act which is lawful in itself, and which, as an individual, he was justified in doing? The question carries its own answer; and it may be generally affirmed that if an act of an employe be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

In the case of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, the Supreme Court of Washington, said:

"Where a fireman was injured in a collision owing to a train conductor failing to obey his orders, and he sued the railroad and the conductor jointly, and a verdict was rendered against the railroad company, nothing being said about the conductor, and the court entered judgment in favor of the conductor, it was error to enter judgment against the railroad, since, if the conductor was not negligent, the railroad could not be liable, and the judgment in favor of the conductor operated as an estoppel in favor of the railroad."

See, also, cases cited 43 Okl. 698, 144 Pac. 1070.

The record discloses in the instant case that the jury returned a verdict in favor of the defendant Hughes, who was the conductor in charge of the train in question, and whose acts, if any, constituted the negligence of the company, and that the jury at the same time returned a verdict against the company.

It was error to render a judgment against the company upon this verdict of the jury, and this cause is therefore reversed and remanded.

PER CURIAM. Adopted in whole.

FARMERS' STATE BANK OF JEFFERSON
v. JORDON. (No. 6177.)
(Supreme Court of Oklahoma. Sept. 28, 1916.)

(Syllabus by the Court.)

1. TRIAL \S 150—DEMURRER TO EVIDENCE.

Where the evidence introduced by the plaintiff in a cause when viewed in its strongest aspect, admitting all the facts which the evidence in the slightest degree tends to prove, and all the inferences and conclusions which may reasonably and logically be drawn from it, fails to establish the plaintiff's case, it is the duty of the trial court to sustain a demurrer thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 346-348; Dec. Dig. \S 150.]

2. ESTOPPEL \S 94(1)—SILENCE—CONDUCT.

The evidence in this case examined, and held insufficient to establish estoppel either by silence, or by declarations and conduct.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 247; Dec. Dig. \S 94(1).]

Commissioners' Opinion, Division No. 5.
Error from County Court, Grant County;
J. W. Bird, Judge.

Action by John Jordon against the Farmers' State Bank of Jefferson, for conversion of personal property. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Parker & Simons, of Enid, for plaintiff in error. Sam P. Riddings, of Medford, for defendant in error.

HAYSON, C. The defendant in error, John Jordon, brought an action in the county court of Grant county against the plaintiff in error, Farmers' State Bank of Jefferson, seeking to recover \$243.70 for the conversion of certain wheat grown by one J. S. Streets and upon which the defendant in error had a chattel mortgage. The material facts as shown by the witnesses of defendant in error are as follows: On August 2, 1912, J. S. Streets owed the Farmers' State Bank of Jefferson \$1,500. The said J. S. Streets on that date executed a mortgage to said bank covering wheat to be raised on the farm owned by defendant in error. The plaintiff in error filed this mortgage for record August 5, 1912. On August 20, 1912, the said J. S. Streets owed defendant in error, John Jordon, \$700 for two years' farm rent, and agreed to execute a chattel mortgage on the wheat to be grown on the farm owned by the defendant in error, which was the same wheat that the said Streets had mortgaged to the plaintiff in error on August 2, 1912. The defendant in error and Streets went to Medford together and went to the Farmers' State Bank, and after they had arrived there Streets and Jordon agreed between themselves that Streets should give Jordon a mortgage on the wheat. They thereupon requested one Ed Quigley, who was cashier of the plaintiff in error bank, to draw up said mortgage. Quigley wrote the mortgage and signed the same as a witness. Quigley said nothing about the mortgage held by the plaintiff in error which was of record. Defendant in error testified that Quigley said he was drawing up the mortgage so Jordon would be sure and get his money. The defendant in error filed this mortgage for record August 21, 1912, and left the state, he having been in the vicinity of Medford for the last two months and found out that the plaintiff in error held a mortgage on the wheat which had been filed for record prior to the mortgage held by him. After discussing the matter with both the plaintiff in error and Streets, but coming to no definite arrangement, Jordon permitted the plaintiff in error to have the wheat harvested and hauled into the elevator, without protest. The wheat was sold and the plaintiff in error collected the proceeds. Thereupon the defendant in error brought

this action for conversion of the wheat. Plaintiff in error in its answer filed a general denial, and as a defense set up its mortgage. Defendant in error filed his reply, which contained a general denial, and alleged that the defendant in error took his mortgage "on account of the solicitation, procurement, and consent" of the plaintiff in error, "and on account of the representation of" plaintiff in error "that said property so included in such mortgage was free and unincumbered at the time he took said mortgage," and for such reason, the plaintiff in error was estopped to assert and claim that it held any mortgage upon said property superior to the mortgage of defendant in error.

After the evidence had been introduced by defendant in error, plaintiff in error demurred to the evidence, which demurrer was by the trial court overruled, and an exception was saved by plaintiff in error. The trial proceeded, and the jury rendered a verdict in favor of defendant in error, and judgment was rendered thereon. From this judgment the Farmers' State Bank brings error, setting up six assignments of error.

It is necessary to notice but one assignment as it is decisive in this case. Did the trial court err in overruling the demurrer to the evidence of the plaintiff introduced at the trial? We think the court did so err.

[1] In a long line of cases our court has held that a demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences and conclusions which may logically and reasonably be drawn from the evidence; some of the more recent cases being *Marshall Mfg. Co. v. Dickerson et al.*, 155 Pac. 224; *Eoff v. Lair*, 156 Pac. 185; *Anderson v. Kelley et al.*, 156 Pac. 1167.

[2] Taking this line of cases as our guide we are forced to the conclusion that there was no evidence introduced in this case to sustain a verdict for the plaintiff. The theory upon which a recovery was sought was that the bank by its acts and conduct was estopped to set up its mortgage as a prior lien. In *Bragdon v. McShea*, 26 Okl. 35, 107 Pac. 916, our court has in paragraph 3 of the syllabus defined what is necessary to constitute "estoppel by silence," in these words:

"In order for the silence of a party to constitute an estoppel against him, it must have occurred under such circumstances as to have made it his imperative duty to speak, and the party in whose favor the estoppel is invoked must have been misled into doing that which he would not have done but for such silence."

In *Williams v. Purcell*, 45 Okl. 489, 145 Pac. 1151, our court has in the third paragraph of the syllabus laid down this rule:

"Estoppels operate only between parties and privies, and the party who pleads an estoppel must be one who has, in good faith, been misled to his injury."

In *Friar v. McGilbray*, 45 Okl. 597, 146 Pac. 581, our court in the second paragraph of the syllabus lays down the rule relating to "estoppels by declaration" as follows:

"In order that a person may be estopped by his declarations or conduct, he must have knowledge of the purposes of the inquiry, in response to which his statement was made, and of the interest of the person claiming the estoppel."

In this case the court quotes with approval the language of the court in *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365, which defines the essential elements of estoppel as follows:

"When invoked in respect to the title, * * * to constitute an estoppel it must appear: First, that the party making the admission, by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission (by his declaration or conduct) with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of all convenient * * * means of acquiring such knowledge by the use of ordinary diligence; and, fourth, that he relied directly upon such admissions, and will be injured by allowing its truth to be disproved."

Measured by these authorities the evidence in its strongest aspect, in this case, admitting all the facts which the evidence in the slightest degree tends to prove, together with all the inferences and conclusions that can reasonably or logically be drawn from it, fails to prove a case of estoppel. Quigley, merely because he was the bank cashier, was not under the imperative duty to speak, when asked to fill out a mortgage for another. Jordan was not misled to his injury. He was no better off with the mortgage than he would have been without it. The former mortgage had been on file for 15 days. It was not shown that he was destitute of all convenient means of acquiring such knowledge by the use of ordinary diligence. We therefore conclude that the trial court erred in overruling the demurrer to the plaintiff's evidence at the trial of the cause.

The judgment of the trial court is reversed and remanded, with directions to the trial court to dismiss the case with prejudice at the cost of the defendant in error.

PER CURIAM. Adopted in whole.

NEW YORK PLATE GLASS INS. CO. v. WRIGHT. (No. 6736.)

(Supreme Court of Oklahoma. Sept. 23, 1916.)

(Syllabus by the Court.)

TRIAL \Leftrightarrow 150—DEMURRER TO EVIDENCE.

Where the evidence introduced by the plaintiff in a cause, when viewed in its strongest aspect, admitting all the facts which the evidence in the slightest degree tends to prove, and all the inferences and conclusions which may reasonably and logically be drawn from it, fails to establish the plaintiff's case, it is the duty of the trial court to sustain a demurrer thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346-348; Dec. Dig. \Leftrightarrow 150.]

Commissioners' Opinion, Division No. 5, Error from District Court, Washita County; James R. Tolbert, Judge.

Action by the New York Plate Glass Insurance Company against C. H. Wright, doing business as the C. H. Wright Dry Goods Company, for damages. Judgment for defendant, and plaintiff brings error. Affirmed.

Swan C. Burnette, of Cordell, for plaintiff in error. Massingale & Duff, of Cordell, for defendant in error.

HAYSON, C. The New York Plate Glass Insurance Company brought suit against C. H. Wright, doing business as C. H. Wright Dry Goods Company, for damages, claiming that C. H. Wright as tenant of a certain store building negligently broke a plate glass window which the New York Plate Glass Insurance Company had insured, stating in the petition that after settling the loss with the owner, by replacing the glass at an expense of \$60, the owner had assigned the claim to the company. C. H. Wright filed a general denial, and the cause was tried to a jury. At the close of the plaintiffs' testimony the defendant interposed a demurrer to the evidence, which was sustained by the trial court and an exception saved by the plaintiff. The plaintiff in error, plaintiff in the trial court, brings error.

The only assignment of error urged is that the trial court erred in sustaining the defendant's demurrer to the plaintiffs' evidence at the trial. The contention is without merit. The acts of negligence set up in plaintiffs' petition in the trial court was as follows:

"That in operating the awning or attachment thereto on the front of said building, he carelessly and negligently threw the iron or crank, used to raise and lower the said awning, against the said plate glass in the front of said building, and thereby broke and damaged one of the large plate glass fronts in said building."

The testimony relative to negligence viewed in its most favorable light is substantially this: That on the 27th day of September the plate glass was broken by defendant C. H. Wright; that it was broken by C. H. Wright, tenant of the store building, while raising or lowering the awning in front of the building; that the apparatus for raising and lowering the awning was defective and was known to be defective by Wright; that the owner's agent sent to fix up the store building for Wright's occupancy had attempted to repair it, but without success, and called Wright's attention to its condition and warned him to exercise care in raising and lowering the awning; that the crank was liable to slip off and break the glass; that the following day the glass was broken. Three witnesses testified that upon inquiring of Wright as to how it was broken he said "that the crank accidentally slipped off the gudgeon as he brought it around and went through the window." The testimony shows that aff-

er the glass was broken the owner of the building sent a man around to repair the apparatus for raising and lowering the awning, and it was found in a very bad condition, and was subsequently repaired.

The evidence shows, when viewed in its most favorable light, merely that an injury had been suffered by accidental means. It wholly fails to show negligence, but upon the contrary affirmatively shows that the injury was caused by accidental means. Negligence is an affirmative fact to be established by the evidence. It cannot be presumed. In *C., R. I. & P. Ry. Co. v. Duran*, 38 Okl. 719, 134 Pac. 878, this court, in the second paragraph of the syllabus, lays down this rule:

"(a) Where there is no evidence reasonably tending to show that such party sought to be charged was guilty of negligence, it is error for the trial court to submit such issue to the jury."

Is there any evidence here which reasonably tends to show that the defendant was guilty of negligence? Our court has repeatedly held that the mere fact one sustains an injury to his person or property is not of itself sufficient to carry with it a presumption of negligence. Some of the recent cases are *C., R. I. & P. Ry. Co. v. Foltz*, 154 Pac. 519; *C., R. I. & P. Ry. Co. v. Nagle*, 154 Pac. 667; *C., R. I. & P. Ry. Co. v. Tate*, 156 Pac. 1182.

What have we in this case, aside from the fact that an injury was sustained, that would tend in any degree to establish negligence, upon the part of defendant in error, Wright, of which the plaintiff in error can complain? The plaintiff in error is in the same position here as the owner of the building, its assignor, would be had he been plaintiff in the trial court. Plaintiff in error urges that because Wright was informed, by the agent of the owner of the building, of the defective condition of the apparatus used in lowering and raising the awning and was warned to be careful in operating such apparatus, and the fact that the crank did slip off the gudgeon and broke the glass, is sufficient to infer negligence upon the part of Wright. This kind of reasoning, we fear, when carried to its conclusion, would lead us to some absurd positions, and would place too great a burden upon a party charged with negligence.

"Negligence," as defined by our court in *Prickett v. Sulzberger & Sons Co.*, 157 Pac. 357, "is defined to be the want of ordinary care by one owing the duty of such care to another."

Wright owed only the duty to the owner of the building to exercise "ordinary care" not "extra care" or "great care." There is no evidence in the record, aside from the injury itself, that would tend to show, or by which it might be inferred, that Wright failed to exercise such care as a reasonable and prudent person would exercise under like or similar circumstances. But, upon the contrary, the only evidence relative to the in-

jury shows it was an accident for which the defendant in error could not be held responsible.

Having carefully considered the evidence introduced in this case, we conclude that such evidence, when viewed in its most favorable light admitting all the facts which the evidence in the slightest degree tends to prove, together with all the inferences and conclusions which may reasonably and logically be drawn from it, fails to establish the plaintiffs' case, and the trial court properly sustained the demurrer to the plaintiffs' evidence. The case is therefore affirmed.

PER CURIAM. Adopted in whole.

ILLINOIS LIFE INS. CO. v. ROGERS et al.
(No. 7717.)

(Supreme Court of Oklahoma. Sept. 26, 1916.)

(*Syllabus by the Court.*)

1. HOMESTEAD \Leftrightarrow 32—NECESSITY OF OCCUPANCY.

A purchase of a homestead within the statutory limits as to quantity and value with the intention in good faith of presently residing on it or residing thereon as soon as some temporary obstacle to such residence can be removed or some necessary preparation for the same can be made, is equivalent to actual occupancy of the residence, and said property is exempt from lien, levy, or forced sale.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 40-43; Dec. Dig. \Leftrightarrow 32.]

2. HOMESTEAD \Leftrightarrow 57(3)—EVIDENCE.

The evidence in this case examined, and the same is held to show that the property in question was not subject to plaintiff's claim, and the judgment of the trial court, sustaining a demurrer thereto is hereby approved.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 85; Dec. Dig. \Leftrightarrow 57(3).]

Commissioners' Opinion, Division No. 3. Error from District Court, Osage County; R. H. Hudson, Judge.

Action by the Illinois Life Insurance Company against Stephen Rogers and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Joseph D. Mitchell, of Pawhuska, for plaintiffs in error.

HOOKE, C. This is an action instituted by the plaintiff in error against Stephen Rogers and wife, Frances Rogers, to subject certain property to the satisfaction of a judgment and execution held and owned by the plaintiff in error against Frances Rogers. The plaintiff alleges the recovery of said judgment, that the same is still unpaid, and that execution has been issued thereon, which was returned by the sheriff, "No property found," and it is alleged that after the rendition of said judgment, the defendant Frances Rogers bought the property involved here with her own money and caused the same to be conveyed to her husband, Stephen

Rogers, for the purpose of defeating the plaintiff in the collection of this debt. The answer of the defendants discloses that the property is owned and occupied by them as a homestead, and that they intended to use and occupy the same as such at the time they purchased it, and as soon after the purchase as they could improve it they moved upon said property, and have used the same from that time until now as a homestead, and it is further contended that the wife was indebted to the husband in a large sum of money, and in order to secure part payment thereof she conveyed said property to her husband. Upon these issues this cause came on for trial in the lower court, and at the conclusion of the plaintiff's evidence the trial court sustained a demurrer to the evidence, and rendered a judgment in favor of the defendants in error, to reverse which an appeal is had to this court.

From an examination of the evidence we are not able to say that the court committed any error to the prejudice of the plaintiff in error in sustaining this demurrer. All of the evidence here shows that the wife was indebted to the husband, and in order to pay a part of said indebtedness she caused said property to be conveyed to him, although it was paid for by her with her own money. The evidence further shows that it was the intention of the parties at the time they purchased this property to occupy the same as a homestead, and that they did move thereon as soon as the property was ready for occupancy.

[1] We are aware that this court, in *Laurie v. Crouch*, 41 Okl. 589, 139 Pac. 304, has held that the bare intention to create a home on a vacant lot at some future time, unaccompanied with actual occupancy of the lot, is not sufficient foundation upon which to base a claim of homestead exemption against an execution, but it also states that where there is a fixed intention by the owner of a lot to presently occupy it as a home, accompanied with overt acts which clearly manifest such intention, such as setting up buildings or repairing a house thereon for occupancy, followed by actual moving therein, without unreasonable delay, it might have the effect, at least in equity, of impressing the homestead character so as to render the property exempt as against claims arising prior to actual occupancy by the family. In this state a man who is the head of a family has the right to purchase a homestead. In fact, it is his duty to purchase a homestead for his family, and if his fancy or his judgment leads him to buy a piece of property which needs improving, it would be a harsh rule of law that would deny him the right to improve his property for the convenience of his family.

[2] The facts in this case show that this property was purchased for a homestead, and

that immediately after the purchase improvements were made with the fixed intention upon the part of the parties to occupy it as a homestead as soon as the improvements were completed. There was no unreasonable delay. In 21 Cyc. 473, it is said:

"Nevertheless, in some states a homestead may be created by intention prior to actual occupancy, when it appears that the owner is entitled to the exemption as the head of the family. * * * So also where intended improvements and occupancy are prevented by litigation, or the intended occupation is interrupted by illness in the claimant's family and the intent to occupy is evidenced by some act tending to show such intent, there may still be a claim of homestead, and such is the case where land is purchased as a residence to be occupied by the claimant as soon as an outstanding tenancy ends, where he subsequently carries out his intention."

In 28 Tex. Civ. App. 123, 66 S. W. 891, *Foley v. Holtkamp*, it is said:

"A homestead may be created by intention prior to actual occupancy, when it appears that the owner is entitled to the exemption as the head of a family, and that this intention has been manifest by such acts as amount to reasonably sufficient notice of that intention; the purpose of the law being to require such open evidence of this intention as will prevent the use of this right as a shield for fraud. * * * In *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832, it is said: 'The intention thus to appropriate the property shall not only be found in the mind of the party, but should be evidenced by some unmistakable acts, showing an intention to carry out such design, or some sufficient reason should be given why this intention was not demonstrated by such acts.' In this case this general rule is announced: 'From these decisions it is apparent that intention is almost the only thing that may not be dispensed with in some state of case; and it follows that this intention in good faith to occupy is the prime factor in securing the benefits of the exemption. Preparation * * * is but the corroborating witness to the declaration of intention, the safeguard against fraud, and an assurance of the bona fides of the declared intention of the party.' Justice Brown in the same opinion says further: 'But the placing upon the premises unheewn logs for the purpose of erecting thereon the humblest cabin, with a bona fide intention to occupy as soon as the cabin can be built, secures the right.' Questions of this sort most frequently arise where the claimant has bought unimproved property for the purpose of a home. In such case the declared purpose for which the property was bought is necessarily a potent factor in establishing the exemption. But we can perceive no difference in principle between such a case and this. Here, while it is true the vacant property was acquired years before the controversy arose, and at a time when appellee, being unmarried, was not entitled to the exemption, yet, after all, it is not the purchase for the purpose which secures the exemption, but the intention formed at a time when the party has a right to the exemption, and evidenced by the requisite acts. The absence of these acts of preparation, or a failure to promptly follow them by occupancy and use, may be accounted for; and, in measuring the reasonableness of the excuse, all the circumstances may be looked to by the jury. The presence of legal obstacles forbidding occupancy or further preparation has been held to excuse these otherwise requisite acts, and permits bona fide intention, coupled with declarations, to secure the right."

See *Gardner v. Douglass*, 64 Tex. 76; *Gallagher v. Keller*, 87 Tex. 472, 29 S. W. 647; *White v. Wadlington*, 78 Tex. 159, 14 S. W. 296; *Hardin v. Neal*, 32 Tex. Civ. App. 335, 74 S. W. 334. In 17 Neb. 368, 22 N. W. 767, in the case of *Hanlon v. Pollard*, the Supreme Court of Nebraska said:

"A head of a family without a homestead, purchasing a piece of property within the homestead limit as to quantity and value, with the bona fide purpose and intention of residing thereon as a permanent homestead, but who is temporarily prevented from occupying the same by reason of the unexpired term of a tenant thereon, existing at the time of such purchase, or other transient cause, and who does enter and reside upon the same within a reasonable time, and with unnecessary delay, and continue to reside thereon, will take the same free of the lien of a judgment existing at the time of such purchase, or which may be rendered previous to the actual occupancy or residing on such homestead."

Under a liberal construction of the homestead law—and it must be conceded that this law should be liberally construed in favor of the people for whose protection it was enacted—it must be held that a purchase of a piece of land within the statutory limits as to quantity and value with intention in good faith of presently residing on it, or residing on it as soon as some temporary obstacle to such residence can be removed or some necessary preparation for the same can be made, is equivalent to actual occupancy of the residence, and said property is exempt from lien, levy, or forced sale. In the above view we have but followed the law as expressed by the Supreme Court of Kansas, Iowa, New Hampshire, Kentucky, and Illinois. See *Edwards v. Fry*, 9 Kan. 417; *Monroe v. May*, 9 Kan. 466; *Gilworth v. Cody*, 21 Kan. 702.

We are therefore of the opinion that the trial court did not commit any error in sustaining a demurrer to this evidence, and the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

WITHERSPOON v. SMITH et al.
(No. 7654.)

(Supreme Court of Oklahoma. Sept. 28, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 754(3)—ASSIGNMENTS OF ERROR—NECESSITY.

Errors occurring during the trial cannot be considered by the Supreme Court, unless the ruling of the trial court upon the motion for new trial is assigned for error in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8086; Dec. Dig. \Leftrightarrow 754(3).]

Commissioners' Opinion, Division No. 4. Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Lizzie Smith against Frank

Hickman and others. Judgment for plaintiff, and defendant J. G. Witherspoon brings error. Affirmed.

Porter Newman, of Durant, for plaintiff in error. H. C. Mechem, of Ft. Smith, Ark., for defendants in error.

EDWARDS, C. This is an action brought by Lizzie Smith against Frankie Hickman, F. A. Handlin, as trustee for the First National Bank of Ft. Smith, Ark., and J. G. Witherspoon, upon a note secured by a real estate mortgage.

The defendant bank filed its answer and cross-petition setting up notes and a mortgage upon the same real estate. The defendant Witherspoon filed his answer, alleging that he was a purchaser of the real estate, and denied owing a portion of the indebtedness claimed by the bank. The judgment was for the plaintiff in the amount prayed for, and for the defendant Handlin as trustee of the First National Bank of Ft. Smith, for the full amount of the indebtedness claimed by it, from which judgment the defendant Witherspoon appeals.

The petition in error does not assign the overruling of the motion for new trial as error. This court has repeatedly held that errors occurring during the trial cannot be considered by this court, unless a motion for new trial has been made by the complaining party and acted upon by the trial court and its ruling assigned as error in the Supreme Court. *Kee v. Park et al.*, 32 Okl. 302, 122 Pac. 712; *Stinch-Comb v. Myers*, 28 Okl. 597, 115 Pac. 602; *St. L. & S. F. Ry. Co. v. Leake et al.*, 34 Okl. 77, 123 Pac. 1125; *Nidiffer v. Nidiffer*, 44 Okl. 218, 144 Pac. 350; *Maddox v. Barrett*, 44 Okl. 101, 143 Pac. 673; *Avery et al. v. Hays*, 44 Okl. 71, 144 Pac. 624.

There being nothing presented by the record for this court to review, the cause is affirmed.

PER CURIAM. Adopted in whole.

JONES v. RESER et al. (No. 7672.)
(Supreme Court of Oklahoma. Sept. 26, 1916.)

(Syllabus by the Court.)

1. DOMICILE \Leftrightarrow 1, 10—REQUISITES—"RESIDENCE."

The residence of a man having a family which he maintains is prima facie where the family dwells, and a man's acts and conduct are more to be considered in determining the change of residence than any mere declarations of intent; and, when the question of residence or nonresidence is doubtful, the question should be so determined as will best secure the rights of creditors and others having dealings with such party.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 1, 39; Dec. Dig. \Leftrightarrow 1, 10.

For other definitions, see Words and Phrases, First and Second Series, Residence.]

2. DOMICILE \Leftrightarrow 1 — REQUISITES — "RESIDENCE."

The term "residence" means a settled or fixed abode of a character indicating permanency, at least for an indefinite time. It signifies a party's permanent home and principal establishment, to which, whenever he is absent, he has the intention of returning.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 1.]

3. PROCESS \Leftrightarrow 149—SERVICE—RETURN—"RESIDENCE."

The return of the sheriff, which recites that a certified copy of the summons was left with defendant's wife, at his usual place of residence, makes out a prima facie case of residence.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 202-205; Dec. Dig. \Leftrightarrow 149.]

Commissioners' Opinion, Division No. 4. Error from Superior Court, Garfield County; James B. Cullison, Judge.

Action by Mrs. Lewis Jones against Charlie H. Reser and others. Judgment for defendant Frank McVicker on his motion to vacate judgment, and plaintiff brings error. Reversed, with instructions to dismiss motions filed by defendant.

Adam S. Garis, of Enid, for plaintiff in error. Geo. D. Wilson and M. C. Garber, both of Enid, for defendants in error.

MATHEWS, C. The plaintiff in the trial court will be designated as plaintiff here, and the defendant Frank McVicker as defendant here.

On January 8, 1913, plaintiff obtained a judgment against defendant Frank McVicker and several other defendants in an action to foreclose a real estate mortgage. An order of sale was issued and said property sold, and, there being a deficiency judgment, an execution was issued and levied upon certain real property belonging to defendant Frank McVicker. This property was duly advertised and sold, and thereupon said defendant appeared specially and filed objection to the confirmation of sale, and also moved to set said judgment aside upon the alleged ground that no legal service was had upon him.

The service of process upon defendant in the original action was had, as shown by the sheriff's return, "by leaving a certified copy of the summons for defendant with his wife at his usual place of residence in Garfield county, Okl." Judgment was entered by default.

It appears from the affidavits and oral evidence introduced at the hearing upon the motions that defendant, with his wife and children, had resided at 715 West Oklahoma Ave., Enid, Okl., for quite a while (the exact time not being disclosed by the evidence) before the sheriff left the summons for defendant with his wife at this place on the 11th day of May, 1912. It further appears that from about the last of February or the first of March, 1912, the defendant spent most of his

time on a farm owned by him near Crescent, in Logan county, which he claimed at the hearing was his residence at all times after the date last mentioned above. At the time he went out to said farm he took some bedding for himself and feed for his stock, and his wife and children also went out to the farm shortly afterwards. How long they stayed there the evidence does not disclose, but the evidence does show that within a month she and the children were again living at their old home in Enid, but it is claimed by defendant that they had taken up their actual residence with him on his farm and had returned to Enid to send their children to school, and that she and the children again returned to the farm in Logan county as soon as the school term closed. It was further shown that defendant was frequently seen in Enid after the date he claimed to have taken up his residence in Logan county, but at the hearing he claimed that on these occasions he had returned to Enid either on business or to visit his family.

The trial court found in favor of defendant upon the issue joined on the motion to vacate the judgment, but we are unable to agree with his conclusions. As a whole, the evidence upon the part of the defendant is very vague, indefinite, and unsatisfactory, and the claim of residence in Logan county at the time the summons was left with his wife in Enid appears to be a mere subterfuge in an endeavor to evade the results of the judgment taken against him. There were several defendants in the suit, and all of them defaulted. The action was a suit upon a note, and for the foreclosure of a mortgage.

The property named in the mortgage was duly sold under an order of sale, and it was not until other property of defendant was levied on to make the deficiency did defendant file his motion to vacate the judgment, which was about two years afterwards.

[1] It is said in *Schultz v. Barrows et al.*, 8 Okl. 297, 56 Pac. 1053:

"It was declared in *Keith v. Stetter*, 25 Kan. 70, that the residence of a man having a family which he maintains is prima facie where the family dwells, and that a man's acts and conduct are more to be considered in determining the change of residence than any mere declarations of intent; and, when the question of residence or nonresidence is doubtful, the question should be

so determined as will best secure the rights of creditors and others having dealings with such party."

[2] We take the following from *Fidelity & Deposit Co. v. Sheahan*, 37 Okl. 702, 133 Pac. 228, 47 L. R. A. (N. S.) 309:

"There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term."

"The term 'residence' simply means a settled or fixed abode of a character indicating permanency, at least for an indefinite time. It signifies a party's permanent home and principal establishment, to which, whenever he is absent, he has the intention of returning." In *re Clarke*, 15 N. Y. Supp. 370; *Williams v. Farmers' Gin & Grain Co.*, 13 Okl. 5, 73 Pac. 269; *Berryhill v. Sepp*, 106 Minn. 458, 119 N. W. 404, 21 L. R. A. (N. S.) 344; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139.

[3] While it is true that the wife's residence does not control or fix her husband's residence and that where a man's family resides is not necessarily the place of his residence, yet where there is no separation in the case of a married man his residence is prima facie where his wife and family reside. *Missouri, Kansas & Texas Trust Co. v. Norris*, 61 Minn. 256, 63 N. W. 634. While there was a feeble attempt to refute it we are of the opinion that at the time the summons was left with the wife, she and the children were undoubtedly residing in Enid in their old home. In addition to this prima facie case, the return of the sheriff, which recites that a certified copy of the summons was left with his wife at his usual place of residence, also makes out a prima facie case for plaintiff, and we are of the opinion that the unsatisfactory evidence upon the part of the defendant does not successfully rebut such prima facie case to say nothing of the substantial evidence adduced upon the part of the plaintiff showing an actual residence in Enid, Garfield county, at the time of the service of summons.

The judgment should be reversed, with instructions to the trial court to dismiss the motions filed by defendant.

PER CURIAM. Adopted in whole.

¹ Reported in full in the *New York Supplement*; reported as a memorandum decision without opinion in 61 Hun. 619.

WILLMERING v. HINKLE. (No. 7297.)
(Supreme Court of Oklahoma. Sept. 12, 1916.
Rehearing Denied Oct. 10, 1916.)

(*Syllabus by the Court.*)

1. LANDLORD AND TENANT — 243 — RENT — LIEN—REQUISITES.

The statutory lien given a landlord upon the crops grown upon the rented farm exists independently of a seizure by attachment or other process.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 983; Dec. Dig. ¶ 243.]

2. LANDLORD AND TENANT — 252(3)—RENT—LIEN—PRIORITY.

The statutory lien given to the landlord is paramount to the rights of one who purchases from the tenant a crop which is yet upon the leased premises, as the purchaser takes same with constructive notice of the landlord's rights and subject to his lien.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1002, 1024; Dec. Dig. ¶ 252(3).]

Commissioners' Opinion, Division No. 1. Error from County Court, Canadian County.

Action by W. W. Hinkle against William Kime, defendant, and Henry Willmering, interpleader. Judgment for plaintiff, and interpleader brings error. Affirmed.

F. W. Fischer, of Oklahoma City, for plaintiff in error. James A. Cowan, of Moore, for defendant in error.

DAY, C. W. W. Hinkle sued William Kime in the county court for a balance due and unpaid for rent for the year 1914, and at the same time and in the same action sued out a writ of attachment to enforce his lien against the crops grown on the farm during said year.

It appears that summons was duly served and the writ of attachment duly executed, save that the officer left the crop consisting of oats in a bin, and baled oat straw and some corn on the premises and in the possession of the defendant Kime.

Plaintiff in error, Henry Willmering filed an interplea claiming said property by purchase from Kime without notice of the attachment and without notice of the lien of the plaintiff Hinkle. A jury being waived, the cause was tried to the court, and the defendant Kime defaulting, judgment was rendered in favor of plaintiff against him. The issues between the interpleader and plaintiff were then tried, resulting in judgment against the interpleader, from which this appeal is prosecuted.

Plaintiff in error contends that the levy of the attachment was ineffectual for the reason that the attached property was left in the possession of the defendant. Conceding, without deciding, that the contention of plaintiff in error in this regard is correct, that question is not material here.

[1, 2] The undisputed facts disclose that

Kime was the tenant of Hinkle and owed him a balance on rent due and unpaid, and that the oats, corn, and oat straw was grown and stored on the premises during the year 1914, and during said year and while such property was thus stored, plaintiff in error, while present in person, on the premises purchased same from the tenant, Kime.

Section 3806, R. L. 1910, provides:

"Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided."

This section of the statute was adopted from Kansas, and was construed by the Supreme Court of that state prior to its adoption here in the case of *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313. In that case, under a state of facts similar to the instant case, it was held that the landlord had a lien upon the crop, which continued until the rent was paid or until the lien was waived, relinquished, lost, or otherwise divested, and that the lien exists by force of the statute independently of the levy of an attachment; and so long as the crops remain upon the premises the lien will prevail over the claim of a purchaser. And toward the conclusion of the opinion, the following language is used:

"The statutory lien given to the landlord is paramount to the rights of any one who purchases from the tenant a crop which is yet upon the leased premises."

Under the authority of the Kansas case, supra, plaintiff in error having purchased the oats, corn, and oat straw grown and yet on the premises, took same with constructive notice of the landlord's rights and subject to his lien.

Finding no error, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

AMERICAN CENT. INS. CO. OF ST. LOUIS, MO., v. SINCLAIR. (No. 6744.)

(Supreme Court of Oklahoma. Sept. 26, 1916.)

(*Syllabus by the Court.*)

1. ESTOPPEL — 52—"WAIVER"—NATURE.

A waiver is the voluntary or intentional relinquishment of a known right, or such conduct of a party, or his authorized agent, as warrants an inference of such intent. It is essentially a matter of intention and may arise out of the acts done by a party, or his authorized agent, who has full knowledge of all the material facts out of which the right springs.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 121-125, 127; Dec. Dig. ¶ 52.

For other definitions, see *Words and Phrases*, First and Second Series, Waiver.]

2. ESTOPPEL — 119—WAIVER—QUESTION FOR JURY.

"A waiver involves the notion of an intention, entertained by the holder of some right, to abandon or relinquish instead of insisting on the

right." It is a question of fact to be determined by the jury.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 309; Dec. Dig. ¶119.]

8. INSURANCE ¶665(3) — ACTIONS ON POLICIES—EVIDENCE—SUFFICIENCY.

The record in this case examined, and held, there was sufficient evidence, if true, to warrant an inference that there had been a waiver of the iron-safe, books, and inventory clause in a fire insurance policy, and that the cause was properly submitted to the jury for their determination.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711-1716; Dec. Dig. ¶665(3).]

Commissioners' Opinion, Division No. 5. Error from District Court, McCurtain County; Summers Hardy, Judge.

Action by W. C. Sinclair against the American Central Insurance Company of St. Louis, Mo. Judgment for plaintiff, and defendant brings error. Affirmed.

Scothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. Steel, Lake & Hend, of Idabel, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendant in error.

HAYSON, C. The defendant in error, W. C. Sinclair, filed two separate actions against the plaintiff in error, in the district court of McCurtain county, seeking to recover on two insurance policies for loss by fire sustained to property covered by said insurance policies. The plaintiff in error, defendant in the district court, filed its answer denying that the plaintiff, in the case, complied with the terms of the policies and alleging that he violated what is known as the iron-safe, books, and inventory clauses and by reason thereof the policies were forfeited. The defendant in error, plaintiff in the district court, filed his reply and denied specifically each of the allegations of the answer, and alleged that the plaintiff in error, defendant in the district court, had by certain acts and conduct waived the right to forfeit the policies on account of any violation of any of those provisions in the policy. The causes were consolidated and tried to a jury. Verdicts were rendered in favor of Sinclair, defendant in error, and judgment rendered thereon. From this judgment the plaintiff in error, American Central Insurance Company, brings error.

The record discloses the facts to be as follows: On June 24, 1912, the plaintiff in error executed a certain insurance policy, by the terms of which it insured the defendant in error against loss or damage by fire on the stock of merchandise owned by defendant in error, located in his store at Millerton, Okl., in the sum of \$2,500 for one year. And that on October 16, 1912, the plaintiff in error executed a certain insurance policy in a like amount and covering the same property for one year. The policies contained certain covenants and warranties commonly known as the "iron-safe, inventory, and book warranty" clauses. On January 6, 1913, the defendant

in error sustained a total loss by fire to his merchandise. Upon receipt of notice of the loss the plaintiff in error referred the matter to the Pates Adjustment Company of Oklahoma City, for adjustment, and that one E. C. Cooper of that firm handled the matter as adjuster for the company. Upon arriving at Millerton where the loss occurred and after meeting Sinclair, the adjuster learned that the assured had failed to comply with certain provisions of the policies with reference to taking inventories and keeping his books in a safe place, and that some of the books were lost in the fire, etc. The adjuster thereupon refused to proceed further until, what is known as, a nonwaiver agreement was executed by the defendant in error Sinclair. After some discussion the nonwaiver agreement was executed and signed by Sinclair for himself, and the insurance companies by Cooper, the nonwaiver agreement being as follows:

"Nonwaiver Agreement.

"It is hereby mutually understood and agreed by and between W. C. Sinclair, of the first part, and the American Central Insurance Company of St. Louis, Mo., and other companies signing this agreement, parties of the second part, that any action taken by any adjuster or representative of the said parties of the second part in investigating the cause of fire or investigating and ascertaining the amount of loss and damage to property of the party of the first part caused by fire alleged to have occurred on January 6, 1913, shall not waive or invalidate any of the conditions of the policies of the parties of the second part held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement, unless such waiver be in writing and signed by each of the parties to this agreement.

"The intent of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the amount of the loss or damage only for the interest of 'whom it may concern,' without regard to liability of parties of the second part.

"Signed in duplicate this 30th day of January, 1913. W. C. Sinclair. American Central Insurance Company of St. Louis, Mo., E. C. Cooper, Adjuster. American Insurance Company of Newark, N. J., by E. C. Cooper, Adjuster."

After the execution of this agreement, Cooper as adjuster for the insurance company, and Sinclair, the insured, worked together upon books and data produced by the assured; they worked all of that day and a part of the next day. The insured, Sinclair, at the request of Cooper, the adjuster, submitted to an examination under oath which was transcribed and signed by Sinclair. Up to this point the witnesses agree as to what was said and done. But from this point on there is a direct conflict in the testimony. Sinclair testifies in substance that at the conclusion of the investigation by the adjuster Cooper, the adjuster arrived at and stated in definite figures the total amount of the loss; that the adjuster then and there stated that all of the provisions of the policies had been complied with, except one, and that one was the sending in the proofs of loss by the in-

sured; that everything was all right; that he (Cooper) was going back to Oklahoma City in the course of a day or so, and upon his arrival there he would turn the matter in. If it was not all right he would phone Sinclair, but if it was all right Sinclair would get his money in eight or ten days; that he told Sinclair to send in his proofs of loss and get up certain duplicate invoices from wholesale houses and send them in. Cooper in his testimony denies all these statements, but states that he did not arrive at the amount of the loss, did not direct or request Sinclair to send in his proofs of loss and never in any manner promised to pay the loss. Sinclair further testifies that Cooper upon his arrival at Oklahoma City did not phone him, and Sinclair then sent in the proofs of loss and duplicate invoices, and was at some little expense and trouble in so doing. After the evidence was all in the court instructed the jury as follows:

"It is shown by the testimony that after said loss the defendant companies asserted their right to claim a forfeiture of said policies, and that thereupon the parties executed what is known as a nonwaiver agreement, by the terms of which it was agreed that the adjuster for the defendant companies might continue his investigations of said losses without waiving the right of the defendant companies to claim a forfeiture of said policies; and you are instructed that this agreement is valid and binding and that plaintiff is not entitled to recover unless there was in fact an actual adjustment of the losses sustained by plaintiff under the several policies.

"You are instructed that if you believe from the evidence by a fair preponderance thereof that after the execution of said nonwaiver agreement, the plaintiff and the adjuster for said defendant companies ascertained the amount of the loss suffered by plaintiff, and the amount due thereon, and agreed that the defendant companies would pay the same, then you should find for the plaintiff on each several policies against the defendant company writing the same for the amount of loss, which you may find him to have suffered thereunder, not to exceed the amount of said policies, and if you fail to so find, you should return a verdict for the defendant."

[1, 2] Plaintiff in error claims that there was no evidence introduced at the trial which would justify the court in giving these instructions, and that the giving of these instructions was error. This is the only proposition briefed by plaintiff in error. Consequently there is but one question to be determined here: Were the acts of the adjuster, after the execution of the nonwaiver agreement, under the record in this case, as testified to by Sinclair, if true, sufficient to constitute a waiver of the books, inventory and iron-safe clauses in the policies? If so, the instructions are correct, and the jury having passed upon the facts, the judgment must be affirmed; if not, then the judgment must be reversed.

"A waiver is [the voluntary or] intentional relinquishment of a known right, or such conduct as warrants an inference of such intent." *Find-eisen v. Insurance Co.*, 57 Vt. 520; *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266.

It is essentially a matter of intention and may arise out of acts done by one who has

full knowledge of all the material facts of the transaction. In *Northwestern National Life Insurance Co. v. Ward*, 155 Pac. 524, our court says:

"Waiver involves the notion of an intention entertained by the holder of some right to abandon or relinquish, instead of insisting on, the right."

The court in its opinion quoted from *Libby v. Haley*, 91 Me. 331, 39 Atl. 1004, as follows:

"Sometimes the conduct of a party may show that he not only intended to and did waive his rights, but that the adverse party had been misled thereby, when the law raises an absolute bar to the repudiation of conduct that caused the mischief."

[3] What is known as the "nonwaiver" agreement and its effect has been settled, and we believe correctly by this court in *Scottish Union & National Insurance Co. v. Cornett Bros.*, 42 Okl. 645, 142 Pac. 315. A similar question to the one that arises here was before the court in that case. The court there said:

"The nonwaiver agreement above clearly reserves to the company every right, under the provisions of the policy, which had not been previously waived, and to the insured every right which had not been forfeited."

The court then recognizes the rule that the acts of the adjuster might constitute a waiver of the provisions of the policy by adding:

"And the record fails to disclose any acts * * * of the adjuster sufficient to constitute a waiver of books and inventory provisions of the policy."

The nonwaiver agreement here provides:

"That any action taken by any adjuster or representative * * * in investigating the cause of fire, or investigating and ascertaining the amount of loss and damage to property * * * caused by fire alleged to have occurred January 6, 1913, shall not waive or invalidate any of the conditions of the policies * * * and shall not waive or invalidate any of the rights whatever of either of the parties to this agreement, unless such waiver be in writing signed by each of the parties to this agreement. The intent of this agreement is to preserve the rights of all the parties hereto and provide for investigation of the fire and the determination of the amount of the loss or damage only for the interest of 'whom it may concern' without regard to liability of parties of the second part" (the insurance companies).

The nonwaiver agreement provides that the acts of the adjuster while engaged in just two things shall not waive or invalidate the conditions of the policies. Those two things are the investigation of the cause of the fire and the investigation and determination of the amount of loss. There is no contention here that the loss was not an honest loss, but the plaintiff in error defends upon the ground that the provisions in the policies known as the iron-safe, book, and inventory clauses had been violated, and by reason thereof the policies had been forfeited. Forfeitures are not favored by the law, and one who seeks to protect himself by an agreement that his acts shall not be taken or construed as a waiver of a forfeiture which he is entitled to exercise must see to it that

when he acts or makes statements he is engaged strictly in pursuit of those things provided for in the agreement, which under this agreement was the investigation of the cause of the fire or the investigation and ascertainment of the amount of loss. The contract being solely for the benefit of the insurer will be strictly construed against the insurer.

In *Hollis v. State Insurance Co.*, 65 Iowa, 454, 21 N. W. 774, the court say:

"But we think it is not true that such waiver can be created only by such acts or conduct as would create a technical estoppel. Neither forfeitures nor estoppels are favored by the law, and it follows necessarily from this consideration that the waiver of a forfeiture may be sustained by circumstances which do not present the strong equities which would be required to create an estoppel. When plaintiff asserted a claim under the policy for the loss, and defendant was informed of the facts out of which the forfeiture grew, it had the right at once to treat the contract as at an end. If it had elected * * * to remain silent, perhaps a waiver could not have been inferred from its silence. But if, with knowledge of the circumstances, it continued to treat the contract as of binding force, and induced plaintiff to act in that belief, the rule holding that it thereby waived the forfeiture is a very just one."

In *Roberts, Willis & Taylor Co. et al. v. Sun Mut. Insurance Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955, the court says:

"Where an adjuster, after learning of the destruction of the insured's itemized inventory, ledger, and scratch book, refused to proceed with the investigation of the loss until the insured agreed that further examination into the loss should not be taken as any waiver of any defense the companies may have by reason of the breach of warranty as contained in the iron-safe clause, we having lost our detailed inventory, there was evidence from which the jury might infer a waiver of the requirement to produce the books other than the detailed inventory, particularly as the adjuster, after making an estimate of the loss, pursuant to said agreement, applied to plaintiffs, to whom the policies had been assigned, for duplicate invoices of purchases of goods."

To the same effect are the following cases: *Titus v. Insurance Co.*, 81 N. Y. 410 (Court of Appeals); *Oshkosh Gaslight Co. v. Germania Fire Insurance Co.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; *Dick et al. v. Equitable Fire & Marine Insurance Co.*, 92 Wis. 46, 65 N. W. 742; *Brown v. State Insurance Co.*, 74 Iowa, 428, 38 N. W. 135, 7 Am. St. Rep. 495; *Corson v. Anchor Mutual Insurance Co.*, 113 Iowa, 641, 85 N. W. 806; *German Insurance Co. of Freeport, Ill., v. Allen*, 69 Kan. 729, 77 Pac. 529; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; *Liverpool & London & Globe Insurance Co. v. Cargill*, 44 Okl. 735, 145 Pac. 1134.

In *Western Reciprocal Underwriters' Exchange v. Coon*, 38 Okl. 453, 134 Pac. 22, this court in the fourth paragraph of the syllabus says:

"An adjuster for an insurance company is authorized to waive forfeitures in an insurance policy.

"(a) The same rule applies to an assistant adjuster performing the duties of a chief adjuster,

unless his authority is limited, to the knowledge of the assured."

Measured by this rule Cooper had the authority as an adjuster to waive any of the rights of forfeiture in the policy. He acknowledged this right when he refused to proceed until a nonwaiver agreement had been executed after having ascertained that a right of forfeiture existed. If he had authority to enter into this contract for the companies, he also had the authority to waive it and to waive the provisions of the policy under which a forfeiture could be claimed. And this he could do just as effectually verbally as in writing. *Western National Insurance Co. v. Marsh*, 34 Okl. 414, 125 Pac. 1094, 42 L. R. A. (N. S.) 991; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *United States Life Ins. Co. v. Lesser*, 126 Ala. 568, 28 South. 646; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *King v. Council Bluffs Ins. Co.*, 72 Iowa, 310, 33 N. W. 690; *German Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; *Barnard v. National Fire Ins. Co.*, 38 Mo. App. 106; *Wilson v. Commercial Union Assurance Co.*, 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700; *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 South. 143; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Northwestern Nat. Life Ins. Co. v. Ward*, 155 Pac. 524.

The iron-safe, book, and inventory clauses in the policies were primarily for the purpose of ascertaining the amount of the loss should one occur, and to prevent fraud upon the part of the insured against the insurer. If the testimony of Sinclair is true, the amount of the loss was definitely ascertained and adjusted with such books and data as was submitted. The adjuster at the conclusion of his investigation was wholly satisfied, and so expressed himself. The amount of loss having been ascertained, the proofs of loss were no longer necessary; and the adjuster by stating that everything was all right, and that upon his arrival at Oklahoma City he would turn the matter in, and if it wasn't all right would phone, and if it was all right the money would be forthcoming in eight or ten days; and all of these things occurring after the total amount of the loss had been determined, and there being no contention that the loss was not an honest loss, the evidence it seems to us was sufficient to go to the jury upon the question of whether or not the iron-safe, book, and inventory clauses had been waived.

The distinction in the cases as we view it is this: Where the insurer with full knowledge of the violation of the provision of the policy which entitled him to the right to exercise a forfeiture afterwards requests the insured to submit proofs of loss and go to unnecessary trouble and expense in the belief that the forfeiture has been waived, the forfeiture will be considered waived. But upon the other hand, if the insured comes in-

to the knowledge of certain facts that may, if true, result in the right to exercise a forfeiture and the proofs of loss and other data are necessary in an investigation to determine these facts, the request to furnish them cannot be taken as a waiver of the forfeiture.

The former case is well illustrated in *Rundell & Hough v. Anchor Fire Ins. Co.*, 128 Iowa, 575, 105 N. W. 112, 25 L. R. A. (N. S.) 29, where it was said by the court:

"The appellant contends, however, that the plaintiffs were bound to send in their proofs of loss, and that Kirkham did not therefore induce them to incur any expense or trouble which they need not otherwise have incurred. The fallacy of this argument is apparent, when we consider the fact that the plaintiffs knew, as well as the defendant, the condition of the contract, and that they could not recover thereon because of the loss of their books and inventories, and that such being the case they need not have incurred the expense of sending proofs of loss. Hence, if they sent them in response to Kirkham's request, and by so doing incurred expense or trouble, all of which the record showed they did, they are within the principle of the cases in which it has been held that similar acts constituted a waiver of the conditions of the policy."

The latter case is illustrated from the same state in *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335, 5 N. W. 155.

We therefore conclude that the court did not err in giving instructions No. 2 and 4, as above set out; that there was sufficient evidence to go to the jury upon the question of the waiver of the iron-safe, book, and inventory clauses in the policy; that it became a question of fact for the jury to determine, and, the jury having determined it, the verdicts will not be disturbed.

The judgment of the district court will therefore be affirmed.

PER CURIAM. Adopted in whole.

AMERICAN INS. CO. OF NEWARK, N. J., v. SINCLAIR. (No. 6745.)

(Supreme Court of Oklahoma. Sept. 26, 1916.)

Commissioners' Opinion, Division No. 5. Error from District Court, McCurtain County; Summers Hardy, Judge.

Action by W. C. Sinclair against the American Insurance Company of Newark, N. J., on certain policies of insurance. Judgment for plaintiff, and defendant brings error. Affirmed.

Scothern, Caldwell & McRill, of Oklahoma City, for plaintiff in error. Steel, Lake & Head, of Idabel, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendant in error.

HAYSON, C. This is a companion case to No. 6744, *American Central Insurance Co. of St. Louis, Mo., v. Sinclair*, 160 Pac. 60; the cases having, by agreement, been consolidated for trial and tried to the same jury, on the same evidence in the district court of McCurtain county. The two cases by consent of the parties were briefed together. The questions of law and fact involved in this case, and the assignments of error raised, are the same as were involved in case No. 6744, *American Central Insurance Co. v. Sinclair*, 160 Pac. 60. The conclusions reached in that case are the same in this case.

The judgment of the trial court is therefore affirmed.

PER CURIAM. Adopted in whole.

FOLSOM-MORRIS COAL MINING CO. v. DE VORK. (No. 6581.)

(Supreme Court of Oklahoma. Feb. 15, 1916. Rehearing Denied Oct. 10, 1916.)

(Syllabus by the Court.)

DAMAGES \S 132(1)—EXPLOSIVES \S 8—MASTER AND SERVANT \S 304 — PROXIMATE CAUSE — LIABILITY OF MASTER TO THIRD PERSONS—EXCESSIVE DAMAGES.

F.-M. was engaged in mining coal, and in connection therewith, maintained an uninclosed powder house, in which it stored in cans blasting powder. When the powder was practically removed from said cans, the cans containing small quantities of powder were thrown on the ground near said powder house, where infants had access to such cans. From said cans, D. and J., infants, gathered a quantity of powder, which D. and J. carried in cans to about 300 yards from where said powder was obtained. J. strewed the powder carried by him upon the ground, struck a match and applied it to said train of powder, about the time that D. attempted to pick up some of said powder upon the ground. The powder upon the ground exploded, and ignited the powder in the can carried by D., which also exploded and severely burned and permanently injured D. Held, that although such injuries be immediately brought about by the intervening cause of the striking of the match by J., such intervening cause was set in motion by the original wrongdoing of F.-M. in throwing out said cans containing said small portions of powder in a place accessible to D. and J., and F.-M. is liable for the resulting damages caused by said explosion of powder. Held, further, that the "powder monkey," employed by F.-M. at said powder house, being present and not objecting to the removal of said powder by said D. and J. from said cans, his action in so doing must be regarded as the negligent act of F.-M. Held, further, that under the facts of this case, a verdict of \$5,000 is not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 372; *Dec. Dig.* \S 132(1); *Explosives*, Cent. Dig. \S 4, 5; *Dec. Dig.* \S 8; *Master and Servant*, Cent. Dig. \S 1226-1229; *Dec. Dig.* \S 304.]

Commissioners' Opinion, Division No. 1. Error from District Court, Coal County; Robert M. Rainey, Judge.

Action by John De Vork, by his father and next friend, Joe De Vork, against the Folsom-Morris Coal Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. G. Ralls, of Atoka, for plaintiff in error. Fooshee & Brunson and C. M. Threadgill, all of Coalgate, for defendant in error.

COLLIER, C. This is an action commenced by defendant in error to recover damages in the sum of \$15,000 against plaintiff in error for personal injuries. Hereinafter the parties will be designated as they were in the trial court.

The material evidence in the case shows that defendant was engaged in coal mining, and in connection therewith maintained a powder magazine or powder house, located on the premises of defendant, within a few hundred feet from the mouth of the coal mine, in which was kept and stored large

quantities of blasting powder from which defendant furnished its employes or coal diggers; that said powder was inclosed in large black cans, each of which contained about 25 pounds of powder; that said cans were opened by defendant and the powder partially emptied therefrom and furnished to its employes; that said cans, still containing small quantities of powder, were thrown out on the ground near and around said powder house; that the place where said cans were thrown after being emptied was unfenced, unprotected, and unguarded; that plaintiff, who was at the time about 12 years of age, together with other small boys, obtained from said powder cans small quantities of powder which had been left in the cans by defendant, its agents and employes, and thereby obtained a quantity of powder which was placed in two cans respectively by said plaintiff and one of the other boys, and on the same day, and shortly after the boys had secured the powder, the plaintiff and one of said small boys took said powder so obtained from said powder cans from where they obtained it to a distance of about 300 yards; that plaintiff carried one of the cans containing said powder in his arms, and one of the other boys carried another can containing a large quantity of powder, obtained as aforesaid, and emptied said powder on the ground, stringing it along for some distance, at which time plaintiff was standing close to said powder being emptied on the ground, and attempted to pick up some of said powder so emptied upon the ground to put it in the can carried by him; and that while so doing, the other boy struck a match and stuck it to said powder so emptied on the ground, and said powder instantly exploded, and a flash of the fire therefrom entered said powder contained in the can held by plaintiff in his arms, which said powder instantly exploded. The evidence further shows that as a result of said explosion, plaintiff was burned about the neck, arms, face, down on the side of his chest, on both arms, and from the forearm down through the palm of his hand; that said burns were deep and very severe; that plaintiff was burned through the skin and into what is known as the "deeper structures"; that practically all the skin was burned off; that his left hand was burned worse than the right; that the burns on the left hand were heavy enough to cause the contraction of the left wrist; that his hand was drawn almost to a right angle; that said burns were severe enough to cause the contraction of his muscles, and may have burned the muscles, ligaments and tendons; that the skin had to be taken out of the palm of his hand and off his fingers, and on the back of his hand and arm; that the burns commenced about even with the nipple; that plaintiff's entire face was burned; that he was confined to his bed for 5 months from the effects of the burns; and that said in-

juries were permanent. Thereupon plaintiff was exhibited to the jury to be examined as to the scars caused by said burns.

The evidence of defendant shows that it had been in control of the mine for about a month and a few days, and that some of the cans in which powder was left had been thrown out by the former company, and that was the usual way to dispose of said cans; that during the time it had control of the mine, it had used and thrown out about 20 powder cans a day; that defendant had a person employed at the powder house, known as a "powder monkey," whose duties were to deliver the powder to the miners; that people had been accustomed to carrying off the cans for various purposes, and that said "powder monkey" in charge of said powder house, as agent of said defendant, saw plaintiff and the other boys on the day of the accident getting powder, and did not in any way attempt to prevent them from so doing.

Upon conclusion of the evidence of plaintiff defendant demurred thereto, which was overruled and excepted to. Defendant requested 11 instructions, which were refused by the court. The court instructed the jury as follows:

"(4) The plaintiff must make out his case by a fair preponderance of the evidence. If he fails to do this or if the evidence is equally balanced your verdict should be for the defendant.

"(5) If you believe from a fair preponderance of the evidence in this case that the defendant, the Folsom-Morris Coal Mining Company, negligently and carelessly threw out its powder cans with small quantities of powder therein, and negligently permitted them to remain there unprotected, and you further believe that the plaintiff, John De Vork, was a young boy not of mature years and discretion, and did not understand or appreciate the dangerous condition of the powder, and that the negligence of the defendant company, if you find that it was negligent, was the proximate cause of the plaintiff's injuries, that is, that the plaintiff's injuries were directly caused as a result of said negligence, you will find for the plaintiff; otherwise you will find for the defendant.

"(6) The fact that the plaintiff was injured does not presume negligence on the part of the defendant; but you are to determine from all the evidence in the case whether or not the defendant was negligent.

"(7) Negligence is the failure to do what a reasonably prudent man, under the circumstances, would have done, or doing what a reasonably prudent man would not have done under the circumstances.

"(8) In the event you find for the plaintiff, in arriving at the amount of his recovery you may take into consideration and allow him reasonable compensation for mental and physical suffering, if you find that he suffered any, and you may take into consideration the reasonable and probable effects in the future upon the health of the plaintiff and the effect, if any, upon his ability to earn a living after he reaches the age of 21 years.

"(9) If you believe that any witness has knowingly and willfully testified falsely to any material fact in issue, you may disregard said witness' testimony, in whole or in part, or you may give it such weight and value as you deem proper.

"(10) You are the sole judges of the credibil-

ity of the witnesses and the weight and value to be given to their testimony. In determining as to the credit you will give a witness, and the weight and value you will attach to a witness' testimony, you may take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the results of the trial; the motives of the witness, if any, in testifying; the opportunity the witness had to observe or to be informed as to the matters respecting which the witness gives testimony and the inclination of the witness to speak the truth, or otherwise, as to the matters within the knowledge of the said witness.

"(11) All these matters being taken into account together with all the facts and circumstances in evidence, it is your province to give to each witness such credit and the testimony of each witness such weight and value as you deem proper."

The jury returned a verdict in favor of plaintiff for \$5,000, to which defendant duly excepted. Motion for new trial was filed by defendant, which was overruled and excepted to, and an appeal perfected to this court.

There are many errors assigned, a large majority of which are predicated upon instructions refused, which we deem unnecessary to set out; the material errors assigned, from our viewpoint, being the action of the court in overruling defendant's demurrer to plaintiff's evidence, and in refusing to grant a new trial.

The material evidence shows beyond question that the cans thrown out by defendant containing the parcels of powder were accessible to plaintiff and other boys, and therefore the first material proposition with which we are met is whether or not such action on the part of defendant was actionable negligence. We are unable to agree with defendant that under the facts in this case no liability attached to defendant; or, that the case of *Pollard v. Oklahoma City Ry. Co.*, 36 Okl. 96, 128 Pac. 300, Ann. Cas. 1915A, 140, in which the facts as to the intervening causes are entirely different from those in this case, supports its contention. In that case it is said:

"It is a well-settled rule of law that requires each person to use such care for the safety and well-being of others in and about the keeping of his property as an ordinarily prudent person would have used under all the facts and circumstances of the case, and the failure to use such care is negligence; and he who does, or permits, a wrongful act is liable for the consequences which ensue in the ordinary and natural course of events, although such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the first or original wrongdoer."

In *Peirce v. Lyden*, 157 Fed. 552, 85 C. C. A. 312, it is held:

"Defendant maintained a shed in a railroad yard of about two acres near a schoolhouse in a city, in which he kept open barrels of oil. During the daytime the shed was left unlocked, and for several months children living in the vicinity who played in the yard had been in the habit of stealing oil from the barrels in old cans and making fires with it in the yard, which fact was known to defendant's watchman. On one such occasion plaintiff, who was an infant, was burned and injured. Held, that defendant was chargeable with notice of such practice of the children from its long continuance and the

knowledge of his watchman, and that the question of his negligence in keeping the place in such condition in view of the danger of their injury therefrom was for the jury."

In *Miller v. Boston & N. St. Ry. Co.*, 197 Mass. 535, 83 N. E. 990, it is held:

"In an action for personal injuries, where defendant's negligence is the proximate cause of the injury, the fact that there are other concurring culpable causes will not preclude recovery."

In *Mattson v. Minnesota & North Wisconsin R. Co.*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498, it is said:

"The dangerous instrumentality here involved (dynamite) is an extremely hazardous article in the hands of mature persons, and a hundredfold more so in the hands of young children. The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article (*Keasbey, Electric Wires* [2d Ed.] 269, 270), and is greater and more exacting as respects young children. As to such, the care required to be exercised is measured by the maturity and capacity of the child. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745. What would constitute reasonable care with respect to adults might be gross negligence as applied to a young child. 7 Am. & Eng. Enc. Law [2d Ed.] p. 441, and cases cited. The case at bar, within these rules, is even stronger than the so-called 'turntable cases.' There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced therefrom, the greater the attraction. As compared with an ordinary turntable, dynamite is vastly more attractive, and far more dangerous. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. In view of these considerations, the rule of law imposed upon him who possesses such dangerous articles should be more exacting than in the case of a turntable; and, applying the rule to the facts before us, it is clear that the jury was justified in finding negligence upon the part of defendant. It failed to take proper care of dynamite brought into this vicinity, and left it exposed upon the premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves.

* * * In the case of *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, it appeared that the railway company had been operating a coal mine near one of its stations, and was in the habit of depositing the slack upon an open lot between the mine and the station in such quantities that it took fire from the spontaneous combustion and remained in that condition, constantly burning. Plaintiff, a young boy, visited the coal mine in company with another boy, and became frightened by threats of other boys who preceded them to the mine, and, in an effort to escape from them, fell into the burning slack, and was severely injured. The company was held guilty of negligence in not properly guarding the pit of slack, and that, under the circumstances disclosed, the plaintiff was not a trespasser. It appeared that people in general visited the mine at pleasure, including boys of the age of plaintiff. There was nothing particularly attractive about the mine, either to adults or children, and certainly nothing attractive in the burning pit of slack. The court in that case cited and commented favorably upon the leading English case of *Lynch v. Nurdin*,

1 Q. B. 29. In that case it appeared that defendant's servant left the horse and cart he was driving for his master unhitched in the street and unattended, while he entered a house on some business errand. Plaintiff, a boy of 7 years, and other children, discovering the horse unhitched, began playing about the cart. Some of the boys got into the cart, while another led the horse down the street. Plaintiff, in attempting to get out of the cart, fell between the wheels, the cart passing over and breaking one of his legs. Defendant, the master, was held liable for the neglect of its servant in leaving the horse in the manner stated, and that his responsibility was not overcome by the fact that the boys were trespassers."

The contention that the plaintiff was a trespasser is not well taken. In *City of Shawnee v. Cheek*, 41 Okl. 227, 137 Pac. 724, 51 L. R. A. (N. S.) 672, Ann. Cas. 1915C, 290, it is held:

"A child under 7 years of age, or, in the absence of evidence of capacity, between 7 and 14 years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting question of duty of owner in respect to dangerous condition of premises. * * *"

The question of whether or not plaintiff, at the time of the accident, was so matured as to appreciate the danger of handling the powder, was under proper instructions of the court, submitted to the jury; and the verdict found was a finding by the jury that plaintiff was not so matured as to understand, and did not understand the danger incident to the handling of said powder.

Whether or not there was evidence sufficient to show liability on the part of defendant was a question for the jury; and this question, we think, was submitted to the jury under proper instructions of the court. In *Littlejohn v. Midland Valley R. Co.*, 148 Pac. 120, it is held:

"In an action for damages for personal injury, charged to have been caused by negligence, the court should not sustain a demurrer to the evidence and withdraw the case from the jury, unless, as a matter of law, no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

We are therefore of the opinion that in permitting the cans containing the powder to be thrown out, as they were, that defendant was liable for such negligence; especially in view of the fact that the "powder monkey" in charge of the powder house was cognizant of the action of the boys in taking the powder, which knowledge of the "powder monkey" must be imputed to defendant, and did not attempt to prevent them from taking the powder. It is true that the injury complained of was brought about by an intervening cause, but such intervening cause was set in motion by the wrongdoing of defendant in throwing out the cans containing the powder. *Pollard v. Okl. Cy. R. Co.*, supra. We are therefore of the opinion that the court did not err in overruling the demurrer to plaintiff's evidence.

The very many requested instructions refused were, where they assert correct rules of law, covered by the general instructions

of the court. We therefore do not deem it necessary to specifically point out the vice of the several requested instructions properly refused by the court.

In view of the fact that the injuries received by plaintiff are permanent, and that necessarily he must have suffered extreme pain, and must go through life terribly disfigured, we are unwilling to say that a verdict of \$5,000 is excessive. Upon a most careful consideration of the entire record, we are of the opinion that the court did not err in overruling the motion for new trial.

This cause should be affirmed.

PER CURIAM. Adopted in whole.

BERRYHILL v. MILLER. (No. 6381.)
(Supreme Court of Oklahoma. Sept. 26, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐614—RECORD—CASE-MADE—AUTHENTICATION.

Where a case-made is signed by the trial judge, but is not attested by the signature of the clerk and the seal of the court, it is not sufficiently authenticated, as required by the statute, to constitute a valid case-made, and the judgment of the trial court cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2708-2713; Dec. Dig. ⇐614.]

2. APPEAL AND ERROR ⇐537—RECORD—CASE-MADE—EXTENSION OF TIME.

A purported order of the trial judge extending the time in which to make and serve a case-made is without force where the case-made fails to show affirmatively that such order was made and is entered of record in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2404, 2405; Dec. Dig. ⇐537.]

Commissioners' Opinion, Division No. 5.
Error from County Court, Muskogee County;
Thos. W. Leahy, Judge.

Action by A. J. Berryhill against Robert Miller. Judgment for defendant, and plaintiff brings error. Dismissed.

Thea. E. Lipscomb and Sumner J. Lipscomb, both of Muskogee, for plaintiff in error. Crump, Bailey & Crump, of Muskogee, for defendant in error.

CAMPBELL, C. This is an appeal from a judgment of the county court of Muskogee county in favor of the defendant, Robert Miller. The plaintiff, A. J. Berryhill, brings this proceeding to have the judgment reversed, and brings the record to this court by case-made.

[1] 1. The case-made, attached to the petition in error, is authenticated by the certificate of the trial judge, and is attested by the signature of the clerk. The seal of the court is not attached thereto. Section 5242, Revised Laws 1910, provides:

"The case and amendments shall, upon three days' notice, be submitted to the judge, who shall settle and sign the same, and cause it to

be attested by the clerk, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case."

In the case of *Oklahoma City v. McKean*, 39 Okl. 300, 135 Pac. 19, it was held:

"Where a case-made is signed by the trial judge, but is not attested by the clerk of the court, and the seal of the court is not attached thereto, it is not sufficiently authenticated, as required by the statute, to constitute a valid case-made, and the judgment of the trial court cannot be reviewed, and the appeal will be dismissed."

This same question was again considered by this court in the matter of the Appeal of *Garland*, 153 Pac. 153, not yet officially reported, and the above rule was followed, and in the opinion it was said:

"The signature of the trial judge, settling the case-made, is not attested by the signature of the clerk of the court and the seal of the court. This is imperative, and a failure to so attest leaves the attempted appeal without verity."

The case-made in the instant case, not being authenticated as required by law, is a nullity, and the appeal is without verity, and should be dismissed.

[2] 2. It appears from the case-made that the motion for a new trial was considered and denied by the trial court on November 11, 1913, and on that date the trial court granted an extension of time in which to make and serve a case-made, and authorized the service of case-made within 60 days from that date, which time would have expired on January 10, 1914, which order of court was duly entered of record in the trial court, as affirmatively appears from the case-made. On December 18, 1913, the trial judge made an order which gave an additional extension of time for 30 days on the application of the plaintiff, but this order of extension does not affirmatively appear from the case-made to have been entered of record in the trial court as required by the statute. The case-made attached to petition in error was actually served on the defendant on February 9, 1914, as shown by the case-made itself. This service was not within the time originally granted by order of the court duly entered of record, but was within the time granted by the judge in the last purported order, which was never entered of record in the trial court. The question presented by the record before us is one of jurisdiction, and one which the parties cannot waive, and this court cannot overlook. *Keenan v. Chastain et al.*, 157 Pac. 326, not yet officially reported. If the last order of the trial judge is without force, the case-made was not served within time, and would be a nullity.

In the case of *Mobley, Adm'r, v. Chicago, Rock Island & Pac. Ry. Co.*, 44 Okl. 753, 145 Pac. 321, this court held:

"A purported order of the trial judge extending the time in which to make and serve a case-made is without force, where the case-made fails to show affirmatively that such order was made and is entered of record."

This seems to have been the rule in this court for a considerable period of time, and it has been so often restated that attorneys who appeal cases to this court should familiarize themselves with it in order that appeals may not be dismissed. The rule was fully established by the decision of this court in the case of *Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co.*, 23 Okl. 824, 102 Pac. 708, and has been followed since, and seems to be very generally recognized at this time by the profession.

For the reasons stated in this opinion, this court cannot consider the questions presented by the appeal, for to do so would be to indulge in an effective method of arbitration not fully contemplated by law, and this appeal is therefore dismissed.

PER CURIAM. Adopted in whole.

**FIRST NAT. BANK OF POTEAU v.
SCHOOL DIST. NO. 49 OF HUGHES
COUNTY. (No. 7069.)**

(Supreme Court of Oklahoma. Sept. 26, 1916.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR §185(1)—REVIEW—
SCOPE AND EXTENT—JURISDICTION OF TRIAL
COURT.**

The jurisdiction of the court from which an appeal comes to this court is a fundamental question in every case, and if such court had no jurisdiction, the parties cannot waive its want of jurisdiction, and this court should not overlook the want of jurisdiction of the trial court, even though the parties have not seen fit to challenge the jurisdiction of the trial court in some proper manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1168, 1170-1170; Dec. Dig. §185(1).]

**2. COURTS §120—JURISDICTION—COUNTY
COURT.**

Under section 12 of article 7 of the Constitution, and section 1816, Rev. Laws 1910, the county courts have no jurisdiction in civil cases where the amount involved is \$200 or less.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. §120.]

Commissioners' Opinion, Division No. 5. Error from County Court, Hughes County; J. Ross Bailey, Judge.

Action by the First National Bank of Poteau against School District No. 49 of Hughes County. Judgment for defendant, and plaintiff brings error. Reversed and dismissed.

J. L. Skinner, of Holdenville, for plaintiff in error. P. W. Gardner, of Holdenville, for defendant in error.

CAMPBELL, C. This action was commenced in the county court of Hughes county by the plaintiff against the defendant for the recovery of \$150, and interest, alleged to be due it under the terms of 12 coupon notes in the sum of \$12.50 each. The plaintiff did not separately state a cause of action upon each coupon note, but pleaded the entire 12 notes

as one cause of action, and prayed for judgment in the aggregate sum of \$150, interest and costs. The defendant filed a demurrer to the second amended petition upon the ground that the amended petition did not allege facts sufficient to constitute a cause of action, and this ground of demurrer was the only one presented to the trial court. The trial court sustained the demurrer and dismissed the cause at the costs of the plaintiff, and this appeal is brought to this court on a transcript of the record.

The only question discussed by counsel is whether or not the amended petition states a cause of action. The trial court held it did not, but we cannot agree with him in the conclusion which he reached. We have carefully examined the petition, and conclude that it is good as against the demurrer upon the ground presented, and that the amended petition stated a cause of action. But we cannot overlook another question involved in every appeal to this court, which is not discussed by counsel. Was the cause of action stated within the jurisdiction of the county court?

[1] It was held in *Keenan v. Chastain et al.*, 157 Pac. 326, not yet officially reported, as follows:

"The question of jurisdiction is primary and fundamental in every case, and cannot be waived by the parties or overlooked by the court. It is the bounden duty of the court to examine into its jurisdiction, whether raised by any party or not, and sua sponte to determine its own jurisdiction."

In the opinion of the court in the above case the general rule is stated and approved, and it is declared to be:

"The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court whether propounded by counsel or not"—citing many cases.

Under this rule it becomes the duty of this court to determine on its own motion whether the county court of Hughes county had jurisdiction of the cause of action stated in the petition. The rules of procedure would have required plaintiff to have stated separately the 12 different causes of action, and if such had been done, each cause of action would only involve \$12.50, exclusive of interest; but it saw fit to state one cause of action upon the twelve different notes, and seeks a judgment in the aggregate sum of the entire 12 notes. In the aggregate the sum involved was \$150, exclusive of interest, under the plaintiff's idea of pleading.

[2] In the recent case of *Musser v. Baker*, Judge, 158 Pac. 442, being No. 7484 in this court, it was held:

"Constitution, art. 7, § 12, and Revised Laws 1910, § 1816, construed together, and held to vest the county court with no jurisdiction of civil cases involving \$200 or less."

Under the construction of the Constitution and the provision of the statute, it would ap-

pear that the county court of Hughes county did not have jurisdiction of the cause of action stated in the second amended petition, and such cause should have been dismissed for want of jurisdiction. Not only was the judgment rendered by the trial court erroneous, but it was without jurisdiction to render any judgment except one of dismissal for want of jurisdiction.

The judgment of the trial court is reversed, and the cause remanded to the county court of Hughes county, with directions to dismiss the action for want of jurisdiction.

PER CURIAM. Adopted in whole.

TALLIAFERRO v. ATCHISON, T. & S. F. RY. CO. et al. (No. 5662.)

(Supreme Court of Oklahoma. Sept. 26, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §800(1)—USE OF STREETS—LIABILITIES FOR INJURIES.

The city of Perry maintained drainage ditches along the north and south sides of D street, immediately to the east of the Santa Fé railroad crossing in said city, which ditches were wholly within the street, with a roadway along said street between such ditches. There was a bridge over the ditch on the south side, which was in a dilapidated condition, which was, at the time of the injury complained of, being used as a means of crossing such ditch in going along a private road across the block to a certain cotton gin and two residences. The bridge in question was practically level with the surface of the street. The horse which plaintiff was driving, attached to a buggy, was frightened by the negligent acts of the employees of the defendant railway company in permitting steam to escape unnecessarily from an engine standing on the Santa Fé track just south of the crossing on D street, according to the testimony of the plaintiff, while he was driving along D street between the Frisco and Santa Fé tracks, and ran across the Santa Fé crossing toward the east, one wheel of the buggy striking the corner of the bridge across the south ditch, which caused plaintiff to drop a drive rein and become partially overbalanced. The running horse, at this point, turned into the roadway, and ran farther in an easterly direction, gradually crossing D street to the north side thereof. Just before running into the ditch on the north side of D street, the horse suddenly turned and started to the south side of D street. Neither the horse nor the buggy went into the ditch on the north side of D street at the point where the horse suddenly turned, and the buggy was not upset, but plaintiff fell from the buggy into the ditch and was injured. The ditch at the point where plaintiff fell into it was about two feet deep. The plaintiff was fully aware of the condition of D street, and had driven along the same many times just prior to his injury, and the horse which he was driving on the occasion of his injury was beyond his control, and had been from the time it crossed the Santa Fé track. Held, that the city of Perry is not liable to plaintiff on account of the injuries sustained by him in such fall.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1666; Dec. Dig. § 800(1).]

2. RAILROADS — 360(2) — OPERATION — ACCIDENTS AT CROSSINGS — CARE REQUIRED.

A railway company, in the enjoyment of its right to operate its trains over its road, must exercise ordinary care not to injure a person who is in the act of crossing its tracks at a public crossing, and its liability for injuries, sustained by a person in a runaway which was caused by the horse taking fright from steam escaping from its engine, is based upon lack of ordinary care under the circumstances; and, where the conditions are such that noises from escaping steam would endanger a person at a public crossing, which result could be avoided by temporarily staying or suspending the noise without materially interfering with the due operation of the train, ordinary care and prudence would require that it be done.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1242; Dec. Dig. — 360(2).]

3. APPEAL AND ERROR — 499(3) — TRIAL — 62(1) — WITNESSES — 275(2) — ACCIDENTS AT CROSSINGS — ADMISSIBILITY OF EVIDENCE — RECORD — CROSS-EXAMINATION OF WITNESS.

The court erred in sustaining the objections to the introduction of evidence offered by plaintiff in rebuttal, and in refusing to permit plaintiff to complete his record by making a tender of the excluded testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2297; Dec. Dig. — 499(3); Trial, Cent. Dig. § 148; Dec. Dig. — 62(1); Witnesses, Cent. Dig. §§ 968, 974; Dec. Dig. — 275(2).]

4. RAILROADS — 401(3) — OPERATION — ACCIDENTS AT CROSSINGS — INSTRUCTIONS.

Instructions examined, and held to be erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1386; Dec. Dig. — 401(3).]

(Additional Syllabus by Editorial Staff.)

5. NEGLIGENCE — 4 — CARE — "ORDINARY CARE."

The term "ordinary care" denotes such degree of care as is commensurate with the dangers to be encountered, and is determined by the jury in fixing the standard of conduct reasonably to be expected from ordinarily prudent persons under similar circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. — 4.

For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

Commissioners' Opinion, Division No. 5. Error from District Court, Noble County; W. M. Bowles, Judge.

Action by C. T. Talliaferro against the Atchison, Topeka & Santa Fé Railway Company and another. Judgment for defendants, and plaintiff brings error. Affirmed as to defendant City of Perry and reversed as to defendant railway company, with directions to grant a new trial.

P. W. Cress and Henry S. Johnston, both of Perry, for plaintiff in error. Cottingham & Hayes, of Oklahoma City, and H. E. St. Clair, of Perry, for defendants in error.

CAMPBELL, C. This action was commenced in the district court of Noble county by C. T. Talliaferro, as plaintiff, against the Atchison, Topeka & Santa Fé Railway Company and the city of Perry, as defendants, to recover damages for personal injuries sus-

tained by him on account of the alleged negligence of the defendants. The cause of action was stated in two counts. The trial resulted in a verdict for the defendants, and judgment was rendered on the verdict for the defendants. The plaintiff appeals, and alleges many errors, on account of which he seeks a reversal of the judgment. We shall consider the record first, as it relates to the city of Perry, and, second, as it relates to the Atchison, Topeka & Santa Fé Railway Company.

[1] 1. According to the evidence of the plaintiff, he was driving along D street in the city of Perry in a buggy on the 27th day of January, 1910, in the afternoon, between the Frisco and Santa Fé railway crossings, going in an easterly direction, to make delivery of some goods to a house in that direction, and just as he got into the basin between the Frisco and Santa Fé tracks he heard the noise of escaping steam from an engine on the Santa Fé track just south of him, and the shrieking noise from such engine frightened the horse he was driving, and the horse plunged forward and ran up the incline to the Santa Fé track where it crossed D street. He had his horse under control by the time he reached the track and then the steam became more violent and the noise became more shrieking, and as he drove down the decline from the track the noise continued. That he saw some person in the engine cab when the steam first frightened his horse, and the person was looking at him and laughing, and when the noise became more shrieking and the steam more violent, just as he was driving down the decline from the track, he saw this same person in the same condition as before in the cab of the engine. He was then trying to control his horse, but she plunged over the tracks and down the decline. The engine was standing still, and steam was coming from the top and bottom of the engine. He was holding on the lines and trying to control her, and when she ran down the decline from the track she was going as fast as she could, and just as he attempted to cross the bridge across the drainage ditch on the south side of the street, his buggy wheel struck the bridge at an angle of about 30 degrees, struck the north abutment more to the east end of the abutment on the north, and as he struck the bridge the horse was going at full speed, and one line was knocked out of his hand, and he was bounced up in the buggy and lost control of the drive rein. The horse then turned back into the roadway in the street and ran in an easterly direction, gradually crossing the street to the north side, and when the horse came near to the drainage ditch on the north side of the street it suddenly turned toward the south side. Neither the horse nor the buggy went into the ditch, and the buggy was not upset, but plaintiff was thrown from the bug-

gy into the ditch on the north side, and broke his leg and bruised himself, and the horse ran to the south side of the street and plunged into the ditch, dragging with her the buggy. There were two drainage ditches, one on the north side and one on the south side of D street just east of the Santa Fé crossing, and between these two ditches there was the roadway, both ditches being within the street. There was a bridge immediately to the east of the crossing, which was used as a means of crossing the south drainage ditch in going along a private road over the block to the cotton gin and two residences, and the planks on the bridge were loose and the bridge was in a bad condition, but the north end of the bridge was level with the ground. He had crossed this bridge and knew about its condition, and knew about the ditches on both sides of the street, and had frequently traveled along this street. The horse was beyond his control after crossing the Santa Fé tracks. The ditch into which he was thrown was about two feet deep. This, in substance, was the testimony of the plaintiff bearing upon the cause of his injury.

It appears from this testimony that the horse which plaintiff was driving became frightened and ran away on account of the negligence of the employes of the defendant railway company, and when the horse ran down the decline immediately east of the Santa Fé tracks, it was running away, and was beyond the control of the driver. The unsafe condition of the bridge across the south ditch may be conceded, but such condition of the bridge in no way contributed to the injury which plaintiff received, unless that portion of the bridge which the buggy struck was in some manner responsible for the injury. As pointed out, the testimony showed that the portion of the bridge which the buggy struck was the north end, and it was level with the ground. No complaint is made as to the end of the bridge being improperly constructed or placed, and nothing gave way when the buggy struck it. Nothing except the usual result attended the striking, namely, the buggy bounded, and the plaintiff was bounced up in the buggy. No negligence, chargeable to the city of Perry, operated to bound the buggy or bounce the plaintiff, and the fact that he lost control of his drive rein was a mere incident so far as the city was concerned in its legal relation to the plaintiff. The bridge might have been in perfectly safe condition and still the same result would have attended the contact of the buggy with the corner of the bridge. There is therefore no causal relation between the unsafe condition of the bridge and the injury sustained by plaintiff.

There were two drainage ditches in the street, one along the north side and the other along the south side. This street was one along which there was very little travel, and

plaintiff knew of the condition of this street. It seems that it was used only by persons who had occasion to visit a very thinly inhabited portion of the city. The street in question was of the usual width, and the ditch where the bridge crossed it on the south side was probably not over four feet wide and three feet deep, and the ditch on the north side of the street was probably a little wider at places, but at no place between the Santa Fé crossing and the place where the injury occurred was the ditch more than three feet deep. The street had been in the same condition for a long time prior to the date of the accident, which occurred about 1 o'clock in the afternoon. There was no culpable defect in the street at the time of the injury under the evidence offered by plaintiff. Taking into consideration the infrequency of travel along this street and the abandoned condition of the roadway along the same, it cannot be said with reason, that the city was guilty of negligence in maintaining it in the condition in which it was at the time of the injury to plaintiff. Under the evidence of the plaintiff, the city had used proper care and diligence to keep the street in question in a reasonably safe and convenient condition for travel in the usual and ordinary manner, and there was no obligation resting upon the city to furnish plaintiff such a highway upon which it would be safe for his horse to run away. There is no evidence to show that these ditches were not necessary in order to furnish an outlet for the surface water, and we cannot assume that they were unnecessary for that purpose. If they were, the only way in which the city could provide against injury to the traveling public would be to construct barriers along the ditches in question, and even if the conditions were such as to have made it the duty of the city to have taken that precaution, it does not appear from the evidence that the injury would not have occurred.

The rule in relation to the liability of a municipality for failure to keep its streets in proper and safe condition is discussed in Dillon on Municipal Corporations, vol. 4, § 1706, as follows:

"The liability is not that of a guarantor of the safety of the traveler. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. They are under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist, or as such may reasonably be expected to occur. They are not bound to keep the streets in such condition that a traveler thereon may, with safety, run his horses at a furious rate of speed or drive thereon unmanageable horses, nor are they bound to keep them in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away."

A learned discussion of the subject is found in the decision of the court in *Ring v.*

City of Cohoes, 77 N. Y. 83, 33 Am. Rep. 574, where it is said:

"A municipal corporation, bound to keep its streets in repair, does not become an insurer of travelers thereon. It is bound to use reasonable skill and diligence in making its streets safe and convenient for travel. It is under no obligation to provide for everything that may happen upon its streets, but only for such use of them as is ordinary or as may reasonably be expected. It is not bound to keep its streets in such condition that a traveler thereon may, with safety, run his horses at a furious rate of speed or drive thereon safely unmanageable horses, neither is it bound to keep its streets in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away."

After discussing the conflicting decisions upon this question, the court announces the rule, which finds support in the weight of authority as well as in reason, as follows:

"When two causes combine to produce an injury to a traveler upon a highway, both of which are, in their nature, proximate—the one being a culpable defect in the highway and the other, some occurrence for which neither party is responsible—the municipality is liable, provided the injury would not have been sustained but for such defect. This appears to us to be the reasonable rule. It exacts no duty from municipalities which has not always rested upon them. They must use proper care and vigilance to keep their streets and highways in a reasonably safe and convenient condition for travel. This is an absolute duty which they owe to all travelers; and when the duty is not discharged, and, in consequence thereof, a traveler is injured, without any fault on his part, they incur liability. They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads; and if they do not, and a traveler is injured by culpable defects in the road, it is no defense that his horse was at the time running away, or was beyond his control."

In the case of *Moss v. City of Burlington*, 60 Iowa, 438, 15 N. W. 267, 46 Am. Rep. 82, it was held:

"Where plaintiff securely tied his horse to a post on a city street, the continuity of which was broken by a precipitous and impassible ravine, along which the city had erected no barriers, and plaintiff's horse, becoming frightened, broke loose and ran along the street and plunged down the precipice and was killed, held that the city was not liable to plaintiff for the damages by him sustained."

In *Teater v. City of Seattle*, 10 Wash. 327, 38 Pac. 1006, the court held:

"The fact that a runaway team of horses while under full headway dashes over the side of a bridge at a point where the city has provided no guard rail does not render the city liable for the injury. If the bridge was in a reasonably safe condition and the fright of the horses had not been caused by any negligence chargeable to the city. A city is not the insurer of the safety of its streets, but is only required to keep them in a safe condition for ordinary travel."

In the case of *Street Railway Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012, the court held:

"The rule is that where two causes combine to produce the injury, both in their nature proximate, the one being the defect or obstruction in the public street and the other some occurrence for which neither party is responsible, the city is liable, provided the injury would not have been sustained but for the defect in the street."

In 13 R. C. L. § 374, it is said:

"According to the weight of authority, where two causes combine to produce the injury, both of which are in their nature proximate, the one being a defect in the highway, for which the city is liable, and the other, the running away of a horse, for which neither party is responsible, then the municipality is liable, provided the injury would not have been sustained but for the defect in the highway and the plaintiff was not guilty of contributory negligence."

To the same effect is the case of *City of Muskogee v. Miller*, 45 Okl. 414, 145 Pac. 782, in which case this question was incidentally discussed, although the injury in that case was not sustained in a runaway.

From the foregoing authorities, it will be observed that before a city may be held liable for injuries sustained in a runaway, where the fright of the horse was not caused by any negligence chargeable to the city, but by an independent act of some third person, the negligence of the city (conceding such negligence) must have been, in its nature, proximate. In the instant case, under the testimony of the plaintiff, there was an efficient, primary, and proximate cause of the injuries sustained by him, independent of any alleged negligent condition of the street in question, and, conceding negligence on the part of the city, its liability under the condition of the record would necessarily be based upon the theory of concurring negligence, which must be proximate in its nature, without which the injury would not have been sustained. Conceding the condition of the street to be just as the testimony of the plaintiff showed, and further conceding negligence on the part of the city of Perry in permitting it to so remain, it would still seem from the decisions upon the question that such negligence of the city would not be deemed sufficient in law as a proximate cause of the injury sustained by the plaintiff under the facts as disclosed by the record in this case.

In the very recent case of *Thubron v. Dravo Contracting Co.*, 238 Pa. 443, 86 Atl. 292, 44 L. R. A. (N. S.) 699, Ann. Cas. 1914C, 252, the court, in discussing this question said:

"The sole question in the case is, What was the proximate cause of the accident? The defendant's negligence in failing to erect barriers on the embankment may be conceded, but liability for plaintiff's loss does not result therefrom, except as such negligence was the proximate cause. Mere concurrence of one's negligence with the proximate and efficient cause of the disaster will not create liability. But for the escape of the horses from the control of the party in charge the accident would not have happened. For that escape defendants, of course, were not liable."

In the above case, the court announced the following rule:

"When there are two efficient, independent * * * causes of an injury sustained on a highway, the primary cause being one for which the party charged with negligence is not responsible, * * * and the other being a defect in the highway, the injury must be referred to the former and not to the latter."

The case of *Schaeffer v. Jackson Twp.*, 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100, 30 Am. St. Rep. 792, is very similar in principle to the case at bar. In that case a horse, hitched to a vehicle, took fright at a donkey drawing a cart loaded with tin cans, and ran away, wrecking one of the wheels, which dragged upon the ground until it reached a hole, negligently left in the highway, when the occupants were thrown out and injured. It was held, reversing the judgment of the lower court, that the proximate cause of the injury was the fright of the horse, which was not caused by any neglect of the township. In the opinion of the court it is said:

"The injury must have been the natural and probable result of the defendant's negligence. But the cases must be rare in which an injury can be said to be the result of the negligence of a party when there is another and primary efficient proximate cause, wholly independent of such negligence and for which the party charged with negligence is in no way responsible. In such cases it would be incumbent on the plaintiff to show that the accident would have happened without the concurrence of the primary efficient proximate cause."

See *Merrill v. City of Portland*, Fed. Cas. No. 9,470; *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N. E. 200; *De Camp v. Sioux City*, 74 Iowa, 392, 37 N. W. 971; *Shepherd v. Inhabitants of Chelsea*, 4 Allen (86 Mass.) 113; *Childrey v. City of Huntington*, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 813; *C. & R. I. & P. Ry. Co. v. Nagle*, 154 Pac. 667 (not yet officially reported).

There seems to be a well-defined exception to the above rule in those cases where the horse is not running away, but is momentarily beyond the control of the driver at the time the injury occurs; and there are several cases in which a different rule appears to have been adhered to, but upon a careful analysis of such cases, such different rule is due to the facts that distinguish that class of cases from the one under consideration. Such apparent conflict exists in the decisions of the courts of Pennsylvania, but all doubt as to the correct rule was removed by the court in the case of *Thubron v. Dravo Contracting Co.*, supra, wherein it was said:

"Whenever in any of our cases a municipality has been held liable for damages resulting through a frightened horse, it has appeared as a fact that the horse took fright at a point on the highway where it was in unsafe condition, and the disaster followed as an immediate consequence."

Entertaining the views we do, so far as the plaintiff's right of recovery against the city of Perry is concerned, it is unnecessary to further consider the alleged errors of the trial court, for the evidence of the plaintiff absolved the city from liability for his injuries, and the court should not have submitted the case to the jury as against the city of Perry, and any errors that may have been committed were without prejudice to the rights of the plaintiff as against the city, as he had none.

[2] 2. We come now to a consideration of

the record as it relates to the defendant railway company. Upon the fact of the negligence of the railway company, there is a sharp conflict in the evidence. If the evidence submitted by the plaintiff is believed, there is liability upon the company; and, on the other hand, if the evidence submitted by the company is believed, there exists no liability. Therefore the case as to the defendant company was properly submitted to the jury. There was a clear case of willful and wanton negligence made out against the defendant company, if the evidence of the plaintiff is to be believed.

There are many cases which deal with the liability of a railway company on account of injuries sustained in a runaway, when the negligence of the company was the primary and proximate cause of such injuries. The evidence of the plaintiff is so strong upon the question of the negligence of the company in the instant case that no doubt can exist as to liability on account thereof, if such evidence is to be believed, but we shall refer to a few of the leading cases upon that question. Under the plaintiff's evidence, not only were the usual and customary noises made by the engine after the perilous position of the plaintiff was observed by the employé of the defendant who was in control of the engine in question, when it was possible to have stayed or suspended such noise without materially interfering with the proper operation of the train, and thereby to have avoided the danger to the plaintiff, but unusual and unnecessary noises were made under conditions which showed a reckless disregard for human life.

The case of *L. & N. Ry. Co. v. Penrod*, Adm'r (Ky.) 66 S. W. 1013, deals with a condition very similar to the one under consideration, and there it was held:

"It is negligence to make the customary noises incident to the movement of a train where the servants in charge have reason to apprehend injury therefrom to the driver of a team, near the track, whose perilous position they have discovered, unless it is reasonably necessary to do so for the protection of the property and lives in their charge."

Another case very similar to this one is *Williams v. Chicago, B. & Q. Ry. Co.*, 78 Neb. 695, 111 N. W. 596, 14 L. R. A. (N. S.) 1224, wherein it was held:

"Ordinarily a railroad company is not liable for injuries caused by a team taking fright at the noises incident to the ordinary operation of a train on its road. But where the conditions are such that noises thus made would endanger a person at a public crossing, which result could be avoided by temporarily staying or suspending the noise without materially interfering with the due operation of the train, ordinary care and prudence require that it be thus stayed or suspended until the danger is past."

In *Culp v. Atchison & Nebraska R. R. Co.*, 17 Kan. 475, it was held:

"The blowing of a steam whistle, and the letting off of steam, are not per se acts of negligence, or evidence of wrongful conduct on the part of those in charge of a railroad train. But when those acts are done carelessly, heedlessly, and without any necessity therefor, they may

become acts of negligence, and the railroad company be responsible for injuries caused thereby."

It was said by Mr. Justice Brewer, in the above case:

"While the defendant might, under some circumstances, lawfully, and without subjecting itself to responsibility for injuries resulting therefrom, cause the whistle to be blown, or the valves to be opened and steam permitted to escape, yet the same acts, done without any necessity therefor, done negligently and heedlessly, might render the defendant responsible for all injuries caused thereby."

See *Fares v. Rio Grande Ry. Co.*, 28 Utah, 132, 77 Pac. 230, 3 Ann. Cas. 1065; *Cox v. Ill. Cent. R. Co.*, 142 Ky. 478, 134 S. W. 911, 32 L. R. A. (N. S.) 831.

In the recent case of *Chicago, R. I. & P. R. Co. v. Hine*, 158 Pac. 597 (not yet officially reported), this court said:

"The situation here, in so far as it relates only to the duty of the railway in regard to making unnecessary noises, is not materially different from that where persons or stock are upon highways or public places contiguous or parallel to the company's right of way. In such situations as in the case at bar, the railway company is operating its train, and the plaintiff has his property, each where they had a right to be; neither is trespassing upon the other's property; each owes the other the duty to use ordinary care not to cause an injury to the other. Whether or not the unnecessary blowing off of the steam would be a lack of ordinary care must, we think, in almost every case, depend upon the particular facts, and whether or not there was a lack of ordinary care must be a question for the jury."

There is no fixed standard of duty in relation to this matter, and a railway company in the enjoyment of its right to operate its train over its road must exercise ordinary care not to injure persons who are crossing its tracks at a public crossing, and its liability for injuries sustained by a person in a runaway, caused by a horse taking fright from steam escaping from its engine upon its track, is based upon the lack of ordinary care under the circumstances; and, where the circumstances are such that noises from escaping steam would endanger a person at a public crossing, which result could be avoided by temporarily staying or suspending such noise without materially interfering with the due operation of the train, ordinary care and prudence would require that it be done.

Under the rule, whether or not the defendant exercised ordinary care under the facts in this case is a question of fact for the jury, under proper instructions from the court, and the court submitted that fact to the jury, and a general verdict was returned in favor of the defendant.

[3] 3. But it is urged that the plaintiff was not permitted to introduce certain material evidence to the jury, and thereby was prevented from fairly trying this question. The plaintiff testified that the steam was escaping from both the top and bottom of the engine standing on the defendant's track just south of the crossing, and that his horse was frightened by the noises from such escaping steam. This was very material testi-

mony, in the light of his further testimony to the effect that the man in charge of the engine was looking at him and was observing his perilous position. The defendant submitted the testimony of its engineer to the effect that steam could not escape from below when the engine was standing still, on account of the mechanical construction of the engine. This evidence contradicted the evidence of the plaintiff, and tended to impeach him and destroy his credibility. In rebuttal, the plaintiff offered a witness in his behalf, and asked several questions, the nature of which indicated that the witness might give testimony that would refute the evidence of the defendant's witness with reference to the construction of the engine. If such testimony was available, it was very material as rebuttal testimony. The trial court sustained objections made by the defendant railway company to the questions so asked the witness on the ground that it was not proper rebuttal testimony. The testimony sought to be elicited from the witness by the questions asked was very material to the plaintiff's cause, and it was proper as rebuttal testimony, if the testimony of the witness had been to the effect indicated by the nature of the questions. In this ruling the trial court was wrong. Thereupon plaintiff endeavored to make a formal tender or offer of the evidence which the witness would furnish if permitted to give his testimony, and to have the same appear in the record so that the court could determine that it was material to the plaintiff's cause, as evidence offered by the plaintiff and excluded from the consideration of the jury by the court, and objection was made to that being done, and the court sustained the objection and refused to permit the plaintiff to have incorporated into the record the evidence which the witness would furnish so that its materiality might be made to appear. In this ruling the trial court was also wrong. In order that rule 25 of this court (39 Okl. x, 137 Pac. xi) may be complied with, it is necessary that the testimony excluded be made to appear in the record in substance, and the only way it can be made to so appear is by making a formal offer of it and have the same appear in the record of the proceedings of the court, and in that way its materiality may be ascertained and the rule of this court complied with. *Vinita Hardware Co. v. Porter*, 45 Okl. 470, 146 Pac. 14. The error of the trial court as pointed out was prejudicial. There was a sharp conflict as to those facts that bear directly upon the question of negligence. Under the evidence that was permitted to go to the jury, they had a right to say that the plaintiff was contradicted in his evidence by the mechanical construction of the engine, and for that reason his testimony was not worthy of belief. Judging from the verdict returned, the jury must have disbelieved the testimony of the plaintiff, which they might not have done if there

had been evidence showing the construction of the engine to be such as to permit steam to escape from below, thereby corroborating the evidence of the plaintiff and making his evidence appear reasonable and fair.

We have examined the record as to the cross-examination of the plaintiff carefully, and we think the cross-examination by the defendant as to the character of the horse which he was driving was proper, and that the disposition of the horse which plaintiff was driving on the occasion of the runaway was a proper subject-matter for cross-examination, and the error urged by plaintiff on that account is without merit.

[4] 4. It is urged that instruction No. 15, given by the court, is erroneous. This instruction is as follows:

"If you believe from the evidence that at the place where the plaintiff met with the injury complained of the street was at the time in a reasonably safe condition, your verdict should be for the defendant. If the jury believe from the evidence that the place where the accident in question occurred was necessarily more dangerous than the ordinary street, and that by the exercise of ordinary care and prudence this condition could have been known to the plaintiff, and was known to him, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and, if he failed to do so, and thereby contributed to the injury, he cannot recover in this suit."

It is not clear from the instructions as a whole whether this particular instruction was intended as applicable to the cause of action so far as it affected the city of Perry, or whether it was given to the jury as applicable alike to the cause against both defendants.

[5] The trial court seems to have, in a measure, given separate instructions, and separately dealt with the liability of the two defendants, and if this instruction was intended as applicable only to the case as against the city, it would be harmless, even though it is an erroneous statement of the law as to the degree of care required of the plaintiff, for the reason that the case was improperly submitted to the jury as against the city. But the instruction could have been considered by the jury as applicable alike to the case against the railway company, and, if it were, it was misleading, in that it required a higher degree of care and caution than should have been required of the plaintiff. All that was required of the plaintiff was ordinary care on his part. The term "ordinary care" denotes such a degree of care as is commensurate with the dangers to be encountered, and that degree is determined by the jury in fixing the standard of conduct reasonably to be expected from ordinary, prudent persons under similar circumstances. The instruction in this respect was erroneous. Instructions Nos. 3 and 4 are also claimed to be erroneous statements of the law. Since these instructions were given solely because the city was a party defendant, and

there will exist no condition in the case which will render them applicable in another trial of this case, we do not deem it advisable to discuss them.

We believe the substantial rights of the plaintiff have been prejudiced on account of the errors pointed out in this opinion so far as his cause of action against the defendant railway company is concerned, and for that reason the judgment of the trial court in favor of the Atchison, Topeka & Santa Fé Railway Company is reversed, and this cause remanded, with directions to grant a new trial. The judgment in favor of the city of Perry is affirmed.

PER CURIAM. Adopted in whole.

DAVIES et al. v. THOMPSON. (No. 7651.)
(Supreme Court of Oklahoma. Sept. 26, 1916.)

(Syllabus by the Court.)

1. JUDGMENT \S 490(1)—VALIDITY—COLLATERAL ATTACK.

An action was instituted in the district court of Montana against E. H. Thompson, and a horse belonging to C. E. Thompson was attached in said action. C. E. Thompson was a nonresident, and no service of process of any kind was had or attempted on him. The court made an order reciting that an immediate sale of said horse was necessary in order to conserve the interest of the parties to the suit and directed the sheriff to make sale of said horse, after giving two days' notice by posting up notices of the time and place of the said sale in three public places in said county. Held, the actual owner of the horse is not bound by said sale and can attack said proceedings collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 926; Dec. Dig. \S 490(1).]

2. ATTACHMENT \S 206—PROCESS—SERVICE.

The court in an attachment action does not acquire jurisdiction to pass absolutely upon the rights of the parties until the defendant has been given legal notice, either actual or constructive, to appear and defend.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 664-670; Dec. Dig. \S 206.]

3. JUDGMENT \S 707—CONCLUSIVENESS—PERSONS CONCLUDED.

Notices being limited to the debtor, the attached property being proceeded against only as his, and the judgment being against it only as such, the debtor and his privies are concluded. All who are parties to the action are bound, but only the rights of property of the debtor and his privies in the attached property which is condemned and sold are affected by the proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1230; Dec. Dig. \S 707.]

Commissioners' Opinion, Division No. 4. Error from County Court, Tulsa County; J. W. Woodford, Judge.

Action by C. E. Thompson against T. A. Davies and another. Judgment for plaintiff, and defendants bring error. Affirmed.

L. J. Martin and Baldwin & Spradling, all of Tulsa, for plaintiffs in error. Poe, Hindman & Lundy, of Tulsa, for defendant in error.

MATHEWS, C. O. E. Thompson will be designated as plaintiff, and T. A. Davies as defendant.

This is an action in replevin instituted in the county court of Tulsa county for the recovery of a certain race horse named "Palatable." Defendant answered by general denial, and further alleged that he had purchased the horse in controversy from one S. Ambrose through the office of the British Columbia Thoroughbred Association of Vancouver for \$700, without any knowledge of any claims of plaintiff to said horse; that on the 21st day of September, 1912, in the district court of the Third judicial district of Montana, in an action wherein one William Gemmell was plaintiff and one E. H. Thompson was defendant, an order was issued by the court directing the sheriff to make a sale of the horse in controversy and that on the 23d day of September, 1912, the said sale was had and the said horse bought in by said William Gemmell, copies of said order of the sheriff's certificate of sale being attached to said answer. To this answer the plaintiff replied by general denial.

At the trial the plaintiff, C. E. Thompson, testified that he had owned the horse in controversy about three years, and that between two and three years before the trial he let a man by the name of Jackson take the horse to Butte, Mont., to race him; that he next heard that Jackson had mortgaged the horse, but that he did not authorize him to do so; that he had never disposed of the horse and still owned him; and that he found the horse in Tulsa in possession of defendants.

The defendant then offered in evidence the following "order" and "certificate of sale":

"In the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge. William Gemmell, Plaintiff, v. E. H. Thompson, Defendant. No. 3064. Order. Upon reading the affidavit of William Gemmell, the plaintiff in the above-entitled action, and it appearing therefrom and from the records and files in the above-entitled action that certain property has been attached, and is now in the custody of the sheriff of Deer Lodge county, under a writ of attachment issued out of the above-entitled court in the above-entitled action, and it appearing to the court satisfactorily that an immediate sale of said property is necessary in order to conserve the interests of the parties thereto. And it appearing from the affidavit aforesaid, that the delay necessary to give notice of the application for this order and of the sale of said property would cause material depreciation in the value thereof and material loss, both to the plaintiff and the defendant above named. And it also appearing that the defendant is outside of the state of Montana, and that it is impossible to give notice of the hearing of this application and of said sale.

"It is therefore ordered, and this does order, that the sheriff of Deer Lodge county make a sale of said property on Monday, the 23d of September, A. D. 1912, and that said sale be made without notice to said defendant, but that notice of the said sale be given by posting notices in writing of the time and place of said sale in three public places in the city of Anaconda, in Deer Lodge county, Montana, for two days prior to September 23, 1912, and that the

proceeds of said sale be paid into court, pending the determination of the above-entitled action by final judgment or otherwise.

"George B. Winston, Judge.

"Dated this 21st day of September, A. D. 1912."

"Certificate of Sale.

"I, James O'Keefe, sheriff of the county of Deer Lodge, state of Montana, do hereby certify, that under and by virtue of an order issued out of the district court of the said county of Deer Lodge in a certain action lately pending in said court at the suit of William Gemmell, plaintiff, against E. H. Thompson, defendant, attested the 21st day of September, A. D. 1912, by which I was commanded to make the sum of nine hundred dollars (\$900) with interest and costs, to satisfy the judgment in said action out of the personal property of said defendant, if sufficient personal property could be found, all as more fully appears by the said order, reference thereto being hereby made; I have levied on and on the 23d day of September, A. D. 1912, at the race track in the county of Deer Lodge, state of Montana, duly sold at public auction, according to law, and after due and legal notice, to William Gemmell, who made the highest bid therefor at such sale, for the sum of seven hundred dollars (\$700) in lawful money of the United States, which was the whole price paid therefor, all the right, title and interest of the said judgment debtor, E. H. Thompson, in and to the following described personal property, to wit: One chestnut stallion, two years old, no brand, named 'Palatable'; one bay gelding, named C. W. Kennon, no brand; one bay mare, star in face, named Our-last, no brand.

"Dated this 23d day of September, A. D. 1912. James O'Keefe, Sheriff of Deer Lodge County, State of Montana. W. A. McAndrews, Undersheriff."

The plaintiff made the following objections to the introduction of the same, which the court sustained:

"We object to the introduction of the exhibit as offered for the reason that it appears upon its face that it is not a final order or decree; second, that it appears upon its face that it is only an interlocutory order and not made or based upon the merits of the cause; and, third, it appears upon its face that the court had acquired no jurisdiction either over the person or subject-matter or the real or horse attempted to be sold thereunder."

No further evidence was introduced by either party, and judgment was rendered for plaintiff, from which defendants appeal.

[1] The only question presented here by appellants is the correctness of the action of the trial court in excluding the above records of the said Montana court. As we view the case, it is immaterial whether the said records were introduced or not, as the results of this action should have been the same, even if these records had been admitted in evidence, although we are of the opinion that the action of the court in excluding the same was correct; at least upon the last objection urged.

It will be noted the Montana action was against "E. H. Thompson," a nonresident. The property attached belonged to "C. E. Thompson," who was also a nonresident. The kind of service had is not disclosed, but it is presumed, if any was attempted, it was by publication. As C. E. Thompson was not

a party to the Montana action it follows no service of any kind was attempted as to him.

It is urged on behalf of the plaintiff that the Montana court acquired no jurisdiction over the horse in controversy, as the records show that if any proceeding had been instituted that it was not against the plaintiff, C. E. Thompson, and therefore not binding upon him. The defendant urges that as the plaintiff only replied to their answer by general denial, that thereby nothing was put in issue except the existence of the record, and consequently a want of jurisdiction in the court to render the judgment cannot be shown under such plea. As said before this becomes immaterial when it is considered that even if the proffered records had been received in evidence it would have had no effect against C. E. Thompson, as the records offered show that they have nothing to do with C. E. Thompson, and therefore do not bind him.

The next proposition advanced by the defendants is that the sale of the property was an action in rem, and that the sale under this order was valid, regardless of who was the owner at that time or of the lack of service. This contention, with the one advanced by plaintiff, set out above, are based somewhat upon the same principle and will, to a certain extent, be discussed together.

While we have been unable to find any decision of this court bearing directly upon the points raised, yet we believe the general principles laid down in the well-considered case of *Ballew v. Young et al.*, 24 Okl. 182, 108 Pac. 623, 23 L. R. A. (N. S.) 1084, followed and discussed in *Bilby v. Jones*, 39 Okl. 613, 136 Pac. 414, practically decides the issues in the case at bar against defendant's contentions.

[2, 3] In the case of *Ballew v. Young*, an attachment was sued out and levied upon real property. The defendant was a non-resident, and the publication affidavit and notice were invalid, but the plaintiff there insisted that notwithstanding those facts such defects did not defeat the court's jurisdiction over the property attached so as to render a judgment thereon a nullity and subject to collateral attack. This is practically defendant's contention in the case at bar, but this court, while admitting that there was a conflict in the authorities on that point, there quoted with approval 4 Cyc. 814, as follows:

"In some jurisdictions it has been held that the court acquires jurisdiction over the property by a valid levy thereupon, and its judgment in regard thereto is binding until reversed on appeal, or set aside in some direct proceeding for that purpose, but the weight of authority, if not of reason, is to the effect that the jurisdiction acquired by the seizure of the property is not to pass absolutely upon the rights of the parties, but only to pass upon such right after defendant has been given an opportunity to appear and defend; and, where this view is maintained, a judgment, rendered without the notice prescribed by law against a defendant who has

not appeared, is deemed absolutely void, and open to collateral attack."

If a judgment rendered in an attachment proceeding, wherein the service upon defendant was attempted by publication, but proved to be defective to the extent that it was held void, is subject to collateral attack, as is stated in *Ballew v. Young*, it equally follows that in an attachment action where there was no attempt at service upon the owner of the property the judgment must also be void and subject to collateral attack.

In the case of *Troyer v. Wood*, 96 Mo. 473, 10 S. W. 42, 9 Am. St. Rep. 387, we find the following discussion of the principles involved in the case at bar:

"It is a principle of universal justice that no one shall be condemned in his person or property without notice, and opportunity to be heard in his defense. Notice is therefore essential to the jurisdiction of all courts; and the rule which requires that it be given to the party whose interests and rights are sought to be affected by judicial proceedings is as old as the law itself. A judgment without notice given, without opportunity to be heard, possesses none of the attributes of a judicial determination; it is simply judicial usurpation and oppression; a mere arbitrary edict, based upon an ex parte statement and entered upon the records of the courts in defiance of the maxim *audi alteram partem*. Such a judgment deserves not the name it bears and will not be respected and upheld in any forum where right and justice are administered. This doctrine is met with and approved at almost every turn you take in the broad fields of adjudication, and is announced by authorities too numerous for computation. *Nations v. Johnson*, 24 How. 203 [16 L. Ed. 623]; *Walden's Lessee v. Craig*, 14 Pet. 154 [10 L. Ed. 393]; *Webster v. Reid*, 11 How. 437 [13 L. Ed. 761]; *Galpin v. Page*, 18 Wall. 350 [21 L. Ed. 959]; *Windsor v. McVeigh*, 93 U. S. 274 [23 L. Ed. 914]; *Earle v. McVeigh*, 91 U. S. 503 [23 L. Ed. 398]; *Pennoyer v. Neff*, 95 U. S. 714 [24 L. Ed. 585]; *Rockwell v. Nearing*, 35 N. Y. 302; *Mason v. Messenger*, [17] Iowa, 281; *Freeman on Judgments* (3d Ed.) §§ 117, 118, 495; *Hitchcock v. Aicken*, 1 Caines [N. Y.] 473; *Blackwell on Tax Tit.* 213.

"But notice may be either actual or constructive, and the state possesses the power to substitute service by publication in lieu of personal service; but such substituted service, when authorized or permitted by law, is as much an element of jurisdiction as is personal service where trial is the only method of service prescribed. In *re Empire City Bank*, 18 N. Y. 199. And proceedings in rem or quasi in rem are not exempt from the operation of the rule which makes service of notice in some form an essential of jurisdiction. *Cooley's Const. Lim.* (2d Ed.) 498, 499, 500, and cas. cit.; *Wells on Jur.* § 88; *Wade on Notice* (2d Ed.) §§ 1144, 1161; *Waples' Proc. in Rem.* §§ 88, 570 et seq. and cas. cit.; *Woodruff v. Taylor*, 20 Vt. 65; *Denning v. Corwin*, 11 Wend. 647; *Freeman v. Thompson*, 53 Mo. 196, and cas. cit."

While the case last quoted involved a judgment for taxes, yet a judgment for taxes is the same in effect as judgments in other actions. *Mayo v. Ah. Loy*, 32 Cal. 477, 91 Am. Dec. 595.

In the case of *National Bank of St. Joseph v. Peters et al.*, 51 Kan. 62, 32 Pac. 637, it is said:

"Notice being limited to the debtor, the attached property being proceeded against only as his, and the judgment being against it only

as such, the debtor and his privies are concluded. All who are parties to the action are bound, but only the rights of property of the debtor and his privies in the attached property which is condemned and sold are affected by the proceedings.

We take the following from the case of *Bank of Colfax v. Richardson*, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664:

"Under our system an attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a nonresident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings on attachment have nothing to do with the merits of the cause of action or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action in personam, with the added incident that the property attached remains liable for any judgment the plaintiff may recover. But, if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding in rem against the attached property, the only effect of which is to subject it to the payment of the amount which the court may find due the plaintiff. Where no personal service is had, the res is brought within the power and control of the court by a seizure under a writ of attachment, but the right to adjudicate thereon is acquired only by the publication of the summons. It is the substituted service, and not the seizure, which gives the court jurisdiction to establish by its judgment a demand against the defendant, and to subject the property brought within its custody to the payment of that demand. In other words, the authority to hear and proceed to judgment depends upon the service of the process and the actual seizure of the thing to be concluded by the judgment, and not upon the regularity of the proceedings by which the control of the property was acquired. When, therefore, the court has the de facto custody of the property by virtue of a de facto writ of attachment, and a right to determine whether such property shall be subject to the payment of plaintiff's demand by virtue of constructive service of process, it has full and complete jurisdiction in the premises, and subsequent errors or irregularities in the proceedings will not be available on collateral attack. A judgment founded on service of process by publication, is, of course, ineffectual, unless it is an adjudication concerning property which the court has in its custody under some lawful process, because there is nothing upon which it can operate; but where the property has been actually seized and brought within the control of the court by some process authorized by law, and the right to determine its liability for the demands of the plaintiff is subsequently acquired by publication, an error of the court in determining the status of the property, or its liability, or the validity of the attachment, can, it seems to us, no more affect the jurisdiction, under a statute like ours, than an erroneous decision as to the amount of plaintiff's demand, or any other error in the case. *Van Fleet, Coll. Attack*, 257, 838; *Paul v. Smith*, 82 Ky. 451; *Barrell v. Wagner*, 5 Tex. Civ. App. 445, 27 S. W. 17; *Thompson v. Eastburn*, 16 N. J. Law, 100; *Diehl v. Page*, 3 N. J. Eq. 143.

"There is much conflict in the authorities generally as to whether the statutory prerequisites to the issuance of writs of attachment are jurisdictional, and must affirmatively appear to protect the proceedings from collateral attack, or whether, in the absence of any showing in the record to the contrary, it will be presumed that the steps necessary to vest the court with jurisdiction were taken. Mr. Waples states with ap-

parent confidence that all the statutory requirements are jurisdictional, and are not to be presumed after judgment, even on a collateral attack, and cites a large number of cases which more or less directly support the text (*Waples, Attach.* 625); while Mr. Works, with equal confidence, says that, while there are authorities holding that such proceedings are special, and that no presumptions in favor of the jurisdiction of the court can be indulged, 'the clear weight of authority and reason is to the contrary' (*Works, Courts & Jur.* p. 547); and this seems to be the view of Judge Van Fleet, as will be seen by reference to the citation from his work on *Collateral Attack*, already made." *Ward v. Boyce*, 152 N. Y. 191, 46 N. E. 180. 36 L. R. A. 549; *Yarborough v. Pugh*, 63 Wash. 140, 114 Pac. 918, 33 L. R. A. (N. S.) 351; 2 R. C. L. § 4, p. 803.

Now as to defendant's contention that as the horse was sold as perishable property under a chambers order of the Montana court, a sale under such an order operated to give the purchaser at said sale a good title notwithstanding the horse may have belonged to plaintiff, and not to E. H. Thompson, the defendant in that action.

Counsel has cited many respectable authorities (4 Cyc. 716, *Young v. Kellar*, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405, *Megee v. Beirne*, 39 Pa. 50, *Millard v. Hall*, 24 Ala. 230, and *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284), which seem to support his contention, but upon this point there are many authorities to the contrary, and we believe the holding in the case of *Ballew v. Young*, supra, upon the general principle there laid down that a judgment rendered in an attachment proceeding wherein the service by publication was void is subject to collateral attack, is equally applicable to the point here under consideration. There was no service of summons, either actual or constructive, upon C. E. Thompson; therefore as to him the attachment proceedings were void and open to collateral attack.

In the case of *Sleeper v. Killion*, 166 Iowa, 205, 147 N. W. 314, the court says:

"Men are known, and their identity fixed, by the name by which they are known. When addressed by name, they respond as segregated individual entities. When not so addressed, they, as a rule, are not expected or required to respond. In nearly every state in which courts acquire jurisdiction by writ, summons, or process, it is required that the paper, on the service of which the court assumes a right to act, must be addressed to the party summoned, by his true name, or by the name by which he is generally known. It has been uniformly held that a writ, summons, or process to one, but served on another, gives the court no jurisdiction of the person served, although he be the real party to the suit, and the one against whom relief is sought."

In the case of *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N. W. 357, 17 L. R. A. (N. S.) 236, 124 Am. St. Rep. 615, 15 Ann. Cas. 114, it was held that a summons served by publication, designated "George H. Leslie" as defendant, was fatal, and conferred no jurisdiction upon the court to adjudicate any rights of "George W. Leslie." The court says:

"Though the partition suit was a proceeding in rem, the mere fact that the court acquired jurisdiction over the subject-matter thereof, the land, did not authorize it to adjudicate the rights or interests of parties, in the absence of proper service of summons upon them."

The court further said:

"The reasons for disregarding the error where there is personal service upon the right party do not apply where the only service is by publication against a nonresident of the state."

Further the court says:

"If the error in the name is jurisdictional, as we hold, a judgment entered is void, and to adopt the contention of appellant would result in compelling a defendant in a particular case to waive the want of jurisdiction in the court to enter judgment against him and to come to this state and litigate the cause on its merits. This the court has no right to do. The law providing for the manner of acquiring jurisdiction over nonresidents is plain, and should not be ignored, even in a case of apparent hardship."

In *Klondike Lumber Co. v. Bender Wagon Co.*, 71 Ark. 339, 75 S. W. 865, the precise question was involved. The case was an appeal from a judgment in an action of replevin. The court, in its opinion, says:

"The title of the Bender Wagon Company rested upon a sale made by virtue of an order of the circuit judge in vacation. Whether this was a valid sale and passed the title of the lumber was the question raised by the action of replevin. If the sale was valid, then the wagon company was entitled to the lumber, otherwise not."

The court, further passing upon the question, said:

"The only remaining question for us to determine is whether the sale of the lumber made under the order of the circuit judge in vacation was a valid sale. The order for the sale was, as before stated, made in an action brought in the circuit court by Williams Bros. against the Long Pine Lumber Company to enforce a lien for labor upon the lumber replevied in this action. Now we find in the statute regulating the proceedings for the enforcement of laborers' liens no provision authorizing the sale of the property by an order of the judge, made in vacation, and there is room for doubt as to whether the judge in vacation can order such a sale in actions of that kind. But there is a provision in the statute regulating proceedings in actions of attachment authorizing the judge in vacation to order the sale of perishable property, and this is no doubt the statute under which the judge acted in this case. That section provides that 'no such sale shall be made in vacation without reasonable notice in writing to the opposite party or his attorney, if either of them reside in the county in which the cause is pending, of the time and place of the application therefor.'"

"Now, the Long Pine Lumber Company was the party sued in that case, but the evidence shows, and the court found, that this company was not the owner of the lumber sold. The lumber was owned by the Klondike Lumber Company, and that company was not a party to the suit until after the order for the sale of the lumber was made, and had no notice of the application for the sale of the lumber. Under these circumstances the sale of the lumber did not affect any right or interest which the Klondike Lumber Company had in the lumber. The sale did not affect their title. The company, after the sale, still owned the lumber, subject, of course, to any valid liens existing against it, and had the right to recover the same from the

purchaser at the sale, for the purchaser acquired only the right, title, and interest therein owned by the Long Pine Lumber Company, the defendant in the action. *Crowell v. Barham*, 57 Ark. 195 [21 S. W. 33]."

In the instant case it will be seen that the record sought to be introduced recites:

"I have levied on, and on the 23d day of September, 1912, at the race track in the county of Deer Lodge, state of Montana, duly sold at public auction, according to law, and after due and legal notice to Wm. Gemmell, who made the highest bid therefor, at public sale for the sum of \$700 in lawful money of the United States, which was the whole price paid therefor, all the right, title, and interest of the said judgment debtor, E. H. Thompson, in and to the following described personal property."

The certificate of sale also recites that the sale was made for the reason that he was commanded to make the sum of \$900 to satisfy the judgment against "E. H. Thompson." *Hornthall v. Burwell*, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556.

For the reasons given, we recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. WALKER.

(No. 5657.)

(Supreme Court of Oklahoma. Sept. 26, 1916.)

(*Syllabus by the Court.*)

1. EVIDENCE \S 582(3) — TESTIMONY IN FORMER TRIAL—AUTHENTICATION.

Before the longhand transcript of the testimony of a witness, given at a former trial, can be admitted in evidence at a subsequent trial of the same case, it must be duly certified by the reporter of the court who took the evidence as correct, or agreed to by the parties as being the evidence of such witness and as being correct, and, then, it can only be used under such conditions as would warrant the use of the deposition of such witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. $\S\S$ 2421, 2422; Dec. Dig. \S 582(3).]

2. APPEAL AND ERROR \S 1068(4)—REVIEW—HARMLESS ERROR—INSTRUCTION.

In an action for personal injuries, where there is no assignment of error that the verdict is excessive, an erroneous instruction in relation to the measure of damage is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4228; Dec. Dig. \S 1068(4).]

Commissioners' Opinion, Division No. 5. Error from District Court, Pontotoc County; Robert Wimblish, Special Judge.

Action by W. U. Walker against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error. B. C. King, of Ada, for defendant in error.

CAMPBELL, C. This action was commenced in the county court of Pontotoc county by W. U. Walker to recover damages from

the St. Louis & San Francisco Railroad Company for injuries sustained by him on account of the negligence of said company. The cause was tried to a jury and a verdict returned for the plaintiff, which verdict received the approval of the trial court, and judgment for the plaintiff was entered on the verdict for the plaintiff in the sum of \$500. The defendant appealed from such judgment, and brings the record here by case-made, and predicates its right to a reversal of the judgment upon two alleged errors: (1) That the trial court improperly excluded the transcript of the evidence of a witness for defendant who had testified at a former trial of this case; and (2) that the trial court erroneously gave to the jury instruction No. 2. No other assignments of error have been discussed in the brief filed herein on behalf of defendant, and no other errors were presented to the court at the oral argument had herein, and, for that reason, this court is not called upon to search the record for any other errors than those urged by counsel.

[1] 1. The defendant company produced at the trial of this cause what was stated by its counsel to be the testimony of its conductor, given at a former trial of this case, and offered the same in evidence. The offer by counsel was as follows:

By Mr. Suits: "The defendant now offers in evidence the testimony of R. E. Davis, its conductor, given at the former trial of this case, shown between pages 64 and 73, inclusive, of the original case-made filed in the Supreme Court, containing the transcript of all proceedings of the former trial, and the stipulations executed by the attorney of record for plaintiff and the attorney of record for defendant. * * *

By Mr. Suits: "I would like to take the stand and show where Mr. Davis is, and let it precede my offer."

Thereupon, counsel was sworn as a witness, and testified that he lived at Oklahoma City and was one of the attorneys for the defendant company in the state of Oklahoma; that it is their custom, in requesting witnesses, to make the request by letter or wire, which was done in this case, and the attendance of the conductor, R. E. Davis was requested, which request was made to W. F. Evans, general counsel for defendant, at St. Louis, and in answer to such request for the attendance of Conductor Davis, witness was advised by the general counsel that Mr. Davis, the witness requested, was residing in California.

After the above testimony was given, on motion of plaintiff, it was stricken, and the objections made to the introduction of the offered testimony was sustained, and the defendant excepted to the ruling of the court in refusing the defendant the right to read such testimony to the jury. The objection made to the introduction of this testimony was upon the grounds—

"* * * that the proper predicate has not been laid for introducing the said testimony, and for the further reason that the said testimony has

not been properly identified as that given by the witness at the former trial of this case."

The testimony offered was not identified in any way except by the statement of counsel in his offer. No clerk was called to identify the transcript or case-made in which the testimony appeared, and no testimony offered as to the correctness of the same. No stipulation of counsel as to it being the testimony of the witness Davis was called to the attention of the trial court, neither was there any certificate of the reporter of the court who took the testimony as to its correctness. In fact, so far as the trial court was concerned, as disclosed by the record, it was not even made to appear that the witness Davis ever did testify at any former trial, or, if he did testify, that his testimony was taken by a reporter and transcribed in longhand. It does not appear from the record that the case-made referred to by counsel as containing the former testimony of the witness was within the control of the counsel. In fact, it was referred to as the original case-made filed in the Supreme Court, but no witness who is charged with the custody of such records was before the court to identify and authenticate it. In the face of an objection, the trial court was called upon to assume that the writing which, perhaps, on its face purported to be a transcript of the testimony of the witness Davis was in fact his testimony, and that it was correct just because it purported to be the testimony of such witness at a former trial. The whole contention of defendant is based upon the decision of this court in *Atchison, T. & S. F. Ry. Co. v. Baker*, 37 Okl. 48, 130 Pac. 577, in which case this question is discussed, but the discussion is based upon the assumption that the testimony offered was in fact the testimony of the witness at the former trial. The matter of the identity of the testimony and its correctness was not involved. This will be seen from the language of the opinion in that case at page 53 of 37 Okl., page 579 of 130 Pac., which is as follows:

"The objection urged seems to go to the point that there was not shown sufficient diligence in procuring the attendance of the witness to justify the use of his former testimony."

In this case, the first thing the trial court had to determine was the identity of the transcript which was offered, and, having determined the fact that the transcript offered was a transcript of the evidence of the witness Davis, then the rule laid down in the above case becomes important. The brief of defendant in this case discusses this question from the assumed position that there is no question as to the identity of the testimony offered. The serious thing in the instant case is the defendant did not show by any evidence that the transcript offered was in fact a transcript of the testimony of the witness Davis, given at a former trial. This fact is essential in order to make it admissible, and when such fact is proven, the tran-

script becomes admissible to show what his testimony was at the former trial, if conditions are such as would warrant the use of the deposition of such witness. The use of the testimony of a witness, given at a former trial, is authorized by section 1942, Compiled Laws 1909, which provides:

"The shorthand reporter shall file his notes taken in any case with the clerk of the court in which the cause was tried, and the same shall be a part of the record in the cause. Any long-hand transcript of notes so filed, duly certified by the reporter of the court who took the evidence as correct, shall be admissible as evidence in all cases of like force and effect, as testimony taken in the cause by deposition, and subject to the same objections. * * *

In the case of *A., T. & S. F. Ry. Co. v. Baker*, supra, it was held:

"The testimony of a witness given in a former trial between the same parties involving the same subject-matter with the opportunity for cross-examination, and taken down by the official stenographer and preserved by bill of exception on appeal, is admissible, if otherwise unobjectionable, in a second trial of the same cause, where the witness resides in another state and is not present at the second trial."

It was held, in *A., T. & S. F. Ry. Co. v. Osborn*, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189, as follows:

"The testimony of a witness given at a former trial, which was taken and preserved by an official stenographer of the court, as the law directs, is admissible in evidence, where it appears that the witness is out of the jurisdiction of the court and beyond the reach of its process."

It would therefore seem to be the rule that before the former evidence could be admitted, it must be shown that such witness is beyond the jurisdiction of the court and is not present at the trial. The defendant undertook to prove that the witness Davis was beyond the jurisdiction of the court, and for that purpose produced a witness who testified that he was advised by the General Attorney for the defendant that such witness resided in California. This testimony was incompetent, and was stricken upon motion. No diligence was shown, and it did not appear from any competent evidence that the witness Davis was beyond the jurisdiction of the court. It does not even appear that Davis was not present at the trial. For these reasons the court properly excluded the offered testimony.

[2] 2. It is contended that the court erred in giving instruction No. 2, and that the judgment should be reversed for that reason. The instruction complained of is as follows:

"You are instructed that if you find for the plaintiff, you will, in assessing his damages, take into consideration his age and condition in life, the injury sustained by him, if any, and physical pain suffered and endured by him on account of said injuries, if any, his loss of time, if any, such damages, if any, as you believe from the evidence he will sustain in the future as the direct effect of such injury, such sums as he has paid out for medical attention on account of said injury, if any, together with all facts and circumstances in evidence in this case, and assess the damages at such sum as from the evidence you deem proper, not exceeding the sum of \$1,000."

It is only that portion of such instruction which permits the jury to award recovery for damages which plaintiff will sustain in the future as the direct effect of such injury which is claimed to be erroneous. It is claimed that this element of recovery was not in the case, for the reason that it was not clearly shown by the evidence that any future damages would be suffered on account of such injury. In fact, counsel for defendant seem to have an erroneous conception of the instruction complained of. They say in their brief:

"The injuries sustained by plaintiff are purely subjective, and of such a nature that laymen cannot, with reasonable certainty, know whether or not there will be future pain and suffering. No expert testimony was offered upon the question of future pain and suffering, and the only evidence introduced upon this point was given by plaintiff himself."

They cite the case of *Shawnee & Tecumseh Traction Co. v. Griggs*, 151 Pac. 230 (not yet officially reported) as authority for their contention, which fully supports the rule that no recovery for future pain and suffering can be had unless there is some expert testimony that future pain and suffering will be endured, where the injury is subjective as in this case. But it will be noted that the instruction in the instant case does not deal with future pain and suffering, and a recovery on that account is not specifically authorized by the instruction as counsel seem to construe it. All the cases cited by defendant's counsel deal purely with the recovery for future pain and suffering and they correctly state the rule that no such recovery can be had unless there is expert testimony, reasonably tending to show that future pain and suffering will be endured where the injury is subjective. The instruction given in the instant case authorizes a recovery for "such damages, if any, as you believe from the evidence he will sustain in the future as the direct effect of such injury," and it can be readily seen that a recovery for future pain and suffering is not directly contemplated by this instruction if the evidence does not show with reasonable certainty that such pain and suffering will be endured. It is not specifically mentioned, but it might be inferentially contemplated, provided the evidence showed that pain and suffering will be endured in the future. So might any legitimate element of recovery for future detriment be inferentially contemplated by the instruction, if the evidence reasonably tended to prove such detriment, but, to argue that the instruction authorized a recovery for future pain and suffering when the evidence did not reasonably tend to prove any is to argue that the trial court, by inference, submitted to the jury an improper element of damage. In all the cases cited by counsel, the instruction positively submitted this element of damage, and in the instant case it was not done. But, if this instruction was too general in its terms and

too sweeping in its scope, it would only constitute technical error, and the record does not disclose that the substantial rights of the defendant have been prejudicially affected. The defendant does not contend that the amount of recovery was excessive. No such complaint was made against the recovery in the motion for a new trial, and it is not even argued that the damages awarded were excessive. We have examined the evidence in the case, and are of the opinion that the amount of damages awarded by the verdict of the jury was not excessive. In the case of *Planters' Cotton & Ginning Co. v. Penny*, 153 Pac. 516 (not yet officially reported) this court held:

"In a suit in damages for personal injuries, where the amount recovered was not excessive error in instructions on the measure of damages is harmless."

Again, in the case of *Midland Valley R. Co. v. Kersey*, 157 Pac. 139 (not yet officially reported), this court held:

"In an action for personal injuries, where there is no assignment of error that the verdict was excessive, error in an instruction relating to the measure of damages is harmless, following *Planters' Cotton & Ginning Co. v. Penny*, 153 Pac. 516."

Under these authorities, if there was any error in the instruction complained of, it was harmless error within the purview of section 6005, Revised Laws 1910, and the judgment of the trial court should not be reversed for such error.

The judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

TEXMO COTTON EXCH. BANK v. LISTON. (No. 7000.)

(Supreme Court of Oklahoma. Sept. 26, 1916.)

(*Syllabus by the Court.*)

1. PLEADING \S 307—USURY \S 111(3)—RECOVERY OF USURY PAID—DEMAND—EXHIBIT—"WRITTEN INSTRUMENT AS EVIDENCE OF INDEBTEDNESS."

"A written demand for the return of usury is a condition precedent to the maintenance of a suit to recover on account of the payment of usurious interest, under section 1005, Rev. Laws 1910; and such demand must be alleged in the petition and proven at the trial." Such written demand is not "a written instrument as evidence of indebtedness" as specified in section 4769, Rev. Laws 1910, and a copy of same need not be attached to the petition as an exhibit. But it is a condition precedent to the maintenance of the suit, and is essentially a matter of evidence to be produced at the trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 930-934; Dec. Dig. \S 307; *Usury*, Cent. Dig. \S 297; Dec. Dig. \S 111(3).]

2. USURY \S 102(1) — RECOVERY OF USURY PAID—WRITTEN DEMAND—SUFFICIENCY.

The written demand in this case examined, and held to be a substantial compliance with the provision of section 1005, Rev. Laws 1910, relative to the written demand for the return of usury paid.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. \S 197, 241, 242; Dec. Dig. \S 102(1).]

Commissioners' Opinion, Division No. 5. Error from District Court, Custer County; James R. Tolbert, Judge.

Action by E. A. Liston against the Texmo Cotton Exchange Bank for debt for usurious interest paid. Judgment for plaintiff, and defendant brings error. Affirmed.

Darnell & Darnell, of Arapaho, for plaintiff in error. W. P. Hickok, of Taloga, for defendant in error.

HAYSON, C. The defendant in error, E. A. Liston, brought an action in the district court of Custer county against the plaintiff in error, the Texmo Cotton Exchange Bank, the action being in the nature of debt for the recovery of the penalty provided for in section 1005, Rev. Laws 1910, where usurious interest has been paid. The defendant in error, E. A. Liston, in his petition set up nine causes of action, alleging in each cause of action that he had paid the Texmo Cotton Exchange Bank a certain sum of money which was usurious interest, and that prior to bringing the action he had made written demand in writing for the return of the usury, which had been refused. In each cause of action he prayed for recovery of double the amount of the usury so paid. The aggregate amount of the usury alleged to have been paid was \$210.55, and the suit was for the recovery of \$421.10 and \$100 attorney fees. Judgment was rendered for \$397.30 and \$40 attorney fees.

The plaintiff in error sets up six assignments of error, but in its brief groups all of them in one general proposition which is decisive of all the questions involved. Was the demand in writing, given by defendant in error to plaintiff in error for the return of the usury, sufficient under our law to entitle Liston to maintain this suit? We must say that it was. The essential parts of the demand are as follows:

"Moorewood, Oklahoma, August 27, 1913.

"To the Cotton Exchange Bank at Moorewood, Oklahoma: I hereby make demand upon you for the return to me of usurious interest charged, reserved, taken and received from me by you the Cotton Exchange Bank, and the forfeiture and penalty therefor, on certain notes and extensions of notes, as follows, to wit:

"[Here follows in detail the various transactions out of which each cause of action arose] "In all a sum of \$210.55, and a like amount as the penalty and forfeiture therefor, in all a sum total of \$421.10 which I hereby and herewith make demand that you repay to me."

"Dated, delivered and demanded this 27th day of August, 1913.

"E. A. Liston, Claimant."

This written demand was served on the assistant cashier, bookkeeper at the bank, he under the testimony being the sole person in charge at the bank at the time of service. This demand not being attached to the petition, the plaintiff in error in the trial court filed its motion to require the same to be attached as an exhibit. The motion was

overruled and an exception saved, and the plaintiff in error was required by the court to answer. To the ruling of the court requiring the plaintiff to answer no exception was saved. The answer filed was a general denial.

[1] In *Mitchell v. Clark*, 152 Pac. 354, this court has decided that it is necessary to allege and prove a written demand in an action such as we have here, the syllabus being as follows:

"A written demand for a return of the usury is a condition precedent to the maintenance of a suit to recover on account of the payment of usurious interest, under section 1005, Rev. Laws 1910; and such demand must be alleged in the petition and proven at the trial."

In the case at bar these two requirements were met, and it was not error for the trial court to overrule the motion of plaintiff in error to require the defendant in error to attach a copy of the written demand to his petition. The demand, while a prerequisite to the maintenance of the suit, was not a "written instrument as evidence of indebtedness," as provided for in section 4769, Rev. Laws 1910, but was a prerequisite to the maintenance of the suit, which must be alleged and proven at the trial. It is essentially a matter of evidence.

In *Citizens' State Bank of Ft. Gibson v. Strahan et al.*, 158 Pac. 378, our court has said in the third paragraph of the syllabus:

"A substantial compliance with the provisions of section 1005 of the Revised Laws of 1910, requiring a demand for the return of usury, is a prerequisite to the institution and maintenance of an action therefor; and, where a demand is made for a less sum than twice the amount of the usurious interest paid, recovery in a suit therefor is limited to the amount of such demand."

[2] The written demand made by Liston was a substantial compliance with the provision in section 1005, Revised Laws 1910, relative to demand prior to the bringing of the suit. The party to whom usury is paid is in as good a position to know the amount of such usury as the party who pays. In most instances he is in a better position, and better qualified in both education and training. He may repay such usury upon written demand being made, and save himself the costs, expenses, and penalty incident to the litigation of the matter. But when a substantial compliance with the law has been met by the party who pays such usury, to the party receiving the usury, by serving upon such party who receives the usury a written demand for its return, and such demand is refused, and suit is brought and a recovery had, the cause will not be reversed because of some technical error as to the amount demanded, so long as the judgment is within the amount demanded in the written demand and is upheld by the evidence in the record.

The judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

ROBERT et al. v. MULLEN. (No. 6992.)
(Supreme Court of Oklahoma. Sept. 26, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐518(5) — RECORD — SCOPE AND CONTENTS—ORDER OF COURT.

The trial court rendered judgment on the pleadings. The answer referred to a certain order of court, approving a full-blood conveyance, as being attached and made a part of said answer. The order so referred to was in fact not attached and was not filed in the trial court. An appeal was taken to this court from said judgment upon a transcript of the record. After the expiration of over a year, a certified copy of the said order was filed with the clerk of this court and attached to the transcript of the record herein. *Held*, that such instrument is not a part of the transcript and cannot be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2348-2350; Dec. Dig. ⇐518(5).]

2. PLEADING ⇐343 — MOTIONS — JUDGMENT ON PLEADINGS—WANT OF REPLY.

The petition contains two causes of action, namely, one in ejectment and one to cancel a conveyance. Both causes are stated in the usual form, and cancellation is sought upon the grounds: (1) That such conveyance was never executed by the plaintiffs; and (2) that the conveyance was never approved by the county court as required by law, the said conveyance being a full-blood conveyance of inherited lands. The petition was not verified. The answer of defendant, which was verified, contained: (1) A general denial; and (2) affirmative allegations of the execution and delivery of the said conveyance and the payment of an adequate consideration thereunder, by way of a cross-petition, and sought to have title quieted as against the plaintiffs. *Held*, that the affirmative relief which defendant sought was dependent upon the result of the trial of the issues raised by the general denial to the petition, and if plaintiffs prevailed in such trial, no relief as sought could be granted defendant, and if defendant prevailed in such trial, his title became effectually adjudicated without such affirmative relief of quieting his title. *Held*, further, that no reply was necessary to join issues of fact, triable to the court or jury, and the relief sought under the cross-petition of the defendant, being dependent upon such trial, and being such relief as would accrue to him, if he were successful in such trial, without a judgment quieting his title, could not be granted him upon the pleadings in default of a reply to the answer and cross-petition of the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. ⇐343.]

Commissioners' Opinion, Division No. 5. Error from District Court, Carter County; A. Eddleman, Judge.

Action by Daniel Robert and another against J. S. Mullen. Judgment on the pleadings for defendant, and plaintiffs bring error. Reversed and remanded.

J. R. Connell and E. C. Armstrong, both of Idabel, and J. M. Willis and G. Earl Shaffer, both of Hugo, for plaintiffs in error. H. A. Ledbetter and F. M. Adams, both of Ardmore, for defendant in error.

CAMPBELL, C. This action was commenced in the district court of Carter county

by plaintiffs against the defendant for the recovery of a tract of land and for the cancellation of a purported warranty deed covering the same. The petition contained two causes of action, separately stated. The first one was an action in ejectment, and the other one was for the cancellation of a conveyance covering the same land, purporting to have been executed to the defendant by the plaintiffs, upon the following grounds: (1) That the deed in question was never executed by the plaintiffs; and (2) that the deed had never been approved by the county court as required by law, the said conveyance being a full-blood conveyance of inherited lands. Both causes were set forth in the usual form, and the petition was unverified. The defendant filed an answer properly verified, which contained: (1) A general denial; and (2) affirmative allegations of the execution and delivery of the deed in question by the plaintiffs to the defendant and the payment thereunder of an adequate consideration therefor, and further alleged the approval of said conveyance by the county court of McCurtain county, being the court having jurisdiction to approve said conveyance, and in said answer made reference to said order of approval and alleged that a copy of same was attached to the answer and made a part of the same, and prayed for a judgment quieting his title to said lands and barring all claims of plaintiffs to the same.

The order referred to was not in fact attached to the answer and never was filed in the trial court. No reply was filed to the answer and cross-petition of defendant, and on motion of defendant the court rendered judgment against the plaintiffs on the pleadings denying any relief to plaintiffs and quieting the title of defendant to the lands involved, barring all claims of the plaintiffs and enjoining them from asserting any claims to said lands and assessing the costs of the action against the plaintiffs. From this judgment an appeal is brought to this court by plaintiffs upon a transcript of the record, and they assign as error the action of the court in rendering such judgment upon the pleadings.

[1] 1. Before entering upon a discussion of the merits of this appeal, it becomes necessary to notice a contention made by the defendant in error with reference to an instrument which has been filed for the first time in this court. As was stated, the order approving the conveyance which was referred to in the answer of defendant was not in fact attached to the answer and was never in fact filed in the trial court, and it does not appear in the transcript of the record attached to the petition in error, but was filed for the first time in this court more than a year after this proceeding in error was commenced. It is true that there appears in the transcript a recital as follows:

"* * * And the answer and cross-petition of defendant having been presented and the exhibits referred to having been read to the court, and argued and treated by counsel for both plaintiffs and defendant in their argument as if the same had been attached or filed, were so treated by the court."

Such recital does not purport to be a copy of any order of the court in the cause, unless it is intended to be a recital of the language of the court in passing upon a motion to permit the filing of a reply, which the trial court, it would seem from such recital, refused to grant. It is fundamental that a motion and the ruling of the court thereon has no place in a transcript of the record, and if such motion or the ruling thereon is included in a transcript by the clerk, it is a mere nullity and cannot be considered by this court. *Devault et al. v. Merchants' Exchange Co.*, 22 Okl. 624, 98 Pac. 342.

The petition in error with the transcript attached was filed in this court on November 23, 1914, and the order referred to in the answer is not in such transcript. On March 9, 1916, there seems to have been filed in this court what purports to be a copy of such order approving the conveyance in question, as recorded in the office of the register of deeds for Carter county, and it is urged by defendant in error that this court should consider such instrument as a part of the record in this court, even though it was never filed in the trial court, and was filed for the first time in this court more than one year after the proceedings in error were commenced. Such an instrument, or exhibit, not having been filed in the trial court, cannot be made a part of the record by filing the same in this court and attaching it to the transcript, and this court cannot consider the same.

[2] 2. The only question presented by the record in this appeal is as to whether the trial court erred in rendering judgment upon the pleadings as they existed in the court below. The two causes of action were in usual form, and no contention is made that either cause is defectively stated, or that either is subject to demurrer. The theory upon which the defendant presented his motion for judgment on the pleadings, and the one which the trial court seems to have recognized, was that the answer and cross-petition required a reply in order to form any issue of fact properly triable to the court or a jury. The petition alleged that the deed sought to be canceled was never executed by the plaintiffs, and, further, that such deed was never approved by the county court having jurisdiction to approve the same, it being a full-blood conveyance of inherited lands.

Under the facts alleged, and the admissions in the answer, it is apparent that such conveyance was one which is required to be approved before it is a valid conveyance. If such conveyance was never executed, as alleged in the petition, by the plaintiffs to

the defendant, or if it were executed but not approved as required by law, then it was subject to cancellation at the instance of the plaintiffs. The defendant in his answer made a general denial, and then alleged affirmatively that such conveyance was executed and delivered to him by plaintiffs, and further alleged that such conveyance was approved by the proper court having jurisdiction to approve same. This is in effect nothing more than a general denial and added nothing to the general denial theretofore appearing in the answer. Two material issues of fact were tendered by the petition and were joined by the general denial in the answer, and no further allegations as to the execution of the conveyance and its approval by a court having jurisdiction that might be placed in the answer could eliminate the necessity for a trial of the issues of fact joined by the general denial. It would seem that the cross-petition of the defendant was merely one in form, as the relief sought thereby was only that relief which would accrue to the defendant if he prevailed in the trial of the issues raised by the pleadings. Judgment in his favor in a trial of the issues joined by the general denial would be just as effectual to quiet his title and bar all claims of the plaintiffs as an affirmative judgment to that effect, and, for this reason, his cross-petition was entirely dependent upon the result of the trial of the issues presented by the petition and general denial, and a failure of plaintiffs to file a reply to the answer and cross-petition of the defendant did not warrant the court in rendering judgment upon the pleadings denying any relief to plaintiffs without having had a trial of the issues properly joined by the pleadings. It will also be seen that no relief could, in the nature of things, be granted to the defendant upon his so-called cross-petition until it was first determined that the deed had actually been executed and delivered and until it was further determined that such deed, if executed and delivered, had actually been approved by the court having jurisdiction to approve such full-blood conveyance. The plaintiffs allege that such deed was never executed by them to the defendant, and that it was never approved as required by law, and upon these two grounds they sought to have the deed canceled. The defendant made a general denial in his answer, and then affirmatively alleged that such deed was executed and delivered to him by the plaintiffs, and that it had been duly approved by the county court having jurisdiction to approve the same. The affirmative allegations added nothing to the general denial and did not require any reply, and the cross-petition of the defendant being only one in form, depending absolutely upon the result of the trial of the issues of fact joined by the general denial, did not require any answer, for it sought no relief different from

that which would accrue to the defendant in the event that he prevailed in the trial upon the other issues of fact joined by the pleadings. A case very similar to this one has been before this court, and the pleadings very similar to the ones in this case have been construed by this court. In the recent case of *Cox v. Gettys*, 156 Pac. 892 (not yet officially reported), it was held:

"The petition, in a suit to cancel deed upon the ground, among others, that it was a forgery, was in the usual form, but unverified. The answer which was verified contained: (1) A general denial; and (2) an allegation to the effect that on November 30, 1912, B. made, executed, and delivered to the defendant his certain deed in writing whereby he conveyed to the defendant the certain premises described in the petition of the plaintiff; that said deed was filed for record in the office of the register of deeds of Oklahoma county on December 6, 1912; that a copy of said deed is attached to the petition, marked 'Exhibit A,' and made a part thereof; that said B. departed this life on December 5, 1912. Held, that the answer was in effect a general denial of the allegation of forgery, to which no reply was necessary, and that evidence tending to establish forgery was admissible."

In the opinion in the above case, Chief Justice Kane says:

"The general denial contained in the answer sufficiently joined the issue upon the question of forgery, and the further affirmative statements to the effect that the deceased made, executed, and delivered the deed did no more."

The answer of the defendant in the instant case being in effect only a general denial as to the main facts, and the cross-petition of the defendant being one in form only, seeking only such relief as would accrue to him in the trial of the case under the petition of plaintiffs, and being entirely dependent upon the trial of the issues of fact joined by the answer, it was not necessary for the plaintiff to file a reply to the answer of the defendant nor an answer to the cross-petition of the defendant. Therefore the judgment of the trial court upon the pleadings in favor of the defendant deprived plaintiffs of a trial upon certain material issues of fact, properly joined under the pleadings, and the judgment was erroneous.

The judgment of the lower court is reversed and cause remanded to the trial court, with directions to proceed therein in accordance with this opinion.

PER CURIAM. Adopted in whole.

BURNEY v. BURNEY. (No. 6511.)
(Supreme Court of Oklahoma. Sept. 26, 1916.)

(*Syllabus by the Court.*)

INDIANS §—15(1) — LANDS — ALLOTMENTS — ALIMONY.

Under the latter part of section 4, 85 Stat. 312, c. 199, Act May 27, 1908, as follows: "Provided, that allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions,

other than contracts heretofore expressly permitted by law"—*held*, that a decree of the court in a suit for alimony which decrees a portion of the annual rents and profits of a restricted allotment and appoints a receiver to take charge of the land and collect and disburse such annual rents and profits until the further order of the court is a charge upon the land, and will be set aside by this court.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 37; Dec. Dig. § 15(1).]

Commissioners' Opinion, Division No. 5. Error from District Court, Marshall County; Jesse M. Hatchett, Judge.

Action by Ben Burney against Myrtle A. Burney. Judgment for defendant awarding alimony on cross-petition, and plaintiff brings error. Affirmed, with directions.

George E. Rider and E. S. Hurt, both of Madill, for plaintiff in error. Hatchett & Ferguson, of Durant, for defendant in error.

HAYSON, C. This was an action brought by Ben Burney against Myrtle A. Burney for a divorce on the ground of abandonment. The defendant, Myrtle A. Burney, filed an answer consisting of a general denial and a cross-petition for alimony. After hearing the evidence in the case the trial court denied the plaintiff a divorce and granted the defendant judgment for alimony decreeing her two-thirds of the annual rents and profits from certain lands and premises of the plaintiff, and appointing one Jas. King receiver to take charge of said lands and premises until the further order of the court and to "collect, impound, and receive the rents and profits arising therefrom, and that annually after the collection of said rents and profits said receiver disburse and distribute the same to the respective parties as follows: One-third to plaintiff, and two-thirds to defendant." The order further provided:

"It is further ordered, considered, and adjudged by the court that the plaintiff and all those claiming by, through, or under him since the institution of this suit be and they are hereby forever barred, precluded, and enjoined from interfering with or molesting said receiver in the possession of said lands and premises or in the collection of the rents, revenues, and profits arising therefrom."

The lands and premises mentioned in the decree is the restricted allotment of Ben Burney, who is a full-blood Chickasaw Indian.

The plaintiff in error urges but one assignment of error. He claims that the trial court cannot so subject the rents and profits of a restricted allotment, and erred in so doing and in appointing a receiver to take charge of the land.

Plaintiff and defendant in error agree that there is but the one question before the court, and that is the construction of the following provision found in the act removing restrictions, passed in 1906 (35 Stat. at L. 312), which is found in section 4 of said act:

"Provided, that allotted lands shall not be subjected or held liable, to any form of person-

al claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

Counsel for both plaintiff and defendant in error cite no authorities that are squarely in point, and both admit in their briefs that neither the state nor federal court has passed upon this particular question. It occurs to us that it is necessary to determine two things: First, the intent of the Legislature; and, second, whether or not the court's order is a charge upon the land.

It was evidently the intention of Congress to protect the full-blood Chickasaw against any character of improvidence upon his part that could possibly result in a claim which could ripen into a charge upon his allotted land. This is, in effect, the holding of the court in *Mullen v. Simmons*, 234 U. S. 192, 34 Sup. Ct. 857, 58 L. Ed. 1274, cited by plaintiff in error in his brief, where a similar statute was before the court.

Is the order of the court a charge upon the restricted allotment? We believe that it is. By the order the court has done indirectly what cannot be done directly. It has taken charge of the allotment to the exclusion of the allottee. It has taken away the power of the full blood to exercise the control over the allotment that Congress intended he should have. By the order he is practically ousted from the land for an unlimited period; it might be a year or any term of years. This proceeding is unnecessary to accomplish the purpose of the court in making suitable provision for the support of the wife. An order should have been made for a specific sum payable at intervals. The law affords ample means to see that such an order is obeyed.

The record shows without question the court was right in its judgment in decreeing alimony to the wife and it is regrettable that the court has not the power to make the order relative to the proceeds of the allotment that was made. But, we believe, the order is contrary to the plain provisions of this statute, and that part of the order granting two-thirds of the annual rents and profits of the restricted allotment and appointing a receiver to take charge of such allotment should be set aside.

The judgment will be affirmed, with these directions: The judgment decreeing the wife to be entitled to alimony is affirmed. The order, in so far as it decrees two-thirds of the annual rents and profits of the restricted allotment and appointing a receiver to take charge of the allotment and collect and disburse such rents and profits, is set aside. The trial court is directed to enter judgment for a specific sum for alimony, as in its judgment is reasonable under the evidence in the case payable at intervals, running from the date of the original decree.

PER CURIAM. Adopted in whole.

JONES v. JONES. (No. 9063.)
(Supreme Court of Colorado. Dec. 4, 1916.)
DIVORCE \Leftrightarrow **200—ALLOWANCES AND ALIMONY**
—COURT COSTS—ATTORNEY'S FEES—TEMPORARY ALIMONY.

In an action for divorce, where the complaint states a cause of action within the equitable jurisdiction of the nisi prius court, and the existence of the marriage relation of the parties, the destitute condition of the wife, and the financial ability of the husband were established, the court had incidental jurisdiction to grant the wife court costs, attorney's fees, and alimony pendente lite.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 587-590, 658; Dec. Dig. \Leftrightarrow 200.]

Error to County Court, City and County of Denver; W. C. Hood, Jr., Judge.

Suit for divorce by Bessie Jones against George T. Jones. From an order directing him to pay court costs, attorney's fees, and alimony pendente lite to plaintiff, defendant brings error. Affirmed.

Edwin N. Burdick, of Denver, for plaintiff in error. Raymond S. Sullivan, of Denver, for defendant in error.

WHITE, J. An action was instituted in the trial court by Bessie Jones against her husband, George T. Jones, for divorce. Plaintiff also petitioned the court to award her alimony pendente lite, court costs, and attorney's fees. An answer and cross-complaint was filed, in which the marriage between the parties was admitted, the grounds alleged by plaintiff for divorce denied, and allegations of misconduct on the part of plaintiff set forth, and a decree of divorce prayed for in behalf of defendant. To the answer and cross-complaint, plaintiff filed her replication, and thereafter a hearing was had upon the petition for alimony, court costs, and attorney's fees only. The court ordered the defendant to pay the costs of the proceeding, a small sum, \$25, as a fee for plaintiff's attorney, and \$5 per week for the support and maintenance of plaintiff during the pendency of the suit. The defendant seeks to have this order reversed.

The question as to which of these parties, if either, is entitled to a divorce is not involved herein. The defendant may be, upon final hearing, adjudged innocent, and the plaintiff guilty, or vice versa, or it may be that both parties are at fault. As to the final result in relation to such matters, we are not concerned at the present time. The complaint states a case within the equitable jurisdiction of the nisi prius court, and the petition for alimony, etc., is incident thereto. The existence of the marriage relation of the parties, the destitute condition of the wife, and the financial ability of the husband were the sole essential facts involved upon the hearing in question. These facts were found in favor of the plaintiff, and she was entitled to the favorable action of the court in the premises. The law in relation

to such matters has been frequently stated by this court. Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Cowan v. Cowan, 10 Colo. 540, 545, 16 Pac. 215; Eickhoff v. Eickhoff, 29 Colo. 295, 298, 68 Pac. 237, 93 Am. St. Rep. 64.

We approve of the action of the court in the premises, and the judgment is therefore affirmed.

Judgment affirmed.

HILL and TELLER, JJ., concur.

JOINER v. JAMES et al. (No. 7855.)
(Supreme Court of Oklahoma. Nov. 15, 1916.)

Commissioners' Opinion, Division No. 3.
Error from District Court, Carter County; W. F. Freeman, Judge.

Action by Collin James against C. M. Joiner and others. From the judgment, defendant Joiner brings error. Affirmed.

Wm. Pfeiffer, of Oklahoma City, for plaintiff in error. McPherrren & Cochran, L. K. Pounds, and Chas. P. Abbott, all of Durant, for defendants in error.

HOOKEE, 'C. This action was filed in the district court of Carter county on October 7, 1913, by Collin James against C. M. Joiner and a large number of other parties, to recover the possession of certain real estate and to cancel and annul certain instruments on record as clouds upon his title, and for damages for the retention of real estate. On May 7, 1915, a judgment was entered in this cause, and from an examination thereof it appears that leave was given on that day for the plaintiff in error, C. M. Joiner, to withdraw his answer filed in said action, which was done, and thereupon judgment was rendered in favor of Collin James. In due time C. M. Joiner filed a motion for a new trial and to vacate and set aside the judgment rendered, alleging as grounds therefor the following reasons:

(1) Because he was advised by his attorney that it would not be necessary for him to be present in court on the day the cause was set for trial, as in his opinion the case would be dismissed, inasmuch as certified copies in certain proceedings in the United States Court for the Eastern District of Oklahoma involving the same matters had been procured and presented to the trial court.

(2) That when his attorneys were compelled to go to trial they attempted to procure the presence of their client, plaintiff in error, but on account of a storm having damaged the telephone they were unable to communicate with him, so as to have him present at the trial of said cause.

(3) Because on the morning of the trial his attorneys were informed and believed that a compromise had been effected with reference to said land involved here, whereby the interest of their client was protected, and that thereupon they withdrew the answer and permitted judgment to go against him.

(4) That he has a subsequent valid interest in and to the property involved in this action.

(5) That it was through no fault of his attorneys that his rights were not presented to the court, and he filed in support thereof the affidavit of W. B. Johnson, his attorney, stating that on the day the case was set for trial he informed the court that plaintiff in error was not present, and that Johnson, as his attorney, had expected the cause to be dismissed, and explained to the court that, inasmuch as certain records that had been requested by the trial judge had been procured, he thought the cause would be dismissed, and that thereupon the court granted a continuance of said cause until the following morning, and in the meantime an effort had been made to reach Mr. Joiner, the plaintiff in error, but was unable to reach him on account of the condition of the telephone, and when on the following morning said cause was called for trial he was led to believe, by conversation of parties interested in said suit, that a compromise had been agreed upon which would protect the interest of his client, and thereupon he withdrew the answer of his client and consented that judgment might be rendered.

In opposition thereto one C. B. Cochran was called as a witness for the plaintiff, and he testified that he was attorney for some of the defendants in the cause, and was present at the time judgment was rendered in the case; that on the morning of the 7th of May, 1915, when he (Cochran) came into the courtroom, the said W. B. Johnson, as attorney for C. M. Joiner, stated that, if the rents upon the land involved would be waived, he (Johnson) would permit a judgment to be rendered in said cause against his client, and thereupon he (Cochran) informed Mr. Johnson that he would take the matter up with the attorney for the plaintiff, Mr. Abbott, which he did, and Mr. Abbott accepted the offer thus made by Mr. Johnson, whereupon he informed Mr. Johnson that the rents would be waived, and when court convened the cause was called for trial, and Mr. Johnson in open court announced that it was agreed that plaintiff and his cross-petitioners would waive the question of rents against C. M. Joiner, and that the said C. M. Joiner would not contest the case further; that the above is the only understanding had by him with Mr. Johnson, and that the attorney for the plaintiff, Mr. Abbott, did not discuss the matter with Mr. Johnson at all. And thereupon C. P. Abbott was introduced as a witness for the plaintiff in opposition to said motion, and denied having any conversation whatever with Mr. Johnson or any one else with reference to this matter, save and except with Mr. Cochran as stated above by him. The court, after hearing this evidence, declined to grant to plaintiff in error a new trial, and plaintiff in error has appealed here.

The vacation of judgments and the granting of new trials are discretionary largely with the trial court, and unless it appears that their discretion has been abused the appellate courts are loathe to interfere. From an examination here it appears that the grounds relied upon by the plaintiff in

error are sharply controverted, and the trial court, after hearing the evidence, tried the questions of fact adversely to plaintiff in error. And inasmuch as the application was one which addressed itself largely to the discretion of the trial court, under the circumstances we cannot say he abused that discretion, so we cannot interfere with the judgment of the court below. See *C. v. R. I. & P. Ry. Co. v. Maynard*, 31 Okl. 685, 122 Pac. 149; *Poff v. Lockridge*, 22 Okl. 462, 98 Pac. 427; *M., K. & T. Ry. Co. v. Ellis*, 158 Pac. 226.

The judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

EBERLE et al. v. HUNTER. (No. 8222.)
(Supreme Court of Oklahoma. Nov. 14, 1916.)

Commissioners' Opinion, Division No. 4. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by John S. Hunter against Lena L. Eberle and another. Judgment for plaintiff, and defendants appeal. Dismissed.

George P. Glaze, of Oklahoma City, for plaintiffs in error. John S. Hunter, of Oklahoma City, for defendant in error.

EDWARDS, C. This case was appealed to this court, and the appeal was dismissed for want of prosecution. The case now comes on on motion of the defendant in error for a judgment against the sureties on the supersedeas bond under the provisions of chapter 249, Session Laws of 1915. The motion is sustained.

Judgment is therefore entered in favor of the defendant in error, John S. Hunter, and against Harry P. Hickey, surety on the supersedeas bond of plaintiffs in error, in the sum of \$906.28, with interest at 6 per cent. per annum from June 2, 1914, and all costs in the lower court, together with the costs incurred in this court.

PER CURIAM. Adopted in whole.

CHUPCO et al. v. CHAPMAN et al.
(No. 7570.)

(Supreme Court of Oklahoma. June 27, 1916.
Rehearing Denied Oct. 10, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 347(2) — REVIEW — INTERMEDIATE ORDER.

The great weight of authority is in favor of the rule that where the statute gives the right of appeal from an intermediate order, decision, decree, etc., the party against whom the appealable order is made during the progress of the litigation has the option to institute proceedings for review at once, or to wait until final judgment, and at that time question the correctness of the prior order, providing that the proceedings

for review are taken within the statutory period for reviewing the order. The general rule seems to be that where a party has the right to appeal from an interlocutory order or decree within a limited time and neglects to do so, the right to appeal is lost, and the interlocutory order or decree cannot be reviewed on an appeal from the final judgment, taken after the expiration of the time to appeal from the interlocutory order or decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1897; Dec. Dig. ¶347(2).]

2. APPEAL AND ERROR ¶347(2) — REVIEW — INTERMEDIATE ORDER — SUSTAINING OF DEMURRER.

Under the authority of *Holland v. Beaver*, 29 Okl. 115, 116 Pac. 768, Ann. Cas. 1918A, 814, this court will consider the question of whether a district court erred in sustaining the demurrers to a petition, when the petition in error, with case-made attached, is filed in this court within six months after the ruling of the lower court sustaining such demurrers was made, the proceedings in error having also been begun within six months from the date of the final judgment subsequently entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1897; Dec. Dig. ¶347(2).]

3. PLEADING ¶52(1) — PETITION — SEPARATE CAUSES — SEPARATE STATEMENT AND NUMBERING.

Where it is sought to set out several causes of action in the same petition, each should constitute a separate count or paragraph, separately stated and numbered. Each paragraph should proceed upon a single definite theory, and should present a complete cause of action, as distinct from others as if it stood alone in the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 118; Dec. Dig. ¶52(1).]

4. PLEADING ¶204(2) — DEMURRER — PETITION — SEVERAL CAUSES OF ACTION.

It is a well-established rule of this court that where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, the demurrer should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 487; Dec. Dig. ¶204(2).]

5. PLEADING ¶216(2) — DEMURRER TO PLEADING.

In considering the defendants' demurrers to the seven separate causes of action, we are not confined to the allegations contained in the particular paragraph or subdivision of the petition, but may supplement such allegations found in the particular paragraphs by other paragraphs, containing general allegations applicable alike to the different causes of action. This we could not do if the separate causes of action were separately stated and numbered, unless there was found in the defective paragraph some reference to other allegations in other paragraphs of the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 537, 538; Dec. Dig. ¶216(2).]

6. SUFFICIENCY OF PETITION — DEMURRER NOT SUSTAINABLE.

It is urged that the petition as a whole did not state a cause of action; hence the court erred in overruling the demurrer to said petition. In view of the conclusion already reached, this position is untenable. Construing the petition as a whole, it sufficiently states a cause of action, sufficient to withstand the attack by general demurrers.

Commissioners' Opinion, Division No. 4. Error from District Court, Hughes County; Tom D. McKeown, Judge.

Action by James C. Chupco and others against James A. Chapman and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with directions.

Lewis C. Lawson, of Holdenville, for plaintiffs in error. Harry H. Rogers and John Rogers, both of Tulsa, for defendants in error.

DAVIS, C. This case presents error from the district court of Hughes county. The parties will be referred to as in the trial court. On the 5th day of February, 1915, the trial court sustained demurrers of the various defendants to plaintiffs' amended petition, and granted plaintiffs permission to amend in case they so desired; no time being fixed in which to make such amendment. On the 7th day of June, 1915, no amendment having been made or other pleadings filed, the defendants made a motion to dismiss the action on the ground that defendants had not amended their petition as provided in a former order of the court. Whereupon the plaintiffs announced that they elected to stand upon their first amended petition, and refused to amend the same, and the court then sustained defendants' motion to dismiss, and formally dismissed the action, to all of which the plaintiffs excepted and were granted 90 days to prepare and serve the case-made upon the defendants. The petition in error and case-made, with stipulation waiving summons, were filed in the Supreme Court on the 4th day of August, 1915.

The defendants raise the preliminary question that the appeal should be dismissed upon the ground that, the demurrers to the amended petition having been sustained and plaintiffs having refused to amend, with the expiration of 15 days from the date the ruling was made, jurisdiction to make and serve a case that should preserve such ruling for review was lost and could not be restored.

[1] The preliminary question thus presented is, Where a demurrer to the petition is sustained, must the party against whom the adverse ruling is made, in order to procure a review of it by means of a case-made, within 15 days from that time either serve a case-made or procure an extension of time for so doing, or may he wait until a final judgment is rendered against him and then by means of a case-made served within the statutory period or period of extension, if any, from that date institute proceedings in error for the reversal of the judgment, and then have the court pass upon the question whether the sustaining of the demurrer was error? The question, of course, is predicated upon the supposition, as in the case at bar, that the party declined to amend, but the order of dismissal was not made until a later date. Section 5236, Rev. Laws Okl. 1910, makes the sustaining of a demurrer a final

order from which an appeal would immediately lie to the Supreme Court, but if the party to the adverse ruling should elect to amend, then the error, if any, will be deemed as waived and no appeal would lie. While a few states hold to the contrary, we believe the correct rule is to be found in 2 R. C. L. § 160, which is as follows:

"The great weight of authority is in favor of the rule that where the statute gives the right of appeal from an intermediate order, decision, decree, etc., the party against whom the appealable order is made during the progress of the litigation has the option to institute proceedings for review at once, or to wait until final judgment, and at that time question the correctness of the prior order, providing that the proceedings for review are taken within the statutory period for reviewing the order. * * * The general rule seems to be that where a party has the right to appeal from an interlocutory order or decree within a limited time and neglects to do so, the right to appeal is lost, and the interlocutory order or decree cannot be reviewed on an appeal from the final judgment, taken after the expiration of the time to appeal from the interlocutory order or decree."

Our statute upon appeal is the same as the Kansas statute on that subject, with the exception that there one year is allowed in which to perfect the appeal instead of six months, as in this jurisdiction, and in the case of *Bates v. Lyman*, 35 Kan. 634, 12 Pac. 33, it is said:

"Where a petition in error is filed in the Supreme Court within one year after the making of an order overruling a motion for a new trial, the proceeding is in time for a review of all the rulings of the court made during the trial, and excepted to at the time, which are referred to in such motion." *Blackwood v. Shaffer*, 44 Kan. 273, 24 Pac. 423; *White v. Atchison, Topeka & Santa Fe Railway Co.*, 74 Kan. 778, 88 Pac. 54, 11 Ann. Cas. 550; and note.

The decisions of our own court are in accord with the above holdings as shown by the following authorities: *Doorley v. Buford & George Mfg. Co.*, 5 Okl. 594, 49 Pac. 936; *Buxton v. Alton-Dawson Mer. Co.*, 18 Okl. 287, 90 Pac. 19; *Bellamy v. Washita Valley Telephone Co. et al.*, 25 Okl. 792, 108 Pac. 889; *Holland v. Beaver*, 29 Okl. 115, 116 Pac. 766, Ann. Cas. 1913A, 814; *Reynolds v. Phipps et al.*, 31 Okl. 788, 123 Pac. 1125; *Rhyme Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart*, 40 Okl. 131, 136 Pac. 1095.

Therefore we hold that where a demurrer to the petition is sustained and the plaintiff excepts and elects to stand on his petition, he has the option to institute proceedings in error at once or wait until final judgment, dismissing his action, is entered, and upon appeal from such dismissal question the correctness of the order sustaining the demurrer, provided the appeal from the final judgment is taken within the statutory period of six months from the time the demurrer was sustained.

[2] The several demurrers were sustained to the amended petition of plaintiffs, which was filed on March 26, 1914, and the plain-

tiffs declined to plead further, and elected to stand on their amended petition on June 7, 1915, whereupon the court rendered a final judgment, dismissing their cause of action. Exceptions were duly taken and saved by plaintiffs to the action of the court in sustaining each demurrer to their amended petition and to the final judgment of the court in dismissing their cause of action, and an appeal was duly perfected and the proceedings in error in this court duly commenced on August 4, 1915. Under the authority of *Holland v. Beaver*, 29 Okl. 115, 116 Pac. 766, Ann. Cas. 1913A, 814, this court will consider the question of whether a district court erred in sustaining the demurrers to a petition, when the petition in error, with case-made attached, is filed in this court within six months after the ruling of the lower court sustaining such demurrers was made, the proceedings in error having also been begun within six months from the date of the final judgment subsequently entered. The defendants *Monitor Oil & Gas Co.*, *H. B. Bonfoey*, and *George S. Hooker* were not served with process, and the three defendants served, *James A. Chapman*, *H. D. Sehorn*, and *Mada McAllister*, each filed a separate demurrer to the amended petition of the plaintiffs, each demurrer being in *hæc verba*, except for the fact that each demurrer contains the name of the defendant demurring and not the name or names of any other defendant. The demurrer of the defendant *James A. Chapman*, omitting the caption and mere formal parts, reads as follows:

"Comes now *James A. Chapman*, one of the defendants herein, and separately demurs to the petition of plaintiffs filed herein and for reason says:

"(1) Said petition as a whole does not constitute a cause of action in favor of plaintiffs and against the defendant *James A. Chapman*.

"(2) The first cause of action as set forth in plaintiffs' petition does not constitute a cause of action in favor of plaintiffs and against defendant *James A. Chapman*.

"(3) The second cause of action as set forth in plaintiffs' petition does not constitute a cause of action in favor of plaintiffs and against defendant *James A. Chapman*.

"(4) The third cause of action as set forth in plaintiffs' petition does not constitute a cause of action in favor of plaintiffs and against defendant *James A. Chapman*.

"(5) The fourth cause of action as set forth in plaintiffs' petition does not constitute a cause of action in favor of plaintiffs and against defendant *James A. Chapman*.

"(6) The fifth cause of action as set forth in plaintiffs' petition does not constitute a cause of action in favor of plaintiffs and against defendant *James A. Chapman*.

"(7) The sixth cause of action as set forth in plaintiffs' petition does not constitute a cause of action in favor of plaintiffs and against defendant *James A. Chapman*.

"(8) The seventh cause of action as set forth in plaintiffs' petition does not constitute a cause of action in favor of plaintiffs and against defendant *James A. Chapman*.

"Wherefore said defendant prays that this demurrer be sustained."

The five assignments of error contained in the petition in error are as follows:

"First Assignment of Error. Because the court erred in sustaining said motion of the defendants in error to require the plaintiffs below to separately state and number their different causes of action.

"Second Assignment of Error. Because the court erred in sustaining each of the demurrers of said defendants in error to the petition and amended petition of the plaintiffs in error filed in this cause.

"Third Assignment of Error. Because the court erred in sustaining the motion of the defendants in error to dismiss said cause for want of prosecution, and because not amended in accordance with prior orders, and in dismissing said cause, and thereby fully sustaining said motion of said defendants in error and defeating the causes of action of the plaintiffs in error thus presented in their petition and amended petition.

"Fourth Assignment of Error. Because said orders, judgments, and decrees of the court are not sustained by the law, but are contrary to the law, and especially the respective acts of Congress set forth and relied upon in said petition and amended petition of the plaintiff in error, and which said acts of Congress are here again referred to and relied upon by said plaintiffs in error to sustain their rights and interests in and to said lands thus allotted to said Amos Chupco and to the heirs of said Katie Chupco, mentioned and described in said petition and amended petition, and the attention of the court is hereby specifically directed to each and to every act of Congress and section thereof mentioned and referred to therein, as fully as if the same was hereby specifically mentioned and set forth in this assignment, as completely as in said petition and amended petition.

"Fifth Assignment of Error. Because of numerous errors of law committed on the trial of said cause and duly excepted to by the plaintiffs in error."

[3] We do not think that there is any reversible error on the part of the trial court under the first assignment of error. Section 4739, Rev. Laws Okl. 1910.

"Where it is sought to set out several causes of action in the same petition, each should constitute a separate count or paragraph, separately stated and numbered. Each paragraph should proceed upon a single definite theory, and should present a complete cause of action, as distinct from others as if it stood alone in the pleadings. Sutherland on Pl. & Pr. §§ 193, 200; 1 Chitty's Pleading, 418; Watson v. San Francisco, etc., Ry. Co., 41 Cal. 17; Moore v. Halliday, 43 Or. 243, 72 Pac. 801, 99 Am. St. Rep. 724." First Nat. Bank of Tishomingo v. Ingle, 37 Okl. 276, 132 Pac. 895.

[4-6] As to the second assignment of error, supra, it will be noticed that each of said demurrers is a general demurrer to the amended petition as a whole, and a general demurrer to each of the separately stated and numbered causes of action therein pleaded and set forth, seven causes of action in all.

"It is a well-established rule of this court that where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, the demurrer should be overruled. Hurst v. Sawyer, 2 Okl. 470, 37 Pac. 817; City of Guthrie v. Harvey Lumber Co., 5 Okl. 774, 50 Pac. 84. There can be no doubt that the petition states a cause of action for the property set forth in that paragraph in which the plaintiff claims a general ownership, and for that reason there was no error in overruling the demurrer." Cockrell et al. v. Schmitt, 20 Okl. 207, 94 Pac. 521, 129

Am. St. Rep. 737; Hurst v. Sawyer, 2 Okl. 470, 37 Pac. 817; Emmerson v. Botkin, 26 Okl. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953; W. E. Berry and J. H. McDonald v. Geiser Manufacturing Co., 15 Okl. 304, 85 Pac. 699; Noble Whiteacre v. Clara E. Nichols, 17 Okl. 387, 87 Pac. 865; Munn v. Taulman, 1 Kan. 254, 81 Am. Dec. 508; Erwin v. Parham, 12 How. 197, 13 L. Ed. 952; Maxwell v. Stewart, 21 Wall. 71 and 22 Wall. 77, 22 L. Ed. 565; Ardmore State Bank v. Mason, 30 Okl. 568, 120 Pac. 1080, 39 L. R. A. (N. S.) 292; Harrill v. Weer, 26 Okl. 813, 109 Pac. 539; Owen et al. v. City of Tulsa et al., 27 Okl. 284, 111 Pac. 320; Hanenkratt v. Hamill, 10 Okl. 219, 61 Pac. 1050; Savage et al. v. Dinkler, 12 Okl. 463, 72 Pac. 368.

"In considering the defendant's demurrers to the six separate causes of action, we are not confined to the allegations contained in the particular paragraph or subdivision of the petition, but may supplement such allegations found in the particular paragraphs by other paragraphs containing general allegations applicable alike to the different causes of action. This we could not do if the separate causes of action were separately stated and numbered, unless there was found in the defective paragraph some reference to other allegations in other paragraphs of the petition.

"It is urged that the petition as a whole did not state a cause of action; hence the court erred in overruling the demurrer to said petition. In view of the conclusion already reached, this position is untenable. Construing the petition as a whole, it sufficiently states, not only a cause of action, but six different causes of action." First Nat. Bank of Tishomingo v. Ingle, 37 Okl. 276, 132 Pac. 895.

In the light of these authorities, and after a careful examination of the amended petition, we are of the opinion that the same does state a cause of action against each of said defendants, interposing against it a separate general demurrer, and that the causes of action, separately stated and numbered therein, are each sufficient as against the separate general demurrers of said defendants leveled against it. The amended petition in this case, after stating the first cause of action in five separate paragraphs, begins the second cause of action as follows:

"Second Cause of Action. And for their second cause of action herein against said defendants, these plaintiffs hereby make paragraphs 1 to 5, inclusive, of their first cause of action a part of this second cause of action as full and completely as if said paragraphs, and each of them, were again set forth herein in *hæc verba*, and ask that the same be read and considered herewith as a part hereof; and, in addition to the matters set forth in said paragraphs, these complainants further charge and aver."

Plaintiffs' third cause of action in said amended petition begins as follows:

"And for their third cause of action in this case, these plaintiffs make paragraphs 1 to 5 inclusive, of said first cause of action a part of this third cause of action as completely as if it was again set forth in *hæc verba*, and ask that the same be read and considered herewith as a part hereof; and in addition thereto plaintiffs further charge and aver."

Plaintiffs' fourth cause of action begins as follows:

"And for their fourth cause of action herein complainants make paragraphs 1 to 5, inclusive, of the first cause of action herein stated a part

hereof, and ask that it be read and considered herewith as likewise a part of this cause of action; and, in addition thereto, and as a part of this cause of action, plaintiffs further charge and aver."

Plaintiffs' fifth cause of action begins as follows:

"And for their fifth cause of action herein complainants make paragraphs 1 to 5, inclusive, of the first cause of action herein stated a part of this cause of action, and ask that the same be read and considered herewith as part hereof; and in addition thereto further charge and aver."

Plaintiffs' sixth cause of action begins as follows:

"And for their sixth cause of action herein these plaintiffs refer to paragraph 1 to 5 inclusive, of their first cause of action herein stated, and ask that the same be read and considered herewith as part hereof; and in addition thereto these plaintiffs further charge and aver."

And plaintiffs' seventh cause of action begins as follows:

"And for their seventh cause of action herein, your complainants make paragraphs 1 to 5, inclusive, of the first cause of action herein stated a part of this cause of action, and ask that the same be read and considered herewith as a part hereof as fully and completely as if said paragraphs were again herein set forth in *hæc verba*; and in addition thereto your complainants further charge and aver."

For the reasons stated herein we are of the opinion that the trial court committed reversible error in sustaining each of the separate demurrers of said defendants to plaintiffs' amended petition, and in rendering final judgment dismissing plaintiffs' action. It is therefore ordered that the cause be reversed and remanded, with directions to the trial court to set aside said judgment of dismissal and to reinstate said action in said court, and to overrule each of said demurrers to said amended petition, and to proceed to further hear and determine said cause according to law.

PER CURIAM. Adopted in whole.

MATHENY v. BANK OF NASHVILLE. (No. 6525.)

(Supreme Court of Oklahoma. Sept. 26, 1916.
Rehearing Denied Oct. 17, 1916.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE §43(3)—JURISDICTION—AMOUNT IN CONTROVERSY.

In an action in replevin in the justice's court, where the amount in controversy exceeds \$200, the court has no jurisdiction thereof.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 75, 153; Dec. Dig. § 43(3).]

2. JUSTICES OF THE PEACE §44(6)—JURISDICTION—AMOUNT IN CONTROVERSY.

In determining the jurisdiction of the justice's court in an action of replevin, the value of the property and the damages sought to be recovered for its detention must be considered together, as fixing the amount in controversy.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 163; Dec. Dig. § 44(6).]

3. JUSTICES OF THE PEACE §141(2) — REVIEW OF DECISIONS—JURISDICTION OF APPELLATE COURT.

The jurisdiction of the county court upon appeal from a replevin action in the justice's court must be determined by the laws in force applicable to the jurisdiction of a justice's court, as the county court upon appeal can acquire no greater jurisdiction than that possessed by the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 472; Dec. Dig. § 141(2); Courts, Cent. Dig. §§ 560, 669.]

4. JUSTICES OF THE PEACE §141(5) — REVIEW OF DECISIONS—JURISDICTION OF APPELLATE COURT.

Remittitur made in the county court so as to reduce the amount involved within the jurisdiction of a justice of the peace cannot invest the county court with jurisdiction upon an appeal from a justice's court, where the amount involved in said action exceeded the jurisdiction of the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 475; Dec. Dig. § 141(5); Courts, Cent. Dig. §§ 560, 669.]

Commissioners' Opinion, Division No. 3. Error from County Court, Alfalfa County; F. M. Gustin, Judge.

Action by the Bank of Nashville against P. M. Matheny. From a judgment for plaintiff, defendant brings error. Dismissed.

Titus & Talbot, of Cherokee, for plaintiff in error. Webster Wilder, of Cherokee, for defendant in error.

HOOKER, C. In January, 1912, the Bank of Nashville commenced this action of replevin in the city of Cherokee, Alfalfa county, Okl., against plaintiff in error, P. M. Matheny, whereby it sought to recover the possession of certain personal property, or if the same could not be had, the value thereof in the sum of \$130, and for the further sum of \$75 damages and costs. Trial was had in the justice court, and judgment rendered in favor of the bank and against the plaintiff in error, from which an appeal was had to the county court of Alfalfa county, and on the 20th day of October, 1913, this cause was tried in said court, and judgment rendered in favor of the bank and against plaintiff in error for a return of the property or its value in the sum of \$130.

There are several reasons assigned why the judgment in this case should be reversed; but, under the view that we take, it is only necessary to consider one.

It appears from an examination of the record before us that the plaintiff instituted this action in the justice's court to recover the possession of personal property or its value in the sum of \$130, and for the further sum of \$75 damages, thus making the amount in controversy in this action \$205. When the judgment was rendered in the lower court, an appeal was had to the county court, where the cause was tried de novo, and at the beginning of the trial the plaintiff in said action attempted to remit or disclaim the damages

sought to be recovered here, and the cause was tried upon the remaining issue involved in said cause, to wit, the recovery of the personal property or its value.

[1, 2] Under section 18, art. 7, of the Constitution of this state, the office of the justice of the peace is created and its jurisdiction fixed in civil cases where the amount involved did not exceed \$200 exclusive of interest and costs. It clearly appears from an examination of the record before us that the amount in controversy here was personal property of the value of \$130, and damages to the extent of \$75. There can be no question under the authorities but that we must consider the value of the property and the damages claimed for its detention together as constituting one sum in controversy here. The following cases are in line with this view:

In the case of *Ferguson v. Byers*, reported in 40 Or. 468, 67 Pac. 1115, the Supreme Court of Oregon said:

"The statute limiting the amount in controversy is as follows: 'A justice's court has jurisdiction, but not exclusive, of the following actions: * * * (2) For the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed two hundred fifty dollars (\$250.00).' It will be remembered that the defendant alleged in her complaint, in the action to recover possession of the property, that the value thereof is \$249, and that in consequence of the unlawful seizure and detention she sustained damage in the sum of \$25, thus making the amount in controversy, in case possession of the property could not be secured, the sum of \$274, which is in excess of the jurisdiction of a justice's court, and its judgment is void unless the remission by defendant's counsel of the sum of \$25 removes the objection. *Camp v. Wood*, 10 Watts (Pa.) 118. While a diversity of judicial opinion exists as to what constitutes the amount in controversy, it is settled in this state that the sum thus involved is to be determined by the ad damnum clause of the complaint, and not by the amount of the judgment. *Troy v. Hallgarth*, 35 Or. 162, 57 Pac. 374. The defendant not having remitted any part of the damage which she claims to have sustained until the judgment for the possession of the property was rendered, it is not necessary to consider whether a party can waive a part of his claim, so as to bring it within the jurisdiction of an inferior court; for, to accomplish this result, the remitter must be made when the action is begun; otherwise jurisdiction of the subject-matter is not secured. *Litchfield v. Daniels*, 1 Colo. 268. * * * A court's jurisdiction of the subject-matter of an action is determined, in the first instance, from an inspection of the allegations of a complaint. Such jurisdiction, however, may be defeated by the introduction of testimony at the trial, conclusively showing that the subject of the controversy is not within the limit of the court's power. * * * But where, from an inspection of the complaint, the court does not have, in the first instance, jurisdiction of the subject-matter, neither testimony nor remitter can confer such jurisdiction. The defendant having alleged in her complaint that the value of the property taken and the damage sustained by her was the sum of \$274, which she apparently sought to recover, the justice's court never secured jurisdiction of the subject-matter."

In the case of *Hobbin v. Ryan*, 130 Cal. 96, 62 Pac. 206, the Supreme Court of California said:

"In Constitution, art. 6, § 11, providing that 'justices shall have jurisdiction in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars (\$25.00) per month, and where the whole amount of damages claimed does not exceed two hundred dollars (\$200.00),' and Code Civ. Proc. §§ 113, 1163, in which the same language is used, the word 'damages' must be construed to include the whole amount sued for, and to be adjudged, not merely the alleged value of the use and occupation, but treble such value, where the same is prayed for as damages, as permitted by statute, and where the damages claimed under such construction exceed \$200, the justice is without jurisdiction."

In *Reynolds v. Phillips*, 72 S. C. 32, 51 S. E. 523, the Supreme Court of California said:

"An action for possession of chattels of the value of \$100, and for \$75 damages, or, if they cannot be returned, for a judgment for \$175, is, under Const. art. 5, § 21, in excess of the jurisdiction of a magistrate."

In the case of *Dempsey v. Hill*, 3 Ohio Dec. 260, the Logan common pleas court of said state held:

"If the damages claimed before a justice exceed \$100 in an action of replevin, his jurisdiction is ousted. * * * Justices of the peace have jurisdiction in such actions of replevin, or trespass against constables and sheriffs, 'where the sum or matter in dispute' does not exceed \$100."

"Under the statutes precluding a justice from exercising jurisdiction 'where the sum or matter in dispute exceeds one hundred dollars (\$100.00),' it requires an addition of the value of replevied property to the damages claimed, in determining a justice jurisdiction in replevin."

In the case of *Wedgwood v. Parr*, 112 Iowa, 514, 84 N. W. 528, it is said:

"Where a petition filed with a justice of the peace praying for judgment on a note for \$128.50, with interest, and for the possession of wheat valued at \$280, the amount exceeded the jurisdiction of the justice, under Code, § 4477, giving justices of the peace jurisdiction when the amount in controversy is not more than \$300."

In the case of *Stevens v. Gunz*, 23 Minn. 520, it is said:

"Justice of the peace has no jurisdiction in an action in replevin, where the value of the property and amount of damages claimed, taken together, appear from the complaint to exceed \$100."

[3, 4] The record here does not disclose that any remitter was made by the plaintiff below as to damages in the justice's court, nor can we in this action indulge the presumption that the same was done, for the record is to the contrary. The remitter made in the county court where said cause was tried upon appeal will not suffice to invest the county court with jurisdiction of this case upon appeal, if the justice's court did not possess jurisdiction thereof. The authorities are well settled that appellate courts, like the county court, do not acquire jurisdiction of the cause by appeal if the justice's court did not have jurisdiction thereof. Having already determined that the amount in controversy was beyond jurisdiction of the justice's court, and that the justice's court did not acquire jurisdiction of said action; it likewise follows that the county court did

not acquire jurisdiction of said action upon appeal. In the early case of *Rhyne v. Manchester Assurance Company*, 14 Okl. 555, 78 Pac. 558, this court said:

"It is the general rule that a court of the justice of the peace is one of limited and special jurisdiction, and no presumptions are entertained in favor of its jurisdiction, but the records must show affirmatively that such court has jurisdiction of both the subject-matter and of the parties. But after jurisdiction of the subject-matter and of the parties attaches, the rule changes, and in all subsequent proceedings the same presumptions are indulged in favor of the regularity and validity of the proceedings of justices' courts as are extended to the superior courts of general jurisdiction."

Under this authority we cannot indulge the presumption that the plaintiff below remitted his claim for damages so as to invest the justice's court with jurisdiction of this case; and, inasmuch as the justice's court is of limited jurisdiction, the record itself should affirmatively show that all the acts were done necessary to give the court jurisdiction of said cause.

We must therefore hold that the justice's court did not have jurisdiction of this case, under the record as the same is presented here, nor did the county court on appeal therefrom acquire jurisdiction of said cause, nor has this court, upon appeal from the county court, acquired jurisdiction, and this appeal is therefore dismissed.

PER CURIAM. Adopted in whole.

BROWN et al. v. WILSON et al. (No. 7370.)
(Supreme Court of Oklahoma. Jan. 11, 1916.
Dissenting Opinion. Oct. 10, 1916. Rehear-
ing Denied Oct. 10, 1916.)

(Syllabus by the Court.)

1. MINES AND MINERALS ¶79(8)—OIL AND GAS LEASE—CONSTRUCTION—FORFEITURE.

Where an oil and gas lease was made, executed, and delivered for the consideration of \$1 in hand paid the lessor, and the covenants and agreements hereinafter contained on the part of the lessee, and leased and let to him a certain tract of land for a term of ten years and as long thereafter as oil and gas or either were produced therefrom by the lessee, he to yield to the lessor certain royalties from the oil and gas produced, and where the lessee agreed to complete a well on the premises within four months from the date thereof or pay at the rate of \$80 in advance for each three months such completion was delayed, *held*, that the \$1 supported the four months' period in which the lessee had to complete a well and supported no other stipulation in the lease; that the prospective royalties were the sole consideration for the execution of the lease on the part of the lessor; that the agreements on the part of the lessee to complete a well on the demised premises within four months or pay for delay conferred an option on the lessee to drill or pay; and that a failure to do either forfeited the lease at the option of the lessor, who thereafter was entitled to have the same judicially declared forfeited and canceled as a cloud upon his title.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 209; Dec. Dig. ¶79(8).]

2. MINES AND MINERALS ¶77—OIL AND GAS LEASE—PROVISIONS AS TO SURRENDER.

Where such lease reserves to the lessee and his assigns the right at any time after four months, on the payment of \$1 and all payable obligations then due the lessor or his assigns, to surrender the lease, if not tested, for cancellation, *held* that, as said lease, construed as a whole, confers on the lessee an option to complete a well within four months or pay for delay and a further option to surrender at any time after four months, and thereby avoid doing both, it was voidable at the option of the lessor at any time after four months for lack of mutuality, in that it imposed no legal obligation on the lessee; that, as prospective royalties were the sole consideration for the execution of the lease on the part of the lessor, payment of which could be defeated by a surrender thereof by the lessee, the lease was nudum pactum; and that, as the same reserves to the lessee the right to surrender the lease at any time after four months before development, a corresponding right exists in the lessor to compel a surrender.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. ¶77.]

3. MINES AND MINERALS ¶79(7)—OIL AND GAS LEASE — RIGHTS OF PARTIES — DELAY RENTAL.

Where said lease as to 80 acres of the demised premises was assigned to the S. S. Co., and where on July 17, 1914, \$20 delay money fell due and payable thereon from the lessee to the lessor, assuming that the lessor and all parties in interest under the lease agreed to the substitution of said company as lessee of said 80 acres so assigned, evidence examined, and *held*, that said company defaulted in said payment, and that time was the essence of the contract, that the court erred in refusing to so hold and that said lease was forfeit as to the holding of said company under the lease, and to cancel the lease accordingly.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 209; Dec. Dig. ¶79(7).]

4. MINES AND MINERALS ¶79(7)—OIL AND GAS LEASE — RIGHTS OF PARTIES — DELAY RENTAL.

Where said lease as to 240 acres of the demised premises was assigned to W. and C., and where on April 17, 1914, \$60 delay money fell due and payable thereon from them to the lessor, evidence examined, and *held*, that they defaulted in said payment, that time was the essence of the contract, that the court erred in refusing to so hold, and that said lease was forfeit as to their holdings thereunder and to cancel the same accordingly.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 209; Dec. Dig. ¶79(7).]

5. MINES AND MINERALS ¶77—OIL AND GAS LEASE—FORFEITURE.

Where the lessor after forfeiture incurred brought suit to have the same judicially declared and to clear his title and thereafter executed a second lease on the same premises and thereafter parted with his interest as lessor in the demised premises, evidence examined, and *held*, that the court erred in refusing to grant such relief to him and to all parties in interest under the second lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. ¶77.]

Kane, C. J., and Thacker, J., dissenting.

Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action by L. B. Brown and others against M. S. Wilson and others. Judgment for de-

defendants, and plaintiffs bring error. Reversed and remanded.

Gubser & Means, of Tulsa, and Noffsinger & Broome, Sumner J. Lipscomb, Thomas H. Owen, and Joseph C. Stone, all of Muskogee, for plaintiffs in error. Geo. S. Ramsey, Edgar A. De Meules, Malcolm E. Rosser, Robertson, Bailey, Nelson & Bailey, and James L. Powell, all of Muskogee, and S. W. Hayes and J. R. Cottingham, both of Oklahoma City, for defendants in error.

TURNER, J. On June 17, 1912, John S. Ruhl and Lena, his wife, being the owners and in possession of the land therein described, made, executed, and delivered to M. S. Wilson an oil and gas mining lease, which was duly recorded, the pertinent part of which reads:

"* * * That the said parties of the first part, for and in consideration of the sum of one dollar in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part, to be paid, kept and performed, have granted, demised, leased and let and by these presents do * * * grant, demise, lease and let unto the second party, his heirs, successors or assigns, for the sole and only purpose of mining and operating for oil and gas: * * * The southeast quarter ($\frac{1}{4}$) of section fifteen (15) and the southwest quarter ($\frac{1}{4}$) of section fourteen (14), both in township 14 N., of range 16 E., containing three hundred and twenty (320) acres, more or less. * * *

"It is agreed that this lease shall remain in full force for the term of ten years from this date, and as long thereafter as oil or gas or either of them is produced therefrom by the party of the second part, his heirs, successors or assigns.

"In consideration of the premises the said party of the second part covenants and agrees:

"First. To deliver to the credit of the first parties, their heirs and assigns, free of cost, in tank or the pipe line to which he may connect his wells, the equal one-eighth ($\frac{1}{8}$) part of all oil produced and saved from the leased premises. * * *

"The party of the second part agrees to complete a well on said premises within four months from the date hereof, or pay at the rate of eighty (\$80.00) dollars in advance, for each additional three (3) months such completion is delayed from the time above mentioned for the completion of such well until a well is completed. The above rental shall be paid to the first parties in person or to the credit of the first parties at the First National Bank of Boynton, Okla., and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease. * * *

"The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

"The party of the second part, his heirs and assigns, shall have the right at any time after 4 mos. on the payment of one dollar and all payable obligations then due to the parties of the first part, their heirs and assigns, to surrender this lease, if not tested, for cancellation, after which all payment and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

"All covenants and agreements herein set forth between the parties heretofore shall extend to

their successors, heirs, executors, administrators and assigns. * * *

Thereafter C. B. Wilson and D. A. Cameron became and now are the assignees of the southwest quarter of section 15; the Seven Sands Oil & Gas Company, the assignee of the east half of the southwest quarter of section 14; John A. Sheppard, the assignee of an undivided half interest in the west half of the southwest quarter of said section; and said Wilson and Cameron, the assignee of the remaining undivided one-half interest therein, all of whom will be hereinafter called lessees.

Thereafter, to wit, on August 29, 1914, said Ruhl and wife made, executed, and delivered a second lease of the same land to one Leidecker, and later parted with their interest therein as lessors to one Humphreys, who later acquired the lease and thereafter conveyed his entire interest in the property to the plaintiffs in error, who, later, leased the entire 320 acres to John A. Sheppard, one of their number, and who is the same Sheppard who also owns, but who claims no interest in, an undivided 80 acres contained in the first lease, as stated.

Prior to the execution of the lease to Leidecker, to wit, on August 1, 1914, John S. Ruhl and wife brought suit to establish, as a matter of record, the forfeiture of the lease of June 17, 1912, and to cancel the same upon the ground that the same was unilateral, unperformed, optional as to the lessee and his assigns, and therefore optional as to the lessor, and that there was default in the payment of the rentals or delay money on the part of the lessees. Pending this suit, Cameron and Wilson, without leave, on September 3, 1914, entered and took possession of the southwest quarter of section 15 and thereupon erected a rig and commenced to drill a well, and thereafter struck oil in paying quantities, whereupon they brought suit to cancel the second lease as a cloud upon their title and to restrain plaintiffs in error from claiming thereunder and from interfering with their possession. Before being restrained, however, plaintiffs in error took possession of the well and thereafter enjoined defendants in error, or those claiming under the first lease, from interfering with their possession. After issue joined, the two cases were consolidated, and there was trial to the court and general judgment for defendants in error sustaining the validity of the first lease and clearing the title of all parties in interest thereunder as prayed, to reverse which it is assigned that the same is contrary to the law and the evidence.

[3] No well was ever commenced nor possession yielded of the demised premises to the lessees under the first lease, but up to July 17, 1914, some \$420 had been paid by them, from time to time, as delay money. It is contended that the Seven Sands Company defaulted in the payment of the \$20 delay mon-

ey due that day on its 80 acres and thereby incurred a forfeiture of that part of the lease. Assuming that all parties in interest agreed to the substitution of said company as lessee of the 80 acres assigned it, as contended by said company, on this point there is no conflict in the evidence. It discloses that on the next preceding rent paying day, i. e., April 17, 1914, Wilson and Cameron took from Ruhl this receipt:

"April to July 17, 1914.

"Boynton, Okl., April 17, 1914.

"Received from C. B. Wilson, by D. A. Cameron, atty., the sum of \$20.00 for rental on lease on the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, of Sec. 14, Twp. 14, Rg. 16 E. recorded in Muskogee county, Muskogee, Oklahoma. John S. Ruhl."

But that in fact no money was paid Ruhl at that time; that instead, it seems, Wilson and Cameron executed to him their promissory note for \$20 payable in 30 days which they afterwards met with the check of the Seven Sands Oil Company for \$20 drawn on the First National Bank of Chelsea, "by H. H. Lindley, Sec.," which was paid and its proceeds placed to his credit by the bank of Boynton on April 28, 1914. At that time, some delay in payment of delay money having theretofore occurred on the part of the lessees and their assigns, in consequence of which Ruhl had made complaint, he told the bank to go ahead and accept further rentals and give them another chance. This closed that incident so far as the Seven Sands Company was concerned until the next rent paying day. This fell on July 17, 1914. To meet this payment, said Lindley at Chelsea registered a letter addressed to Ruhl at Boynton, Okl., containing a like check for a like amount, which arrived at Boynton on the 17th. On the next day the postmaster mailed Ruhl a rural delivery notice that there was a registered letter in the post office for him. Ruhl came to Boynton August 3, 1914, and there received the letter and the check, both of which he immediately returned to the sender, because, he says, he, being unlearned, did not understand its contents. At no time had the Seven Sands Oil Company funds in the bank to pay the check, and never had an account there. On August 12, 1914, or 25 days after it was due, said company caused \$20 delay money to be deposited to the credit of Ruhl in the First National Bank of Boynton, which was the bank named in the lease as authorized to receive it. Ruhl never knew of this deposit until the fall of 1914 and, in the meantime, had on August 1, 1914, commenced his action to cancel the lease, as stated, and on August 29, 1914, had executed the Leidecker lease.

It is sufficient to say that sending a worthless check to the lessor for the amount of the delay money is not payment thereof, and that placing the amount due to his credit in bank long after that time was not payment in advance or indeed payment at all, especially after he had declared a forfeiture and begun

suit to cancel the lease on the ground, among others, of failure to pay. When the lessee and his assigns agreed in the lease, as they did, to complete a well on the premises within four months from the date thereof or pay at the rate of \$80 in advance for each additional three months such completion was delayed after the expiration of the four months, the Seven Sands Oil Company, by accepting an assignment of 80 acres thereof, was on July 17, 1914, no well having been completed, possessed of an option to pay the lessor \$20 delay money and thereby keep the lease alive until another rent paying period or not pay, and thereby forfeit or abandon its rights under the lease. This \$20 was, by express terms of the lease, not only due on that day, but was payable in advance or as a condition precedent to the continued life of the lease. And time was the essence of this contract. *Cooper v. Ft. Smith & Western R. Co.*, 23 Okl. 139, 99 Pac. 785. In *Frank Oil Co. v. Belleview, etc., Oil Co.*, 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487, although an "unless" lease was under construction, what we said there as to that lease is equally applicable here to an "or" lease. There, in the syllabus, we said:

"A gas and oil lease giving the lessee the option to pay a certain sum, and thus extend the lease, is operative against the lessor during such extension only upon the payment of such sum; contract rights being correlative and mutual. * * *

"When contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound and against the party that is not bound."

See, also, *Kolachny v. Galbreath et al.*, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451.

In *Mitchell v. Probst*, 152 Pac. 597, recently decided by this court but not yet officially reported, we said:

"Where an oil and gas lease provided 'that, if a well is not drilled on said premises in one year from date hereof, then this lease and agreement shall be null and void, unless the party of the second part, within each and every year in advance, after the expiration of the time above mentioned for the drilling of a well, shall pay a rental of \$2.50 per acre for the first year,' etc., held, that such provision amounts to an option and gives the lessor the right to cancel unless the conditions are complied with.

"Where, in such case, the sum agreed to be paid for the option is not paid at the time agreed upon, nothing else appearing, the lessor has the right to cancel the lease. * * *

"In case of an option, time is of the essence of the contract, unless the contract expressly provides that it shall not be."

It will not do to say that, as the leases in those cases contain express provision that they shall be void if no well is completed within a certain time "unless" the lessee pay a certain sum for delay, what we said there has no application here, where the lease contains no such provision, but binds the lessee to complete a well within a certain time "or" pay for delay without providing that the lease shall be void on failure so to do. This for the reason that, the leases

there and the lease here alike give to the lessee the same kind of an option. In other words, although not couched in the same terms, the option in both leases to pay or not to pay for delay amounts to the same thing and works the same result; that is, if exercised it prolongs the life of the lease, if not, the lease is abandoned by the lessee and is forfeitable at the option of the lessor, and, after forfeiture declared, being a cloud upon his title, the lessor has a right to come into a court of equity and have it declared forfeit and canceled and removed.

We said the option was substantially the same in an "unless" lease as in an "or" lease. What the option is in an "unless" lease we have just shown by quotations from former opinions of this court. That it is substantially the same in an "or" lease is shown in *McMillan v. Phila. Co.*, 159 Pa. 142, 28 Atl. 220. There the court said:

"The lessee had covenanted to do one of two things; to begin a well within 60 days and complete it within three months thereafter, or pay \$25 per month as rental for the privilege of doing so afterward, and within the three years which limited his term, unless oil or gas was found in paying quantities. * * * He may drill the well and so pay no rental, or he may pay the rental and not be compelled to drill the well. It is not for the lessor, but it is for the lessee, to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words and make it part of the contract."

Jennings-Haywood Oil Syndicate v. Housiere-Latreille Oil Co., 119 La. 793, 44 South. 481, treats the obligation of the lessee to drill or pay delay money as an option substantially the same as in an "unless" lease, and that too in construing an "or" lease, as here. The court said:

"If he merely secured an option, then, by failing to make the fourth quarterly payment within the time fixed for the exercise of the option, he, or his assigns, forfeited all rights under the contract; and there is an end of the matter. *Escoubas v. Petroleum Co.*, 22 La. Ann. 280. It is clear that if I agree to be bound on the condition, or provided you do a certain thing within a certain time, for example, if I agree that you shall have the exclusive right to exploit my land for minerals, provided you begin operations within six months, or pay me in advance of the expiration of the six months \$50 for a prolongation of the term, and you fail to do the thing thus stipulated to be done, I am not bound."

And after quoting from *Pothier* (volume 6, p. 217, § 209) said:

"It would seem to be a plain proposition that if I agree to lease you my house on condition that you pay me the rent in advance, and you fail to do so, I am under no obligation to you. 'An option must be exercised within the time limit, or the right will be lost.' 21 A. & E. El. 931; *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 129; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 648, 36 L. Ed. 479."

And it makes no difference whether the lease contains a forfeiture clause or not, or whether it is an "unless" lease or an "or" lease, as both leases afford to the lessee the same option.

160 P.—7

In *Cohn v. Clark*, 150 Pac. 470, L. R. A. 1916B, 686, there was an oil and gas lease under construction, as here, and, as here, it was an "or" lease, and again, as here, it contained no forfeiture clause. The "or" clause of the lease read:

"Second party agrees to commence operations on said premises within, on or before Jan. 1st, 1910, from this date, or thereafter pay to the first party, one dollar per acre per annum annually until a well is drilled, or the property hereby granted is conveyed to the first party."

Reversing the rule and construing it most strongly against the lessor, the court said:

"* * * We will treat this clause as meaning that, upon failure of the lessee to begin operations or to pay rent as the contract provides, that within itself works a forfeiture. * * *"

Mitchell v. Probst, supra, was an "unless" lease containing a forfeiture clause in effect that the lease would be void on failure of the lessee to drill or pay "unless." There the court said:

"Where, in such case, the sum agreed to be paid for the option is not paid at the time agreed upon, nothing else appearing, the lessor has the right to cancel the lease."

In *Conkling v. Krandsky*, 127 App. Div. 761, 112 N. Y. Supp. 13, the lease was for oil and gas. It was an "or" lease and contained no forfeiture clause. The sixth syllabus reads:

"An oil lease provided that the lessee should begin operations at a specified time, or, in lieu thereof, pay a rental of \$10 per month from that date, with the option at any time to surrender his lease and be released from all unfulfilled conditions. The lessee failed to commence operations at the time specified, and paid the first month's rental of \$10, but thereafter for more than two months he ceased to pay and made no attempt to bore for oil. Held that, as in the lease time was the controlling factor, the failure to enter the premises or to pay the \$10 per month was an abandonment of the lease."

In the body of the opinion the court said:

"He must keep his own lease alive, either by the monthly payments or by drilling for oil, if the provisions for his benefit were to be operative. * * * He paid the \$10 * * * expecting possibly to go on with the venture. After that, and more than two months before Galletts entered, he ceased paying and made no attempt to bore for oil."

"In this lease time was the controlling factor, and when he failed either to enter the premises or to pay the \$10 each month, one or the other of which was essential to keep his right effective, he manifested his purpose to abandon the project."

In *Thornton's The Law Relating to Oil and Gas*, § 797, it is said:

"If the lessee has only a mere option to enter and explore, then he must do some act toward the development of the property or pay the rent or commutation money for delay and in one of these ways exercise his option before the lessor gives notice of his election to revoke and cancel the lease."

It is unnecessary to cite authority in support of what appears to us to be so clear. But see *Smith v. Guffey*, 202 Fed. 106, 120 C. C. A. 436, where the learned Circuit Judge compared an "unless" lease and an "or" lease substantially the same as here and held the

difference between the two "negligible." And so we say the Seven Sands Oil Company, having failed to pay the delay money in advance, pursuant to the terms of the lease, abandoned and made subject to forfeiture at the option of the lessor all its rights thereunder so far as the 80 acres held by it was concerned. And it makes no difference in our conclusion that H. H. Lindley, who sent the check dated July 15, 1914, signed "Seven Sands Oil & Gas Co., by H. H. Lindley," testified that he, personally, had sufficient money in the bank upon which it was drawn to pay the check, and further that, although he had no arrangement with the bank to do so, yet, as the bank had paid the previous check so drawn and charged it to his personal account, he was of the opinion that the bank would pay the check in question and also so charge it. As the check, had it been good, would not have been cash in advance as demanded by the lease (*Kolachny v. Galbreath*, supra), it goes without saying that a worthless check was not equivalent to placing the money in the hands of Ruhl or depositing that amount to his credit in the bank designated in the lease. We are therefore of the opinion that the court was wrong in holding, as counsel say he did, that the lease in question was not subject to forfeiture, and in failing to hold that, in so far as the Seven Sands Oil Company was concerned, it had abandoned, and made subject to forfeiture at the option of the lessor, its rights under the lease by failing to pay the delay money in question pursuant to the terms thereof.

[4] It is further contended that Wilson and Cameron defaulted in the payment of the \$60 delay money due and payable in advance April 17, 1914, and thereby abandoned and made subject to forfeiture the lease as to the remaining 240 acres of the demised premises. Assuming said amount was all that was due from them to Ruhl on that day, which seems to be the construction placed upon the lease by all parties in interest, the facts disclose that on said day Ruhl executed to Wilson and Cameron a receipt which reads:

"April to July 17, 1914.

"Boynton, Okl., April 17, 1914.

"Received in full \$60.00 for rent according to terms of lease recorded in Muskogee county, Okla., given by me to the S. E. $\frac{1}{4}$ of Sec. 15 and S. W. $\frac{1}{4}$ of Sec. 14 of Twp. 14, Rg. 16 E. "John S. Ruhl."

But that in fact no money was paid him at that time. Instead, Wilson executed to Ruhl his promissory note for \$60 payable 60 days thereafter with interest from date, which was not paid when due and not until November 3, 1914, at which time said amount with interest was placed to the credit of Ruhl in the bank designated in the lease long after he had brought suit to cancel the same and had parted with all interest in the demised premises, as stated. There is no evidence tending to prove that Ruhl agreed to take the note in absolute payment of the

debt. On the contrary, the evidence discloses that Ruhl accepted it reluctantly, stating that he was tired of taking notes, as they did not pay them on time and that he could not cash them, but was finally induced to accept the note on the strength of the promise of Wilson that he would pay it before due if Ruhl would notify him that he needed money. This Ruhl did and later, before and after it was due, insisted on payment up to the time he brought suit to cancel the lease. But the note was not paid when due and not until after said suit was brought, to wit, on November 3, 1914, was the amount of the note and interest placed to his credit in the bank named in the lease.

Among other things, it is contended that, owing to the absence of a forfeiture clause therein, the lease was not subject thereto, and, if it was, inasmuch as Ruhl had theretofore accepted the checks of the Seven Sands Company and the notes of Wilson and Cameron for delay money, which was afterwards paid, that he thereby waived the forfeiture, if any, and is estopped to assert it. But, as we have just held that an "or" lease without a forfeiture clause and an "unless" lease with a forfeiture clause alike vests an option in the lessee to drill or pay, and as we have seen that a failure to drill or pay, as here, forfeits, or, in other words, operates as an abandonment by the lessee of, an "unless" lease, so we hold that the same result would follow a failure to drill a well or pay pursuant to the terms of this "or" lease, and that there is no merit in the contention that the lease in question is nonforfeitable. And as we have repeatedly held that in order for defendant to avail himself of an estoppel he must plead it (*Town of Sapulpa v. Sapulpa Oil & Gas Co.*, 22 Okl. 347, 97 Pac. 1007), and such has not been done, and it nowhere appearing that, if true, such conduct misled the lessee to his injury, we pass to the next contention, which is, in effect, that, by accepting the \$60 note of April 17, 1914, for the delay money then due and attempting to collect it, which he did, Ruhl evidenced his intent to and did waive the forfeiture (or rather his option to declare a forfeiture), if any accrued and elected to affirm the lease. In support of this contention, counsel cite *Archer on Oil and Gas*, p. 284, where it is said:

"If the lessor declares a forfeiture, the lease is terminated, and thereafter no recovery can be had for rentals thereunder; if he claims the rentals, he affirms the continuation of the lease for the period for which he claims."

And 40 Cyc. 268, note 45, where the annotator says:

"The courts not favoring forfeitures are usually inclined to take hold of any circumstances which indicate an election to waive it."

He cites many cases, some of which undoubtedly support his contention. But such is not the rule in this jurisdiction, where, in *Kolachny v. Galbreath*, supra, quoting approvingly from the *Mehlin Case*, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942, we said:

"* * * Oil and gas leases are construed most strongly against the lessee and in favor of the lessor."

And in *Deming Investment Co. v. Lanham*, 36 Okl. 773, 130 Pac. 260, 44 L. R. A. (N. S.) 50:

"* * * By failing to drill a well or to pay the rent the lease became forfeited, and no rent was due thereunder. Ordinarily forfeitures are not favored, but gas and oil leases furnish exceptions to this general rule. Thus, in paragraph 148, Thornton's (2d Ed.), the law relating to oil and gas provides: 'Forfeitures, however, on the part of the lessee in a gas or oil lease, which arise by reason of his neglect to develop or operate the leased premises, are rather favored by the law, because of the peculiar character of the product to be provided.'

Which means that we will not be astute to seize on circumstances indicating a waiver of forfeiture on the part of the lessor. Whether the lease is an "unless" lease or an "or" lease, or whether the "or" lease contains a provision that the same "shall be null and void" on failure to drill or pay as is contained in the "unless" lease, or not, the option available to the lessor to forfeit the lease (on failure of the lessee to do either), being for his benefit only, may be waived by him. But there is no evidence reasonably tending to prove that the lessor waived the forfeiture here.

On this point, aside from any question of pleading, the evidence discloses that, at the time the \$60 note of April 17, 1914, was taken for the delay money due that day from Wilson and Cameron, Ruhl took the note under protest for the reason that their notes theretofore given by them for the same purpose had not been paid promptly; that Ruhl then and there told them in effect that if he took the note they must start a well within three days, which they declined to do but promised to start a well within ten days, after which, it appears, he took the note, saying that he would not allow the lease to run longer if they did not and that it was the last chance he was going to give them; that thereupon they agreed upon those terms, and, in addition, Cameron told Ruhl that if he needed the money "bad" he would send it to him at any time; that thereafter, before the note fell due, he pressed them for payment, which was refused, and when due remained unpaid, whereupon he placed the matter in the hands of his attorneys, who, on July 20, 1914, caused written notices to be served on defendants that he had declared a forfeiture of the lease. Of course, Ruhl could have waived the forfeiture by acts from which an intention so to do might fairly be inferred (*St. Paul, etc., Co. v. Cooper*, 25 Okl. 38, 105 Pac. 198); but there was nothing in his acts from which to infer such intention, but, on the contrary, everything to lead us to believe that he intended to insist on a forfeiture.

[5] It will not do to say that a forfeiture of the lease should not be enforced for the reason that both the \$60 note of Wilson and the \$20 check of the Seven Sands Company

given Ruhl for the delay money due from them to him on April 17, 1914, and July 17, 1914, respectively, were on November 3, 1914, and August 12, 1914, respectively, paid by depositing the money in the bank named in the lease, and hence the lessee should be relieved of the forfeiture by reason of *Rev. Laws 1910, § 2844*, which reads:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful or fraudulent breach of duty."

This for the reason that, as said lessees stood on their lease in the trial court and denied a forfeiture and there prevailed upon the theory that the lease was not forfeited, if indeed it was forfeitable at all, they will not be permitted to change front in this court and for the first time urge that, under the facts, they should be relieved of the forfeiture, if any occurred. Having failed there to plead in confession and avoidance in virtue of the statute invoked and there put in issue the question of whether or not they had made "full compensation to the other party" as required by statute and whether their breach of duty was or was not "grossly negligent, willful or fraudulent," we can give them no relief here, especially in view of the fact that the rights of the second lessees have intervened and had intervened at the time of the rendition of the judgment complained of. Besides, as stated in *Dill v. Fraze*, 169 Ind. 53, 79 N. E. 971:

"There is little or no reason for the interference of a court of equity to prevent a forfeiture before operations have begun, where the operator has sinned away his opportunity under the contract."

We are therefore of opinion that by non-payment in advance of the delay money, as stated, this entire lease was subject to forfeiture, that is, as to the 240 acres thereof held by the Camerons and also as to the 80 acres held by the Seven Sands Company; that, being so subject, the same was not waived by Ruhl and, not being waived, was by him duly declared; that the jurisdiction of the court was properly invoked to have the same declared forfeit and canceled as a cloud upon his title; and that the court erred in refusing to grant relief to him and those claiming under the second lease as prayed and in granting relief in effect, sustaining the validity of the first lease.

[1] But let all we have said be as it may: Was Ruhl, together with the owners and holders of the second lease and those claiming under them, entitled to cancel the first lease on other grounds? They contend, in virtue of the general surrender clause contained therein, they were, because, they say, the lease is a "contract," the performance of which is optional on the part of the lessee and hence is optional on the part of the lessor, and, being unperformed, the lessor had

the right to terminate the same at any time and sue to set aside, as he did. This contention must be sustained. The lease although reciting a consideration to Ruhl of \$1 paid "and the covenants and agreements hereinafter contained on the part of the second party, to be paid," the real and only consideration for the lease, as a whole, was development by the lessee or his assigns. *Jennings, etc., Co. v. Houssiere, etc.*, supra; *Foster et al. v. Elk Fork, etc., Co.*, 90 Fed. 178, 32 C. C. A. 560; *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971; *National Oil, etc., v. Teel* (Tex. Civ. App.) 67 S. W. 545. After which they were "to deliver to the credit of the first parties, their heirs and assigns, free of cost in the tank or the pipe line to which he may connect his wells, the equal one-eighth ($\frac{1}{8}$) part of all oil produced and saved from the leased premises." Now, while there is authority to the contrary (*Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213 and others), we hold that the dollar paid Ruhl at the time of the execution and delivery of the lease was the sole and only consideration paid to hold the lease for the four-month term within which the lessee had to enter and complete a well, and that such consideration did not extend to uphold any other stipulation in the lease; and, further, that the agreement on the part of the lessee to pay delay money after that time was a provision made for the sole purpose of prolonging the lease.

In *Lowther Oil Co. v. Guffey et al.*, 52 W. Va. 88, 43 S. E. 101, speaking to the \$1 consideration, the court said:

"* * * It was only intended to hold the grant for two years, and after that time a further consideration to prevent forfeiture was provided."

Or, as stated in the headnote to *Allegheny Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604:

"* * * The consideration recited (\$1) supported, not only the grant for the two years term, but as well the privilege of extending the time for drilling by paying the stipulated price therefor."

In *National Oil & Pipe Line Co. v. Teel* (Tex. Civ. App.) 67 S. W. 545, the court said:

"The real consideration of these instruments was not the recited \$1, nor the \$100 that after the two years might be paid, in order that they might keep it going from year to year, but the beginning and prosecuting with due diligence of wells for oil or minerals upon the land; in other words, the development of the property for oils and minerals in the near future. This was the clear purpose of the grant."

See, also, *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.) 169 S. W. 192.

[2] Now, if the \$1 paid the lessor was earned at the expiration of the four months in which the well was agreed to be, but was not, completed and thereafter, under the terms of the lease, there remained to the lessee the option to pay for delay, and thus keep the lease alive or not pay and thereby let it die, with the further option to surren-

der it for cancellation at any time and thereby terminate the contract and defeat both payment and development, the lease not only lacked in mutuality, in that it imposed no legal obligation on the lessee to do anything, but, in addition thereto, for the reason that it imposed no such legal obligation and left the lessor powerless to compel the lessee to develop and thereby perform the contract and thus yield the lessor the prospective royalties which constituted the sole consideration for which the lease was given, the lease was also nudum pactum and nothing more than a mere option on the part of the lessee, or rather two options: To drill or pay or surrender (and thereby avoid doing either), or, in other words, an option to develop or not to develop, or rather to perform or not to perform the lease contract as he saw fit.

That such lease is an option is contrary to the holding in Illinois and other jurisdictions where it is held to vest a freehold estate in the land. Or, as stated in *Guffey v. Smith*, 237 U. S. 101, 85 Sup. Ct. 526, 59 L. Ed. 856:

"It is settled by the decisions of the Supreme Court of Illinois that an oil and gas lease like that of the complainants passes to the lessee, his heirs and assigns, a present vested right—a freehold interest—in the premises, that this interest is taxable as real property, and that the clause giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will, or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality. *Bruner v. Hicks*, 230 Ill. 536, 540, 542, 82 N. E. 888, 120 Am. St. Rep. 332; *Poe v. Ulrey*, 233 Ill. 56, 62, 64, 84 N. E. 46; *Ulrey v. Keith*, 237 Ill. 284, 298, 86 N. E. 696; *People ex rel. Carroll v. Bell*, 237 Ill. 332, 339, 86 N. E. 593, 19 L. R. A. (N. S.) 746, 15 Ann. Cas. 511; *Daughetee v. Ohio Oil Co.*, 263 Ill. 518, 524, 105 N. E. 308. These decisions constitute rules of property and must be accepted and applied in passing upon the complainants' rights."

But where the lease vests no such interest, but only an option, as here, the great weight of authority supports the rule announced by us in the *Mehlin Case*, supra. There we said:

"* * * An executory contract, which under its terms leaves it optional with one party whether or not he will proceed with the contemplated enterprise, makes the same likewise optional with the other. * * *"

The application of which leads to a rule precisely contrary to the Illinois rule, and that is the rule that, where the lessee has the option to surrender the lease at any time, the lessor has the corresponding option to compel a surrender, and that the lease is void for want of mutuality, or rather voidable, before performance, at the option of the lessor.

In the *Jennings Case*, supra, the lease involved was an "or" lease, as here, in which the lessee agreed to commence development within six months or pay \$50 quarterly in advance for each three months' delay and to deliver to the owner a royalty of one-eighth of the production. The lease contained a clause that the lessee might at any time

cancel and surrender the lease on the payment of a sum certain. After certain payments were made for delay, the lessor refused to accept the next payment, which was tendered after the date on which it was due, on the ground that the lease had thereby become forfeit. In a suit to enforce the forfeiture, it was held that such it had become for the reason that the option of the lessee had not been exercised within the time limit, and "that since the sole object and purpose of the contract was to exploit the land for oil and gas, and the contract left the lessee at liberty to do so or not at his option, there was in reality no contract binding on the lessee."

Owens v. Corsicana Petroleum Co., supra, was a suit to cancel an oil and gas mining lease, the provisions of which were substantially as here. It was an "or" lease and contained a general surrender clause. Therein the lessee agreed to complete a well on the demised premises one year from the date thereof or pay to the lessor \$28.20 each three months in advance for delay. In construing that clause as operated on by the general surrender clause, the court said:

"If appellants could neither recover damages, require the completion of a well, nor recover \$28.20 rent without the consent of appellee, the contract is clearly unilateral and void. Any attempt to do either of these things could be instantly defeated by appellee by interposing that term of the contract whereby it is permitted to surrender the grant upon the payment of \$5."

And in the syllabus:

"A contract between an owner of oil lands and an oil company, giving the company the right to bore for oil, or to pay quarterly rentals, which, upon acceptance by the owner, extended the contract for another quarter, or to surrender the lease at any time upon the payment of \$5 to the owner, was a unilateral contract, void for want of mutuality; the \$5, being merely a nominal consideration and no consideration for the grant."
* * *

See, also, *Long v. Sun Co.*, 132 La. 601, 61 South. 684.

Witherspoon v. Staley et al. (Tex. Civ. App.) 156 S. W. 557, was also a suit to cancel an oil and gas lease in effect as here. It was executed in consideration of \$25 and certain royalties, and provided if operations were not commenced with diligence within 60 days from a certain date the grant should immediately become void, except that lessee might prevent such forfeiture by paying \$25 every 60 days until an oil well was commenced; construing which, it was held that, since the instrument did not bind the lessee to do anything, it was a unilateral contract and nothing more than an option, which terminated on the failure of the lessee to perform the conditions. It seems that such was the conclusion of the court independent of the general surrender clause in the lease. In the opinion the court said:

"This contract was likewise a unilateral one, in that it did not bind or obligate the lessee to perform any of the conditions thereof, and was therefore lacking in mutuality. See *Natl. Oil &*

Pipe Line Co. v. Teel, 95 Tex. 561, 38 S. W. 979, 67 S. W. 545; *Forney v. Ward*, 25 Tex. Civ. App. 443, 62 S. W. 109; *Roberts v. McFadden*, 32 Tex. Civ. App. 47, 74 S. W. 111; *Hodges v. Brice*, 32 Tex. Civ. App. 358, 74 S. W. 590; *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Huggins v. Daley*, 99 Fed. 600, 40 C. C. A. 12, 48 L. R. A. 320; *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107. See, also, *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Harness v. Oil Co.*, 49 W. Va. 232, 38 S. E. 670; *Cowan v. Iron Co.*, 83 Va. 547, 3 S. E. 120."

Young v. McIlhenny (Ky.) 116 S. W. 728, was a suit for delay money due on two certain oil and gas leases, alike in all essential particulars. They were "unless" leases, and each provided:

"If no well is commenced on the premises hereby leased, within one year from this date, then this grant shall be null and void, unless the party of the second part shall pay to the first party (\$75 in one lease and \$50 in the other) for each year thereafter such commencement is delayed"—and contained a general surrender clause, as here.

Without any particular note of the effect of the surrender clause, in construing the lease, the court said:

"These leases are simply options given by the lessor to the lessee for one year with the right to renew the options at the end of the year upon the payment of \$125, if the lessee has not commenced operation thereunder within the 12 months. There is nothing in either the leases or the contract binding the lessee to do anything. He has the exclusive right to bore for oil or gas upon the premises described in the leases for 12 months, and if he fails to exercise his right such failure, of itself, operates to cancel the leases. The right to bore for either oil or gas is purely optional with the lessee; the lessor is bound, but the lessee is not. There is nothing in the leases or the contract upon which the lessor could base an action for specific performance; under neither the leases nor the contract could he compel the lessee to commence operations, or to continue them after he had commenced."

"In the case of *Steinwender's Coffee Co. v. Guenther Grocery Co.*, 80 S. W. 1170, 26 Ky. Law Rep. 270, this court, in speaking of a contract similar to the one under consideration, said: 'Contracts which are valid must be mutual and binding upon both parties. As we have said, it is a fundamental principle of law that there must be mutuality in every contract.'"

Reese et al. v. Zinn et al. (C. C.) 103 Fed. 97, was a suit for the cancellation of a lease. It does not appear whether the same was an "unless" or an "or" lease, or whether it contained a general surrender clause or not. But therein the court was of opinion that the plaintiff was entitled to the relief sought: First, for the reason that the parties claiming thereunder had by the terms and provisions of the lease forfeited their right, and not only that, but had abandoned the lease; and:

"Second, because the contract is void for want of mutuality, for the reason that it puts it in the power of the lessee to terminate the lease at will, and thereby confers the same power upon the lessor. This principle is well settled by numerous decisions, both in our own courts, as well as courts of other states. 12 Am. & Eng. Enc. Law, 757; *Kelly v. Waite*, 12 Metc. (Mass.) 300; 2 Bl. Comm. 146; *Guffy v. Hukill*, 34 W.

Va. 49, 11 S. E. 754, 8 L. R. A. 759 [26 Am. St. Rep. 901]; *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95; *Eclipse Oil Co. v. South Penn Oil Co.* [47 W. Va. 84] 84 S. E. 932."

See, also, *National Oil, etc., Co. v. Teel* (Tex. Civ. App.) 67 S. W. 545.

In *Steelsmith v. Gartlan et al.*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, the question was, as here, whether the first lease was at an end at the time the second lease was executed. The lease was an "unless" lease and was for and in consideration of \$1. It contained a general surrender clause, substantially as here. Referring to the first lease, the court said:

"Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, in diligent search therefor, should find oil and gas in paying quantities. If such lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on either party, and voidable, if not void, at the pleasure of either. *Cowan v. Iron Co.*, 83 Va. 547, 3 S. E. 120; *Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn. 381, 18 S. W. 65."

See, also, *Foster v. Gas Co.*, 90 Fed. 178, 32 C. C. A. 560.

Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923, was a suit in equity by the owner of the first lease against the owner of the second lease on the same property, who had entered and commenced development, to test the validity of the first lease, although nothing had been done thereunder except the payment of the annual rental therein provided for. The lease was for and in consideration of "the covenants and agreements hereinafter mentioned," which was a royalty on production. It provided for the drilling of a well upon the demised premises "within six months from the date of the execution of the lease," or "in lieu thereof" the lessee agreed to pay \$1 an acre per annum until the well was completed. The lease also contained a general surrender clause, which, if exercised, would defeat development as here, construing which the court said:

"Under the provisions of the lease in controversy, there is no obligation upon the lessee to explore or pay rent; but he reserved the voluntary option to surrender it at any time, without legal obligation to do anything or pay anything. Hence the lessor had the right to vacate it at any time while in an executory state. * * * The only considerations mentioned in the lease are the royalties and rentals on oil and gas to be produced, and the commutation for failure to complete a well. The plaintiff was not bound to complete a well in any given time, or during the life of the lease, so as to produce oil royalties or gas rentals, but in lieu thereof might pay a commutation, which he reserved the right to defeat at any time before payment enforced by surrender of the lease. It was entirely optional with him to bore or not, or pay or not. He was not bound to do either, but could decline to do both. This lease is not capable of any other construction. A consideration mentioned which is not legally enforceable is equivalent to no consideration, and a contract dependent thereon is as much a nudum pactum as if no consideration were mentioned."

In *Petroleum Co. v. Coal, etc., Co.*, 89 Tenn. 381, 18 S. W. 65, *Lurton, J.*, said:

"If the compensation to be paid the lessor depends upon the profit to result from the development and working of a mine, and the lessee is not bound, either expressly or impliedly, to explore and discover, or, when discovered, to work such mine, then no consideration for the lease exists. It is a mere option based upon no consideration, and may be withdrawn at any time before money is expended in doing what is optional upon the part of the lessee. *Taylor's Landlord & Tenant*, § 152."

We are therefore of opinion that, as the lease in question conferred on the lessee the right to surrender the lease at any time after four months before development and thereby terminate the same, a corresponding right existed in the lessor to compel a surrender and terminate the same before development, which he did by making the second lease and yielding possession of the land to the second lessee (*Oil Co. v. Oil Co.*, 47 W. Va. 84, 34 S. E. 923), and by commencing his action to cancel the same, and that the court was wrong in refusing to grant him relief upon this ground and in granting relief to the lessees sustaining the first lease.

In so holding, we refuse to follow *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213, which counsel for the lessees in the first lease contend should be considered as establishing a rule of property in this state. That was a suit in equity to establish a forfeiture of an oil and gas lease as a matter of record and to cancel the same as a cloud on plaintiffs' title, as here. A demurrer was sustained to the petition from which plaintiff appealed. The lease provided, among other things, that the lessee "may at any time remove all his property and reconvey the premises hereby granted and thereupon this instrument shall be null and void," and that, "if no well shall be drilled upon said premises within five years from this date, second party agrees to reconvey, and thereupon this instrument shall be null and void." No well was drilled during the first four years of the lease, delay money being paid during the third and fourth years. During the fifth year a well was drilled from which gas was obtained in paying quantities. In refusing to cancel the lease, the court, in effect, refused to apply the doctrine we have applied here, for the reason that the court took an entirely different view of the nature of the lease. The court said that the position taken by reason of the surrender clause that the lease was wanting in mutuality, was determinable at the will of the lessee, and was therefore equally terminable at the will of the lessor, was not sound, for the reason that the lease was in the nature of a grant in present of all the oil and gas in the land described, with the right to enter and search for them, and to mine and remove them when found. From which premise the court concluded that the surrender clause did not make the estate a mere tenancy at will within the operation of the common-law rule that an estate at the

will of one party is equally at the will of the other, and hence denied the relief. Besides, it will be seen that the contract there had been in part performed by boring, but not so here. Here we are not attempting to make application of the doctrine announced after the lease contract has been performed in whole or in part by the lessee, but are applying it where there has been no performance. Although the last case cited came from Kansas, the rule there applied was substantially the Illinois rule, which we have never followed, but refused to follow in the Mehlin Case, the Frank Oil Case, the Kolachny Case, and the Mitchell Case, supra. For the same reason we refuse, on this point, to follow Central Ohio Natural Gas Co. et al. v. Eckert et al., 70 Ohio St. 127, 71 N. E. 281; Brown et al. v. Fowler et al., 85 Ohio St. 507, 68 N. E. 76; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46. Also, Watford Oil Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144, where an oil and gas lease is held to convey a "freehold interest."

Neither will we follow Poe v. Ulrey, supra. That was a suit in equity against the appellants, the object of which was to enforce a forfeiture and cancellation of an oil and gas lease providing substantially as here. The lessor urged his corresponding right to compel a surrender of the lease in virtue of the surrender clause contained therein giving such right to the lessee; but the court held that such he could not do for the reason that the consideration of \$1 mentioned in the lease as paid to the lessor by the lessee was sufficient to sustain every covenant in the lease, included the surrender clause, and hence the same was not void for want of mutuality. We say we will not follow that case in holding that the dollar was sufficient to uphold the stipulation contained in the surrender clause for the reason that such holding is not in keeping with reason or the weight of authority, and, besides, we have just held the contrary, and that it was sufficient consideration to hold the lease for the four months during the time the lessee had to enter and complete a well only, and that such consideration did not extend to uphold any other stipulation in the lease. Besides, it would be incongruous with what we have just held, which is that, after the expiration of the four months in which the lessee had the right to enter and complete a well, it is not the dollar paid as consideration to hold the lease during that time which thereafter keeps alive the lease, but the payment of delay money only in advance as a condition precedent to that end. It would also be incongruous with what we have just held, in keeping with what we believe to be the weight of authority, that development is the sole consideration moving the lessor to execute the lease, that is, the lease as a whole; while the dollar, we repeat, is consideration to sustain the four months' term for drilling.

It is perhaps unnecessary to say, but we will, in the language of the headnote in Ohio Oil Co. v. Detamore, 165 Ind. 243, 73 N. E. 906:

"Where the lessee has lost his rights under a lease and the lessor has commenced an action to quiet his title, the lessee by re-entering over the lessor's objections cannot revive any rights to the premises."

See, also, Zeigler v. Dalley, 37 Ind. App. 240, 76 N. E. 819.

We are therefore of opinion that as the surrender clause in this lease rendered the performance thereof optional as to the lessee, being unperformed, it was also optional as to the lessor; that, as the clause under consideration gave the lessee the right to surrender the lease at any time after four months, a corresponding right existed in the lessor to compel a surrender; and that the court erred in holding that such right in him did not exist and in refusing to decree a cancellation thereof pursuant to his prayer and the prayer of those claiming under the second lease.

Let the cause be reversed and remanded, to be proceeded with pursuant to the views herein expressed.

SHARP and HARDY, JJ., concur.

KANE, C. J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court, and, on account of the importance of the questions involved, I deem it advisable to set out the grounds of my dissent in a separate opinion.

This is a controversy between the lessors of a tract of undeveloped oil land and certain of their lessees and their sublessees on one side, and subsequent purchasers from the lessors and another group of lessees and their sublessees on the other. John S. Ruhl and Lena Ruhl, his wife, are the common lessors and grantors.

On the 17th day of June, 1912, they executed an oil and gas lease for the entire tract of land in dispute to the defendant in error M. S. Wilson. The lease, which did not contain a forfeiture clause, recited, in substance, that it was made for and in consideration of the sum of \$1 in hand paid by the lessee, and "for the covenants and agreements hereinafter contained on the part of the party of the second part, to be paid, kept and performed." The habendum clause provided that:

"This lease shall remain in force for ten years from this date, and as long thereafter as oil and gas, or either of them, is produced therefrom by the party of the second part, his heirs, successors or assigns."

The lease also contained a clause which obligated the lessee "to complete a well on said premises within four months from the date hereof, or pay at the rate of eighty dollars in advance, for each additional three months such completion is delayed," and another clause which conferred upon the lessee

the right "at any time after four months, on the payment of one dollar and all payable obligations then due to the parties of the first part, their heirs or assigns, to surrender the lease, if not tested, for cancellation." In April, 1914, the lessors attempted to declare a forfeiture of the Wilson lease, for failure on the part of the lessee or his assigns to complete a well or pay in accordance with the terms of the lease. On the 1st day of August, 1914, the lessors commenced a suit in equity to cancel the Wilson lease, upon various grounds, which later will be noticed more in detail; and on the 29th day of August, 1914, they made another lease of the same premises to other parties, who, with their sublessees, constitute the other group of lessees. Subsequently the lessors conveyed their entire interest in the land to still other parties. Although the numerous parties coming into the case from the initial sources above indicated filed voluminous pleadings, praying for such relief, legal or equitable, as their varying circumstances seemed to them to warrant, essentially the cause of action amounted to a suit in equity to declare a forfeiture of the Wilson lease: (1) for failure to drill or pay; and (2) because, on account of the surrender clause, the lease was unilateral and void.

Upon trial to the court the validity of the Wilson lease was upheld, and a decree entered in favor of the group of lessees and sublessees who claimed thereunder; whereupon the lessors, their grantees, and the other group of lessees and sublessees, instituted this proceeding in error for the purpose of reviewing the action of the trial court.

In this court the lessors, the subsequent purchasers of their interest in the land, and all lessees and sublessees claiming under the second lease, are plaintiffs in error, whilst all parties claiming under the first or Wilson lease are defendants in error. This brief general outline of the record sufficiently states the facts to clearly indicate the line of cleavage between the contending parties, and that the case upon its merits turns upon the validity or invalidity of the Wilson lease.

As many of the most serious objections urged against the validity of the Wilson lease by counsel for plaintiffs in error turn upon the construction of the clauses thereof hereinbefore set out, it will not be necessary to set out in full the remaining parts thereof in this opinion.

Before reviewing the important questions of law arising out of the various assignments of error presented for review, it will be helpful to notice briefly a few of the preliminary circumstances in which the Wilson lease was given, upon which the parties all agree. Whether the leased tract contained oil and gas was not known at the time the lease was executed. It was in "wild cat" territory wherein the drilling of test wells would be attended with great expense and the many hazards naturally incident to proving and

developing a new oil field. The lease itself is free from ambiguity, and no fraud, deception, or overreaching was practiced in procuring it. All the parties were competent to contract with each other and, presumably, entered into the lease because its terms were satisfactory to them. Ordinarily, contracts arising out of such circumstances are not prolific of either suits in equity or actions at law; but counsel for plaintiff in error and a few of the courts seem to have discovered some subtle distinction between oil and gas leases or contracts and other contracts which, they say, requires the former to be placed in a class by themselves and construed strictly in favor of the lessor and against the lessee, the practical effect of which upon the contract involved herein is stated by counsel for plaintiff in error in their brief as follows:

"The lease at bar is merely a working agreement for four months with the further provision that the parties might by mutual consent, extend the same quarter by quarter upon payment of rentals upon the same terms without further formality or other written agreement. This renewal or continuation of the working agreement could have been accomplished by tender of the delay money on the one hand and acceptance on the other."

The first assignment of error presented by counsel for plaintiff in error in their brief is stated as follows:

"The Ruhl-Wilson contract is unilateral, and, having been unperformed when Ruhl declared a forfeiture, the same was optional as to Ruhl because optional as to the lessee. Contracts unperformed optional as to one of the parties are optional as to both."

A great many authorities are cited as supporting this doctrine, among them the following cases decided by this court, which counsel contend are controlling: *Frank Oil Co. v. Bellevue Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487; *Superior Oil Co. v. Mehlin*, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942; *Kolachny v. Galbreath*, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451; *Hill Oil & Gas Co. v. White* (No. 4647) 157 Pac. 710 (not yet officially reported).

The theory of counsel on this point is further disclosed by the following excerpt from their brief:

"The lease of June 17, 1912, by Ruhl to Wilson, covering the 320 acres involved, was executed for the nominal consideration of \$1, the real consideration being the development which Ruhl expected as a result of the contract. The surrender clauses in the lease hereinafter quoted made the same entirely optional with the lessee. He was not required to do anything. The lessee might drill a well on the premises within four months, or he had the option to delay drilling for three months' periods by paying in advance for each quarter \$50 for such delay, and he had the further option to surrender the lease if not tested, at any time, upon the payment of the nominal sum of \$1 and thereby relieve himself from the payment of rentals. He had the further option, even after entering upon the premises, to abandon the same any time and to remove all machinery and fixtures placed by him on the premises including the right to draw and remove casing. These terms of the contract bring it clearly within the equitable rule so often announced by this court with

particular reference to oil and gas mining leases, that contracts unperformed optional as to one of the parties are optional as to both.

"In the case of Kolachny v. Galbreath, 26 Okl. 772, 119 Pac. 902, 88 L. R. A. (N. S.) 451, this court said, as if writing to cover this very case, and as if to declare this very lease voidable at the option of the lessor, citing the case of Superior Oil & Gas Co. v. Mehlin, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942: 'The general rule in such cases is that contracts unperformed, optional as to one of the parties, are optional as to both. *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Huggins et al. v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; *Reese et al. v. Zinn et al.* (C. C.) 103 Fed. 97; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.' The foregoing quotation is a conclusion drawn by the learned justice in answer to a question which he himself had put, as follows: 'Does the surrender clause, as hereinbefore set out, render the lease such a contract as a court of equity will refuse to enforce?' Referring to a surrender clause in the following words: 'It is hereby further agreed that the party of the second part shall have the right at any time to surrender and terminate this grant and demise by serving written notice upon the parties of the first part of such intention, after which all payments or liabilities to accrue shall cease and determine.' This authority is conclusive on this case, for the court says that such a surrender clause giving the lessee the right to surrender also gives the lessor the right to surrender, and that therefore a court of equity will not enforce such a contract."

From an examination of a great many of the authorities cited by counsel for the respective parties as supporting their view of the various questions of law arising out of the foregoing general assignment of error, it is apparent that many of the courts, in citing authorities and discussing the proper construction to be given oil and gas leases, have assumed that such instruments have become standardized, and therefore have not attempted to distinguish with clearness between the varying terms of the contracts involved in the various cases. It is true that there is a general vein of similarity running through all contracts of this nature, and that at present a large majority of them may be embraced within two general classes which, for convenience, have sometimes been designated "unless" leases and "or" leases.

I am aware, of course, that the words "or" and "unless," of themselves, have no particular potency in determining the character of an oil and gas lease; but, in the leases I have examined, the following essential differences between "or" leases and "unless" leases are uniformly found to exist: The "unless" lease by its terms confers upon the lessee the option to continue or renew the lease by payment of rental for certain fractional periods at a time. The payment of the rental is a necessary condition precedent to the renewal of the lease for the fractional times specified in the lease contract. In fact, it is a lease from year to year, or quarter to quarter.

On the other hand, under the "or" lease containing a surrender clause the payment of the rentals from time to time is not necessary to renew the lease by fractional periods

from time to time; the failure to pay under the "or" lease not operating automatically to terminate the lease. It is true that under the "or" lease containing a surrender clause the lessee may accelerate the termination of the lease and his liability thereunder, by payment of the amount which the parties have stipulated in the surrender clause he shall pay for the privilege of being released from the contract; but such leases rarely, if ever, by their terms become null and void by failure to pay rentals in advance. In this respect, the two leases are diametrically opposed. The "unless" lease by its terms automatically terminates by failure to pay rentals; whereas, the "or" lease remains in force in the event the lessee does not elect to accelerate the ending of the lease by paying the stipulated consideration for the privilege of surrendering, and by surrendering it. Under the "or" lease (with surrender clause), even though it contains an express forfeiture clause, the lessor may waive the default and sue the lessee and recover the rentals; the lessee being bound as the lessor's debtor for the rentals until the lessee surrenders. *Cohn v. Clark*, 150 Pac. 467, L. R. A. 1916B, 686; *Burress v. Diem*, 23 Okl. 776, 101 Pac. 1116.

But in addition to these general classifications, in considering cases upon rental clauses, care should be taken to distinguish between leases containing: (a) An "or" clause and a forfeiture clause; (b) containing an "or" clause and a provision to the effect, that a failure to complete a well or pay will render the lease null and void, in effect, a forfeiture clause; or (c) containing an "unless" clause, from leases which provide, as in the case at bar, for a definite term of years, and the lessee agrees either to drill or pay, and which contain no forfeiture clause.

The majority of the court, it seems to me, have fallen into error by not distinguishing the "or" lease, herein involved, from the "unless" leases, construed in the former Oklahoma cases, and failing to observe that, when the "unless" lessee fails to drill or pay, the lease, by its terms, becomes null and void; whereas, failure to either drill or pay under the "or" lease, even though it contains a surrender clause, does not terminate or end the rights and powers of both lessor and lessee, because the lessor still has the right to elect to keep the lease alive and hold the lessee for the rentals. Before the lessor's right to keep the "or" lease alive by claiming the rental ends, the lessee must do something more than fail to drill or pay; he must affirmatively surrender the lease and pay the lessor the \$1 and all unpaid rentals, pursuant to the terms of the surrender clause. Mere failure on the part of the lessee under the "or" lease to drill or pay does not constitute an abandonment or surrender of his rights under the lease. If it did, this court could not have sustained an action by the lessor against the lessee for the unpaid ren-

tals, as was done in *Cohn v. Clark*, 150 Pac. 467, L. R. A. 1916B, 686, and *Burress v. Diem*, 23 Okl. 776, 101 Pac. 1116.

That this court in at least one opinion recognized these distinctions between the "or" lease and the "unless" lease is apparent from the following excerpt from *Frank Oil Co. v. Bellevue Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487:

"We have been unable to find a single case where a court of chancery ordered the specific performance of a lease at the instance of the lessee where there had been no development and the lease provided only that it should be forfeited unless the lessee paid a certain sum of money for delay, such contract being merely optional; but, where the contract provided that there should be certain development or the lessee should pay a certain specific sum of money, then, in the event of delay or failure of development, an obligation was incurred on the part of the lessee to pay a certain sum of money."

Observing these fundamental differences in the terms of the two classes of contracts, it is not necessary to notice in detail the distinctions which might be drawn between the form of the actions and the nature of the relief prayed for in the former Oklahoma cases cited, and the form of the action and relief prayed for in the case at bar, or the distinguishing features of each case, for the reason that the contract now under consideration is so different in the essential features just pointed out, from the contracts formerly construed, as to render the former class of cases wholly inapplicable to the case at bar.

When these differences between the "unless" leases construed in *Kolachny v. Galbreath*, supra, and the other cases of that class, and the "or" lease, herein involved, are considered, it is apparent to me that this court has never held, in a suit of this nature, that the surrender clause in an "or" oil and gas lease, supported by an independent consideration, renders such lease void, or unilateral, nor that it creates a tenancy at the will of either party, nor that such a lease is optional as to the lessor. On the contrary, it seems to me that to so hold would overrule in principle *Frank Oil Co. v. Bellevue Oil & Gas Co.*, *Deming Investment Co. v. Lanham*, *Mitchell v. Probst*, and other cases of that class.

Having reached this conclusion, which I have shown is not in conflict with any former decision of this court, it does not seem necessary to distinguish the case at bar from the cases from other jurisdictions cited by the majority of the court and counsel, as supporting the rhythmic doctrine that "contracts unperformed, optional as to one of the parties, are optional as to both." It is sufficient to say of such cases that in none of them do I find any support for the contention that the effect of a surrender clause in a lease expressly agreed upon between the parties, which, by its terms, grants the lessee the right to surrender, and for which privilege

the lessee obligates himself to pay an adequate independent consideration, is to confer a corresponding right upon the lessor to forfeit the lease at his option, without any agreement to that effect, or the payment or promise of payment of any consideration whatever. The authorities, it seems to me, are to the contrary. *Legg v. Benion*, Willes (Eng.) 43, 125 Com. Pleas Rep. 1047; *Brewster v. Lanyon Zinc Co.*, supra; *Brown v. Fowler*, supra; note to *Warehouse Co. v. Paper Co.*, Ann. Cas. 1916B, 308.

And it also may be added that the value as authorities of the cases from Louisiana, principally relied upon by counsel for plaintiff in error upon this point, will be greatly minimized when it is considered that in that jurisdiction, which derives its jurisprudence from the civil law, \$1 is not considered an adequate consideration to support a contract. That the rule as herein stated in cases wherein the consideration is deemed to be adequate is clearly established by the recent case of *McClendon v. Busch-Everett Co.*, 138 La. 722, 70 South. 781.

Being unhindered by the decisions of our own court, it seems to me that, in construing these contracts, it would be more consonant with right and justice and sound business principles to follow the familiar trend of authority from the other great oil producing states of the Union, and particularly the doctrine approved by the Supreme Court of the United States and the Circuit Court of Appeals for the Eighth Circuit, the federal circuit in which this state is situated. Many of the operators within this state have come from states where the surrender clause has been sanctioned by law for the past half century, and, finding the same to be the rule in the Circuit Court of Appeals for the Eighth Circuit, the court of last resort, in many instances, for this jurisdiction prior to statehood, they and the vast number of citizens of this state who joined them in the development of the oil industry were justified in assuming that the surrender clause would not be stricken down by the courts of the state.

The following cases hold that the presence of a surrender clause in an oil and gas mining lease does not render it void and subject to cancellation in a suit in equity: *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Central Oil, etc., Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Pittsburgh Vit. Pav. & B. B. Co. v. Bailey*, 76 Kan. 42, 90 Pac. 803, 12 L. R. A. (N. S.) 745; *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 300; *Houssiere-Latreille Oil Co. v. J. H. Oil Co.*, 115 La. 107, 38 South. 932; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213; *Allegheny Oil Co. v. Snyder*, 106 Fed.

764, 45 C. C. A. 604; *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856; *Cohn v. Clark*, 150 Pac. 467, L. R. A. 1916B, 686.

And the following authorities hold that \$1 is a sufficient cash bonus consideration to bind the lessor in a surrender clause lease: *Guffey v. Smith*, 237 U. S. 101, 116, 35 Sup. Ct. 526, 59 L. Ed. 856; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213; *Allegheny Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604; *Pittsburg, etc., Brick Co. v. Bailey*, 76 Kan. 42, 90 Pac. 803, 12 L. R. A. (N. S.) 745; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144; *Central Ohio Nat. Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 860; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S. E. 961, 43 L. R. A. (N. S.) 848; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Gillespie v. Fulton Oil Co.*, 236 Ill. 188, 86 N. E. 219.

The next assignment of error which would follow in logical order, as well as importance, is stated by counsel in effect as follows: There was default in payment of rentals due April 17, 1914, whereupon the lessor, as he had a right to do, declared a forfeiture because of default in payment. This assignment of error is based upon the assumption by the plaintiffs in error that, notwithstanding the absence of a forfeiture clause, a slight default in the payment of the rentals, as provided for in such a lease contract, authorizes the lessor to declare the lease forfeited. *Frank Oil Co. v. Bellevue Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487, and several other Oklahoma cases, are cited in support of this doctrine. I have heretofore pointed out some of the distinctions between "unless" and "or" leases, and that it was an "unless" lease which, by its terms, became null and void if delay money was not paid in advance, that was under discussion in the *Frank Oil Co. Case*, whilst the contract in the case at bar is an "or" lease, which contains no forfeiture clause, nor provision which expressly or impliedly provides that time is of the essence of the contract. By express statute (section 968, Rev. Laws 1910), in this jurisdiction, "time is never considered as of the essence of a contract, unless by its terms expressly so provided." *Snyder v. Stribling*, 18 Okl. 168, 89 Pac. 222; *Standard Lbf. Co. v. Miller*, 21 Okl. 617, 96 Pac. 761; *Edwards v. Iola Gas Co.*, 65 Kan. 362, 69 Pac. 350.

It is true that mining and oil leases often contain provisions for a forfeiture in case of cessation of the work in the development of the lands, and such provisions in proper cases the courts have unhesitatingly enforced. 18 Am. and Eng. Enc. Law, 372.

But in the absence of a forfeiture clause, the common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term. 18 Am. and Eng. Enc. Law, 369.

The following cases support the doctrine that, in the absence of an express forfeiture clause in an "or" lease, there can be no forfeiture for nonpayment of rentals: *Reserve Gas Co. v. Carbon Mfg. Co.*, 72 W. Va. 757, 79 S. E. 1002; *Thompson v. Christie*, 188 Pa. 230, 20 Atl. 934, 11 L. R. A. 236; *Marshall v. Forest Oil Co.*, 198 Pa. 83, 47 Atl. 927; *Rose v. Lanyon Zinc Co.*, 68 Kan. 126, 74 Pac. 625; *Davis v. Chautauqua O. & G. Co.*, 78 Kan. 97, 96 Pac. 47; *Castle Brook Carbon Co. v. Ferrell (W. Va.)* 85 S. E. 544; *Bennett v. Glaspell*, 15 N. D. 239, 107 N. W. 45; 27 Cyc. 716; *Gale v. Oil Run Petroleum Co.*, 6 W. Va. 200.

Counsel seek to avoid the force of these decisions and the general rule governing forfeitures by the application of the rule of construction hereinbefore adverted to which they state as follows:

"Forfeiture of such a lease is favored. The lease must be construed strictly in favor of the lessor and against the lessee and his assigns."

The application of this doctrine to oil and gas leases is based upon the theory that, because of the peculiar character of oil and gas as property, and the violent fluctuations in the value of lands and leaseholds incident to the discovery of these substances, the courts have placed contracts of this kind in a class by themselves, and, in the light of the known character of the business of oil mining, construe them most strictly against the lessee, and favorably to the lessor.

Without questioning the soundness or justice of this doctrine, it is still but a rule of construction to be invoked only for the purpose of aiding the court in determining the intention of the parties when the contract under consideration is not free from ambiguity. Section 949, Rev. Laws 1910, provides:

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article."

Here the contract upon its face is clear and unambiguous. The parties to it have not seen fit to incorporate a forfeiture clause, or words equivalent to a forfeiture clause, into its terms, and I find no justification for writing one into it, in any proper application of the canon of construction invoked. Moreover, the instant case has developed into a controversy between two distinct groups of claimants, each deriving its interest from a common lessor, who has parted with his own interest, and therefore the reason for the rule that the lease must be construed strictly in favor of the lessor and against the lessee has wholly failed.

Having reached the conclusion that there was and could have been no forfeiture of the

lease at the option of the lessors for default in the payment of rentals in strict conformity with its terms, the next question which presents itself is whether there was an abandonment of the lease by any of the first group of lessees. Generally, whether a contract is abandoned is a question of fact to be determined by the court or jury from all the facts and circumstances of the particular case. *Martin v. Spaulding et al.*, 40 Okl. 191, 137 Pac. 882.

In *Garrett v. South Penn Oil Co.*, 66 W. Va. 598, 66 S. E. 745, the Supreme Court of Appeals of West Virginia pointed out the distinction between "abandonment" and "forfeiture" as follows:

"'Abandonment' * * * rests upon the intention of the lessee to relinquish the premises, and is therefore a question of fact for the jury; while a 'forfeiture' does not rest upon an intent to release the premises, but is an enforced release. * * * Whether or not a lease has been abandoned is a matter of defense, and need not be negated by the plaintiff in an action for the rent."

Again, in *Smith v. Root*, 66 W. Va. 638, 66 S. E. 1007, 30 L. R. A. (N. S.) 176, the Supreme Court of Appeals of West Virginia said:

"A lessee may abandon the premises notwithstanding there is no forfeiture clause. His failure to pay the cash rentals stipulated in the contract may not alone be sufficient to prove abandonment; but his failure to pay, taken in connection with other facts and circumstances evincing a clear intention to abandon the enterprise, coupled with the fact that no operations were ever begun upon the land, is sufficient to prove relinquishment of lessee's right."

In that case the lessees had drilled no well and had defaulted in the payment of five quarterly rentals; also, they had drilled on the adjoining tract, became insolvent, and gone out of business. All these facts were held to constitute abandonment.

In *Phillips v. Hamilton*, 17 Wyo. 41, 95 Pac. 846, the court held that:

"In determining whether one has abandoned his property or rights, the intention is a paramount subject of inquiry, as there can be no abandonment without an intention to do so, and where plaintiff leased certain land to defendant for the purpose of boring for oil and gas, operations to be commenced within a year, and operations were begun within that time and the well drilled, and some seven months after drilling the first well the lessee returned to erect another rig and drill another well when plaintiff revoked the lease, there was no intention by the lessee to abandon the lease."

Archer on Oil and Gas, p. 501, says:

"To constitute abandonment by the lessee of a lease for oil and gas purposes there must be both an intention to abandon and an actual relinquishment of the leased premises."

In *Fisher v. Crescent Oil Co.*, 178 S. W. 908, the Court of Civil Appeals of Texas said:

"'Abandonment' is the relinquishment of a right. If the owner sees proper, he may so abandon and evidence his intention by any act legally sufficient to vest or divest the ownership. *Phillips v. Watkins, etc.*, 90 Tex. 195, 38 S. W. 270-274(3), 470. The existence of the intent

to waive or abandon the right on the land was a question of fact for the court trying the same, and, if the facts would authorize the conclusion that there was no such intention, we would not be warranted in setting aside the judgment. *Railway v. Hendricks*, 49 Tex. Civ. App. 314, 108 S. W. 748, 749; *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87."

In *McMillin v. Titus*, 222 Pa. 511, 72 Atl. 244, the Pennsylvania Supreme Court said:

"Abandonment ordinarily is a question of fact to be determined by the jury under all the circumstances of the case."

It is true that the nonpayment of the rentals under an "unless" lease may well be found to constitute an abandonment, in the absence of circumstances tending to show a contrary intention. If the failure to pay is voluntary, and not caused by some accident, mishap, or mistake, then, under the "unless" lease, the presumption is that the lessee chose that method of surrendering the lease. But, in this case, the evidence shows almost without dispute, and the trial court found, that the original lessees neither intended to abandon the lease on the 80 acres, nor the Cameron and Wilson 240 acres.

At this point, it may be well to observe that every issue of fact, where an issue of fact was joined by the evidence, necessary to sustain the judgment rendered below, has been settled in favor of the defendants in error by the findings of fact of the trial court.

In such circumstances, not finding the findings of fact made by the trial court to be clearly against the weight of the evidence, the court is not at liberty to disturb them.

The only remaining assignment of error which I deem it necessary to notice is stated by counsel in their brief as follows:

"Development which Ruhl expected to be made under the terms of his lease was the real consideration for the contract. Wilson and Cameron held the contract in a speculative venture, without development, and there was therefore no consideration for the contract."

Whether the lease was unfair and inequitable must be determined in view of the circumstances in which it was given, which will be found quite fully set out elsewhere in this opinion. In my judgment, the consideration for the lease, viz., \$1 paid to the lessors and the covenants and agreements of the lessee, cannot, in view of the evidence, be said to be unreasonable. An examination of many of the cases and authorities hereinbefore cited will show that similar leases, resting upon like consideration, have been uniformly sustained by courts of the highest respectability.

The lease upon its face discloses a sufficient consideration to support such a contract, and in clear and unambiguous terms declares that it "shall remain in full force for the term of ten years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, his heirs, successors or as-

signs." The intention of the parties being clear, no good reason appears why their contract should not be given effect in accordance with its terms. The authorities seem to be quite uniform to the effect that a lease for a specified term, "and as long thereafter as oil or gas, or either of them, is produced," is not only a lease for the specified period, but beyond it, provided the lessee finds and produces oil during the period named. *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595, 64 S. E. 1027, 28 L. R. A. (N. S.) 959; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S. E. 961, 43 L. R. A. (N. S.) 848; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Young v. Forest Oil Co.*, 194 Pa. 243, 45 Atl. 121; *Chaney v. Ohio & I. Oil Co.*, 32 Ind. App. 193, 69 N. E. 477; *Eaton v. Allegany Gas Co.*, 122 N. Y. 416, 25 N. E. 981; *Dickey v. Coffeyville Vit. B. & T. Co.*, 69 Kan. 106, 76 Pac. 398; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; *Tucker v. Watts*, 25 Ohio Cir. Ct. R. 320; *Thornton on Oil & Gas*, §§ 134, 135; *Graves v. Gas Co.*, 83 Iowa, 714, 50 N. W. 283; *Whiteman v. Gas Co.*, 139 Pa. 492, 20 Atl. 1062; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

If there is one thing more than another which would tend to add stability to the oil and gas business, and a sense of security to those entering into oil and gas leases and contracts, it would be strict adherence to the salutary rule that men of full age and competent understanding shall be allowed the utmost liberty of contracting with each other, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice in strict accordance with their plain terms. The statute (section 946, Rev. Laws 1910), as well as the rules of construction, enjoin that:

"A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful."

There are many elements of hazard and uncertainty for the operator, which naturally inhere in the business of exploring for oil and gas in undeveloped territory; but, if the foregoing fundamental rules are strictly observed by the parties to oil and gas contracts and the courts, it seems to me this element of uncertainty would not be carried into the contracts or leases necessary to carry on this important branch of the great oil industry.

From an examination of the entire record, I am convinced that the trial court correctly found the facts, where issues of fact were joined by the evidence, deduced therefrom proper conclusions of law, and on the whole decided the case in accordance with right and justice.

I am authorized to state that Mr. Justice THACKER joins me in this dissenting opinion.

BOARD OF COM'RS OF MUSKOGEE
COUNTY et al. v. DUDDING.

(No. 8553.)

(Supreme Court of Oklahoma. Sept. 26, 1916.)

(Syllabus by the Court.)

INJUNCTION ~~16~~—COUNTY COMMISSIONERS
—EQUITABLE JURISDICTION—REMEDY AT
LAW.

By section 1, c. 117, Session Laws 1915, p. 205, any person aggrieved at the action of the board of county commissioners in allowing and ordering paid any claim against the county, may appeal from the decision of the county commissioners to the district court upon filing a bond as therein required; and such remedy is plain, speedy, and adequate, and equitable relief by injunction against the apprehended action of the commissioners in the premises cannot be had.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. ~~16~~.]

Commissioners' Opinion, Division No. 3. Error from District Court, Muskogee County; W. H. Brown, Judge.

Action by J. R. Dudding against the Board of County Commissioners of Muskogee County and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Fred P. Branson, Co. Atty., W. W. Noffsinger, and Y. P. Broome, all of Muskogee, for plaintiffs in error. Gibson & Hull, Rutherford & Cosgrove, and S. H. Lattimore, all of Muskogee, for defendant in error.

BLEAKMORE, C. In Muskogee county there is no courthouse erected by the county. In August, 1912, the board of county commissioners entered into a lease contract with the Courthouse Building Company for the use of five upper floors of a certain eight-story building for courthouse purposes, for a term of ten years, at an annual rental of \$18,000. The judges using the courtrooms provided for by the terms of the contract, approved the same; and the county has since occupied these quarters. Such rental was paid for the two succeeding years. In March, 1915, the county commissioners notified the Courthouse Building Company, and the owners of at least one other building in the city of Muskogee, to submit bids for the furnishing of quarters for courthouse purposes for the ensuing fiscal year; and pursuant to negotiations responsive to such notice, the Courthouse Building Company let the same five floors of its building to the county for that year at a rental of \$15,000. In March, 1916, similar notices were given by the commissioners to the Courthouse Building Company and to the owners of the Metropolitan building. The owners of the last-mentioned building thereupon offered to let the five upper stories of their building and certain other space, to be used for the various courtrooms, to the county for courthouse purposes for the fiscal year beginning

July 1, 1916, at a rental of \$11,000. The Courthouse Building Company having ignored the notice received by it, the county commissioners, on May 2, 1916, entered into a contract with the owners of the Metropolitan building in accordance with the terms of their offer. On May 31, 1916, the judge of the superior court of Muskogee county advised the county commissioners that he had examined the plans of that portion of the Metropolitan building to be used for courtrooms as contemplated by such contract, and also the building itself, and was convinced that suitable courtrooms could not be provided for the various courts; that he had learned that the present quarters could be secured for only \$1,000 more than the rental of the proposed quarters in the Metropolitan building; that the employees in the present location would in his judgment save more than \$1,000 in efficiency, to say nothing of the inconvenience and cost of moving, et cetera, and stated that he was unable to approve the contract.

On May 24, 1916, the Courthouse Building Company having learned of the execution of the contract between the commissioners and the owners of the Metropolitan building, filed with the county clerk its offer to let that portion of its building occupied by the county at a rental of \$12,000 for the following fiscal year.

On June 5, 1916, the commissioners, perhaps without knowledge of the offer of the Courthouse Building Company, but in any event without regard thereto, entered into what is termed a supplemental contract with the owners of the Metropolitan building, by the terms of which it was agreed that if the judges of the various courts were not satisfied with the courtrooms after the same were completed and arranged as provided in the original agreement, and declined to approve the same, the county should pay \$9,000 for that portion of the building to be used as quarters for other officials.

The courtrooms in the Metropolitan building not being completed and ready for occupancy were not submitted for inspection to the various judges presiding over the courts for whose use they were contemplated, nor was the contract therefor submitted to them for approval. But, on June 20, 1916, J. R. Dudding, a resident taxpayer of Muskogee county, commenced this action against the board of county commissioners, seeking to enjoin the removal of the county property and offices from their present location to the Metropolitan building.

On July 10, 1916, upon a hearing, defendants were enjoined from removing or causing to be removed any of the offices of the county officials, and the furniture, fixtures, books, and records of the county to the Metropolitan building until the further order of the court, and from this order defendants have appealed. Evidence of the comparative suitable-

ness of the two buildings for courthouse purposes was excluded by the trial court.

It is contended by the plaintiff that the contract with the owners of the Metropolitan building was fraudulently, arbitrarily and capriciously entered into by the board of county commissioners.

The evidence disclosed that the space in the Metropolitan building intended for use as courtrooms under such contract was from 37 to 43 per cent. of the entire space provided for all purposes; and it is argued that the division of the rental under the supplemental contract—\$2,000 for the courtrooms and \$9,000 for the remainder—is so palpably disproportionate as to constitute fraud on its face, and that such unequal division was made for the express purpose of depriving the judges of the various courts of the free exercise of independent judgment and discretion in the approval or rejection of the quarters provided for their courtrooms under the terms of such contract.

Plaintiff below in his brief says:

"Unless prevented by this injunction, these plaintiffs in error, with the exception, perhaps, of Mr. Strahorn, will proceed to move into the Metropolitan building the county offices, including, unless prevented by other injunction proceedings, the office of the court clerk, with all the records, papers and furniture of the courts; and under such circumstances we could not reasonably expect our judges to feel free to exercise that independence of choice and action which has been a tradition of the American judiciary and the sacred preservation of which every interest of the public demands. It means, further, that if the courts shall refuse to bow in submission to the arbitrary will of these commissioners and shall exercise their right to choose their own quarters there will be forced upon this defendant in error and the other taxpayers of Muskogee county, the burden of a double and greatly increased rental, due to the arbitrary, capricious and fraudulent action of these commissioners in making the rental contracts they have."

By the statute it is provided (section 1617, Revised Laws of 1910):

"In any county where there is no courthouse or jail erected by the county, or where those erected have not sufficient capacity, it shall be the duty of the board of county commissioners to provide for courtroom, jail, and offices for the following named officers: Sheriff, treasurer, register of deeds, district clerk, county clerk, county attorney, superintendent of public schools and county judge, to be furnished by the county in a suitable building or buildings, for the lowest rent to be obtained at the county seat, or to secure and occupy suitable rooms at a free rent within the limits of the county seat or any of the additions thereto, until such county builds a courthouse. They shall also provide the courts appointed to be held therein, with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of their business. If the commissioners neglect, the court may order the sheriff to make such necessary provision, and the expenses incurred by him in carrying the order into effect, when certified by the court, shall be a county charge.

"Section 1618. The power to rent courtrooms shall only extend to such rooms as the court using the same may approve."

It is contended by the defendant: (1) That the plaintiff below is not the real party in

interest; (2) that the plaintiff is not entitled to relief by injunction. However laudable the interest manifested by the plaintiff in the matter may be, our views are not in harmony with the proposition advanced by him, namely, that he as a taxpayer may invoke the jurisdiction of a court of equity to relieve the judges from the alleged possible baleful effects consequent upon the exercise of statutory authority, lest their discretion be subverted, and their actions coerced by the artful designs of a board of Machiavellian commissioners.

It is clear that the only possible interest plaintiff, as a taxpayer, could have in the removal of county property and offices from one building in the city of Muskogee to another, is in the increased amount of taxes to which it is alleged his property would be subjected by reason of the payment of a greater rental.

It is obvious that the county commissioners were acting within the scope of their authority and performing a duty intrusted to them by statute in providing quarters for the use of the county officials. The law vested in them the discretionary power to select such quarters at the lowest rent to be obtained; and this, it appears, they have attempted to do.

If, however, the contention of the plaintiff is correct, and it may be reasonably apprehended that the board of county commissioners will audit and allow claims for an excessive rental, the plaintiff has an adequate remedy at law, under the provisions of section 1, c. 117, Session Laws 1915, which provides:

"From all decisions of the board of commissioners, upon matters properly before them, there shall be allowed an appeal to the district court by any persons aggrieved, including the county by its county attorney, upon filing a bond with sufficient penalty, and one or more sureties to be approved by the county clerk, conditioned that the appellant will prosecute his or her appeal without delay, and pay all cost that he or she may be adjudged to pay in the said district court; said bond shall be executed to the county, and may be sued in the name of the county upon breach of any condition therein: Provided, that the county attorney, upon the written demand of at least fifteen (15) freeholders of the county, shall take an appeal from any action of the board of county commissioners when said action relates to the interests or affairs of the county at large or any portion thereof, in the name of the county, when he deems it to the interest of the county so to do; and in such case no bond shall be required or given and upon serving the notice provided for in the next section the county clerk shall proceed the same as if a bond had been filed."

In *Black et al. v. Geissler et al.*, 159 Pac. 1124, case No. 8421 (not yet officially reported), a suit by a taxpayer seeking to enjoin the county commissioners, members of the excise board, county assessor, county treasurer, and county registrar from the performance of certain acts devolved upon them by the registration law, wherein it was alleged that unless restrained the defendants would al-

low and pay out large sums of money upon the order of the registrar for supplies furnished upon his order, for carrying into effect the provisions of the act, and would incur additional expense and let other contracts for supplies, and that the county excise board would include the same in the estimate for taxes of the county, which taxes would be collected by the county treasurer, all without authority of law, et cetera, it was held:

"Should claims for said alleged illegal expenses be presented to and allowed by the board of county commissioners, the plaintiff would have an adequate remedy in the premises by an appeal from the action of the board to the district court, upon giving bond as required by section 1, c. 117, Session Laws 1915, p. 205, amending section 1640, Revised Laws 1910. Having a complete and adequate remedy at law under this section, plaintiff was not entitled to relief by injunction against any apprehended action of the board of county commissioners in the allowance of said claims. *Smith et al. v. Board of Com'rs*, 28 Okl. 819, 110 Pac. 669; *Fast et al. v. Rogers*, 30 Okl. 289, 119 Pac. 241; *Garvin County v. Lindsay Bridge Co.*, 32 Okl. 784, 124 Pac. 324; *Turner et al. v. City of Ardmore et al.*, 41 Okl. 660 [130 Pac. 1156]."

It is unnecessary to advert to other phases of the case presented by the briefs. The question of the enforceability of the contract between the county commissioners and the owners of the Metropolitan building is not properly determinable in the case before us.

The judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

KYTKA v. WEBER COUNTY.

(No. 2846.)

(Supreme Court of Utah. Sept. 27, 1916.)

1. DISTRICT AND PROSECUTING ATTORNEYS \Leftrightarrow 7(2)—REPRESENTATIVE OF COUNTY—EXPENDITURES—EXPERT WITNESS—"COUNTY ATTORNEY."

Comp. Laws 1907, § 538, provides that county charges shall include the necessary expenses of the county attorney incurred in criminal cases arising in the county and all other expenses necessarily incurred by him in the prosecution of criminal cases. Thereafter Comp. Laws 1907, §§ 2445x7, 2445x8, created the office of district attorney and provided that all the duties as public prosecutor, devolving upon county attorneys, should be discharged by the district attorney, without changing the provision as to county charges. *Held*, that the words "county attorney" mean public prosecutor, and the district attorney, having become public prosecutor, was authorized to incur necessary expenses in the prosecution of criminal cases in the district court, and to make them county charges.

[Ed. Note.—For other cases, see *District and Prosecuting Attorneys*, Cent. Dig. § 34; Dec. Dig. \Leftrightarrow 7(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *County Attorney*.]

2. COUNTIES \Leftrightarrow 223—EVIDENCE \Leftrightarrow 245—CRIMINAL PROSECUTION—EXPENSES—ACTION.

In an action against a county to recover for plaintiff's services as a handwriting expert, rendered at the request of the district attorney in

a criminal case, evidence as to what the chairman of the county board, outside of board meetings said to the district attorney or to the county attorney was inadmissible as his extrajudicial statement, and was not binding on the board or the county, and evidence as to what the county attorney told the district attorney was also inadmissible; but evidence that the board itself approved or ratified the plaintiff's employment was admissible.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 360-362; Dec. Dig. § 223; Evidence, Cent. Dig. §§ 937-944; Dec. Dig. § 245.]

3. DISTRICT AND PROSECUTING ATTORNEYS § 7(2)—EXPENDITURES—RATIFICATION.

Where a county board in the first instance could have authorized the employment of a handwriting expert in a criminal case, and could have agreed to pay him reasonable compensation, it might ratify, in whole or in part, an arrangement between the district attorney and the expert as to the expert's services and compensation.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 34; Dec. Dig. § 7(2).]

4. TRIAL § 168—MOTION FOR DIRECTED VERDICT—GROUNDS.

There was no error in overruling a motion for a directed verdict, where no ground whatever was stated to support it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. § 168.]

5. DISTRICT AND PROSECUTING ATTORNEYS § 7(2)—EXPENDITURES—AUTHORITY.

While the district attorney is authorized under Comp. Laws 1907, §§ 538, 2445x7, 2445x8, to incur necessary expenses in the prosecution of criminal cases and to make them county charges, he may not bind the county beyond what is reasonably necessary, or for service rendered beyond the reasonable value thereof.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 34; Dec. Dig. § 7(2).]

6. COUNTIES § 224—EXPENDITURES—NECESSITY OF SERVICE—QUESTION FOR JURY.

Whether a handwriting expert's services were necessary in a criminal case is a question of law and fact, the question whether services of a certain class or kind are required, and whether expenditures therefor are necessary, being for the court, and the question whether the particular services rendered were actually necessary, in view of all the circumstances of the case in which rendered, being a question of fact for the jury.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 363; Dec. Dig. § 224.]

7. COUNTIES § 224—EXPENDITURES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a county to recover for services as a handwriting expert in a criminal case under arrangement with the district attorney, evidence held not so conclusive as to justify a directed verdict for the plaintiff.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 363; Dec. Dig. § 224.]

Loofbourow, District Judge, dissenting.

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Theodore Kytka against Weber County. Judgment for defendant on a directed verdict, and plaintiff appeals. Reversed and remanded for a new trial.

H. H. Henderson, of Ogden, for appellant. Joseph E. Evans and John G. Willis, both of Ogden, for respondent.

STRAUP, C. J. In the prosecution of a criminal case in the district court, the district attorney procured the services of the plaintiff, an expert on handwriting, and called him as a witness. The plaintiff testified that it was agreed between him and the district attorney that he was to have \$25 a day for laboratory work, \$50 a day out of San Francisco, where he resided, and his expenses, which, in the aggregate, he testified, amounted to \$2,500. An itemized and verified claim for this was presented to the county commissioners of the county wherein the crime was committed and the trial had. They rejected it for the stated reason that they were "not fully advised as to the legality of said claim by reason of the difference of opinion of attorneys as to the legality thereof." The plaintiff thereupon brought this action against the county. At the close of the evidence the court directed a verdict in favor of the defendant. The plaintiff appeals. He complains of that ruling, of the court's refusal to direct a verdict in his favor, and also of rulings refusing to admit various offers of proof.

The district attorney testified that he sought and obtained the services of the plaintiff at San Francisco who informed him that his charges would be as testified to by the plaintiff. This was communicated to the county attorney, who approved it, and who told the district attorney that he had taken the matter up with the county commissioners. On objections, the plaintiff was not permitted to show what the county attorney in such respect told the district attorney. The district attorney also spoke to the chairman of the board of county commissioners, but on the objection of the defendant the plaintiff was not permitted to show that the chairman told him: "You know about those things; go ahead and do what you think is best." The plaintiff also offered to prove, but on the objection of the defendant was not permitted to do so, that after the services were rendered and the claim presented, the district attorney "had a talk with the county commissioners in their board, and that they acknowledged that they had authorized the county attorney to hire this expert, and that the bill was all right, as far as they knew, and that the only question in their mind was whether they had authority to pay it."

The county attorney in part corroborated the testimony of the district attorney and in part disputed it. He testified that he "took the matter up with the county commissioners, but was taken under advisement by them, and as far as he knew they still had it under advisement." The chairman of the board testified that the matter was taken up with the board by the county attorney and taken under advisement; and that the next he knew, the expert had been sent for and had come on, and that then the county attorney

advised him that "there was no need of our taking further action."

The grounds for a direction of the verdict are that the complaint does not state a cause of action and insufficiency of evidence to show that a contract was made between the plaintiff and the county commissioners, or between the plaintiff and the county attorney. That the complaint states a cause of action is not open to argument.

We need say no more about that. Nor is that what divides the parties.

[1] It is chiefly contended by the respondent that the district attorney was not authorized to incur any expense in the prosecution of criminal cases and make them county charges, and hence was not authorized to employ the plaintiff and make his compensation county charges; that while the county attorney, in the prosecution of criminal cases, could incur necessary expenses and make them county charges, he, nevertheless, could not authorize the district attorney to do so; and that while the county commissioners could authorize necessary expenses to be incurred in the prosecution of criminal cases, yet the evidence fails to show that they had authorized the employment of the plaintiff or had agreed to pay him anything. We have a statute (C. L. 1907, § 538) which defines "county charges" and which, so far as material, reads:

"The following are county charges:
* * * (2) The necessary expenses of the county attorney, incurred in criminal cases arising in the county, and all other expenses necessarily incurred by him in the prosecution of criminal cases. * * *

When that statute was passed duties were imposed on the county attorney to prosecute all criminal cases, both felonies and misdemeanors, in the district and justice courts. There then was no office known as district attorney. Later the office of district attorney was created, as many districts in the state as there are judicial districts, each comprising several counties. The statute creating that office also prescribed the duties of the district attorney. C. L. 1907, § 2445x7, is:

"It shall be the duty of the district attorney to appear and prosecute for the state in the district court of his district, and in all criminal prosecutions, and in all civil cases in which the state may be interested. * * * He shall draw all indictments and informations for offenses against the laws of this state within his district, and shall cause all persons indicted or informed against to be speedily arraigned; he shall cause all witnesses for the state to be subpoenaed to appear before the court or grand jury," etc.

The next section provides that:

"Any district attorney may, whenever he deems it necessary, appear and prosecute before any justice of the peace within his district in the preliminary examination of any person charged with a felony. All the duties as public prosecutor now devolving upon county attorneys shall be assumed and discharged by the district attorney, except in cases of prosecutions for misdemeanors and preliminary examinations before justices of the peace."

It is thus seen that all duties pertaining to the county attorney in the prosecution of

criminal cases in the district court were taken from him and imposed on the district attorney. The statute, however, defining county charges heretofore referred to was not changed. Because of that the respondent contends that no power was conferred on the district attorney to incur any expense in the prosecution of criminal cases and make it a county charge. We think that is a too narrow construction. It certainly is not within the spirit of the statute. The dominant factor of the statute in this respect is to make all necessary expenses of the public prosecutor, in the prosecution of criminal cases arising in the county, charges against the county. When there was no district attorney, and when the duties pertaining to the prosecution, both in the inferior and district courts, were imposed on the county attorney, such dominant factor was well expressed by the language "the necessary expenses of the county attorney in criminal cases arising in the county," etc., for he then was the sole public prosecutor. We think the words "county attorney" as there used but mean "public prosecutor." That is emphasized by the language of the statute taking duties from the county attorney and imposing them on the district attorney—"all the duties as public prosecutor now devolving upon the county attorney shall be assumed and discharged by the district attorney, except," etc. It is hard to believe the Legislature intended that the necessary expenses incurred by the county attorney as a public prosecutor in the prosecution of criminal cases before justices of the peace were to be charged against the county, but that the necessary expenses incurred by the district attorney as a "public prosecutor," in the prosecution of cases in the district court, were not, and that the one was authorized to incur such expense, but that the other was not. We think the Legislature intended that all necessary expenses incurred by the public prosecutor, whether he be county attorney or district attorney, in the prosecution of criminal cases arising in the county, should be charges against the county. To stick to the very letter of the statute and hold otherwise leads to this: The county attorney could not himself incur expenses for the prosecution of criminal cases in the district court, for he no longer has any duties to perform with respect to such prosecutions, not being "expenses necessarily incurred by him in the prosecution of criminal cases," nor could he authorize the district attorney to incur any such expenses, for he is clothed with no such power. So, before the district attorney could incur any expense, however small or necessary, in such prosecutions, he would be required to first take the matter up with the county commissioners for their approval and direction, a most cumbersome practice, fraught with delays and inconvenience. We do not think the Legislature intended that. We are of the

opinion that the district attorney was himself authorized to incur necessary expenses in the prosecution of criminal cases in the district court and to make them county charges; and that therefore the court erred in directing a verdict against the plaintiff. *People ex rel. Gardiner v. Board of Supervisors*, 134 N. Y. 1, 31 N. E. 322; *Rocca v. Boyle*, 166 Cal. 94, 135 Pac. 35, Ann. Cas. 1915B, 857. Because of somewhat dissimilar statutes these cases are not greatly in point as case law; still, in principle, support the conclusion just reached.

[2, 3] Now, as to other rulings. The plaintiff was not entitled to show what the chairman of the board, outside of board meetings, and when not in performance of official duties, said to the district attorney, or to the county attorney. His extrajudicial statement in no sense was binding on the board or the county. All offers of testimony of that character were properly excluded. But the plaintiff also offered evidence tending to show that the board itself approved, or ratified, plaintiff's employment. Though it should be conceded that the district attorney was not authorized to incur the expenses in question, yet we do not see why the board could not ratify all the district attorney did in such respect. If the board, in the first instance, could have authorized the employment of the plaintiff and could have agreed to pay him reasonable compensation, we do not see why it could not thereafter ratify such employment, and, in whole or in part, the arrangement made by the plaintiff and the district attorney as to plaintiff's services and compensation. To that extent the plaintiff was entitled to support his offer by proof. Of course, as is already apparent, he could not show that by the mere extrajudicial statements or admissions by one or more members of the board, as was attempted by some of plaintiff's offers; and while it would have been competent to show what directions, if any, the board itself gave the county attorney, or another, with respect to the employment of the plaintiff, it was not competent to show that by mere extrajudicial statements of one or more members of the board, nor by mere hearsay evidence what the county attorney told the district attorney.

[4] Lastly, it is contended by the plaintiff that his motion for a directed verdict in his favor ought to have been granted. No error was made in overruling the motion, for: (1) No ground whatever was stated to support it; and (2) on the record the motion was properly overruled.

[5-7] While we have just held that the district attorney is authorized to incur necessary expenses in the prosecution of criminal cases and make them county charges, yet he may not bind or charge the county beyond what is reasonably necessary, and certainly may not bind it for services rendered beyond

the reasonable value thereof. It was sufficiently alleged that the services were necessary, and that the amount demanded was reasonable. But such allegations were denied. Whether plaintiff's services were necessary was a mixed question of law and fact, a question for the court whether services of a certain class or kind are needful and required, and whether expenditures for them are necessary, and for the jury whether the particular services rendered were actually necessary in view of all the conditions and circumstances of the case in which rendered. The question of reasonable value was entirely one of fact. While considerable evidence was given tending to show that the services were necessary, yet, even as to that point the evidence was not so conclusive as to justify the court to direct a finding in plaintiff's favor. We have not been pointed to any evidence to show the reasonableness of plaintiff's charges or expenses. Nor have we been able to find any. Certain it is, if there is any, our attention has not been called to it. The plaintiff seems to have contented himself with his agreement of \$25 a day for laboratory work, \$50 a day out of San Francisco and all expenses, traveling on de luxe trains, and eating \$1.50 breakfasts at the Falstaff at Ogden. In the absence of evidence to show that such charges and expenses were reasonable, it is indeed doubtful whether the plaintiff was entitled to go to the jury for anything more than a nominal sum; but certainly he was not entitled to a directed verdict for the sum demanded, \$2,500 and interest. There being no such evidence, had the defendant on that ground asked that a verdict be directed in favor of the plaintiff for only a nominal sum, and, on his failure to supply such proof, had such motion been granted, the plaintiff would have little, if any, cause to complain. But as no such motion was made and no such action invoked, let that be as it may; for, on the record it is very clear that the plaintiff was not entitled to a directed verdict in the sum demanded by him. For the reasons heretofore given, let the judgment be reversed, and the case remanded for a new trial. Costs to the appellant. Such is the order.

FRICK, J. (concurring). At the time the case was argued I was of the opinion that the statute did not confer authority upon the district attorney to bind the county for the costs or expenses incident to criminal prosecutions to any extent. After more mature reflection, however, and with some reluctance, I have been forced to the conclusion that the construction given the statute in question by the CHIEF JUSTICE is the correct one. I, therefore, concur with him in the reversal of the judgment for the reasons stated in his opinion.

LOOFBOUROW, District Judge, sitting for McCARTY, J., dissents.

VIREND et al. v. UTAH ORE-SAMPLING CO. (No. 2918.)

(Supreme Court of Utah. Sept. 19, 1916.)

1. MASTER AND SERVANT \S 295(1)—ASSUMPTION OF RISK—QUESTION FOR JURY.

Where there is a dispute in the evidence respecting the material circumstances, or some of them, or where it is such that reasonable men might fairly differ with regard to whether the danger under all the circumstances was so open and apparent to any one of ordinary prudence and intelligence that he ought to have known and appreciated it, the question of his assumption of risk was for the jury; but where there is no dispute regarding the facts, or any of them, and the risk of injury is of such a character that a person of ordinary prudence and intelligence ought to have known and appreciated it, there is nothing for the jury to pass upon.¹

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1168, 1169, 1179; Dec. Dig. \S 295(1).]

2. MASTER AND SERVANT \S 217(23)—ASSUMPTION OF RISK—PRESUMPTION.

Where it requires only ordinary knowledge, skill, and prudence to know and appreciate the danger to an employé in an ore-sampling plant, the law assumes that he must have known and appreciated whatever danger there was.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 591; Dec. Dig. \S 217(23).]

3. MASTER AND SERVANT \S 285(2)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE.

Where the real cause of a fatal accident to an employé in an ore-sampling plant while operating an ore crusher was a mere matter of conjecture, so that different persons reading the evidence might suggest different causes, a nonsuit and a judgment dismissing the action were proper.²

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1002; Dec. Dig. \S 285(2).]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by Annie Virend, Sr., and Annie Virend and others, minors, by their guardian ad litem Annie Virend, Sr., against the Utah Ore-Sampling Company. Judgment for defendant, on a directed verdict, and the plaintiffs appeal. Affirmed.

Morgan, Huffaker & Bradford and E. A. Walton, all of Salt Lake City, for appellants. King & Nibley and P. T. Farnsworth, Jr., all of Salt Lake City, for respondent.

FRICK, J. The plaintiffs Annie Virend, as the wife of one Frank Virend, deceased, in her own right, and as the guardian ad litem of Annie, Frank, Christina, and Rose Virend, minor children of said first-named Annie Virend and Frank Virend, brought this action to recover damages, which it is alleged all of the plaintiffs suffered by reason of the death of the deceased husband and father. In the complaint, after alleging the relation-

ship of the plaintiffs to the deceased, and that at the time of his death he was in the employ of the defendant in its ore-sampling mill and that he was employed about an ore crusher with an unguarded flywheel, etc., it is then alleged that the deceased came to his death by reason of the negligence of the defendant. The negligence that is relied on by the plaintiffs is stated thus in their printed abstract:

"That it (the defendant) negligently failed to provide the deceased with a reasonably safe place in which to work, that it negligently and carelessly failed to warn and instruct the deceased in respect of the danger of said work, and that it negligently failed and omitted to have and maintain a guard rail or other protection at and about said flywheel."

The defendant, in its answer, after admitting the relationship of the parties and that of master and servant, denied all acts of negligence, and as affirmative defenses pleaded contributory negligence and assumption of risk.

We remark here that there is no evidence in the record supporting the second ground of negligence above stated. Plaintiffs' evidence upon the other branches of the case tended to prove the following facts: The deceased, on the 23d day of June, 1915, the day of the accident, was engaged in operating an ore crusher in defendant's sampling mill. The crusher was on an upper floor in the building and at the time was crushing what the witnesses call "copper matte," which is a substance that is hard to crush. The crusher consisted of two horizontal corrugated rolls which revolved toward each other, and in that way crushed the material which was run into a hopper located over the two rollers. A witness for the plaintiff, stating his evidence in the language of the printed abstract furnished by the plaintiffs, described the operation of the crusher as follows:

"In keeping the rolls clear, the men used an old steel drill about 3 feet long and three-fourths inches in diameter, with a head put on it so that the men could drive it into the rolls without the rolls catching the bar. When I saw the deceased lying there I saw the bar lying on the platform back of him, towards the wall, which would be to the left as indicated by the drawing. I have cleared rolls and kept them clear during such operations. These rolls had small corrugations, about one-eighth inches. They were both the same size; about 8 inches in diameter and 20 inches long, and operate very close together, one roll being set on heavy springs, so that it will give a little, about half an inch, and thus accommodate itself in some degree to the size of the rock to be crushed. It is necessary to have a man watch the rolls, because the matte is hard and slick, and if the chunks are a little large they ride the rolls to the end of the cheek plate and the rolls don't bite them. The duty of the operator is to hit the pieces that won't go through and drive them through; hit them hard enough so that the rolls will bite them. In so doing it is possible for the rolls to bite the bar. In my experience in that mill I have had the bar taken away from me and drawn through the rolls. When the bar is in use its direction is on a slant from the

¹ Busse v. Murray Meat, etc., Co., 45 Utah, 596, 147 Pac. 626; Cook v. Smelting Co., 34 Utah, 190, 97 Pac. 28; Richards v. Ogden Steam Laundry, 32 Utah, 423, 91 Pac. 267.

² Fritz v. Electric L. Co., 18 Utah, 493, 56 Pac. 90.

perpendicular, and if jerked hard by the rolls it will go through, and even if not jerked so hard as to be pulled through, it is bound to jerk a man and pull him around. When I saw Mr. Virend lying there dead, the bar was lying behind him, probably 2 feet away from the crusher, and about a foot from the body, which was lying between the bar and the machine. The bar, when not in use, was usually kept standing up in the corner and not in that particular place where it was found. The platform is about 3 feet wide from the front of the roll to the east wall of the mill, and about 4 or 5 feet from stair to stair."

The witness, again quoting from the abstract, on cross-examination, said:

"Prior to his death, Virend had been working about three years in the plant, and for a year it had been a part of his business to watch or work about the crusher at which this accident occurred. Prior to that time he at times worked about the crusher. He worked about that crusher more than any one else. The accident occurred at about 8 o'clock in the forenoon. It was light, and there are outside windows about 4½ feet from the crusher. The crusher had been there with the flywheel and the railing and other things immediately about it in that same condition during all the three years the deceased had worked in the mill. There was no difficulty in seeing the conditions there. We were running matte that day. We receive shipments of matte regularly. We have run matte through that crusher hundreds of times while the deceased, Frank Virend, was there performing his work. I was the first man there after the accident. I found his head between the flywheel and the crusher (indicated on drawing by counsel). That was the only part of his body in contact with the flywheel, and his body and legs extended in a northerly direction. At the time he was wearing overalls and a jumper. They were not torn or disarranged."

The witness who was the foreman in charge of the mill also testified that the deceased went to work at 7 o'clock on the morning of the accident, and that the witness directed him to go to work at the crusher. His testimony then proceeds as follows:

"It would take both the rolls to bite the bar, and in that event the tendency would be to jerk the bar to the right or left or into a perpendicular, and to pull it away from the man. The rolls are full length of the platform across the point marked 'X.' I noticed that the top and back of his head was open, torn off; part of the skull was torn off. He was right against the wheel, and the spokes of wheel were pounding away at his head. That platform and the situation were the same then as now. There is a stair rail which comes down flush with the side rim of the pulley. The wheel was open, and his head was between the inside rim and the frame of the roll, at which place there is an opening."

Another witness testified for plaintiff, and, according to the abstract, said:

"I live in Murray. I am working at the Utah Ore-Sampling plant at Murray. I worked there about a year and a half before Mr. Virend was killed. I have worked lots of times on the crushers, but not steady; about three or four months at a time. I have worked at the crusher where Mr. Virend was killed while matte was being run, and I have used a bar, but I have never had it get caught. I never saw anybody get hurt while using the bar, but I have seen the rolls take the bar away from the man; you see the rolls pull the bar so quick, the man has no time to loosen it; it jerks it

and jerks him. This man that I said I saw the bar taken away from was a Mexican named Lou. When we took the bar out we had to stop the mill. I helped take it out."

On cross-examination he further said:

"When I first started to work down there it was six or seven years ago, and I have worked off and on ever since, about three years in all. I worked all over the plant. I never knew of anybody getting hurt; but I did see the bar taken away from this Mexican. That is the only time I ever saw that happen. On that occasion we had to loosen the rolls to get the bar out. It was held fast in the rolls."

It was further shown that the crusher was operated by means of a belt and drive wheel, and that an open or unguarded balance or flywheel about 5 feet in diameter was constantly revolving at a rapid rate near the crusher when it was in operation. The flywheel is described in the foregoing statements of the witnesses and is the wheel near which the deceased was found lying dead when found by the foreman as by him stated. It was further shown that the crusher—that is, the hopper into which the material to be crushed was received—was about the height of an ordinary man's waist; that the crusher sat on a small open platform several feet from the main floor of the building, which platform was connected with the main floor by means of several steps, and that the operator always had full view of the different parts of the crusher, including the wheels aforesaid. The foregoing, in substance, is all the evidence relating to the negligence of the defendant and as to how the accident probably occurred.

After plaintiff rested the defendant interposed a motion for a nonsuit upon substantially the following grounds: (1) That plaintiffs failed to establish any negligence on the part of the defendant; (2) that there is no evidence tending to prove that any of the alleged acts of negligence were the proximate cause of the accident; and (3) that the deceased assumed the risk. The court sustained the motion, and the ruling is assigned as error.

On behalf of the plaintiffs it is insisted that although it be conceded that the machinery was open, and that the deceased was familiar with the operation of the crusher, yet the question whether he appreciated the danger was a question for the jury.

[1] No doubt, ordinarily, when there is some dispute in the evidence respecting the material circumstances, or some of them, or where it is such that reasonable men might fairly differ with regard to whether the danger, under all the circumstances, was so open and apparent to any one of ordinary prudence and intelligence that he ought to have known and appreciated it, then the question is for the jury. Where, however, as here, there is no dispute regarding the facts, or any of them, and the danger or risk of injury is of such a character that a person of ordinary prudence and intelligence ought to have known and appreciated it, then there is

nothing for the jury to pass upon. We think the case, so far as the doctrine of assumption of risk is concerned, is controlled by the cases of *Busse v. Murray Meat, etc., Co.*, 45 Utah, 596, 147 Pac. 623, *Cook v. Smelting Co.*, 34 Utah, 190, 97 Pac. 28, and *Richards v. Ogden Steam Laundry*, 32 Utah, 423, 91 Pac. 267.

[2] In the case at bar, as in the cases referred to, it required only ordinary knowledge, skill, prudence, and foresight to know and appreciate the danger with which the servant might be confronted, and hence the law assumes that he must have known and appreciated whatever danger there was.

[3] As to the utter lack of evidence, or facts from which inferences might legitimately be deduced, respecting the real cause of the accident, the case of *Fritz v. Electric L. Co.*, 18 Utah, 493, 56 Pac. 90, is controlling. There, as here, the real cause of the accident was a mere matter of conjecture. In this case one person reading the evidence might suggest one cause, another reading the same evidence a different cause, while a third who read all of the evidence might perhaps think that to some extent a part of each of the other two suggested causes was operative. That, as pointed out in *Fritz v. Electric L. Co.*, supra, does not constitute the degree of proof necessary to support a verdict.

After a careful reading of this record the conclusion is unavoidable that the district court committed no error in sustaining the motion for nonsuit and in entering judgment dismissing the action.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

MUSGRAVE v. STUDEBAKER BROS. CO. OF UTAH. (No. 2876.)

(Supreme Court of Utah, Sept. 19, 1916.)

1. EVIDENCE §514(2)—EXPERT TESTIMONY—STREETS—INJURIES TO PERSONS UPON.

In an action by one injured when he tripped over a rope connecting a dead motor car with a live one which was furnishing motive power, the question whether the manner of moving the dead car was safe is not one of expert knowledge, and consequently evidence on that issue is properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2321; Dec. Dig. §514(2).]

2. MUNICIPAL CORPORATIONS §706(6) — STREETS—INJURIES TO PERSONS UPON—CARE.

As the law does not fix any particular degree of care to be exercised in moving a dead motor car along the street, but requires only the exercise of ordinary care under the circumstances, which is a question for the jury.¹

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. §706(6).]

3. MUNICIPAL CORPORATIONS §706(4) — STREETS—INJURIES TO PERSONS THEREON.

Where a pedestrian, who attempted to cross between two dead motor cars which were being drawn by a live one by means of ropes, was tripped and injured, evidence that it was not safe to move the dead cars through the streets without some prior arranged signal whereby those in charge of each car could signal the other, is properly excluded in view of testimony that the drivers of the several cars blew their horns, and of the fact that the question of negligence was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. §706(4).]

4. TRIAL §62(2)—EVIDENCE—REBUTTAL.

In an action for injuries by a motor car, evidence as to the location of the accident, offered after defendant had introduced evidence contradicting that of plaintiff on the matter, is not rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 149; Dec. Dig. §62(2).]

5. TRIAL §68(1)—OPENING OF CASE—DISCRETION.

Whether a case shall be reopened so as to allow the introduction of testimony which should have been introduced in chief, rests in the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 158-160; Dec. Dig. §68(1).]

6. TRIAL §68(1) — REOPENING OF CASE — ABUSE OF DISCRETION.

In an action by one hurt when he tripped over a rope used to haul a dead motor car and was struck by the car, it was not an abuse of discretion for the trial court to refuse to allow plaintiff to reopen his case to introduce further evidence as to the location of the accident, though defendant had introduced testimony contradicting plaintiff's evidence as to the site of the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 158-160; Dec. Dig. §68(1).]

7. MUNICIPAL CORPORATIONS §703(1)—INJURIES TO PERSONS ON STREETS—MOTOR VEHICLES.

Laws 1909, c. 113, § 4, subd. 2, providing that every motor vehicle while in use shall be equipped with front lamps showing white lights and a red tail light, applies only to vehicles in use and not to a dead motor car being hauled through the streets by another car.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509; Dec. Dig. §703(1).]

8. TRIAL §228(3) — INSTRUCTIONS — VERBAL INACCURACIES.

Where the instructions cover the case and are correct, they are not subject to criticism because of their mere phraseology.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 512; Dec. Dig. §228(3).]

9. TRIAL §244(1) — INSTRUCTIONS — EMPHASIS.

Though the court refused 15 of plaintiff's 22 requests, and 7 of the 15 instructions given which correctly covered the case concluded with a direction to the jury, in event of finding certain facts, to find for defendant, the instructions are not open to the objection that defendant's theory of the case was unduly emphasized.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 577; Dec. Dig. §244(1).]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by James Walter Musgrave against

¹ *Spilking v. Con. R. & P. Co.*, 33 Utah, 313, 96 Pac. 238, and *Gibson v. Utah L. & T. Co.*, 151 Pac. 76.

the Studebaker Bros. Company of Utah. From a judgment for defendant, plaintiff appeals. Affirmed.

J. E. Darmer and S. P. Armstrong, both of Salt Lake City, for appellant. Gustin, Gillette & Brayton, W. H. King, and Thos. Marionaux, all of Salt Lake City, for respondent.

FRICK, J. The plaintiff sued the defendant to recover damages for personal injuries which he alleged he suffered through its negligence. The case was tried to a jury, which returned a verdict for the defendant, and the plaintiff appeals.

The plaintiff has assigned numerous errors relating to alleged erroneous rulings of the court during the progress of the trial and upon alleged errors committed in charging the jury. The assignments are grouped under nine heads, and we shall, without following their order, consider such as are deemed material.

The controlling facts, briefly stated, are as follows: On the 15th day of February, 1911, the defendant, while engaged in conducting an automobile business in Salt Lake City, was transferring two automobiles from the railroad station in the western part of the city to its storehouse or garage located in the central part of the city, and perhaps one-half or two-thirds of a mile from the station. The two automobiles were being transported by being attached to each other and to a live one by means of ropes. The ropes were about 16 feet in length, and the space between the automobiles, when attached as aforesaid, was about 12 feet, or, perhaps, a little more. Plaintiff's evidence upon that point was that they were farther apart, but the jury was authorized to take the defendant's evidence which made it the distance just stated. A driver or chauffeur was in charge of the first or live car, and there was also a chauffeur steering each one of the two dead ones. The three men aforesaid left the railroad station with the cars about 5 minutes after 6 o'clock p. m. and while proceeding on their way up town to defendant's garage, on the south side of Second South street, at a point about 200 feet east of Main street, the plaintiff, in attempting to pass between two of the moving cars, was injured. All agree that the automobiles were being moved at a rate of from 3 to 4 miles an hour; that there were lights on the first or live car which also had the cover or "hood" up, and there were no lights on the two dead ones, and neither of those had a cover or "hood" up, and that the cars were attached by means of the ropes which were about one inch thick. The witnesses all agree also that there were no curtains up on the first car. From this point the evidence is somewhat conflicting. The preponderance of the evidence, however, or that which the jury had a right to say constituted the pre-

ponderance, is substantially as follows: As the three men were proceeding easterly on the south side of Second South street with the cars at the point before stated the plaintiff was in the act of crossing said street from the north to the south; that he saw that the three automobiles were being moved and saw the three men in them; that he attempted to pass between the live car and the one next to it when the chauffeur in the dead or second one spoke to him and warned him from doing so; that he then stepped back and waited until the second car had passed him when he attempted to pass immediately behind that car and between it and the second dead one; that the man in the last car saw plaintiff in the act of attempting to pass between the last two cars and he "blew his horn and told him to get back"; that plaintiff, nevertheless, proceeded to pass between the two dead cars, and in doing so his leg came in contact with the rope which was about 18 inches from the ground, and he then stepped on to the rope, and after doing so he fell to the south and the front wheel of the rear car passed over his limbs, or, at least, one of them; that all the cars were brought to a full stop within a distance of 6 or 8 feet after the plaintiff fell and before the rear wheel of the last car had reached him. The street at the point of the accident was well lighted, some of the witnesses said better than any other part of the city, with street arc lamps, by electric signs, and by other electric lights which were maintained by the business houses along the south side of the street. With respect to the time of the accident plaintiff's witnesses testified that it occurred after 7 o'clock p. m., while defendant's witnesses were positive and gave some convincing reasons showing that the accident occurred a little before 7 o'clock. How the facts just stated are material will be made more clear hereafter. The plaintiff and his witnesses, however, gave their version of the accident as being somewhat different from that stated above, but the jury were justified in finding the facts as we have stated them.

[1, 2] During the trial the plaintiff offered evidence tending to show: (1) That the manner of moving the dead cars was not safe; (2) that it was not safe to move dead cars in that way without some prior arranged signals whereby the three men in the different cars could signal one another in case it became necessary to do so; and (3) that there "is a safer way of taking automobiles from the depot to the garage through the streets than the manner" in which the three cars were being moved. The court excluded the proffered evidence on the first two propositions for the reason that the subject was not one of expert knowledge, and excluded the evidence on the third one because in answering the question the witness would be usurping the province of the jury. We can see

no escape from the court's conclusion. As to the first proposition it is sufficient to say that it was the duty of the defendant in passing through the streets to exercise reasonable or ordinary care so as not to inflict injury on any one else using the street. The exercise of reasonable or ordinary care under all the circumstances was the duty that the law imposed upon the defendant, and the jury were quite as capable of determining whether under all the facts and circumstances before them the defendant's employes had exercised that degree of care as was any one else. Again, it may well be conceded that so far as pedestrians were concerned there may have been a safer way to move automobiles through the streets of the city, but that is not the test. It might have been safer, perhaps, to have moved the cars only between certain hours after midnight and before daylight. Again, it might have been safer to move them one at a time and by their own power or to have handled only one at a time with a team, or to have moved them only on certain streets that were not being greatly used by pedestrians. The law does not prescribe any particular method by which vehicles may be moved on the streets. But in moving them it imposes the duty of exercising due or ordinary care. What constitutes ordinary care in view of a particular set of facts is ordinarily for the jury. That is, it is for the jury to say whether, in view of all the facts and circumstances in case of dispute, or where different inferences may be deduced by different minds, the conduct of the party charged with negligence did or did not constitute negligence, and if such conduct was negligence whether it was the proximate cause of the accident.

[3] The plaintiff, however, further insists that it was the duty of the defendant in moving its cars in the manner it was done to provide a code of signals for the three men in the car so that in case of threatened accident or danger the two men in the dead cars could signal the one in the live car to stop it. Defendant's counsel insist that the question just stated is not properly before us for the reason that no such act or cause of negligence is alleged in the complaint. It is, to say the least, very doubtful whether any such a cause of negligence is pleaded. Giving the plaintiff, however, the benefit of the doubt upon that question, yet we are of the opinion that the assignment cannot prevail. Plaintiff's counsel do not point out any particular signal or signals that should have been adopted. Where the statute prescribes no method of signaling the whole matter must ordinarily be left to the judgment of the triers of fact. Here again the exercise of ordinary care is the test. What better signals could have been devised than the human voice and speech for the purpose of communication between the men who were only about 20 feet apart in the open street

with no deafening noises or other obstructions surrounding them so far as the evidence shows? Both of the men in the two dead cars testified that they "tooted" or "blowed" their horns and spoke to the plaintiff. They also said that they used no other signals and that they had no other means of signaling either plaintiff or the man in the front car. The evidence that the jury were authorized to accept, however, showed that the cars were stopped about as soon as they could have been after the plaintiff fell. It is not easy to perceive what other system of signaling the defendant should have provided for its employes in moving the cars. Neither do we understand that the law imposes the duty upon the defendant of providing a code of signals where the work was as simple as was the work in moving the dead cars from the station to the garage. This assignment, therefore, cannot prevail.

[4-6] Another assignment relates to the court's rulings in excluding certain evidence offered in rebuttal by plaintiff. The plaintiff, in presenting his case in chief, produced evidence relative to the place where the accident occurred. He and his witnesses testified that it occurred in front, or practically in front, of a particular café. The defendant's witnesses, in their testimony, placed the point of the accident a little farther west. The difference between the two sets of witnesses was, however, not great. On rebuttal plaintiff's counsel offered further evidence upon the question relating to the precise point of the accident. Defendant's counsel objected to the proffered evidence upon the ground that it was not proper rebuttal, and the court sustained the objection. Plaintiff's counsel then requested the court to permit them to reopen the case upon that point, and the court denied their request. Both of the foregoing rulings are assailed as erroneous. As to the first proposition it is sufficient to say that the evidence was clearly not rebuttal. The plaintiff and his witnesses had given their testimony regarding the place of the accident and the defendant's witnesses had given theirs. In view, therefore, that the plaintiff had gone into the subject in opening his case he had no right to again go into it on rebuttal unless the court permitted him to do so by reopening the case. The court, however, refused his request to do so, and the only question is whether the court abused its discretion in denying the request. Whether the court will or will not permit a party to reopen his case upon a certain question or subject is largely a matter of discretion. No doubt the court might abuse its discretion in that regard, and if such were the case relief could be had on appeal. We, however, cannot see any abuse of discretion in this case, and therefore this assignment must also fail.

[7] A number of assignments relate to the refusal of the court to charge the jury as

requested. Although the case was one unusually free from complications and involved only issues of fact, yet the plaintiff offered 22 separate requests to charge and now insists that the court erred in refusing 15 of his requests. Entirely apart from the instructions stating the issues and some so-called stock instructions, the court charged the jury in 20 separate paragraphs in which every phase of the case was adequately covered. True, the court, in many instances, did not follow either the language or the substance of plaintiff's requests, but it, nevertheless, fully covered every legal phase of the case. One of the requests related to the code of signals we have referred to. We have, however, already disposed of that phase of the case, and for the reasons then stated no error was committed in refusing that request.

It is, however, strenuously insisted that the court erred in refusing to charge the jury that the defendant was negligent as a matter of law in not providing the two dead cars with lights as prescribed by the statute in force when the accident in question occurred. Chapter 113, Laws Utah 1909, § 4, subd. 2, then in force, so far as material here, provided:

"Every motor vehicle while in use on a public highway shall be * * * so constructed as to exhibit, during the period from one hour after sunset and one hour before sunrise, two lamps showing white lights visible within a reasonable distance in the direction towards which such vehicle is proceeding, and also a red light visible in the reverse direction."

As we have seen, the plaintiff contends the accident occurred more than one hour after sunset, while the defendant contends that it occurred less than that time thereafter. Plaintiff's counsel, however, insist that inasmuch as the evidence respecting the time the accident occurred was conflicting, he was entitled to an instruction in conformity with his evidence. As hereinbefore pointed out, the first or live car was provided with sufficient lights, but the dead cars were not. Did the statute apply to the dead cars? We think not. The statute applied to cars only "while in use on a public highway." It is manifest to our minds that it was the intention of the Legislature in adopting the statute to limit its provisions to such cars only as were actually being used on the public highways or streets that is, to such as were being driven by their own power either for business or for pleasure. The phrase "while in use on a public highway" shows a clear intent not to include every motor vehicle that may be moved in some manner on the streets or highways. With that limitation, however, so clearly expressed, there can be no doubt that the statute has no application to motor vehicles that were merely being moved on the street for the purpose for which the two cars in question were being moved. Any other construction would do

violence to the natural, ordinary, and obvious meaning of the language of the statute. For the reasons stated, therefore, the court committed no error in refusing to charge as requested.

[8] Many of the objections to the instructions of the court constitute mere criticisms of the phraseology used by it. Such criticisms are always possible, the only difference being that the phraseology used by one judge or in one case may be more vulnerable than the phraseology of another judge or that used in another case. Where, as here, however, it clearly appears that each party not only had but exercised every opportunity to develop its side of the case and the court in its charge fully covered every legal phase of the issues and correctly submitted those issues to the jury, we cannot interfere, although if we had tried the case we, in certain particulars, should have used different language or in certain other particulars should have been inclined to follow more nearly the language of the requests. From a careful reading of the whole charge we cannot see how, by anything the court said or omitted to say, the jury could have been misled either as to the law or regarding their duty in the premises.

[9] Finally, complaint is made that the instructions given, as counsel put it, "were strictly a defendant's instructions." That complaint is based upon the fact that seven paragraphs of the court's charge end by telling the jury that if they find the facts to be as stated they "must find for the defendant," or that under such finding their verdict cannot be "against the defendant." No serious complaint is made that the legal conclusions stated by the court are not sound if the facts upon which the conclusions are predicated are found to be as indicated. While a court may make a particular subject involved in a case, or a particular phase thereof, too prominent by frequent repetitions and in that way may create an impression favorable to one or unfavorable to the other party, yet where, as here, the charge correctly states the law and also correctly outlines the duty of the jury we cannot say that the mere repetition of the things complained of resulted in prejudice. In our judgment they could not have produced such a result. While counsel are, and should be, free to criticize courts for careless statements and frequent repetitions in giving instructions to juries, yet a mere cursory examination of the very numerous requests that are constantly being offered in almost every contested case demonstrates beyond all question that counsel themselves are most to blame for at least a large portion of that vice in instructions. In this case plaintiff's counsel offered 22 requests to charge many of which are not only quite lengthy, but relate to the same subject. There are, therefore, frequent repetitions in the requests. If the requests had been given, therefore, the

vice of repetition complained of by counsel would not only not have been eliminated, but it would, if anything, have been more pronounced than it now is, the only difference being that it would have been less objectionable from counsel's point of view.

In concluding this opinion we desire to say that the jury no doubt were impressed with the fact that the plaintiff, in hurrying to reach his destination, a café deliberately passed between two of the moving cars, and that he did so in spite of the warnings of the chauffeurs; that in stepping on the rope by which the two cars were attached he lost his balance and fell immediately in front of the front wheel of the rear car; that under the circumstances defendant's employes stopped the cars as soon as they could be stopped; and that the plaintiff's carelessness, and not that of the defendant, was the proximate cause of the injury. That such was the jury's conclusion, is, we think, made manifest from the evidence and the court's charge. The court in its charge to the jury followed the principles which we held apply to those who are using the public streets in the cases of *Spiking v. Con. R. & P. Co.*, 83 Utah, 813, 93 Pac. 838, and *Gibson v. Utah L. & T. Co.*, 151 Pac. 76. We cannot see how, under the rule laid down in those cases, the plaintiff can recover in view that the jury found the facts in favor of the defendant.

Upon the whole record we are constrained to hold that the judgment should prevail. The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

COLTHARP v. COLTHARP.
(No. 2908.)

(Supreme Court of Utah. Sept. 19, 1916.)

1. DEEDS §93 — CONSTRUCTION — INTENTION OF PARTIES.

In the construction of deeds, the intention of the parties as it appears from the ordinary and generally accepted meaning of the language used by them when applied to the subject-matter of the writing in the light of its surrounding circumstances controls, rather than mere technical words or phrases.¹

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. §93.]

2. DEEDS §5 — CONSTRUCTION — CONVEYANCE OR POWER OF ATTORNEY.

A writing executed by a husband in the presence of witnesses and acknowledged before a notary public, and delivered to his wife, entitled a "Deed of Conveyance," whereby he gave, sold, granted, and demised all of his personal and real property of which he was then possessed to her, in consideration of love and affection, and in contemplation of a trip abroad, his poor health, and expressly declaring his intent that she should take an immediate present title in fee simple of his realty, and actual possession of his

personalty, and do with them as she might think for her best interest, and that to such extent the instrument might be treated as a general power of attorney to dispose of the property as if it were her own, contained apt words of a grant, and was a deed of conveyance of all his property to the wife, the words "give and demise" and the words "all of" being mere repetitions, not changing the legal effect of the instrument as a whole, and being mere surplusage.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 7-9; Dec. Dig. §5.]

3. DEEDS §5 — POWER OF ATTORNEY — CONSTRUCTION OF INSTRUMENT.

Such instrument was not a mere power of attorney to the wife, ceasing at the husband's death, since after the clearly expressed intention to give the property to her absolutely, the words relating to her power to dispose of the property would be treated as surplusage.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 7-9; Dec. Dig. §5.]

4. DEEDS §97 — CONSTRUCTION — REPUGNANCY.

Where there are words or phrases found in different parts of a writing which are repugnant, the courts must, if possible, construe the whole instrument so that all of its parts may be harmonized and be given either a primary or secondary meaning.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. §97.]

Appeal from District Court, Uintah County; A. B. Morgan, Judge.

Action of claim and delivery by Hattie Coltharp against William H. Coltharp. Judgment for defendant, and plaintiff appeals. Reversed, and cause remanded, with direction to grant a new trial.

J. A. Wilson, of Vernal, J. H. McDonald and Whitecotton & Bagley, all of Provo, for appellant. O'Donnell & Calder, of Vernal, and Thurman, Wedgwood & Irvine, of Salt Lake City, for respondent.

FRICK, J. The plaintiff commenced this action of claim and delivery under our statute. Judgment was entered in favor of defendant, and plaintiff appeals.

Two causes of action are stated in the complaint. In the first cause plaintiff seeks to recover the possession, or the value, of a certain certificate representing 20 shares of the capital stock of a certain corporation, which stock, it is alleged, was of the value of \$1,000. In the second cause of action she seeks to recover possession, or the value, of 60 head of cattle alleged to be of the value of \$3,000. The defendant answered the complaint, and while he disclaimed either ownership or interest in any of the property in question, he, nevertheless, denied that the plaintiff is the owner thereof, and avers that he merely holds the property for its true or rightful owner.

The case, in the court below, went off upon a question of law which arises as follows: The plaintiff and one Hugh W. Coltharp, who was a brother of the defendant, on the 14th day of March, 1914, were husband and wife. Said Hugh W. Coltharp died on the

¹ *Caine v. Hagenbarth*, 37 Utah, 69, 106 Pac. 945; *Burt v. Stringfellow*, 46 Utah, 207, 143 Pac. 234; *Reese Howell Co. v. Brown*, 158 Pac. 684.

22d day of August, 1914, and a considerable time before this action was commenced. On the date first aforesaid Hugh W. Coltharp made and delivered to the plaintiff, his wife, an instrument in writing which, as copied from respondent's brief, is in words and figures as follows:

"Deed of Conveyance.

"I, the undersigned, Hugh W. Coltharp, of Vernal, Utah, hereby give, sell, grant and demise all and singular, all of my personal and real property of which I am possessed in present to my wife, Hattie Coltharp of Vernal, Utah.

"The consideration of the above grant is love and affection.

"At the time of the ensembling of this instrument, I am contemplating a trip abroad, and knowing the uncertainty of world affairs and being in poor health, it is my desire to provide for said wife.

"It is hereby intended that my said wife shall take an immediate present title in fee simple of my real property and actual personal possession of my personal effects and to do with them as to her may be to her best interest. And to that extent, this instrument may be treated and considered as a general power of attorney to do and to act and to dispose of said real and personal property the same as if it were her own.

"Executed at Vernal, Utah, this 14th day of March, 1914. Hugh W. Coltharp.

"Executed in the presence of

"Amos Hoeft,

"D. D. Cartar, Myton, U.

"The above parties, both principal and witnesses, appeared before me, this the 14th day of March, 1914, and duly acknowledged their signatures thereto.

"J. S. Wilson, Notary Public."

At the trial the plaintiff produced the foregoing instrument and offered the same as evidence of title to the property in question. In addition to the instrument she also produced proof identifying the property described in the complaint as the property of her husband, Hugh W. Coltharp, at the time of his death, and that the instrument was executed and delivered. The defendant in his answer admitted that plaintiff's husband owned 13 head of cattle and no more, and in which he disclaimed all interest as he did in the capital stock. He, as before stated, denied plaintiff's title. The defendant objected to the introduction of the foregoing instrument in evidence for any purpose, upon the grounds that it was—

"immaterial, irrelevant, and incompetent, * * * and that it purports to be a general power of attorney, instead of an absolute conveyance of the property in fee simple, and it appearing from the evidence that the grantor or maker of this instrument is dead, the power thereby ceases for any purpose."

The defendant's objection to the introduction of the instrument was sustained; and, the other evidence standing alone being insufficient to prove title in the plaintiff, the district court directed the jury to return a verdict upon both causes of action for the defendant, which was accordingly done, and judgment was entered as before stated. Plaintiff excepted to the ruling of the court, and has assigned the same as one of the principal errors.

The evidence shows that at the time the instrument in question was made and delivered Hugh W. Coltharp and the plaintiff were husband and wife; that they were married in April, 1910; that as the fruit of such marriage two children were born, one of whom, at the time of the trial, was 3, and the other 4 years of age; that Hugh W. Coltharp, at the time of his death, was 28, and the plaintiff 23, years of age. Just before the instrument was delivered it was also shown that Hugh W. Coltharp had returned from a fishing trip, and in delivering the instrument plaintiff testified "he told me he came very near getting hurt, and when he came home he told me I better have that," the instrument in question. She also testified, "He told me to have it recorded." The instrument was recorded June 7, 1915. It also appears from a recital in the instrument that when it was delivered plaintiff's husband contemplated making a trip abroad. The matters last above referred to are material only in so far as they illustrate the circumstances surrounding the parties to the instrument at the time of its execution and delivery. What we must determine, therefore, is whether the instrument in question is merely a power of attorney, as contended for by defendant's counsel, the force and operation of which ceased at Hugh W. Coltharp's death, or whether it is to be considered as a deed of conveyance by which all of the property belonging to the grantor was intended to be and was conveyed to his wife.

[1] The rule of construction applicable to instruments of writing, including deeds, in this jurisdiction is that the intention of the parties, as the same is made apparent from the ordinary and generally accepted meaning of the language used by them when applied to the subject-matter of the writing in the light of the surrounding circumstances of the parties at the time, controls rather than mere technical words or phrases. *Caine v. Hagenbarth*, 37 Utah, 69, 106 Pac. 945; *Burt v. Stringfellow*, 45 Utah, 207, 143 Pac. 234; *Reese Howell Co. v. Brown*, 158 Pac. 684.

[2] If, therefore, we give the language of the instrument its ordinary and generally accepted meaning and apply that language in the light of the circumstances surrounding the parties to the instrument and the subject-matter thereof, what was the intention of Hugh W. Coltharp, the grantor, in making and delivering the same? It certainly cannot be successfully contended that the instrument lacks apt words of grant, or that it lacks any essential element of a conveyance. It is not disputed, certainly not seriously, that such is the case, but it is vigorously insisted by defendant's counsel that the latter part of the instrument clearly indicates that Hugh W. Coltharp merely intended to execute and deliver a power of attorney to his wife. From a full consideration of all that is said in the instrument we are forced to disagree with counsel. It is

true that it is said that "this instrument may be treated and considered as a general power of attorney." That phrase must, however, be considered, not only in the light of everything else that is said, but must also be considered in the light of what is said immediately preceding and in connection with the phrase. What is the language that immediately precedes the phrase in question? The grantor says:

"It is hereby intended that my said wife [the grantee] shall take an immediate present title in fee simple of my real property and actual personal possession of my personal effects and to do with them as to her may be to her best interest."

Then the instrument proceeds thus:

"And to that extent this instrument may be treated and considered as a general power of attorney to do and to act and to dispose of said real and personal property the same as if it were her own."

In the granting clause the grantor had already used apt words of both grant and gift. He said:

"I * * * hereby give, sell, grant and demise all and singular all of my personal and real property of which I am now possessed in present [present] to my wife, Hattie Coltharp."

Then follows a statement of the consideration that is followed by the recital relative to what induced the grantor to make the instrument, and then follows what we have already quoted concerning the power of attorney. If all that is said concerning the power of attorney is considered, it is plain enough that the grantor merely intended to grant the power in the sense of conferring power upon his wife to immediately dispose of the property. It is too clear for controversy that the grantor intended to make provision for his wife and children in case he should leave them as recited in the instrument. If the instrument be considered merely as a power of attorney and not as a grant, which power terminated at the death of Hugh W. Coltharp, then he merely constituted his wife his agent, and thus, in a legal sense, made no provision for her at all. Then again, in passing upon the true meaning and effect of the instrument, it should be borne in mind that it is very inartificially drawn. There are a number of unnecessary repetitions of words used in the instrument. For example, it is said "I *give, sell and demise* all and singular *all of* my personal and real property," etc. (Italics ours.) Now the italicized words "give and demise" and the two words "all of" are mere repetitions and neither add anything to or take anything from the ordinary meaning of the other terms used. Nor can these words be permitted to change or affect the legal effect of the instrument as a whole. The law regards substance and not form. These words must therefore be regarded as mere surplusage.

[3,4] We now approach that portion of the instrument which, it is contended and which the district court held, constitutes the instrument a mere power of attorney. Here we again meet with the crudeness and

inartificiality of the language used. Notwithstanding those defects, however, the real intention of the grantor is quite clear. While it is quite true that it was not necessary to confer power upon the wife to dispose of the property if the same had been granted and conveyed to her, yet neither was it necessary to "give and demise" the same to her if it had been sold and granted as stated in the instrument. If it is clear that it was the grantor's intention to grant absolutely, then the words relating to the power to dispose of the property may also be treated as mere surplusage so far, at least, as they would affect the grant in question. While it is quite true that every word, and of course, every phrase, must be given its ordinary and usual meaning and effect, yet where unnecessary words are used in a grant and it is clear that they were not intended by the grantor as limitations upon the grant, but rather as conferring a power which existed by implication of law, courts may not cut down the grant merely because useless words are incorporated in the instrument. Moreover, where there are words or phrases found in different parts of a writing which are repugnant the courts must if possible, construe the whole instrument so that all of its parts may be brought in harmony and so that all of its parts may be given some meaning and effect, whether primary or secondary. As already pointed out, the ruling intention of the grantor was to make provisions for his wife and, no doubt, for his and her children. By granting the property to his wife he would effectuate that purpose, whereas, if he merely conferred a naked power of attorney upon her, he would not have done so since she, under such an instrument, would have been merely his agent and not his grantee.

But it is suggested that by the terms of the instrument she had complete power to dispose of the property as to her might seem best and as though it were her own, and hence she would not have to account for anything she had disposed of under the power granted to her during the husband's lifetime. That may be one plausible view to take, but it is not the only view, and, in our judgment, it is not the correct one. As we view it, the correct view, and the one which harmonizes all the different parts of the instrument, is that, as before pointed out, the grantor merely intended to confer the power of disposition upon the wife in express terms, whereas that power under the grant was implied. Why say "and to that extent this instrument may be treated as a general power of attorney" if it was intended to confer a mere power of attorney upon the wife? Those words clearly imply that the grantor did not desire any question to arise concerning the wife's immediate right to possess herself and to dispose of the property as she pleased. Of course she already had that right by implication of law, but that,

in view of all that is said in the instrument, did not, and was not intended to, affect the grant, but what the husband intended was not to leave any doubt concerning her right and hence what is said about a power of attorney was added in the crude and inartificial manner as it appears there.

We are of the opinion that the district court committed manifest error in its construction of the instrument, and hence in directing a verdict and in entering judgment for the defendant.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court of Uintah county, with directions to grant a new trial. Plaintiff to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

HUTCHISON v. CRANDALL.

(Supreme Court of Oregon. Oct. 10, 1916.)

APPEAL AND ERROR \S 425—NOTICE OF APPEAL—TIME—STATUTE.

Under L. O. L. \S 550, as amended by Laws 1913, p. 617, \S 1, requiring service of a notice of appeal within 60 days from the date of the judgment, and section 541, declaring that service by mail is deemed complete on the first day after the date of deposit of the notice in the post office that the mail leaves such post office, since a notice of appeal from a judgment rendered May 23, 1916, mailed on July 22d, excluding the day that judgment was rendered and including the last day, was not complete until the sixty-first day, and was too late, and the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 2155-2161; Dec. Dig. \S 425.]

In Banc. Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Action by M. T. Hutchison against Mrs. F. D. Crandall. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Sam M. Johnson, of Portland, for appellant. M. E. Miller and W. A. Harris, both of St. Helens, for respondent.

McBRIDE, J. This is a motion to dismiss defendant's appeal. The judgment was rendered May 23, 1916, at St. Helens, Or. The proof of service shows that notice of appeal was mailed in Portland on July 22d, directed to defendant's attorneys at St. Helens. The statute requires service of notice of appeal within 60 days from the date of the judgment. Section 550, L. O. L., as amended by Laws 1913, c. 319. By section 541, L. O. L., service by mail is deemed complete on the first day after the date of deposit of the notice in the post office that the mail leaves such post office for the place to which the notice is sent. Excluding the day that the judgment was rendered and including the last, we find that there remained 8 days in May, 30 days in June, and 22 days in July within which to complete the service. The

service by reason of the provisions of section 541, L. O. L., was not made upon the plaintiff's attorneys until July 23d, which was the sixty-first day.

The notice was therefore served one day too late; and the appeal is dismissed.

STATE ex rel. McCOURT et al. v. FARRIN. (Supreme Court of Oregon. Oct. 10, 1916.)

1. PAYMENT \S 35—RIGHT TO RECEIPT.

Under L. O. L. \S 876, providing that whoever pays money is entitled to a receipt therefor from the person to whom the payment is made, and may demand a proper signature as a condition of the payment, an attorney employed to collect claims, who kept his clients advised of the true state of the business, and promptly, on receipt of their money from the debtor, paid them what was due them under the agreement for collection, was entitled to a receipt for the money.

[Ed. Note.—For other cases, see Payment, Cent. Dig. \S 15; Dec. Dig. \S 35.]

2. ATTORNEY AND CLIENT \S 44(1)—SUSPENSION—DECEIT—STATUTE.

Under L. O. L. \S 1092, providing that an attorney may be removed or suspended for being guilty of any willful deceit or misconduct in his profession, where an attorney, handling claims for collection, after being notified by the debtor that it would pay in full on presentation of the bill, wrote his client to ascertain the least the claim would be compromised for, thus intimating that the matter was yet unsettled, and, after receiving two checks for the amount of the claim from the debtor, which he indorsed without authority and cashed, did not admit that he had collected the money until his client had direct communication with the debtor, such attorney will be suspended from membership of the bar for one year.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. $\S\S$ 55, 62; Dec. Dig. \S 44(1).]

Department No. 1. Original proceeding by the State before the Supreme Court, on the relation of John McCourt, and others, the grievance committee of the Oregon Bar Association, to secure the disbarment of George N. Farrin, as a practicing lawyer. Defendant suspended from membership of the bar of the court for one year.

Elton Watkins, of Portland, for relators. C. H. Libby, of Portland, for defendant.

PER CURIAM. This is an original proceeding in this court in the name of the state upon the relation of the grievance committee of the Oregon Bar Association to secure the disbarment of the defendant as a practicing lawyer. He was associated with Frank G. Micelli in the practice of law in Portland. It is stated in the complaint and admitted in the evidence that Micelli had nothing whatever to do with the transaction in question and is not in any way to blame or responsible for the matters of which complaint is made. For convenience of designation, therefore, the defendant will be referred to as such or as the firm. Two brothers, J. A. and Alvin Smith, had a demand of \$200 each against

the Weyerhaeuser Land Company to be mentioned as "the company" for patrolling timber lands in southern Oregon during the year 1910. They were somewhat in doubt about who was liable to them for their services and had been unable to collect for them. During the month of April, 1914, they placed their claim in the hands of the firm of Farrin & Micelli for collection. The business was intrusted entirely to the defendant Farrin. The company had a Portland office and also one in Tacoma, Wash. The defendant on April 13th addressed a letter over his firm name to the company demanding payment of the claim. The latter responded promising to look into the matter, saying that the transaction in the beginning was under the supervision of an agent then in Washington, D. C., and that it should receive prompt attention and decision on his return. This phase of the matter was the subject of several letters from the company to the firm. On May 22, 1914, he wrote to them a very sharp demand for the payment of the money. On June 1, 1914, writing from the Tacoma office the company informed the firm that Mr. McCormack the agent already mentioned recommended payment in full of the claim of \$400, and closed by saying in substance that if the defendant would submit a bill for the amount the company would send to him a check for it. On the 3d of the same month the company writing from Tacoma to the defendant acknowledged his letter with the bills of the Smiths for \$200 each, and returned them, with two checks for the same, payable to the order of the Smiths for \$200 each, and asked the defendant to have the bill receipted and mailed to the company. On this same 3d day of June, 1914, although he had been notified as stated by the letter of the company of date June 1st that the bills would be paid in full on presentation, the defendant in the firm's name wrote to Alvin Smith to this effect:

"I have been continually working on the case of yourself and brother J. A. v. Weyerhaeuser Timber Company with very much success."

He then continues substantially asking that the Smiths let him know the least they would compromise for, stating that he thought he could get \$100 or possibly \$200 in full settlement of all claims, and closed by asking his addressee to tell him the best he would do, and that in turn the writer would do the best he could in the matter. The next in order in the correspondence is a letter from the company to the defendant reminding him that on June 3d, the company had sent him two checks for \$200, but had had no acknowledgment of the same. On that same date the company wrote J. A. Smith, stating that they had sent to the firm on June 3d checks covering the amount. On July 6th the company notified the firm about having written to the Smiths on the subject. Following this on July 8th the defendant wrote to the Smiths, saying:

"We have succeeded in getting a settlement from the Weyerhaeuser Timber Company for your account and are sending you herewith receipts to sign. Upon receiving the same we will forward a check to you."

On July 13th Alvin Smith wrote to Micelli an individual letter informing him that the Smiths had received a letter from the company, saying that they had paid the firm on June 3d and demanding that the amount be forwarded to the Smiths without delay, saying that they could not receipt for the money until they received it. On July 16th the defendant wrote to Smith substantially that the Weyerhaeuser firm was willing to settle, but not until they got a receipt for \$200 each, and requested them to send such; that the defendant's firm would hold it and get such settlement as they could turning over the receipt and sending to the Smiths their amount of the collection. On July 18th Alvin Smith wrote to the firm declaring that in their letter of July 8th already referred to they did not send any receipts. He again called attention to the fact that the company claimed to have made payment on June 3d. Again on July 18th the company reminded the defendant's firm that Smith claimed not to have received the money in payment of his claim and requested that the defendant get the Smiths' receipts. Finally on August 31st the matter seemed to have gotten into the hands of John D. Goss of Marshfield. Acting for the Smiths, he addressed a letter to the firm, saying that the Smiths refused to sign the receipts for \$400 on payment of only \$200. He recited a history of the transaction, quoted parts of the letters to the Smiths, demanded that the defendant pay \$360, and suggested sending the money to the First National Bank at Marshfield to be paid on delivery of the receipts. On September 10th the defendant replied in his firm name to Goss, saying he was ready to pay the Smiths \$100 received on the collection on execution of a receipt to Weyerhaeuser, and declared that the money would be held by the defendant's firm until the receipt was sent through the bank to be paid the Smiths on delivery of the receipt in full, the defendant's firm retaining one-half of the collection, as he stated, "according to agreement." At the bottom this is initialed F. G. M., E. E. L., as though F. G. Micelli had dictated to the stenographer, whose initials were E. E. L. The defendant admits that he himself wrote this letter. Two receipts, "pro tanto," one from each of the Smiths to the Weyerhaeuser Land Company under date of January 30, 1915, for \$100, constitute the last chapter of exhibits in the case.

Alvin Smith testifies that he put the account into the hands of the firm for collection to compromise or do any way to get it or any part of it and he would be satisfied. He says there was nothing said about the charge for collection. Micelli says there was nothing definite stated on that subject. On the other

hand, the defendant declares that afterwards Smith returned to the office and told him he would give him one-half of the amount collected as his fee for his services. Without any authority except what might be implied by having been intrusted with the collection of the claim, Farrin indorsed the two checks sent by the company writing the name of the payee on the back, Alvin Smith in one case, and J. A. Smith in the other. The two names are written in different handwriting. They are not signed Alvin Smith by G. N. Farrin, and J. A. Smith by G. N. Farrin, but simply the names of the payee. He attributes the difference in the appearance of the two names he wrote on the checks to the fact that, as he states, he used a sharp pen for one and a stub pen for the other. He delivered these to a man named Cone, who negotiated them to the Scandinavian American Bank in Portland on June 5, 1914, receiving his money on the Alvin Smith check and depositing the other for collection. The latter was finally paid and the defendant received the entire proceeds of \$400. Micelli testifies that when he received the individual letter from the Smiths he asked the defendant if he had collected the money, and the latter responded that he had not. This letter was dated July 13, 1914.

There is no distinct admission in any of the defendant's letters that he had the money until September 10, 1914, in answer to the letter from Goss. On the contrary, after having been notified by the company in its letter of June 1st that they would pay the full amount of \$400 on presentation of the bill, he wrote to Alvin Smith and wanted to know the least the claim would be compromised for, intimating that the matter was yet unsettled. It is a marked coincidence that it was not until the Smiths had direct communication from the company and he had been stirred up by the letter of Goss that the defendant directly admitted that he had collected the money. The tone of his correspondence up to that time was to the effect that the company was demanding a receipt direct from the Smiths as a condition precedent to paying the money, when in fact the company had made receipts a condition subsequent. It is not altogether a dispute between an attorney and his client about the fee of the former.

[1, 2] It is said in section 1092, L. O. L.:

"An attorney may be removed or suspended by the Supreme Court for either of the following causes, arising after his admission to practice. * * * 3. For being guilty of any willful deceit or misconduct in his profession. * * *

The quality of deceit is written large throughout the correspondence of the defendant with his clients. Knowing full well that the claim would be paid in full on presentation, he magnifies his office and pretends that the matter is still open for adjustment and compromise. This was evidently intend-

ed to deceive and mislead those whom he represented. If he could have been equipped with receipts in full for the \$400 he might have pocketed the entire amount and flaunted them in the face of his clients as a bar to their claim for the money.

It was his duty to keep his employers advised of the true state of the business and promptly on receipt of their money to have paid them their just dues, whether it be 50 or 90 per cent. of the collection. On doing so he would have been entitled to a receipt for the money, under section 876, L. O. L., reading thus:

"Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor, from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery."

Evidently these are concurrent conditions, and he had no right to demand a receipt in full as a condition precedent to sending them the money. If he had desired to act fairly and honestly with the Smiths he could have sent the money promptly to some responsible banking institution near their residence with instructions to pay it to them on execution of the necessary receipts.

The conduct of the defendant is not in accordance with the ethics of the profession, and, for the protection of the court and of clients in general, for the proper administration of justice, and to maintain the dignity and purity of the practice of law it is ordered that the defendant be suspended from a membership of the bar of this court for the period of one year.

STATE v. STILES.

(Supreme Court of Oregon. Oct. 10, 1916.)

1. EMBEZZLEMENT \S 44(5) — LARCENY BY BAILEE—EVIDENCE—SUFFICIENCY.

In a prosecution for larceny by bailee, alleged to have been committed by a real estate broker in retaining as a commission a sum of money received from a prospective purchaser as a first payment of purchase price, evidence held sufficient to sustain a finding that the purchaser parted with title to the money conditionally and only in case her proposal to give a chattel mortgage in part payment should be accepted by the owner of the property.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 70; Dec. Dig. \S 44(5).]

2. CRIMINAL LAW \S 1137(5) — APPEAL AND ERROR—REVIEW—INVITED ERROR.

Where defendant's counsel on direct examination asked the owner of the property if he confirmed the sale as reported to him, error in permitting the witness on cross-examination to answer substantially the identical question, which called for a conclusion of the witness, was invited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 8009; Dec. Dig. \S 1137(5).]

3. EMBEZZLEMENT \S 39—EVIDENCE—ADMISSIBILITY—STATUTE.

Under L. O. L. \S 1956, making it larceny for any bailee of money, etc., to wrongfully convert or neglect or refuse to deliver or account for

money bailed, etc., according to the trust, intent not being an element of the crime, the exclusion of testimony of the owner of the property tending to show the intent with which the money was retained by the broker was not error.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 62; Dec. Dig. ¶ 39.]

4. CRIMINAL LAW ¶ 761(8)—TRIAL—INSTRUCTIONS.—ASSUMING FACTS.

A requested instruction that if the jury found that the owner of the property approved the terms of the contract of sale at or about the time it was signed it was confirmed according to the terms of the contract there would be no larceny by defendant in retaining the money, and they should acquit defendant, was properly refused as assuming that certain terms offered by owner were accepted by prospective purchaser, and not submitting the question whether such a contract was consummated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1758; Dec. Dig. ¶ 761(8).]

5. EMBEZZLEMENT ¶ 48(3)—TRIAL—INSTRUCTIONS.

A requested instruction that under the terms of the contract in evidence when the money was delivered to defendant, title passed with possession, and its retention would not constitute larceny, was properly refused, there being evidence that the money was delivered conditionally.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 74; Dec. Dig. ¶ 48(3).]

6. CRIMINAL LAW ¶ 814(5)—TRIAL—INSTRUCTIONS.

An instruction defining the word "bailee," although not predicated on any evidence, was not error, since the defendant having been charged with the crime of larceny by bailee, the definition of the word, or a general description of the relation which it implies, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ¶ 814(5).]

7. CRIMINAL LAW ¶ 814(5)—TRIAL—INSTRUCTIONS.

An instruction that if the state proved beyond a reasonable doubt that the sale was not confirmed, that the money was delivered to defendant and that defendant failed to return it on demand, and contrary to the provision of his trust, the jury should find defendant guilty, the remainder of the instruction to which no exception was taken being that if the state failed to prove these various propositions beyond a reasonable doubt, the jury should find defendant not guilty, was properly given, as supported by evidence that the money was delivered to defendant conditionally.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ¶ 814(5).]

Bean, J., dissenting.

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

H. A. Stiles was convicted of larceny by bailee, and he appeals. Affirmed.

W. T. Hume, of Portland (H. Daniel, of Portland, on the brief), for appellant. C. C. Hindman, of Portland (Walter H. Evans, Dist. Atty., of Portland, on the brief), for the State.

MOORE, C. J. It is contended that an error was committed in denying motions, interposed when the state had introduced its evidence and rested, and also when all the evidence had been received, to direct the jury

to return a verdict for the defendant, on the ground that the evidence disclosed the money alleged to have been misappropriated was paid over to him pursuant to a written contract whereby the title to the property passed with a delivery of the possession. The evidence shows that the defendant is a real estate broker and engaged in that business at Portland, Or., that F. F. Waffle, Emma Waffle, and Maude M. Kent, on March 27, 1914, were the lessees of the John A. Nelson farm, situate near Warren, Or., and the owners of live stock, farming implements, and hay then on the demised premises, at which date they executed to the defendant a writing whereby he was authorized, within 15 days, to secure an assignee of the lease and a purchaser of the stock, etc., "for the sum of \$3,250 net to us, all cash for the equipment, and assume the said lease." The writing contains the following clauses relating to the defendant, viz.:

"And you are hereby authorized to accept a deposit on the purchase price, and to execute a binding contract on our behalf. If the above-described property is sold within the life of this contract to any purchaser to whom you have submitted and offered the property during the term of this agreement, we hereby agree to pay you all over \$3,250 that you sell for as commission, and you are hereby authorized to retain said commission out of any money which may be paid to you on account of said purchase price or as a deposit."

The limitation thus prescribed, within which a sale of the property might be made, was orally extended by the owners from time to time. Pursuant to such authority the defendant advertised the property for sale for \$4,000, whereupon Mrs. Elizabeth C. Ross, having seen the published notice, called at his office and inquired about the lease, the live stock, and the hay. She then owned in Portland a house and lot, estimated to be worth \$3,500, which real estate was subject to a mortgage of \$800, and she desired to execute a deed of her home in part payment of the consideration stated in the advertisement. Soon thereafter the defendant with an automobile took her and two young men who subsequently became her sons-in-law to the Nelson farm where they inspected the property offered for sale. Mrs. Ross testified that having talked with Mr. Waffle she said to the defendant on the return journey:

"Mr. Stiles, I don't see what you fetched us down here for. This is a cash proposition."

He replied:

"Never mind that. Just leave that to me. We don't have to have \$2,000 cash."

She also stated upon oath that in a day or two the defendant notified her he had prepared a contract for the purchase of the property and desired her to call and sign the agreement. She complied with the request, saying:

"When Mr. Stiles handed me the contract to sign there were certain things we had to meet before I could raise the \$2,000, and Mr. Stiles understood this completely. I told Mr. Stiles

"I don't think I ought to sign that contract until I hear from Mr. Jackson." He was the man that held the \$800 mortgage on my place at this time, and the one that I wanted to get it increased with. 'If he didn't come through with what I want, I can't raise that \$2,000.' Mr. Stiles says, 'Never mind, Mrs. Ross, I am making about \$500 a month. I will help you out of that if you can't get it from Mr. Jackson.'"

She signed the contract May 16, 1914, then orally offering to pay \$2,000 in cash and to give a chattel mortgage on the property as security for the remainder of the purchase price. She hoped by executing a new mortgage on her home for \$2,300 to have \$1,500 remaining after discharging the prior lien and in order to obtain the latter sum the defendant agreed to apply to Mr. Jackson therefor. Mrs. Ross also expected to secure from a Mrs. Fisher a loan of \$600 and from George G. Allison \$300, thus making \$2,400 with which to pay the \$2,000 on account of the purchase of the stock, implements, and for an assignment of the lease, and to defray the expense of moving to the farm. At the time the contract was signed the defendant desired her to make a deposit with him of some money on account of the agreement, and three days thereafter she took to him a check for \$200 for that purpose, whereupon a receipt therefor was indorsed on the agreement above the signature of the parties. The contract was a printed form on which the written part left meaningless the impressed word "dollars," now marked by parentheses. The amended writing reads:

"This agreement entered into this 16th day of May, 1914, by and between H. A. Stiles, of Portland, Or., and Mrs. E. O. Ross, purchaser, address 5204 43d St. S. E., Portland, Oregon, witnesseth: That H. A. Stiles, agent, agrees to sell, and the aforesaid purchaser agrees to buy the stack of feed and implements on the John A. Nelson farm, 1 1/4 miles west of Warren, Or., according to a list already submitted, and take over the lease now held by F. F. Waffle and associates, subject to confirmation by owners, for the purchase price of \$4,000, including the rent to April, 1915 (dollars) upon the following terms: \$2,000 cash when papers are ready, balance to be arranged, and a part of the old hay and hogs that may be sold is to be applied on the balance when sold and subject to as many conditions and restrictions as may run with the land. It is further agreed that Mrs. Ross is to have credit for the hogs and calves, etc., that has been sold off the farm by F. F. Waffle. H. A. Stiles hereby acknowledges receipt of \$200, May 19th (dollars) as earnest money and part of the purchase price, which deposit shall be returned in case owner does not confirm sale. H. A. Stiles, Agent, by R. A. Stiles. Mrs. E. O. Ross, Purchaser."

Mrs. Ross further testified that upon paying \$2,000 on the purchase price of the property she expected to secure the remainder by giving a mortgage upon the stock, implements, and crop; that she did not understand the chattel mortgage was not satisfactory; that she paid the \$200 on Mr. Stiles' word that if a further loan could not be secured from Mr. Jackson the defendant would help her; that failing to get the money from the mortgagee, Mr. Stiles could have obtained

from another source a loan upon her home of only \$1,250; that if he had been able to secure a loan of \$1,850 she, with the help of Mrs. Fisher and Mr. Allison, could have raised the \$2,000 required by the terms of the contract; that when the defendant heard from Mr. Jackson and she was notified he could not let her have the money, she abandoned the idea of giving a chattel mortgage; that no bill of sale of the stock, etc., was ever tendered to her, no demand made upon her for a commission; that the \$200 which she paid had never been returned to her; and that the proposed sale was never confirmed.

Her testimony is corroborated in most particulars by that of F. E. Olson, a son-in-law, who went in the automobile with her to examine the property offered for sale and who was also with her May 16, 1914, when she signed the contract. This is the substance of the testimony which was received when the first motion for a directed verdict was interposed.

F. F. Waffle, a witness for the defendant, was interrogated on direct examination as follows:

"I will ask you to state whether or not on the 19th day of May of this year you saw that contract?"

He replied:

"Mr. Stiles showed me the contract, but I didn't read it. He told me that he had received \$200 from Mrs. Ross under certain conditions, if she could put the deal through, and she could put the deal through if I would accept her terms; but I didn't read this at that time. Q. Did you confirm the sale as he had reported it to you? A. Well, no. Q. What did you tell him? A. He told me that Mrs. Ross could pay us \$2,000 cash, if we would give her time on the balance, and I says, 'What security will she give?' And he says, 'A chattel mortgage on the stock.' I told him, No, I couldn't accept a chattel mortgage on the stock, but I would accept the \$2,000 cash, if she could give us security, bankable notes, or a first mortgage on Portland real estate, and he said he thought he could put it through that way. Q. Then the provision in the contract of the \$2,000 cash, and the balance to be arranged, that was approved by you? A. In that way; that I would accept— Q. To be arranged satisfactorily to you? A. Yes, sir; with the proper security. Q. The sale was confirmed then, as far as you were concerned, according to that arrangement; \$2,000 cash and the balance to be arranged to your satisfaction? A. Yes, sir. Q. And did Mr. Stiles have authority to retain the \$200 that was paid on the purchase price? A. Not from me; no."

The witness was further interrogated as follows:

"Q. This is the contract that you had with him, is it not? Examine that paper. Do you recognize those signatures? He answered: Yes, sir; those signatures are correct. There is one mistake here, the amount of the price, \$3,250. It should read \$3,650. Oh, I understand; that was in addition to the lease. I think we covered that. * * * Q. Would you have sold to Mrs. Ross if she had complied with the terms of this contract of \$2,000 cash and a satisfactory arrangement for the other \$2,000? A. Yes, sir."

J. W. Hammond, a witness for the defendant, testified that as a loan broker he, about the middle of May, 1914, at the request of

Mr. Stiles, examined the house of Mrs. Ross and offered to make a mortgage loan thereon of \$1,850, but he never thereafter heard anything about the matter. Mr. Hammond's testimony is corroborated by that of Mr. Stiles who, in referring to Mrs. Ross, says:

"As soon as she paid me the deposit, I immediately got in my machine, after talking with Mr. Hammond, and found I could raise the money on mortgage on her property, and I went down there and talked with Mr. Waffle"

—informing him that Mrs. Ross was going to pay \$2,000 in cash and proposed to give a mortgage on the property offered for sale as security for the remainder of the purchase price, which offer was declined by Mr. Waffle who demanded negotiable paper which could readily be converted into cash; that when the witness found there was a mortgage of \$800 on the house of Mrs. Ross, it was then ascertained she did not have sufficient funds with which to complete the contemplated purchase.

Mrs. Ross testified that when she learned she was unable to secure any further loan from Mr. Jackson, the man who held a mortgage of \$800 on her home, she called upon the defendant to whom she said, "Mr. Stiles, I came down for that money," meaning the \$200 she had left with him. "He says, 'Mrs. Ross, I put that check in the bank for safe deposit;' and he says, 'My bank account has been garnished, and you will have to wait a few days before I can pay you.'" The evidence shows he wrote her several letters promising to repay the money which he had received from her as soon as he could obtain that sum. The defendant referring to these letters says they were written while sympathizing with her for the loss and not because he considered he was under any legal obligation to repay the amount which he had earned as commission for negotiating a sale of the property and as liquidated damages for the expense he had incurred.

[1] The phrase in the written contract, referring to the payment of \$2,000 on the purchase price, "balance to be arranged," renders uncertain the payment of, or the security for the remainder of the purchase price. The writing is not complete, but ambiguous, and in order to explain the meaning of the phrase last quoted evidence was admissible for that purpose. The testimony given by the witnesses appearing for the state tended to show that the defendant received \$200 as a part of the \$2,000 to be paid, if the owners of the property would accept a chattel mortgage thereof to secure the payment of \$2,000, the remainder of the purchase price, and that if such an agreement could not be consummated, the money so deposited was to be returned. This evidence was sufficient, if believed by the jury, to show that Mrs. Ross parted with the title to the money conditionally and only in case her proposal to give the chattel mortgage should be accepted by the owners of the property. *State v. Skin-*

ner, 29 Or. 599, 46 Pac. 368; *State v. German*, 54 Or. 395, 103 Pac. 521. No errors were committed in denying the motion to direct a verdict for the defendant.

[2, 3] On the direct examination of F. F. Waffle he was asked by the defendant's counsel: "Did you confirm the sale as he had reported it to you?" referring to the defendant's statement of the offer of Mrs. Ross to give a chattel mortgage of the property as security for the payment of \$2,000. The witness replied, "Well, no." On cross-examination Mr. Waffle was asked: "So in regard to the terms of the sale, the contract which Mr. Stiles offered you on behalf of Mrs. Ross in his interview—you never confirmed that sale or contract, did you?" An objection to this inquiry on the ground that it called for the conclusion of the witness was overruled and an exception allowed, whereupon the witness replied, "No, sir." In permitting this question to be answered it is maintained that an error was committed. It will be seen that substantially the identical question complained of on the cross-examination of Mr. Waffle was asked by the defendant's counsel of that witness on direct examination. No objection was interposed to the first inquiry, it is true, but a sense of fairness on the part of the trial court evidently prompted the overruling of the objection, on the theory that the error, if any, was invited. *Capital Lumbering Co. v. Learned*, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792. Mr. Waffle was interrogated by defendant's counsel as follows:

"If Mrs. Ross had given you \$2,000 cash and had given you a bankable note of Mr. Olson's, secured by a mortgage, or any other person, for \$2,000, you would have transferred the property to her, would you not, described in that contract? A. Yes, sir. Q. And Mr. Stiles would have kept the \$200, would he not?"

An objection to this question having been sustained and an exception allowed, it is maintained that an error was committed in not permitting the witness to answer the inquiry. In discussing this ruling it is stated in the brief of defendant's counsel:

"We contend that the defendant was entitled to this evidence. One of the essential features of a prosecution for larceny is the intent with which the property is retained, and the answer of the witness, Waffle, was relevant to be considered by the jury in determining the question."

In *State v. Chapin*, 74 Or. 346, 144 Pac. 1187, it was held that under section 1956, L. O. L., making it larceny for any bailee of money, etc., to wrongfully convert or neglect or refuse to deliver or account for the money bailed, etc., according to the trust, intent to defraud was not an element of the crime. The decision in that case is conclusive on this point, showing that no error was committed as alleged.

[4] An exception having been reserved it is insisted by defendant's counsel that an error was committed in refusing to give the following requested instruction:

"If you find from the evidence in this case that Waffle, the owner, consented to and approved the terms of the contract of sale at or about the time the same was signed, then I charge you the sale was confirmed according to the terms of the contract and there would be no larceny by the defendant in retaining the money in controversy and you should acquit the defendant."

This instruction assumes that Waffle's offer to take mortgages of real property in Portland, Or., as security for \$2,000, upon the payment of a like sum in money, was accepted by Mrs. Ross. This seems to be the theory of the defendant, but such hypothesis is denied by Mrs. Ross, who testified that no contract to that effect was made. The request does not submit to the jury the question of whether or not such a contract was consummated, and, this being so, no error was committed as alleged.

[5] It is maintained that an error was committed in refusing to give the following requested instruction:

"I charge you that under the terms of the contract in evidence when the money, \$200, was delivered to the defendant, the title passed with the possession, and the retention of the money would not constitute larceny, and you should acquit the defendant."

What has been said on the denial of the motion for a directed verdict is controlling as to this requested instruction, in refusing to give which no error was committed.

[6] It is contended that an error was committed in charging the jury as follows:

"Now, the word 'bailee' is used in this indictment. When property is delivered by one person to another with the understanding that the identical property or its equivalent is to be returned to him, the person who delivered the property is called the bailor, and the one to whom it is delivered is called the bailee; and so in this case if the defendant received the money as alleged in this indictment, he would be the bailee."

It is argued that this part of the charge, though correctly stating a legal proposition, was not based on any testimony, and hence was abstract and misleading. Unless an instruction is predicated on evidence which has been received it is unrelated to the case on trial and usually erroneous. *Pearson v. Dryden*, 28 Or. 350, 43 Pac. 166; *State v. Weaver*, 35 Or. 415, 58 Pac. 109; *State v. Hogg*, 64 Or. 57, 129 Pac. 115; *Oberlin v. Oregon-W. R. & N. Co.*, 71 Or. 177, 142 Pac. 554. The defendant having been charged with the crime of larceny by bailee, the definition of that word or a general description of the relation which it implies was proper in order that a correct understanding of the term might have been gained by the jury. *State v. Anderson*, 10 Or. 448, 459; *State v. Hinton*, 56 Or. 428, 109 Pac. 24. An examination of this instruction when construed in connection with the entire charge shows that no error was committed in giving the language complained of.

[7] It is insisted that the following instruction was not supported by the evidence, and

that an error was committed in saying to the jury:

"If, then, the state has proved to you beyond a reasonable doubt that the sale was not confirmed, and that the \$200 were delivered by the complaining witness to the defendant, and that the defendant failed to return the money to the complaining witness on demand, and contrary to the provisions of his trust, then it would be your duty to find a verdict of guilty as charged in the indictment."

The concluding part of this instruction, and to which no exception was taken, reads:

"But if, on the other hand, the state has failed to prove to you beyond a reasonable doubt these various propositions, then it would be your duty to find a verdict of not guilty."

The question presented by the last instruction to which an exception was taken is discussed in considering the motion to direct a verdict for the defendant, and needs no further elucidation.

The judgment should be affirmed, and it is so ordered.

EAKIN and McBRIDE, JJ., concur.
BEAN, J., dissenting.

STATE v. McCLARD.

(Supreme Court of Oregon. Oct. 10, 1916.)

1. CRIMINAL LAW §369(1) — EVIDENCE — OTHER OFFENSES—ADMISSIBILITY.

As a general rule, evidence of other and distinct crimes than that charged in the indictment cannot be given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. §369(1).]

2. CRIMINAL LAW §371(7) — BURNING TO DEFRAUD INSURER — EVIDENCE OF OTHER OFFENSES.

Such rule is subject to exception in prosecutions for burning property to defraud the insurer, and evidence that accused secured insurance on other property at a different place, and the property was burned very soon thereafter is admissible as tending to show the intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. §371(7).]

3. CRIMINAL LAW §1120(1) — APPEAL — SCOPE—PRESERVATION OF EXCEPTIONS.

It is the duty of the accused in his bill of exceptions to negative the existence of evidence which might, under some theory, render admissible that which was excepted to or to negative any theory under which it might be admissible, and if he does not do so, the court cannot say that the evidence complained of was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2931; Dec. Dig. §1120(1).]

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Fred McClard was convicted of an offense, and he appeals. Affirmed.

The defendant was indicted for the crime of burning property with intent to injure and defraud the insurer, which crime it was alleged was committed on the 7th day of November, 1915. There was evidence tending to show that on the 30th day of October, 1915, he procured insurance in the North British &

Mutual Insurance Company upon certain household goods, consisting principally of clothing and personal effects and then being in a frame building situated at 1745 Court street, Salem, Or.; that on November 7th a fire occurred in his room which totally destroyed the contents, and that a claim with an itemized list of the articles destroyed, amounting in alleged value to \$239.40, was duly presented to the insuring company. The state introduced with other testimony not shown in the bill of exceptions evidence tending to show that on March 8, 1916, defendant applied for and received insurance in the Pacific Fire Insurance Company upon a similar class of goods, situated in a dwelling house at 1223 Ferry street, Salem, Or., and that on the 15th day of the same month a fire occurred in his room whereby the alleged goods were destroyed, and he made proof of his loss and received \$207 in satisfaction thereof. It also appeared that the goods in his room at Ferry street were brought there contained in two suit cases, and two suit cases are listed among the items embraced in the proof of loss. To the introduction of this testimony defendant's counsel objected as being irrelevant, which objection was overruled by the court; and the defendant, having been convicted and sentenced, appeals.

Guy O. Smith, of Salem (Smith & Shields, of Salem, on the brief), for appellant. Elmo S. White, Deputy Dist. Atty., of Salem (Ernest R. Ringo, Dist. Atty., of Salem, on the brief), for the State.

McBRIDE, J. (after stating the facts as above). [1, 2] The principal question discussed here is the admissibility and sufficiency of the evidence as to another and similar occurrence to the one charged. It is a general rule that evidence of other and distinct crimes than that charged in the indictment cannot be given in evidence. *State v. Baker*, 23 Or. 441, 32 Pac. 161; *State v. McDaniel*, 39 Or. 172, 65 Pac. 520; *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892; *State v. Lee*, 46 Or. 42, 79 Pac. 577; *State v. Martin*, 47 Or. 284, 83 Pac. 849, 8 Ann. Cas. 769; *State v. Kelliher*, 49 Or. 83, 88 Pac. 867; *State v. Baker*, 50 Or. 386, 92 Pac. 1076, 13 L. R. A. (N. S.) 1040; *State v. Finch*, 54 Or. 488, 103 Pac. 505; *State v. Hembree*, 54 Or. 474, 103 Pac. 1008; *State v. La Rose*, 54 Or. 555, 104 Pac. 299; *State v. Smith*, 55 Or. 408, 106 Pac. 797; *State v. Rader*, 62 Or. 37, 124 Pac. 195; *State v. Start*, 65 Or. 178, 132 Pac. 512; *State v. McAllister*, 67 Or. 480, 136 Pac. 354; *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 991; *People v. Mayor*, 80 N. Y. 364; *Shipply v. People*, 86 N. Y. 375, 40 Am. Rep. 551; *Pinckord v. State*, 18 Tex. App. 468; *Commonwealth v. Shepard*, 1 Allen (Mass.) 575; *Boyd v. United States*, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077; *Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778; *Schaser v. State*, 36 Wis. 429. But to this rule there are certain

exceptions, for it has been frequently held that for the purpose of showing motive to commit a crime, to show the intent with which an act was committed, or to show that the act charged in the indictment was committed pursuant to a system of acts of the same character having in view a similar fraudulent result, such testimony can be admitted. This is particularly true in cases of counterfeiting, obtaining money by false pretenses, and setting buildings on fire to defraud insurance companies. *People v. Marrin*, 205 N. Y. 275, 98 N. E. 474, and 43 L. R. A. (N. S.) 754, where many cases are collated and commented upon in an exhaustive note to the principal case. In trials for false pretenses the rule is thus stated in *Underhill on Criminal Evidence*, § 438:

"Evidence of similar offenses, involving the making of other false representations, is admissible against the prisoner to show that he was aware of the falsity of the statements made by him in the present instance, and that, knowing them to be false, he made them with the intent to deceive. Evidence of similar false pretenses is particularly relevant when it appears that the fraudulent act for which the accused is on trial does not stand alone, but is a part of a scheme not merely to defraud one individual, but to swindle the community at large."

See, also, *State v. Germain*, 54 Or. 395, 106 Pac. 521, *State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904, and cases there cited.

The same rule has been applied in cases involving the burning of buildings with intent to defraud the insurance company. 4 *Chamberlayne*, Ev. § 3225; *Regina v. Gray*, 4 *Foster & Finlason*, 1102; *Kramer v. Commonwealth*, 87 Pa. 299; *State v. Huffman*, 69 W. Va. 770, 73 S. E. 292; *State v. Jones*, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786; *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 78; *Hinkle v. State*, 174 Ind. 276, 91 N. E. 1090. The circumstances in these cases are various and there are few of them exactly coincident with those in the case at bar, but from them we may deduce the principle that when the motive or intent of a party constitutes a material part of the offense charged, and particularly where the intent must necessarily be fraudulent in order to constitute the crime, evidence of similar acts may be received to show the intent in the particular case. It is not unusual for a man to insure his property and for a fire thereafter to consume it, but after a series of insurances and subsequent burnings occurring within a comparatively short period, the average man—and the jurymen is supposed to be such—is liable to conclude that the last burning is something more than a coincidence. Take the case at bar: it is at least unusual that a lodger at such boarding houses as exist in Salem, and whose clothing and worldly effects are contained in two ordinary suit cases, uses the extraordinary precaution of having them insured, and it is a singular coincidence that within a few days a fire should break out in the closet

where they are stored and consume them. It is also rather peculiar that the same lodger should between March and October have accumulated \$207 worth of similar articles and taken them in suit cases to another lodging house and promptly insured them, and that within a little over a week another fire should break out in his vicinity and again destroy his effects. We do not have all the testimony here, and are therefore not informed as to the extent to which this series of insurings and burnings reached.

[3] The bill of exceptions is meager, and it appears from it that there was other testimony. While standing alone it might make a landlord reluctant to entertain such a lodger, it would not, perhaps, be sufficient to justify a conviction, but the bill of exceptions does not show that it stood alone, and it may for aught we are able to say from the record be a single link in a chain of occurrences of like character, each of which would strengthen the belief that the burning named in the indictment was not merely coincidental with other insurances and burnings, but occurred in pursuance of a design on the part of the defendant to systematically defraud the insurance companies by insuring his property and burning it. If the evidence could have upon any theory of the case been admissible, it was the duty of the defendant to have negated that theory by proper statements in his bill of exceptions. If it was admissible as a link in a chain of such occurrences, it devolved upon him to show by the bill of exceptions that those necessary links were not supplied by other testimony. As we said in *Pacific Laundry Co. v. Pacific Bridge Co.*, 69 Or. 306, 138 Pac. 221, and here repeat:

"A bill of exceptions must point out error * * * and make it plain that under no combination of circumstances could the testimony have been admissible."

The cases of *State v. Start* and *State v. McAllister*, supra, cited by counsel, are not in conflict with the views herein expressed. In *State v. Start*, Mr. Justice Burnett quotes with approval an excerpt from the case of *State v. O'Donnell*, supra, which is as follows:

"The rule that evidence of crimes other than that charged in the indictment is inadmissible is subject to a few exceptions, speaking of which Mr. Underhill, in his valuable work on *Criminal Evidence* (§ 87), says: 'These exceptions are carefully limited and guarded by the courts, and their number should not be increased.'"

Among the exceptions noted by Mr. Underhill is evidence of other offenses to show intent. He states the exception as follows:

"Another exception to the rule occurs when the intention present in an act is material. Thus, suppose the question is: Was a given act, either by the accused, or by some other person, intentional or accidental? Here it is relevant to prove that the person whose intention is in question had performed acts of a precisely similar nature either before or after the

act intention of which is in question. And if it be found that he has performed many such acts, we have the best of grounds for drawing the conclusion that the act, in the present instance, is intentional and not accidental. So where the commission of an act alleged to be a crime is admitted by the accused, but he denies that he intended to commit it or alleges that he did it without guilty knowledge, his doing similar acts wholly independent and unconnected with that under investigation is relevant to show intention. Evidence of similar and independent crimes (but never those which are dissimilar) is often relevant to show the presence of some specific intent. Thus, evidence of forgeries by the accused has been received to prove the intent to defraud, which is essential in forgery, and of arson or of attempts at arson to prove that a burning was not the result of accident. So, when it is material to show that a given act was done with a fraudulent intention, as, for example, in a prosecution for obtaining goods by false pretenses. Other disconnected false pretenses in which the presence of fraud is recognized may be proved to show the intent. To illustrate, where the accused had used a fraudulent abstract of title to induce one to sell him goods in exchange for real estate it may be shown that the accused had on the same day employed the same means to induce another person to sell him goods." *Underhill on Criminal Evidence* (2d Ed.) § 89.

In the case of *State v. Start*, supra, the motive or intent with which the act charged was committed was not material or a necessary ingredient of the offense. Here it is the very gist of the crime, and herein lies the distinction between the two cases.

The judgment of the circuit court is affirmed.

MOORE, C. J., and BURNETT and BEAN, JJ., concur. BENSON, J., not sitting.

KOSCIOLEK v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. Oct. 10, 1916.)

1. DEATH — §31(6)—HUSBAND AND WIFE — 209(4)—LOSS OF CONSORTIUM—WIFE'S RIGHT OF ACTION.

At common law, while the husband could maintain an action for injury to or death of his wife, whereby he lost her services or consortium, yet the wife herself cannot maintain a corresponding action to recover for the loss of services and consortium due from the husband to herself.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 37; *Dec. Dig.* — §31(6); *Husband and Wife*, Cent. Dig. §§ 769, 968, 973; *Dec. Dig.* — 209(4).]

2. DEATH — §31(6)—HUSBAND AND WIFE — 209(4) — WIFE'S RIGHT TO RECOVER FOR DEATH OR INJURY—STATUTE.

L. O. L. § 7050, repealing all laws imposing or recognizing civil disabilities upon a wife which are not imposed or recognized as existing as to the husband, merely allows her admission to the courts as a suitor, independently of her husband, to redress the infringement of rights which she already has, and does not give a widow the right to recover for the death of her husband, or a wife to recover for injury to her husband.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 37; *Dec. Dig.* — §31(6); *Husband and Wife*, Cent. Dig. §§ 769, 968, 973; *Dec. Dig.* — 209(4).]

8. CIVIL RIGHTS ¶1—NATURAL RIGHTS OF PERSON.

The natural rights of a person at common law are those of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property.

[Ed. Note.—For other cases, see Civil Rights, Cent. Dig. §§ 1-2; Dec. Dig. ¶1.]

4. DEATH ¶31(3) — DEATH BY WRONGFUL ACT—STATUTE.

On the death of an individual by the wrongful act of another, L. O. L. § 380, gives a cause of action to his personal representative.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 38; Dec. Dig. ¶31(3).]

5. DEATH ¶31(6) — DEATH OF HUSBAND — WIFE'S RIGHT OF ACTION.

Where a husband suffered personal injuries when a street car collided with his team, sued therefor and compromised with the street railway for \$850, his widow, after his death, had no right of action for the consequential injury to her through loss of consortium and support; there being no statute giving the widow such a right of action.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 41, 42; Dec. Dig. ¶31(6).]

Department No. 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Katherine Kosciolek against the Portland Railway, Light & Power Company. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

The plaintiff, widow of John Kosciolek, complains that the defendant negligently ran one of its street cars against a wagon being driven on a street in Portland by her husband, whereby without his fault he was injured so that he died about 18 months later. She says that:

"By reason of the matters and things herein alleged this plaintiff has been, now is, and will hereafter be deprived of the comfort, society, love, affection, association, companionship, and support of the said John Kosciolek; that prior to said injuries the said John Kosciolek was a kind, affectionate, and devoted husband and father, but after receiving such injuries he became nervous, cross, irritable, sick, and childish and was so up to the time of his death; that such condition arose shortly after his injury, and was of a permanent and progressive character, and existed at the time of his death;" and "that by reason of the matters and things herein set forth, this plaintiff has been injured to her damage in the sum of \$20,000."

The defendant denied everything in the complaint except its own corporate existence and that it was operating a street car system in Portland. It charges that the decedent was guilty of contributory negligence, in that he drove his team upon the track directly in front of the defendant's car so suddenly that it was impossible to avoid a collision. Another defense was that the decedent himself during his lifetime sued this defendant for damages for the same injuries growing out of the identical accident described in plaintiff's complaint, and that after issue joined and the action was ready for trial, this defendant, as a compromise there-

of, paid to the said John Kosciolek, in full satisfaction of all claims and demands on account of said accident, the sum of \$850, in consideration of which Kosciolek executed and delivered to defendant a release on behalf of himself, his heirs, executors, and administrators, forever discharging the defendant, its successors, and assigns from all liability by reason of the injury and from all claims or causes of action on account thereof. The first defense is traversed by the reply. As to the release the reply admits the institution of the action between the plaintiff's husband and the defendant and the execution of the acquittance. It is not denied that the defendant paid to Kosciolek the sum of money mentioned in the answer as a compromise of the action. In brief the contention of the reply is that the injuries mentioned in the release were not those of which the plaintiff here complains. It was also urged in the reply that the effect of the release was an admission on the part of the defendant of its liability for all injuries growing out of the negligence of the defendant in the instance described. A jury trial resulted in a verdict for the defendant, and the plaintiff appealed.

I. N. Smith, of Portland (E. V. Littlefield, of Portland, on the brief), for appellant. Frank J. Lonergan, of Portland (Griffith, Leiter & Allen, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1, 2] Many questions are suggested in the plaintiff's brief which are unnecessary to consider. The whole question hinges upon the determination of whether or not a widow can maintain an action for loss of consortium incident to the marriage relation between herself and her deceased husband. It may be set down that at common law, while the husband could maintain an action for an injury to or death of the wife whereby he lost her services and consortium, yet the wife herself could not maintain a corresponding action to recover for the loss of services and consortium due from the husband to herself. The position of the plaintiff, however, is that since the enactment of section 7050, L. O. L., a wife has rights and remedies equivalent in all respects to those with which the husband is endowed. That statute reads thus:

"All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed; provided, that this act shall not confer the right to vote or hold office upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has."

This section does not confer upon the wife any new right of action. It only allows her

admission to the courts as a suitor independent of her husband for the purpose of redressing the infringement of rights which she already had. It is only by virtue of statutes that any one has a chose in action not known to the common law. If our legislation gave the widow a right to recover for the death of her husband, or a wife to recover for injury to her spouse, she would be a competent suitor under this section to institute an action for damages for the violation of her statutory right, but no enactment exists giving her that privilege.

[3] The natural rights of a person at common law are the right of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property. 1 Bl. Com. 129. It is said in Black's Law Dictionary, page 1038:

"Natural rights are those which grow out of the nature of man and depend upon personality as distinguished from such as are created by law and depend upon civilized society, or they are those which are plainly assured by natural law."

These words of the statute refer to those privileges which a feme sole possesses in common with any other individual, and the only effect of the enactment is to allow a married woman to litigate in her own name independent of her husband when these rights have been violated. It cannot be said that the marriage relation gives rise to natural rights in the sense designated by the common-law writers, for that relation grows out of the customs of society, and is more or less conventional.

[4, 5] The authorities cited by the plaintiff are instances either where the husband is suing for an injury to his wife, thus enforcing his common-law right, or where there is a direct attack upon the marriage relation itself, as for the alienation of the husband's affection and the like. The latter cases depend upon the fact that there is a direct and intentional interference with the marriage relation. As said in *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, 364, Ann. Cas. 1913A, 983:

"This right is invaded whenever a third person through machination, enticement, seduction, or other wrongful, intentional, and malicious interference with the marriage relation deprives the husband or wife of the consortium of the other."

There the attack upon the marriage relation is direct, with purpose and malice. The harm to the wife is immediate and not merely consequential or secondary, and the law visits punitive damages in her favor upon the wrongdoer. A negligent injury to the husband, however, affects the wife or widow only

indirectly or collaterally, calling for mere compensatory damages which the husband while living, or his personal representatives after his death, may collect, thus settling the grievance once for all. This distinction runs throughout the authorities, and is ground for holding that a mere negligent wrong to the husband does not furnish cause of action to a woman in her character either as wife or widow. The injury to her in such conditions is not the direct, natural, and necessary consequence of the carelessness of the defendant. For what he suffered during his life the husband had an action directly against the defendant. It is through her spouse that the plaintiff claims in the present instance; but, while he had control of the situation, he released his cause of action, and, the source of her claim thus having been taken away, she has no standing to demand more. After the death of an individual by the wrongful act of another, the statute gives a cause of action to his personal representatives under section 380, L. O. L. Many persons, such as minor children and dependent relatives, besides the wife, might be more or less indirectly affected by injury rendering the husband or father less capable to continue his duty of support. The wife stands in no better plight than any of the others mentioned. Section 380 affords relief to her in common with the others, and it would be unreasonable to hold that the defendant, after fairly compensating the injured man for the negligent wrong inflicted upon him, should be compelled to search out all others of his relatives and litigate or settle with them.

It is unnecessary to decide whether the husband could bring such an action as this or not where his wife was injured or slain. It is sufficient to say that there is no statute so equipping the wife or widow. The complaint did not state a cause of action against the defendant. Much instruction on this subject may be derived from the perusal of the following cases: *Feneff v. N. Y. Cent. & H. R. Ry. Co.*, 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291; *Brown v. Kistelman*, 177 Ind. 692, 98 N. E. 631, 40 L. R. A. (N. S.) 236; *Goldman v. Cohen*, 30 Misc. Rep. 336, 63 N. Y. Supp. 459; *Stout v. Kansas City Terminal Ry. Co.*, 172 Mo. App. 113, 157 S. W. 1019; *Gambino v. Manufacturer's Coal & Coke Co.*, 175 Mo. App. 653, 158 S. W. 77; *Patelski v. Snyder*, 179 Ill. App. 24; *Marri v. Stanford St. Ry. Co.*, 84 Conn. 9, 78 Atl. 532, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912B, 1120.

The judgment is affirmed.

MYERS v. JOSEPH A. STROWBRIDGE ESTATE CO. et al.

(Supreme Court of Oregon. Oct. 10, 1916.)

1. MECHANICS' LIENS §72—RIGHT TO LIEN—CONTRACT WITH LESSEE—"AGENT"—STATUTE.

Under L. O. L. § 7416, conditioning the right to a mechanic's lien upon the labor and material being furnished at the instance of the owner or his agent, a lessee under a lease providing, as a part consideration thereof, that he should make permanent improvements which should revert to and become the property of the lessor, and who causes such improvements to be made, becomes the "agent" of the lessor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 86; Dec. Dig. §72.]

For other definitions, see *Words and Phrases*, First and Second Series, Agent.]

2. MECHANICS' LIENS §103 — WAIVER — KNOWLEDGE—PROVISION IN ORIGINAL CONTRACT.

Where the owner and lessor made his lessee an agent to make improvements on the leased premises, a stipulation in the agent's contract that the owner and lessor should not be responsible for any bills contracted in the improvement was not binding upon a subcontractor, unless he assented or agreed to be bound thereby; and the subcontractor's knowledge alone of the original contractor's waiver of his lien did not constitute a waiver of the subcontractor's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. §103.]

3. MECHANICS' LIENS §78—PERSONS LIABLE—OWNER—NOTICE DENYING LIABILITY.

Under L. O. L. § 7419, providing that every building constructed on land with the knowledge of the owner shall be held to have been constructed at his instance and shall be subject to liens, unless within three days after knowledge of such construction he posts a notice that he will not be responsible therefor, premises leased for a term and under which the lessee became the owner's agent and contractor for its improvement were subject to the liens of subcontractors, notwithstanding the posting of such notice.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 111; Dec. Dig. §78.]

4. MECHANICS' LIENS §103 — IMPROVEMENTS OF LEASED PREMISES—OWNER'S NOTICE OF NONLIABILITY—EFFECT.

Under such provision and L. O. L. § 7416, giving a lien to every person performing labor upon or furnishing material used in the construction of any building at the instance of the owner or his agent, and making every contractor an agent for the owner, and section 7417, imposing such lien upon the land if it belongs to the person who caused the improvements, the posting of notices by the owner and lessor that it would not be responsible for the payment for labor or materials furnished for improvements made by its lessee, as agent or contractor, would not affect the matter of the waiver of the subcontractors' liens, or prevent a lien upon the improved building, or even inform them that the lessee, as contractor, had stipulated that no lien should attach to the premises.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. §103.]

5. MECHANICS' LIENS §103—PLANS AND SPECIFICATIONS—REFERENCE—EFFECT.

Where a lessee, as the owner's agent and contractor, employed an architect to prepare plans and specifications for the improvement of the leased premises, and in the heading on the first page the building was described as own-

ed by the lessor, and on the first page of the specifications there was a provision inserted at the lessor's request that he would not be responsible for any bills contracted in the improvement therein specified, and where the two pages of the specifications relating to subcontractors' work were detached from the remainder and given to and signed by them without directing their attention to the provision that the owner and lessor should not be responsible, etc., the reference could serve only the purpose of furnishing the plans and specifications for the work, under the rule that where reference is made in one document to another unattached document for a specific purpose only, such other document becomes a part of the former for such purpose only.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. §103.]

6. MECHANICS' LIENS §103 — ORIGINAL CONTRACTORS — WAIVER — SUBCONTRACTORS—EFFECT.

In view of the statute giving a direct lien to persons furnishing labor and material in the alteration of a building, upon the estate of the person causing the alteration to be made, as a privilege or right for their protection, based on the theory of having added to the value of the estate with the consent of the owner, the fact that the original contractor has agreed with the owner to protect him against liens is not an agreement on the part of subcontractors that they will look exclusively to the original contractor and not to the property for their compensation, as in such case there is no meeting of the minds of the contracting parties to that effect.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. §103.]

7. MECHANICS' LIENS §98—SUBCONTRACTORS—WAIVER.

The agreement of subcontractors to accept a part of their compensation in the preferred stock of the lessee, the owner's agent and contractor, did not amount to a waiver of their right to a lien to that extent, where the stock was never delivered or tendered as security or payment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 130; Dec. Dig. §98.]

Department No. 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action to foreclose a mechanic's lien by J. H. Myers, doing business as J. H. Myers Heating Company, against the Joseph A. Strowbridge Estate Company and the Yamhill Sanitary Public Market Company, in which H. Barde and others, doing business as the Forth Plumbing & Heating Company, filed a cross-complaint to foreclose a lien. Decree for plaintiff and cross-complainant, and the Joseph A. Strowbridge Estate Company appeals. Affirmed.

Plaintiff, J. H. Myers, commenced this suit to foreclose a mechanic's lien. Defendant, Forth Plumbing & Heating Company, a partnership, designated herein as the Forth Company, filed a cross-complaint to foreclose its liens. From a decree in favor of the lien claimants awarding plaintiff \$1,819.99, with interest, and \$150 attorney's fee, and the Forth Company \$5,425.57, with interest, \$350 attorney's fee, and costs and disbursements, defendant, the Joseph A. Strowbridge Estate

Company, a corporation, hereinafter named as the Strowbridge Estate, appeals.

On January 31, 1912, the Strowbridge Estate was the owner of lots 4, 5, and 6 in block 14 of the city of Portland, Multnomah county, Or., and the buildings thereon. On that date it entered into a lease and contract with J. Nudelman, demising the premises for the term of ten years at a rental of from \$1,500 to \$2,150 a month for the first five years, and from \$2,150 to \$2,500, as might be arranged, for the last five years. On February 22, 1912, this lease, with the consent of the Strowbridge Estate, was assigned to the Yamhill Sanitary Public Market Company, which for brevity's sake we will hereafter call the Market Company. J. Nudelman was the president and managed the principal affairs of this company. The lease contained, among others, the following stipulations:

"That said lessee will and shall make all the necessary changes, repairs, alterations, additions and improvements to, and upon all the said above-described premises, as so desired by said lessee, he doing all the work, furnishing all of the labor, materials of all kinds, placing and furnishing the heating plant, elevator service, electric wiring, plumbing of all kinds and each and everything that he may desire to change said premises to conform with their plans, including the tearing down and removing the small brick building in the rear of number 227 Yamhill street, and making such improvements as they may desire upon said part of said lot six (6) aforesaid, all of said improvements to be free from all cost or expense to the said lessor, excepting that the said lessor is to keep the roof and sidewalks in good repair.

"All of the work, alterations, changes, additions or improvements to be done upon said premises or any part thereof, are to be under the supervision of a competent architect to be employed by, and his services therefor paid by the said lessee, and the said work and improvements so done are to be performed in a substantial manner, subject, however, to the approval of said lessor, and the plans therefor are to be submitted by the said lessee to the said lessor before any work, changes or improvements are made to said premises. * * *

"And the said lessor is to be held absolutely harmless from any claim of damages arising out of contracts, liens, material or labor furnished or otherwise, from the said improvements that are to be, or shall be, made thereon and thereto, and at the end of this lease or upon sooner termination thereof the said improvements, changes or additions made to or upon the said premises or any part thereof shall be turned over to the said lessor, its successors and assigns, by the said lessee, free of all cost, or from any claim or claims to the same or any part thereof. * * *

"The said lessee is to forthwith deposit with the said lessor a certified check payable in favor of the said lessor in the sum of six thousand (\$6,000) dollars, said money to be held by the said lessor without interest except as aforesaid as security and for the faithful performance by the said lessee in carrying out all of the initial improvements agreed upon herein, * * * and to indemnify the said lessor against all liens for work, labor or materials furnished, or both, that the said lessee may allow or cause to be placed on or against the premises or any part thereof, or on any improvement that the said lessee may make thereon. * * *

"It is further agreed * * * that the said lessee is not to expend a sum of money upon said premises less than twelve thousand five

hundred (\$12,500.00) dollars for said improvements upon the same, and such improvements and changes are to commence, and the same to be done as soon thereafter as the turning over of said premises by the said lessor to the said lessee, as shall be reasonable. * * *

Certain changes in the original contract were made by supplemental agreements between the Strowbridge Estate and the Market Company, one of April 10, 1912, wherein it appears as follows:

"It is further agreed and understood by the said parties herein, that the lessor being the owner of the premises herein, may employ a competent man to supervise all the work, alterations and improvements to be done and performed upon all of said leased premises, and to pay for said services. Said supervisor to act for all of the parties herein and to see that the work is properly done and performed in a good first-class manner, and all of said parties to abide by the judgment of said supervisor therein."

In another dated August 12th of the same year it was agreed that preferred stock in the Market Company should be deposited in lieu of the \$6,000 deposited as a guarantee by that company. Another stipulation was made on November 25, 1912, in which, among various other things, it was provided that the Strowbridge Estate should pay certain expenses to be incurred by placing iron columns and I beams in the building on Yamhill street. Still another contract as to a reduction of the rental was made December 14, 1912. The Market Company thereupon employed H. M. Fancher, an architect, to prepare plans and specifications for the work. In the heading on the first page the building is described as owned by the Strowbridge Estate Company. On the first page of these specifications at the request of the owner there was inserted the following clause:

"The owners of the building will not be responsible for any bills contracted in the alteration of the building nor for any of the works herein specified."

Negotiations were had with certain contractors not satisfactory to the Strowbridge Estate, and afterwards a contract for the work was entered into with the Wineland Company. This company made important changes in the plans and specifications prepared by Mr. Fancher. After these had been approved by both the Market Company and the Strowbridge Estate, the contract with the Wineland Company was canceled upon the payment of \$300 to the latter, the work was divided up and various parts awarded to different contractors.

Under an agreement with the Market Company dated July 13, 1912, plaintiff Myers installed a complete heating system. The two pages of the specifications relating thereto were detached from the remainder and each was identified by the signatures of the contracting parties. While Myers was engaged in installing the heating system, owing to certain changes made by the Market Company and the Strowbridge Estate in the original contract, it became necessary that plain-

tiff's contract and work be modified accordingly. All changes that were made became a part of the original contract and were approved by the Strowbridge Estate and the Market Company. By reason of the changes made in the first plans and specifications an expenditure of many thousands of dollars was necessitated, more than that called for by the original plans. On August 6, 1912, the Forth Company entered into a contract with the Market Company to furnish materials and do the plumbing work. The Forth Company claimed they saw only that part of the specifications which pertained to such work when they were awarded the contract and were given only the few sheets which contained the directions relating thereto and the description of the plumbing material to be used. In the plumbing contract there were, among other things, the following two clauses:

"Article 1. The contractor shall and will provide all the materials and perform all the work for the installation in the buildings on lots 4, 5 and 6, block 14, city of Portland of the following: (here follows an enumeration of a number of plumbing supplies) as shown on the drawings and described in the specifications prepared by H. M. Fancher, Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract. * * *

"Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be five thousand three hundred (\$5,300.00), subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor in current funds and only upon certificates of the architect, as follows: Thirty per cent. thereof when roughing in thereof is completed and 30 per cent. thereof when work is finished and 40 per cent. thereof in preferred stock of the owner bearing 7 per cent. interest and to be redeemed by owner in thirty monthly installments beginning thirty days after issue. If the building is finished in two sections the cash payment shall be prorated according to the proportion of the work done and the stock shall be issued upon the completion of the work."

In the Myers heating contract it was provided that of the \$3,900 to be paid him 30 per cent. was to be paid in preferred stock of the Market Company, "bearing 7 per cent. interest and redeemable in thirty monthly installments, said stock to be issued upon completion of this contract." None of the preferred stock in the Market Company was ever delivered to plaintiff Myers or to the Forth Company. Neither was that company in a position to deliver the same. The term of the lease commenced June 15, 1912. About June 3d, numerous notices of nonliability were posted by the owner in conspicuous places on the building and several of them remained so posted during the entire construction, a copy of which notice is as follows:

"Notice

"Notice is hereby given that the Joseph A. Strowbridge Estate Company, a corporation, the owners of these premises, the same being

lots numbered four, five and six in block fourteen, city of Portland, Oregon, with the brick buildings thereon, will not be responsible or pay for any materials or labor used, furnished, delivered or performed by any person or persons, firm or corporation whatsoever, on said premises or any part thereof, or for any construction, alteration or repairs thereto or for any liens, unpaid bills, accounts, claims, labor or material contracted for or used in the alteration, repairing or the remodification of said premises aforesaid, or any part thereof, at any time or times whatsoever.

"In witness whereof, the said Joseph A. Strowbridge Estate Company, a corporation, pursuant to a resolution of its board of directors, heretofore adopted, have caused this notice to be signed, given and posted by its president and secretary and the corporate seal to be affixed hereto. The Joseph A. Strowbridge Estate Co., by J. A. Strowbridge, President. [Seal.] The Joseph A. Strowbridge Estate Co., by A. B. Strowbridge, Secretary.

"Dated June 3, 1912."

The Market Company became financially embarrassed and was unable to pay for the work done or the materials furnished in the remodeling of the building. Plaintiff Myers states that when he was awarded the contract he saw only that part of the specifications pertaining to the heating system and was given just the two sheets containing the specifications therefor. The first boiler for heating that Myers installed did not comply with the contract and was not satisfactory, and he installed another. Myers finished his work March 15, 1913, and filed a notice of lien on April 3d of that year. The Forth Company finished their work on February 19, 1913, and filed a notice of their lien on March 15th of that year. The Strowbridge Estate paid on account of the work and materials in this building a fraction over \$29,000. This amount included three loans made to the Market Company aggregating \$16,000. Defendant George E. Reed superintended the work for the Market Company, and the Strowbridge Estate employed A. Walkly to look after its interest in the reconstruction of the building, pursuant to the stipulation in the lease. He was personally present nearly all the time during the rebuilding of the edifice, and the principal, if not all, the changes made in the plans which occasioned additional expense and also deductions from the original contract price were agreed to by contracts made at the time or settled after that portion of the work was done.

W. W. Cotton and H. W. Strong, both of Portland (J. A. Strowbridge, of Portland, on the brief), for appellant. W. J. Makellm, of Portland, for respondent Myers. E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble and Giltner & Sewall, all of Portland, on the brief), for other respondents.

BEAN, J. (after stating the facts as above). The Strowbridge Estate in its answer to the lien claimants maintains that its property is not subject to liens for the debts of the Market Company, the lessee, for the following reasons:

"(1) The lien claimants knew of the provisions of the lease exempting the property from liens. (2) Owner's property is exempted from liens by the notices of nonliability and the knowledge conveyed thereby to lien claimants prior to the making of the improvements. (3) Lien claimants waived their right to liens by express contract to that effect. (4) Notices of liens were not filed within 30 days after the completion of work."

The reasonable value of the work and the right to liens for part of the price agreed to be taken in stock is also in issue. It is stated in the brief of the learned counsel for the defendant Strowbridge Estate as follows:

"The legal effect of the lease in this case is to make the lessee a contractor within the meaning of the mechanic's lien law for the alterations and repairs contemplated by the lease. *Oregon Lumber & Fuel Co. v. Nolan*, 143 Pac. 935, at 937. Thus the lessee will be considered as a contractor with the owner and the lien claimants as subcontractors in considering the rights of the parties herein."

This statement practically disposes of the question raised by the notice of nonliability posted on the building.

[1, 2] It is contended by counsel for the Strowbridge Estate that subcontractors waived their right to liens for the reason that they had knowledge of the stipulation made by the Market Company in the principal contract prior to the time of furnishing materials or performing labor upon the premises, and they cite *Hume v. Seattle Dock Co.*, 68 Or. 477, 137 Pac. 752, 753, 50 L. R. A. (N. S.) 153; *Zanello v. Heating Co.*, 70 Or. 69, 139 Pac. 572, 575; *Hughes v. Lansing*, 34 Or. 118, 55 Pac. 95, 96, 75 Am. St. Rep. 574. In *Hume v. Seattle Dock Co.*, supra, it was claimed that when the owner and builder stipulate that no mechanic's lien shall be filed such a stipulation binds the subcontractors. In commenting upon the rule in a few states where the subcontractor is bound by a nonlien stipulation in the original contract, Mr. Justice Eakin said:

"By this rule the laborer is not consulted, and he must accept the work under the conditions of the original contract, in the making of which he had no voice. It was to protect the workman against such conditions that our lien law was enacted. A lien is not given through the contractor by subrogation, but is a direct and independent lien to each claimant against the property."

The opinion is not authority for the claim made. It does not go to that extent. In *Zanello v. Heating Co.*, supra, 70 Or. at page 76, 139 Pac. at page 575, Mr. Justice Ramsey said:

"The right to a lien was created by statute, and it cannot be annulled by the owner's giving notice that he will not 'recognize' such right, or by saying, in the building contract, that he will not be responsible for the claims of persons furnishing material or labor for the building. A contractor, a subcontractor, or a person furnishing labor or material for a building can waive his right to a lien by agreeing that he will not claim a lien, or by assenting to a provision in a contract stating that no liens shall be claimed or filed upon the building. But a person furnishing labor or material that goes into a building cannot be deprived of his right

to file a lien, excepting by his contract, or by acts on his part constituting an estoppel."

By section 7416, L. O. L., the right to a lien upon a building is conditioned upon the labor or material for which the lien is claimed being furnished "at the instance of the owner of the building * * * or his agent." Where it is provided in a lease as a part of the consideration thereof that the lessee shall make permanent improvements which shall revert to and become the property of the lessor at the termination of the lease, the lessor thereby causes the improvement to be made and the lessee becomes the agent of the lessor in the making of such improvements. This section declares who shall be deemed such agent of the owner. The waiver by virtue of a stipulation in the original contract that no lien will be permitted implies that there was an assent to the stipulation, or an agreement on the part of the subcontractor not to claim a lien. The Strowbridge Estate, the lessor, required a deposit of \$6,000 to be made by the Market Company to indemnify the lessor against any lien the lessee might cause or allow to be placed on the premises. This provision in the original contract between the owner, Strowbridge Estate, and the Market Company, the contractor, seems to have contemplated that work would be done upon the building and materials furnished for which the structure would be subject to a lien. In such cases a subcontractor does not waive his lien by reason of an agreement between the principal contractor and the owner to the effect that liens should not be filed unless the subcontractor assents or agrees to be bound by such stipulation. Knowledge alone by a subcontractor that the original contractor has waived his lien does not constitute a waiver by a subcontractor of his personal right to a lien for his work and materials in the absence of some agreement on his part that he will also be bound by the original contractor's waiver. *St. Johns Lbr. Co. v. Pritz*, 75 Or. 236, 146 Pac. 483; *Schade v. Muller*, 75 Or. 225, 146 Pac. 144; *Norton v. Clark*, 85 Me. 357, 27 Atl. 252; *Miles v. Coutts*, 20 Mont. 47, 49 Pac. 393; *Hume v. Seattle Dock Co.*, supra; *Zanello v. Heating Co.*, supra.

[3] The *Nolan* Case, which was decided after the present suit was tried in the lower court, eliminates the question relating to the posting of notices of nonliability by the owner of the land under section 7419, L. O. L., and disposes of the main part of this controversy.

[4] It is contended, however, that the notice was information to the subcontractors that the original contractor had made a nonlien stipulation with the owner. The provisions for this notice are intended to relieve the owner of the land upon which an edifice is constructed, when he has not contracted for the improvement, from the liability of having a lien attached to his land.

Oregon Lumber & Fuel Co. v. Nolan, *supra*. The posting of such notices would not prevent the lien upon the building itself as provided for in section 7416, L. O. L., and a laborer or materialman might still rely upon the structure as security for his pay, and by taking proper measures have the same sold and removed according to the terms of section 7417, L. O. L., which is as follows:

"The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the circuit court at the time of the foreclosure of such lien), shall also be subject to the liens created by this act, if, at the time the work was commenced or the materials for the same had been commenced to be furnished, the said land belonged to the person who caused said building or other improvement to be constructed, altered, or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien; and in case such interest shall be a leasehold interest, and the holder thereof shall have forfeited his rights thereto, the purchaser of such building or improvements and leasehold term, or so much thereof as remains unexpired at any sale under the provisions of this act, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay the lessor all arrears of rent or other money and costs due under said lease, unless the lessor shall have regained possession of the said land and property, or obtained judgment for the possession thereof, prior to the commencement of the construction, alteration, or repair of the building or other improvement thereon; in which event, said purchaser shall have the right only to remove the building or other improvement within thirty days after he shall have purchased the same; and the owner of the land shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal."

Therefore the posting of the notices by the Strowbridge Estate would not affect the matter of a waiver of the lien. The notice in question would not even inform the claimants that the Market Company, the contractor, had stipulated that no lien should attach to the premises; but, on the other hand, if considered with a knowledge of the provisions of the statute would tend to indicate that the owner of the estate had made no contract for the improvement.

[5] As stated above, when the respective contracts were executed by Myers and the Forth Company two or three pages of the specifications, one set relating to the heating system and the other to the plumbing work, were detached and given to them, and those particular pages were signed by the respective subcontractors. Their attention was not particularly directed to the clause inserted on the first page of what was designated in the heading as "Specifications" and "General Remarks," to the effect that the owner would not be responsible for the work. It may have been noticed in a casual or general way. The rule seems to be well established that where reference is made in one document to another unattached docu-

ment for a specific purpose only, such other document becomes a part of the former for such special purpose only. The reference to the Fancher specifications in the Myers' and Forth Company's contracts can serve only for the purpose of furnishing the plans and specifications for the plumbing and the installation of the heating system. *Moreing v. Weber*, 8 Cal. App. 14, 84 Pac. 220; *Stewart v. American Bridge Co.*, 108 Md. 200, 69 Atl. 708; *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135; *Meredith v. Bitter Root Co.*, 49 Mont. 204, 141 Pac. 643, 648. The covenant in the lease from the Strowbridge Estate to the Market Company to the effect that no lien would be suffered to be placed upon the premises was not known to the claimants until after a large part of their work was performed and materials furnished. It does not appear that either of these claimants assented to the nonlien stipulation. In *Norton v. Clark*, 85 Me. 357, 360, 27 Atl. 252, Mr. Justice Emery, in commenting upon a similar stipulation between an owner and a building contractor, said:

"This particular stipulation, like all other stipulations, binds only those who made it or assented to it."

[6] By virtue of our statute a direct lien is given to every person who shall furnish material and perform labor in the construction, alteration, or repair of a building. That lien is upon the estate of the person causing the construction, alteration, or repair to be made. Such lien is a privilege or right given to such persons for their protection and is based upon the theory that they have added to the value of the estate with the consent of the owner, and therefore such estate is liable therefor. The fact that the original contractor has agreed with the owner to protect him against liens cannot be said to be an agreement, on the part of the subcontractors, materialmen, and laborers that they will look exclusively to the original contractor and not to the property for their compensation. The builder's main contract is to the same effect as the nonlien stipulation, and, if he fully complies therewith, there would be ordinarily no occasion for the filing of a lien by subcontractors, materialmen, or laborers. His nonlien stipulation, so far as to others than himself are concerned, is a mere duplicate of his principal agreement, and subcontractors, materialmen, and laborers cannot be bound by such a stipulation, unless they agree to the same. In such a case as in any contract there must be a meeting of the minds of the contracting parties to that effect.

[7] The agreement of the subcontractors to accept a portion of their compensation in preferred stock of the Market Company to be redeemed within a certain time did not amount to a waiver of their right to a lien to that extent, as the stock was never delivered or tendered as security or payment to them. *McMurray v. Brown*, 91 U. S. 257,

23 L. Ed. 321; Springer Land Association v. Ford, 168 U. S. 513, 18 Sup. Ct. 170, 42 L. Ed. 562. The claimants did not waive their right to a lien on the premises.

From a reading of the 800 pages of type-written testimony and an examination of the several contracts and exhibits in the case we find that each of the lien claimants filed a notice of lien within the statutory time, and that the work was performed and the materials furnished in accordance with the contract and the changes made therein by agreement. During all the time of the performance of the work and the furnishing of the materials involved herein the reconstruction of the building was superintended on the part of the Market Company by George E. Reed, a competent person, and in behalf of the Stowbridge Estate by Mr. A. Walkly, an experienced builder, who was employed by it for that purpose pursuant to the terms of the original contract between it and the Market Company. Many of the questions as to the compensation arising on account of the modifications in the plans and specifications and the agreed departures therefrom were settled and adjusted by the parties through the instrumentality of the superintendents, and such supervision indicates that the materials furnished were in accordance with the agreement therefor. It is plain that the remodeling of the building was proposed to be made at too small a cost, and that best materials were not at first specified. This no doubt necessitated many changes, and it may be that the modifications resulted in some incongruity or kind of patchwork, but we find from the evidence that the work was done by the lien claimants according to their contracts, and that the amounts allowed are reasonable.

The decree of the lower court will therefore be affirmed.

MOORE, C. J., and HARRIS and BENSON, JJ., concur.

STATE ex rel. SCHOOL DIST. NO. 25 et al.
v. EVANS et al.*

(Supreme Court of Oregon. Oct. 10, 1916.)

1. SCHOOLS AND SCHOOL DISTRICTS ¶42(2)—ANNEXATION OF DISTRICT — VOID ORDER CALLING ELECTION.

An order calling an election on the question of whether a school district be annexed to a high school district is void for legal fraud and lack of jurisdiction if the district boundary board had no information concerning the number of legal voters in the school district except the statements found in the petition and remonstrance and later developments reveal that the petition did not contain the names of the necessary one-third of the legal voters.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 85; Dec. Dig. ¶42(2).]

2. QUO WARRANTO ¶1—ABOLITION OF REMEDY—SUBSTITUTION.

By L. O. L. § 363, the writ of quo warranto and information in the nature of quo warranto have been abolished, but only the forms having been done away with, as the remedies obtainable thereunder are still available by an action at law, prosecuted in the name of the state under the authority of section 366.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 1, 3, 23, 28; Dec. Dig. ¶1.]

3. QUO WARRANTO ¶49—PLEADING — BURDEN OF PROOF.

In a statutory action in the nature of quo warranto requiring a district boundary board to show by what authority they acted in consolidating a school district with a union high school district, plaintiffs alleging the annexation was illegal because the requisite number of voters did not sign the petition for an election on the question, defendants must allege all the facts necessary to show that the school district was legally annexed; the burden of proof resting upon them to show that the two districts were legally consolidated.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 49-52, 59, 60; Dec. Dig. ¶49.]

4. SCHOOLS AND SCHOOL DISTRICTS ¶42(2)—CONSOLIDATION — PETITION — ELECTION — STATUTE.

Under L. O. L. § 4194, relative to elections to unite school districts for high school purposes, an election on the question of whether a school district be annexed to a union high school district was void, and the attempted annexation came to naught, unless the petition for the election from the school district was signed by not less than one-third of the legal voters, the petition being jurisdictional and no petition at all unless in conformity with the statute.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 85; Dec. Dig. ¶42(2).]

5. EVIDENCE ¶83(1)—PRESUMPTION—DOING OF PRIOR ACT.

When the legality of a subsequent act depends upon the doing of a prior act, proof of the performance of the subsequent act may carry with it, until the contrary is shown, the presumption that the prior act was correctly done, the rule of presumption being not necessarily conclusive.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. ¶83(1).]

6. QUO WARRANTO ¶55 — EVIDENCE DEHOBS THE RECORD.

In quo warranto against a district boundary board demanding that it show by what authority it ordered the consolidation of a school and a high school district, complainants claiming that the annexation of the school district was not legal because the petition for the election on the question was not signed by the requisite number of voters, complainants could offer evidence dehors the record that the petition was not signed by the requisite number, the petition and order for election not of themselves proving the sufficiency of the petition.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 63-65; Dec. Dig. ¶55.]

Department 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by the State, on the relation of School District No. 25, and others, against J. Ward Evans and others. From a judg-

ment for relators, defendants appeal. Judgment affirmed.

Petitions were circulated in seven school districts of the third class and numbered 35, 36, 39, 41, 43, 48, and 50, asking the district boundary board to call an election to unite them for high school purposes. The petition for district No. 36 and the one circulated in district No. 50 were not signed by one-third of the legal voters and for that reason they were not sufficient to authorize the holding of an election in those two districts. Having received all the petitions from the seven school districts, the district boundary board ordered the holding of an election and caused a notice to be sent to the chairman of the board of school directors for each district, except districts 36 and 50, directing that the election be held. Notices that the election would be held for the purpose of uniting districts 35, 39, 41, 43, and 48 were duly posted in each of those districts and at the election, which was held in the five districts, a majority voted for a union high school district. Having canvassed the votes the district boundary board declared on September 1, 1914, that districts 35, 39, 41, 43, and 48 were duly united for high school purposes under the name of Union High School District No. 1. The chairmen of the five school district boards, who by force of law became the directors of the union high school district, organized as directors of the union high school by electing J. Ward Evans as chairman and F. N. Lasley as clerk. A union high school was opened on September 28, 1914, and afterwards a union high school building was constructed at an expense of about \$9,000.

During September, 1914, but after the middle of the month, a petition was circulated in school district No. 25, a district of the third class, asking the district boundary board to direct that an election be held on November 7, 1914, for the purpose of uniting that school district with union high school district No. 1. The names of 15 persons were signed to the petition which was circulated in school district No. 25. A similar petition for the annexation of school district No. 25 was also circulated in the territory embraced within the boundaries of the union high school district. Acting upon these two petitions, the district boundary board on October 26, 1914, ordered that an election be held on November 7, 1914, to decide whether school district No. 25 should be annexed to union high school district No. 1. Before making the order of October 26, 1914, the district boundary board received a writing which will be called a remonstrance. After reciting that they had signed the petition for the annexation of school district No. 25 on account of a misunderstanding of the facts and praying "that no further action be taken upon said petition," the remonstrance is signed by 8 persons who had signed the petition which had been circulated in school district No. 25 for

the annexation of the territory to the union high school district. Appended to the remonstrance was a writing which, after confirming the recitals in the remonstrance and requesting "that no proceedings be taken compelling the joinder of said school district No. 25 with said union high school district No. 1," was signed by 37 persons who represented themselves to be "legal voters of school district No. 25." The remonstrance was overruled by the district boundary board and no attempt was made to review its decision. The election was held on November 7, 1914, pursuant to notice and the order of the district boundary board. In the union high school district, 29 voted for and 2 voted against annexation, while in school district No. 25, 4 votes were cast for and 16 given against consolidation. After canvassing the votes the district boundary board declared that school district No. 25 and union high school district No. 1 "were legally united for high school purposes." The chairman of the school board of school district No. 25 refused to act as a director of the union high school district. Claiming to be the officers of union high school district No. 1 and asserting that school district No. 25 is included within union high school district No. 1, all the defendants except E. D. Chamberlain levied a tax on November 14, 1914, on all the taxable property within the union high school district including district No. 25. Afterwards on February 6, 1915, this action, which is the statutory substitute for the writ of quo warranto as well as for the proceeding by information in the nature of quo warranto, was commenced by the relators who as legal voters and taxpayers of school district No. 25 demand that the defendants be required to show by what authority they have acted, and that the pretended consolidation of school district No. 25 with union high school district No. 1 be dissolved. The trial court ruled that no question could be raised against the validity of the election which was held on August 25th when the five school districts voted to consolidate for union high school purposes, for the reason that the relators did not reside in or pay taxes on any property within any of these five districts. The court found from the evidence that there were 41 legal voters qualified to vote at school elections in school district No. 25, and that there were "11 other legal voters of the state of Oregon who had not the property qualifications necessary to entitle them to vote at school elections;" that the name of H. Henriksen and E. Bourgeois should be stricken from the petition which was circulated in school district No. 25, because the former was not a legal voter, and the latter neither signed nor authorized her name to be signed to the petition; that the petition circulated in school district No. 25 was not signed by one-third of the legal voters and consequently was not sufficient to confer juris-

diction, and that therefore school district No. 25 is not a part of the union high school district. A judgment was rendered for the relators in conformity with the findings made by the court, and the defendants appealed.

E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for appellants. J. M. Haddock, of Portland, for respondents.

HARRIS, J. (after stating the facts as above). The relators allege that union high school district No. 1 does not legally exist for the reason that the petitions asked for the consolidation of seven school districts while the election was called to unite five districts. The defendants say that the relators cannot question the legality of the original organization of the high school district because all of the relators reside in school district No. 25 and none of them pay taxes on property in any of the five school districts which were united by the original organization of the high school district. An examination of this phase of the controversy between the parties will not be necessary because of the conclusions reached upon another branch of the case, and we shall therefore assume, without deciding, that as a result of the election which was held on August 25, 1914, the five school districts, numbered 35, 39, 41, 43, and 48, were legally consolidated as Union High School District No. 1.

The relators have challenged the defendants to show any right or authority for treating school district No. 25 as a part of union high school district No. 1; the defendants justify their acts by alleging that school district No. 25 was legally annexed to the high school district by an election which was ordered and held after the district boundary board had received a petition for annexation from the high school district and a similar petition from school district No. 25 signed by more than one-third of the "30 legal voters qualified to vote at school elections in said district and more than one-third of said legal qualified voters of said school district No. 25, to wit, 14 thereof." The relators reply by saying that the petition from school district No. 25 was only signed by 13 legal voters because E. Bourgeois neither signed nor authorized her name to be signed to the petition and H. Henriksen was not a legal voter; and "that the number of legal voters of said district is now and was at all times herein referred to far more than three times the number of legal voters who signed said petition." The defendants allege and the relators deny that the petition from school district No. 25 contained one-third of the legal voters in that district. As a part of their case and almost at the very beginning of the trial the defendants in order "to show the number of legal voters in the district *prima facie*" offered, and the court received in evidence, an

annual report for the year ending the third Monday in June, 1914, prepared by the clerk of school district No. 25, filed with the county school superintendent on July 15, 1914, showing the "number of legal voters for school purposes in district at time of making this report" to be 30. The relators met the "*prima facie*" case of the defendants by offering parol evidence that H. Henriksen was not a legal voter, that E. Bourgeois did not sign nor authorize her name to be signed to the petition, and that there were 41 legal voters in school district No. 25 when the petition was filed with the district boundary board. The defendants are now arguing that when the district boundary board ordered the election, that tribunal necessarily found the fact to be that the petition was signed by a sufficient number of legal voters; that parol evidence is not admissible in a quo warranto proceeding, except where fraud is alleged, to show the fact to be that a petition is not signed by a sufficient number of legal voters; that while this proceeding may be "a direct attack on the record sustaining the organization, it is a collateral attack upon a finding of fact" and hence the fact found by the district boundary board is conclusive here and therefore parol evidence was not admissible to impeach that finding unless it is tainted with fraud.

[1] Before undertaking to determine the question raised by the appellants it may be helpful to make some further explanation of the record. The petition from school district No. 25 does not recite that it was signed by one-third of the legal voters, and the accompanying certificate of the chairman and clerk only certifies that the petition "contains the legal voters, at school elections of this district, to the best of my knowledge and belief." The district boundary board did not make an express finding that the petition was in fact signed by one-third of the legal voters, nor is it shown or even claimed that the board had any evidence of the number of legal voters except the petition and the remonstrance; and those two papers when taken alone without further information warned the board that the petition might not contain one-third of the legal voters, and consequently in the language of *State v. Woods*, 233 Mo. 357, 135 S. W. 932, an order calling an election would be "void for legal fraud and lack of jurisdiction," if the board had no information concerning the number of legal voters except the statements found in the petition and remonstrance and later developments revealed that the petition did not contain the names of one-third of the legal voters.

[2] The writ of quo warranto and information in the nature of quo warranto have been abolished by statute, and yet only the forms have been done away with because the remedies which were obtainable under those forms are still available by an action at law

which is prosecuted in the mode prescribed by legislative enactment. Section 363, L. O. L.; *State ex rel. v. Cook*, 39 Or. 377, 65 Pac. 89; *In re State v. Millis*, 61 Or. 245, 119 Pac. 763. Authority for the maintenance of this action is found in section 366, L. O. L., where it is provided that an action at law may be maintained in the name of the state:

"1. When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation either public or private, created or formed by or under the authority of this state. * * * 8. When any association or number of persons act within this state, as a corporation, without being duly incorporated."

[3] The defendants are asserting that school district No. 25 is a part of the union high school district and before they can successfully meet the attack made by the complaint in this action they must allege all the facts necessary to show that school district No. 25 was legally annexed to the union high school district. 32 Cyc. 1453; *High's Extra. Leg. Rem.* (3d Ed.) § 712. And the burden of proof rests upon the defendants to show that the two districts were legally consolidated. *State ex rel. v. Port of Tillamook*, 62 Or. 332, 336, 124 Pac. 637, Ann. Cas. 1914C, 483; *People v. Karr*, 244 Ill. 374, 91 N. E. 485; *People v. Baldrige*, 267 Ill. 190, 108 N. E. 49; *People v. McDonald*, 264 Ill. 514, 106 N. E. 501, Ann. Cas. 1915C, 31, 10 Ency. of Ev. 454.

[4, 5] The election was void and the attempted annexation comes to naught unless the petition from school district No. 25 was signed by "not less than one-third of the legal voters." Section 4194, L. O. L. The petition is jurisdictional and unless it is signed by "not less than one-third of the legal voters" it is in legal contemplation no petition at all, and consequently an order calling an election on a petition which does not contain the required number of signers is like an order calling an election without any petition. The appellants argue, however, that the petition and the order for the election of themselves prove the sufficiency of the former because the latter necessarily implies that the board found the fact to be that the petition was signed by the required number of legal voters; and that while a quo warranto proceeding is a direct assault on whatever may be written in the record it is nevertheless a collateral attack on the finding of fact which is implied from the order for the election. It is true that when the legality of a subsequent act depends upon the doing of a prior act proof of the performance of the subsequent act may carry with it, until the contrary is shown, the presumption that the prior act was correctly done. *State v. Port of Tillamook*, 62 Or. 332, 339, 124 Pac. 637, Ann. Cas. 1914C, 483; *Anderson v. Stayton State Bank*, 159 Pac. 1033, decided September 12, 1916; *Brownell v. Palmer*, 22 Conn. 107; 9 Ency. of Ev. 953. But this rule of presump-

tion is not necessarily conclusive and does not always bar the doors to truth when the truth is different from the presumption, for as was said in *Knox County v. Ninth National Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 98:

"There is a marked difference between an omission to prove one step in a prescribed course of proceeding, and evidence that such step was not taken."

[6] This action was commenced for the express purpose of showing that school district No. 25 was not legally annexed, and the single result sought to be accomplished is the annulment of an order without which the annexation is void, and therefore a direct attack is being made upon the order. *Morrill v. Morrill*, 20 Or. 96, 101, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95. Actions involving questions like the one presented here have been referred to or treated by this court as direct attacks. *State v. Port of Tillamook*, 62 Or. 332, 337, 124 Pac. 637, Ann. Cas. 1914C, 483; *Spionskofsky v. Minto*, 62 Or. 560, 571, 126 Pac. 15; *Bonnet Trust Co. v. Sengstacken*, 58 Or. 333, 352, 118 Pac. 863; *School Dist. v. School Dist.*, 34 Or. 97, 99, 55 Pac. 98. See, also, *Tyree v. Crystal Dist. Imp. Co.*, 64 Or. 251, 126 Pac. 605. The same result has been reached in other jurisdictions. *People v. Barber*, 265 Ill. 316, 106 N. E. 798; *People v. Peoria*, 166 Ill. 517, 46 N. E. 1075; *People v. McDonald*, 264 Ill. 514, 106 N. E. 501, Ann. Cas. 1915C, 31; *State v. Woods*, 233 Mo. 357, 135 S. W. 932. Since this action is a direct attack upon the right to make the order, those who prosecute the attack can show that jurisdiction never attached, and for the purpose of showing the truth may offer evidence dehors the record. *People v. McDonald*, 264 Ill. 514, 106 N. E. 501, Ann. Cas. 1915C, 31; *People v. Stratton*, 33 Colo. 464, 81 Pac. 245; *Kamp v. People*, 141 Ill. 9, 30 N. E. 680, 33 Am. St. Rep. 270; *State v. Clark*, 75 Neb. 620, 106 N. W. 971; *Territory v. Armstrong*, 6 Dak. 226, 50 N. W. 832; *State v. Independent School Dist. of Carbondale*, 29 Iowa, 264, 32 Cyc. 1461; 2 *Spelling on Inj.* (2d Ed.) § 1800.

The district boundary board is not a court of record, but at the most it is only an inferior tribunal with special and limited powers; the statute which prescribes the procedure for annexing territory to a union high school district does not expressly provide for a hearing on the petition and makes no mention of an appeal from an order for an election, so that there is no room to claim that another adequate remedy besides quo warranto is available; and the attack made here strikes at the right of the board to act at all and not at the correctness or wisdom of a decision which the board has made after jurisdiction is indubitably conferred. These features readily distinguish the instant case from authorities relied upon by defendants like *State v. Briggs*, 45 Or. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424; *State v.*

Port of Bay City, 64 Or. 189, 129 Pac. 496; Stettler v. O'Hara, 69 Or. 519, 139 Pac. 743, Ann. Cas. 1916A, 217; Louisville Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229; State v. Houser, 122 Wis. 534, 100 N. W. 964; Chicago Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636; Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; Bridge Co. v. U. S., 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435; Howell v. Howell, 151 N. C. 575, 66 S. E. 571; People v. Waite, 213 Ill. 421, 72 N. E. 1087. See, also, Gill v. Commissioners, 160 N. C. 176, 76 S. E. 203, 43 L. R. A. (N. S.) 293, for an explanation of Howell v. Howell, supra, and 32 Cyc. 1425, for a statement of the holding in People v. Waite, supra. Quite a different question is presented when an assault is made upon an order or judgment or a court of record, or where another complete remedy is available, or when the attack is against the wisdom of a finding made by an officer or tribunal after jurisdiction has actually attached. Here the complainants strike directly against the right to make the order claiming that jurisdiction was never conferred; and they can go behind the record and show the truth. The judgment is affirmed.

MOORE, C. J., and BENSON and BURNETT, JJ., concur.

LANE v. BALL et al.

(Supreme Court of Oregon. Oct. 10, 1916.)

1. LIMITATION OF ACTIONS—§55(1)—ACCRUAL OF RIGHT OF ACTION—FALSE IMPRISONMENT.

The statute of limitation against the right to redress for false imprisonment began to run on the date of an order for plaintiff's discharge.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 209; Dec. Dig. §55(1).]

2. LIMITATION OF ACTIONS—§118(2)—WHAT CONSTITUTES COMMENCEMENT OF ACTION—STATUTES.

Under L. O. L. § 8, providing that an action for false imprisonment must be commenced within two years, and section 15, providing that an attempt to commence an action shall be deemed equivalent to the commencement thereof, when complaint is filed and summons delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county, an action for false imprisonment was commenced where a complaint was filed and summons for several defendants, but only one copy of the complaint, was delivered to the sheriff.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 528; Dec. Dig. §118(2).]

3. FALSE IMPRISONMENT—§8—MALICIOUS PROSECUTION DISTINGUISHED—PLEADING—COMPLAINT.

Where a complaint charged that defendants caused plaintiff's imprisonment under an execution order unlawfully issued by defendant clerk of court without authority, directing the sheriff to arrest and imprison him, the gist of the action is false imprisonment and not malicious prosecution, since an action for false imprisonment may be maintained where the imprison-

ment is without legal authority; but where there is a valid, or apparently valid, power to arrest, the remedy is by action for malicious prosecution.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 2; Dec. Dig. §3.]

4. FALSE IMPRISONMENT—§20(1)—PLEADING—COMPLAINT—SUFFICIENCY.

A complaint for false imprisonment, which alleged that defendants caused plaintiff to be imprisoned under an execution order issued by defendant clerk of court without legal authority, directing the sheriff to arrest and imprison him, was sufficient, although it did not aver want of probable cause.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 86-88; Dec. Dig. §20(1).]

5. PROCESS—§66—SUMMONS—SERVICE—STATUTE.

Under L. O. L. § 55, subd. 5, providing that the summons shall be served by delivering a copy thereof with a copy of the complaint to defendant personally, where summons in due form was served on joint defendants in a law action, but the sheriff delivered a copy of complaint to only one defendant, no jurisdiction of the persons of the other defendants was secured by such attempted service.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 53; Dec. Dig. §66.]

6. JUDGMENT—§490(2)—VALIDITY—DEFECT IN SUMMONS.

A defect in the form or matter of a summons not absolutely destructive of its validity, although material and sufficient to cause a reversal of the judgment, does not deprive the court of jurisdiction, and therefore does not expose the judgment to collateral impeachment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 927; Dec. Dig. §490(2).]

7. PROCESS—§158—QUASHING—GROUND.

As the power of a court to quash a summons must rest upon the assumption that it is void, and authority to set aside attempted service of summons is upon the theory that the exhibition of original or delivery of certified copy was ineffectual because of failure to comply with the statute regulating the service, a defect in the return of a summons is not reached by a motion to quash, but must be assailed by an application to set aside the service.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 218-220; Dec. Dig. §158.]

8. TORTS—§22—PLEADING—JOINDER OF DEFENDANTS.

In an action for false imprisonment against several defendants, plaintiff had an election to proceed against any or all of them, as one joint wrongdoer cannot complain that others, equally guilty, are not united with him.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. §22.]

9. DISMISSAL AND NONSUIT—§26—JOINT DEFENDANTS—RIGHT TO DISMISS.

In an action for false imprisonment against several defendants, plaintiff could have dismissed his action as to some of the defendants without affecting the merits of the cause as to the others.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 46, 48-59; Dec. Dig. §26.]

10. PROCESS—§152—SUMMONS—SUFFICIENCY OF SERVICE.

In an action for false imprisonment against several defendants, where summons in due form was served on each, but a copy of the complaint was served on only one, the service on this defendant was not rendered void in consequence

of the direction given the sheriff to deliver a copy of the complaint to him only.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 208; Dec. Dig. ¶152.]

11. LIMITATION OF ACTIONS ¶119(3)—STATUTES—CONSTRUCTION—COMMENCEMENT OF ACTION.

L. O. L. § 14, providing that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons served on him, or on a codefendant who is a joint contractor, "or otherwise united in interest with him," means a defendant in an action arising out of a joint contract, and an action for false imprisonment against joint defendants was not deemed commenced against defendants who were only served with summons by proper service of summons and copy of complaint on one defendant.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 531, 534; Dec. Dig. ¶119(3).]

12. PROCESS ¶45—SUMMONS—RIGHT TO SERVE ADDITIONAL SUMMONS—STATUTE.

Under L. O. L. § 60, providing that whenever it shall appear from the return of the sheriff, etc., that defendant is not found, plaintiff may deliver another summons to be served or may proceed by publication at his election, when construed with section 56, subd. 2, providing for service by publication upon affidavit in cases there specified, and section 57, which provides that when publication has been ordered, personal service outside of the state shall be equivalent to publication and deposit in the post office, in an action against joint defendants, where plaintiff failed to have copies of the complaint served upon defendants except one, he had the right, at any time before the statute of limitations had run, to issue another summons without a return of "not found," and cause it and certified copies of the complaint to be served upon the parties as to whom prior attempted service was ineffectual.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 42-45; Dec. Dig. ¶45.]

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Adolphus Lane against W. F. Ball and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The complaint in this action was filed February 23, 1915, and alleges, in effect, that the defendants E. E. Farrington, C. H. Farrington, and O. M. White are, and at all the times stated were, attorneys at law and engaged in the practice of their profession at Portland, Or., and are financially interested in a judgment which they secured in the circuit court of the state of Oregon for Multnomah county in favor of the defendant W. F. Ball and against the plaintiff, Adolphus Lane; that the defendant John B. Coffey is the county clerk of that county and ex officio clerk of that court; "that on or about the 15th day of February, 1913, the said defendants, E. E. Farrington, C. H. Farrington, O. M. White, and W. F. Ball, acting jointly and illegally and for the wrongful and unlawful purpose of extorting money from this plaintiff and unlawfully compelling plaintiff, by

and through wrongful and unlawful means and methods, to pay over money to said defendant Ball and his said attorneys, and without any order or leave of the above court, or judge thereof, in the premises, did wrongfully, unlawfully, and maliciously solicit, procure, and induce the said defendant John B. Coffey, then being and acting as clerk of the said circuit court as aforesaid, unlawfully to issue a warrant for the arrest and imprisonment of the above plaintiff, and that the said John B. Coffey, as clerk of the above circuit court as aforesaid, unlawfully acting under and upon the solicitations, inducements, and advice of his codefendants, and in furtherance of the aforesaid unlawful purposes of his codefendants, did, on the 15th day of February, 1913, unlawfully and in violation of the statutes of the state of Oregon, and without any leave or order of the above court or any judge thereof so to do, and in violation of plaintiff's rights in the premises, issue an execution order, directing the sheriff of Multnomah county, Or., to arrest and imprison the above plaintiff, Adolphus Lane, in the county jail of Multnomah county, Or., until he should pay certain sums of money, then claimed to be due to defendant W. F. Ball and his said attorneys, upon a certain judgment of the above court, or be otherwise discharged"; that Coffey wrongfully and unlawfully caused such execution forthwith to be delivered to such sheriff, who pursuant thereto arrested the plaintiff February 15, 1913, and committed him to the jail of that county, where he remained until March 24, 1913, when he was discharged by order of such court, which held that the writ under which he was apprehended and imprisoned was illegal and void, and issued without authority of law, and thereupon canceled such warrant, from which judgment no appeal was taken, and the order has become final; that statements concerning the plaintiff's arrest and imprisonment were published in the press, and became generally known to, and were discussed by, his friends and acquaintances, thereby injuring his credit, reputation, and social and business standing, causing mental strain and anguish, to his damages in the sum of \$10,000, for which judgment was demanded. The day the complaint was filed, a summons regular in form was issued and delivered to the sheriff of that county, having noted thereon the following direction, addressed to such officer and subscribed by plaintiff's counsel, as sanctioned in suits in equity. L. O. L. § 398. Omitting the address and signature, the direction reads:

"You will please serve a copy of summons upon all defendants herein, and only one copy of complaint, which is to be served upon defendant C. M. White."

The return of the sheriff shows that he served the summons within that state and county by personally delivering a certified copy thereof to each of the defendants, nam-

ing them, and that at the same time and place and in the same manner he also delivered to White a certified copy of the complaint. Ball, E. E. Farrington, C. H. Farrington and Coffey, jointly appearing specially on March 5, 1915, moved to quash the summons and the attempted service thereof as to them, on the ground that no copy of the complaint had been delivered to either. *White at the same time, alone appearing specially, moved to quash the summons and the service thereof as to him, for that only one copy of the complaint was served. A second summons was issued March 9, 1915, and served the next day upon Ball, the two Farringtons, and Coffey, to each of whom was delivered a certified copy of the complaint. The court on March 15, 1915, sustained the motions referred to, and quashed the first summons and the service thereof as to each of the defendants. Thereupon a third summons was issued and served March 15, 1915, upon White, to whom was also delivered a certified copy of the complaint. All the defendants except White, jointly appearing specially March 19, 1915, moved to quash the second summons, attempted to be served upon them, for that the return of the first summons did not state that they were, or either of them was, not found, and that when the second summons was issued there was then pending in such court, and undetermined, motions to quash the first summons and the service thereof. White, on March 26, 1915, alone appearing, specially moved to quash the third summons and the service thereof on substantially the same grounds as last stated. The court on March 29, 1915, quashed the second and third summons and the service thereof, and at the same time made an order, permitting the issuance of another summons. Pursuant to such authorization a fourth summons was issued March 30, 1915, and served the same day upon each of the defendants, to whom was also delivered a certified copy of the complaint. On April 9, 1915, Ball and Coffey separately, and the other defendants jointly, demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and that the action had not been commenced within the time limited therefor. Each of these demurrers was sustained April 12, 1915. The plaintiff's counsel on the 5th of the next month moved to vacate all the previous rulings made in this cause, and for an order directing each of the defendants to file an answer to the complaint. This motion was denied May 24, 1915, the order reciting the overruling of the demurrers, "and that plaintiff has failed to further plead in this action," and concluding as follows:

"Now, therefore, it is considered and adjudged by the court that defendants go hence without day, and recover of the plaintiff their costs and disbursements herein expended, taxed at \$13.65."

From this judgment the plaintiff appeals.

Allan R. Joy, of Portland (Logan & Smith, of Portland, on the brief), for appellant. C. M. White, of Portland, for respondents.

MOORE, C. J. (after stating the facts as above). [1, 2] It will be remembered the complaint charges that the defendants, acting jointly and illegally and for the wrongful and unlawful purpose of extorting money from the plaintiff by wrongful means, caused an execution to be issued, directing the sheriff to arrest and imprison the plaintiff in the county jail until he should pay Ball and his attorneys, defendants herein, the sum due on the judgment, and that pursuant to such writ the plaintiff was arrested February 15, 1913, and so imprisoned until the 24th of the next month, when he was discharged by order of the circuit court of Multnomah county, Or., which judgment had become final. The initiatory pleading, however, does not aver a want of probable cause. The plaintiff could not maintain an action for false imprisonment until he was discharged from the alleged illegal restraint, and an order to that effect having been made March 24, 1913, the statute of limitations began to run on that date against his right to redress for the injury of which he complains. This being so, it becomes important to consider some clauses of the statute regulating the proceedings in a case of this kind. "An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract," must be commenced within two years from the time the cause arose. L. O. L. § 8. "An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the complaint is filed, and the summons delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county, in which the defendants or one of them usually or last resided." Id. § 15. It will be kept in mind that the complaint herein was filed February 23, 1915, on which day the summons was undertaken to be served. Two years, therefore, had not elapsed when this action was commenced.

[3] Though the demurrers interposed assign two grounds, such written objections to the initiatory pleading were evidently upheld on the assumption that the complaint did not state facts sufficient to constitute a cause of action, for the order, dismissing the action, stated that after the demurrers were sustained, the plaintiff failed further to plead. The primary inquiry, therefore, is whether or not the complaint is sufficient when its averments are directly challenged at the proper time and in a formal manner. If the gravamen of the action is malicious prosecution, it is quite probable the complaint is insufficient, for in an action of that kind the averment of a want of probable cause, in respect to the alleged illegal restraint,

seems to be essential. "In actions for malicious prosecution the real controversy," says a text-writer, "is generally upon the question of probable cause, the want of which is a vital and indispensable element in the plaintiff's case, and as to which the burden of proof is upon him." Newell, Mal. Pros. 267. In another clause of this work it is said:

"To support this action it must be alleged: (1) That a prosecution was commenced against the plaintiff; (2) that it was instituted or instigated by the defendant; (3) that it was malicious; (4) that it was without probable cause; and (5) that it has been legally and finally terminated in the plaintiff's favor." Id. 397.

This author in another section observes:

"An action to recover the damages sustained by reason of the abuse of legal process differs materially from actions for malicious prosecution and false imprisonment, both in matter of pleading and proof. * * * And it is not necessary that actual malice should be alleged in terms or explicitly proved; and the action may be maintained against any one who wrongfully sues, arrests and imprisons a party for a wrongful or fictitious claim, without alleging or proving a want of probable cause." Id. 404.

In *Roberts v. Thomas*, 135 Ky. 63, 121 S. W. 961, 21 Ann. Cas. 456, 457, it is said:

"There is a well-marked distinction between an action for false imprisonment and an action for malicious prosecution. An action for false imprisonment may be maintained where the imprisonment is without legal authority. But where there is a valid, or apparently valid, power to arrest, the remedy is by an action for malicious prosecution."

In *Southern Ry. v. Shirley*, 121 Ky. 863, 90 S. W. 597, 12 Ann. Cas. 83, it was determined that in an action for false imprisonment it was unnecessary to allege or prove that the imprisonment complained of was without probable cause. See the exhaustive notes to this case upon that subject.

In *Wood v. Graves*, 144 Mass. 365, 367, 11 N. E. 567, 576 (59 Am. Rep. 95) it was ruled that an action for false imprisonment would lie for the misuse or abuse of legal process after it had issued, beyond the mere fact of arrest and detention. In deciding that case it is said:

"Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution."

Tested by this rule, an examination of the paragraph of the complaint hereinbefore quoted will show that the gist of the action is false imprisonment, and not malicious prosecution. In an action to recover damages for the malicious abuse of process, it is unnecessary to allege that the means employed to apprehend and incarcerate the plaintiff was sued out without probable cause. 13 Ency. Pl. & Pr. 442.

[4] A different announcement, however, was made in *Ruble v. Coyote G. & S. M. Co.*, 10 Or. 89, and reiterated in *Mitchell v. Shver Lake Lodge*, 29 Or. 294, 45 Pac. 798. The

doctrine so proclaimed is not in harmony with the current authority, and may have induced the decision herein on the demurrers. But however this may be, justice demands a correct rule should be established, when no property right has accrued while relying upon the erroneous decision. We conclude, therefore, that the complaint is sufficient, and that the demurrers to that pleading were improperly sustained.

[5] This deduction necessitates a consideration of the efficacy of the summons originally issued herein and the validity of the service thereof. The statute prescribing the means of securing jurisdiction of the person of a defendant provides:

"The summons shall contain the name of the court in which the complaint is filed, the names of the parties to the action, and the title thereof. It shall be subscribed by the plaintiff, or his attorney, and directed to the defendant, and shall require him to appear and answer the complaint, as in this section provided, or judgment for want thereof will be taken against him." L. O. L. § 52.

"There shall also be inserted in the summons a notice, in substance as follows: 1. In any action for the recovery of money or damages only, that the plaintiff will take judgment for the sum specified therein, if the defendant fail to answer the complaint." Id. § 53.

"The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or by the court or judge thereof, in which the action is commenced." Id. § 54.

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint, * * * to the defendant personally." Id. § 55, subd. 5.

The body of the summons in the case at bar is in due form, and complies with all these specified requirements. In *Belfils v. Flint*, 15 Or. 158, 161, 14 Pac. 295, 296, it was held that the service of a copy of the complaint upon a defendant in a law action was mandatory, the court saying:

"This is a statutory requirement which must be observed before jurisdiction can be assumed or conferred."

It will be remembered that in obeying the directions of the plaintiff's counsel, the sheriff delivered only one copy of the complaint, which was handed over to the defendant White. This being a law action, no jurisdiction of the persons of the other defendants was secured by such attempted service, though a copy of the summons was delivered to each. 32 Cyc. 449.

[8,7] The power of a court to quash a summons must rest upon the assumption that it is void. A defect in the form or matter of a summons, not absolutely destructive of its validity, although material and sufficient to cause a reversal of the judgment, does not deprive the court of jurisdiction, and therefore does not expose the judgment to collateral impeachment. 23 Cyc. 1075. The authority to set aside the attempted service of a summons proceeds upon the theory that the exhibition of the original or the delivery of a certified copy thereof was in-

effectual by reason of some failure to comply with the requirements of the statute regulating the service. Thus a defect in the return of a summons is not reached by a motion to quash, but must be assailed by an application to set aside the service. *Engelke, etc., Milling Co. v. Grunthal*, 46 Fla. 349, 35 South. 17. So, too, in *Hopkins v. Baltimore & O. R. Co.*, 42 W. Va. 535, 26 S. E. 187, a motion to quash a summons and the return of the service of it was sustained on the ground that the constable, in delivering back to the court the process which he was required to serve, did not certify that the agent of the defendant to whom a copy of the notice was given resided in the county in which the service was undertaken to be made. But upon appeal it was ruled that the defect mentioned did not affect the summons, or show that the court did not have jurisdiction, and hence could not be the basis of a motion to quash both the summons and the return.

[8-10] It will be kept in mind that the complaint charges a joint tort committed by all the defendants. The plaintiff had an election to proceed against any or all of them. *Cooley, Torts* (3d Ed.) 223; *Pomeroy's Code Rem.* (4th Ed.) § 208; *Cooper v. Blair*, 14 Or. 255, 12 Pac. 370; *Warner v. De Armond*, 49 Or. 199, 89 Pac. 373, 90 Pac. 1113; *Krebs Hop Co. v. Taylor*, 52 Or. 627, 97 Pac. 44, 98 Pac. 494. One joint wrongdoer cannot complain that others, equally guilty, are not united with him. *Scott v. Flowers*, 60 Neb. 675, 84 N. W. 81; *Whitman-McNamara T. Co. v. Wurm* (Ky.) 66 S. W. 609. At any stage of the proceedings the plaintiff could have dismissed his action as to some of the defendants without affecting the merits of the cause as to the others. *Berkson v. Kansas City R. Co.*, 144 Mo. 211, 45 S. W. 1119; *Melson v. Thornton*, 113 Ga. 99, 38 S. E. 342. This action can therefore be maintained against the defendant White, if it should be determined that no jurisdiction of the persons of the other defendants was obtained by the attempted service of the summons upon them. It is not to be supposed, however, that the command of plaintiff's counsel addressed to the sheriff, requiring him to serve a copy of the complaint only upon White, evidences a purpose voluntarily to dismiss the action as against the other defendants; but it will be assumed from such direction that the attorney who made the indorsement upon the summons believed the practice in suits in equity, where only one copy of the complaint need be served (L. O. L. § 398), also obtained in securing jurisdiction in actions at law of the person of more than one defendant. The summons, having contained all the information that the statute requires should be imparted, was not rendered void as to White, in consequence of the direction to which reference has been made. This being so, an error was committed in quashing

the summons. Its service having been good as to that defendant, the court also erred in annulling the service as to him.

[11] In order to toll a prescribed limitation, the statute declares:

"An action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him." L. O. L. § 14.

The clause, "or otherwise united in interest with him," as used in the enactment last quoted, when interpreted by the rule of *noscitur a sociis*, means a defendant in an action arising out of a joint contract, and not based upon a joint tort. *Patterson v. Thompson* (C. C.) 90 Fed. 647. This action is therefore not even deemed to have been commenced against the other defendants by reason of a proper service of the summons upon White.

[12] It remains to be seen whether or not, after the return of the original summons, showing all the defendants to have been found by the sheriff, the plaintiff's counsel could, without leave of court, lawfully issue another summons, and, if so, did its service upon Ball, E. E. Farrington, C. H. Farrington, and Coffey, on March 10, 1915, and within the two-year period of the statute of limitations (L. O. L. § 8), confer upon the trial court jurisdiction of their persons? A provision of our statute reads:

"Whenever it shall appear by the return of the sheriff, his deputy, or the person appointed to serve a summons, that the defendant is not found, the plaintiff may deliver another summons to be served, and so on, until service be had; or the plaintiff may proceed by publication as in this chapter provided, at his election." L. O. L. § 60.

The defendants' counsel, relying upon this enactment, and invoking the rule that the expression of one means of service is the exclusion of all others, cites the cases of *Briggs v. Davis*, 34 Me. 158, and *Loeb v. Smith*, 24 Misc. Rep. 200, 52 N. Y. Supp. 677, and contends that the right to issue another summons does not exist in Oregon until the original summons is returned non est inventus. It will be remembered that section 52, L. O. L., an excerpt from which is hereinbefore quoted, provides that the summons shall be subscribed by the plaintiff or his attorney. The method thus prescribed for giving notice, which, when properly served, secures jurisdiction of the person of a defendant, relates to the issuing of a summons in an action commenced in a court of record, and does not refer to a court of inferior jurisdiction, such as a justice's court where the summons must be issued and signed by the justice. L. O. L. § 2418. A summons issued by the plaintiff or his attorney in an action instituted in a court of record in Oregon is not "process" within the meaning of that word as used in our Code. L. O. L. § 1368; *Bailey v. Williams*, 6 Or. 71; *Whitney v. Blackburn*, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857. As

to the case of *Briggs v. Davis*, supra, it may be stated that actions in the state of Maine are commenced by suing out an original writ which is issued by the clerk of the court. It will thus be seen that the process there employed is judicial. So, too, in *Loeb v. Smith*, supra, it is stated that "a summons was issued by the clerk of the district court in the city of New York." The process there sued out was unquestionably judicial, though in courts of superior jurisdiction in the state of New York an action is commenced by the service of a summons, which notice must be subscribed by the plaintiff's attorney. The cases thus relied upon are not controlling in Oregon, where a summons issued in an action instituted in a court of record is not process, nor more than a mere notice to the defendant upon whom it is served. Section 55, L. O. L., specifies the manner of serving a summons. The next section of the Code, so far as involved herein, reads:

"When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof; * * * and it also appears that a cause of action exists against the defendant, * * * the court or judge thereof * * * shall grant an order that the service be made by publication of a summons in either of the following cases: * * * 2. When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or with like intent keeps himself concealed therein, or has departed from the state and remained absent therefrom six consecutive weeks."

Section 57 contains a clause as follows:

"When publication is ordered, personal service of a copy of the summons and complaint out of the state shall be equivalent to publication and deposit in the post office. * * * Personal service of a summons without the state may be made by any person not a party to the suit or action, and proof thereof made by his affidavit."

The publication of a summons, when ordered, must be made in a newspaper of general circulation, published in the county where the action or suit is commenced, if there be such a paper. L. O. L. § 58. The defendant against whom publication is ordered, on application and showing a sufficient cause at any time before judgment is rendered, shall be allowed to defend the action; and for like reasons and upon such terms as may be just he may also be permitted to defend at any time within one year from the entry of the judgment. Id. § 59. Section 60, L. O. L., upon which the defendants' counsel relies, has been hereinbefore set forth. That section is the concluding part of the statute with reference to the service of a summons by publication, and should be construed in connection with subdivision 2 of section 56, which provides for the service of a summons by publication in the cases there specified. Section 60 should also be interpreted in conjunction with section 57, which provides that when the publication of a summons has been

ordered, personal service of a copy of the summons and complaint out of the state shall be equivalent to publication and deposit in the post office.

When it is kept in mind that every summons issued in a suit or action instituted in a court of record in Oregon must be subscribed by the plaintiff or his attorney, it is believed that the latter part of section 60, L. O. L., relates to the service of a summons, either personally or by publication, after an order has been secured for service by the latter method. "In the absence of statutory authority a court," says a text-writer, "has no power to issue process to be executed beyond the limits of its territorial jurisdiction." 32 Cyc. 427. This authority has been conferred upon a court, or judge thereof, or a justice of the peace, when it satisfactorily appears by affidavit that the defendant, after due diligence, cannot be found within the state, and when it also appears that a cause of action exists against the defendant. L. O. L. § 56. An examination of that section will show that its provisions do not demand the return of a summons non est inventus as a condition precedent to the issuing of an order for service by publication, nor is a return of the summons "not found" a prerequisite for the making of such an order. *Bank of Colfax v. Richardson*, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664. The fact that such return is not required to be indorsed upon the summons before an order for its publication has been issued (L. O. L. § 56), but is demanded when it appears by the return of the officer or person appointed to serve the summons "that the defendant is not found," strengthens the conclusion we have reached that the latter section relates to, and governs, the service when attempt has been made to serve it pursuant to an order for its publication.

Under the practice prevailing in this state, a summons, not being process, is nothing more than a mere notice to the defendant in a suit or action instituted in a court of record, warning him that if he fail to appear and answer the complaint within the time limited, judgment will be taken against him for the sum demanded, or that the plaintiff will apply to the court for the relief prayed for in the initiatory pleading. As a summons, whether served personally or by publication pursuant to an order therefor, is, in every instance, subscribed by the plaintiff or his attorney, the issuing of a second or a subsequent summons is not an alias or pluries writ, and hence need not contain the clause, "as we have heretofore commanded you," or, "as we have often commanded you," since such notice in a court of record is not issued by the clerk. In this state a summons issued in a suit or action commenced in such court is an original notice, and though a return thereof is provided for (L. O. L. § 54), such delivery back is essential to show the court had jurisdiction of the per-

son of the defendant only when he has not appeared, answered, nor otherwise admitted the authority of the court over him. *Albright-Pryor Co. v. Pacific Selling Co.*, 128 Ga. 498, 55 S. E. 251, 115 Am. St. Rep. 108.

Though the question is not here involved, it is believed a plaintiff or his attorney, at the commencement of a suit or action in a court of record, may, if necessary, issue as many summonses as he elects, and thereafter file in court only the notices, from the returns of which it appears that one or more of the defendants has been served. The course suggested would be advantageous to a plaintiff when a defendant was attempting to flee the state so as to avoid the personal service upon him of a summons and a certified copy of the complaint in a law action. But however this may be, the plaintiff's counsel herein when he ascertained a mistake had been made in failing to have copies of the complaint served upon any of the defendants except White, had the right, at any time before the statute of limitations had run against his client's right, to issue another summons and cause it and certified copies of the complaint to be served upon the parties as to whom the prior attempted service was ineffectual.

Many other reasons are assigned by defendants' counsel to support the conclusion reached by the trial court herein, and authorities are cited as tending to uphold the contention thus made. A careful examination of the decisions thus relied upon leads to the conclusion that they are not in point under a statute like ours.

It follows from these considerations that the judgment is reversed as to each of the defendants, and the cause is remanded, for such further proceedings as may be necessary, not inconsistent with this opinion.

BENSON, BURNETT, and HARRIS, JJ., concur.

KIMBOL v. INDUSTRIAL ACCIDENT COMMISSION. (L. A. 4193.)

(Supreme Court of California. Sept. 20, 1916.)

1. MASTER AND SERVANT §371 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

Within Workmen's Compensation Act (St. 1913, p. 283) § 12, an injury arises out of the employment if there is a causal connection between the working conditions and the injury, but not in the absence of such connection, nor if the injury is common to persons regardless of the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §371.]

2. MASTER AND SERVANT §373 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

A restaurant dishwasher, upon whom, while at work, the ceiling fell, due to overload of stored goods on the upper floor, over which the

master had no control, received an injury "arising out of the employment."

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §373.]

3. MASTER AND SERVANT §371 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

If the employment necessarily accentuates and increases the danger to a higher degree than that to which persons generally are subjected, then it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment, even though unexpected or unusual and in no way actually anticipated.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §371.]

4. MASTER AND SERVANT §372 — WORKMEN'S COMPENSATION — "ARISING OUT OF EMPLOYMENT."

In determining whether injury arises out of the employment, it is immaterial whether the danger was anticipated, or the employer was free from fault, or the injury resulted from the act of a third party.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §372.]

5. MASTER AND SERVANT §101, 102(1)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

It has always been the law that it is the master's duty to furnish his servant a safe place to work, and if for any reason the place was unsafe the master was liable for resultant injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 178, 179; Dec. Dig. §101, 102(1).]

6. MASTER AND SERVANT §371—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Under the old law the employer's exemption from liability where he was not negligent existed solely because he was not negligent, and not because the injury did not arise out of the employment, and even under Workmen's Compensation Act the injury, to create liability, must result from a risk reasonably incident to the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §371.]

Henshaw, Lorigan, and Melvin, JJ., dissenting.

In Bank. Proceedings before the Industrial Accident Commission by Fred Douglas for workman's compensation, opposed by Ed. Kimbol, employer. Certiorari by said Kimbol to review an award of the Commission in favor of the claimant. Affirmed.

Boyer & Beach, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. Certiorari to review an award made by the Industrial Accident Commission to one Fred Douglas against petitioner, Ed. Kimbol, for injuries received by him by accident in the course of his employment by said Kimbol, and alleged and found to have arisen out of said employment.

[1, 2] There is no doubt that the injury to Douglas was sustained "by accident," within the meaning of our Workmen's Compensation Law, and admittedly the accident happened "in the course of the employment." Our act requiring as an essential to compensation

that the injury must not only be received in the course of the employment, but must also arise out of the employment (section 12), the claim is that the injury here did not arise out of the employment within the meaning of our act. A divided commission has found against this claim. There is no dispute as to the material facts.

Kimbol was the owner of and was conducting a restaurant business on the ground floor of a building in Los Angeles. Douglas was in his employ as a dishwasher. While working as such, the floor immediately above the place where he was at work suddenly gave way, with the result that he was struck by some falling object or objects and injured. The giving way of this floor was due to the fact that it was overloaded, a large quantity of bottled grape juice having been stored thereon. This floor was not included in the lease under which Kimbol occupied that portion of the building devoted to restaurant purposes, and he had no control whatever thereof; nor did he have any knowledge that the floor above was being used for storage purposes. It was in fact rented for a rooming or lodging house, and the lease contained a clause that it should not be used for any other purpose. Under these circumstances can it fairly be held that the injury arose out of the employment?

The Supreme Judicial Court of Massachusetts has said in regard to the meaning of the term "arising out of the employment" as used in Workmen's Compensation Laws:

"It [the injury] 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." In *re McNichols*, 215 Mass. 498, 102 N. E. 697.

This appears to us to be a good general definition of the term "arising out of the employment," and we think it fairly includes such a case as this. It will be conceded, in view of the facts we have stated, that the place in which Douglas was employed was not an unsafe place in the sense that there was any structural defect therein likely to cause injury so long as the building was used for the purposes for which it was in-

tended, and that the danger of a collapse of the ceiling of the restaurant and the collapse of such ceiling were due wholly to the unauthorized use by another of the floor above for storage purposes, and the consequent subjection of that floor to a greater burden than that for which it was designed; but because of this unauthorized use of the floor above for storage purposes those below were, in fact, in danger of injury from a collapse of the floor, and in that sense the place in which Douglas was required to do all his work was an unsafe place. The danger was one peculiar to that very place—an incident of the particular premises used as they were being used—and it is not unreasonable to say that Douglas was specially exposed to that danger by reason of his employment. Solely by reason of and in pursuance of such employment he was required to remain in this unsafe place exposed to this danger of a collapse of the ceiling of the room in which he was constantly at work. The risk was normally one incident to working in that place, one due solely to its unsafe condition. If this be so, we are of the opinion that the injury may fairly be said, in view of the authorities, to have arisen out of his employment. All the circumstances being considered, there is a causal connection between the conditions under which the work was required to be performed and the injury. The resulting injury was a natural incident of the work in view of the conditions under which it was being done, one that would have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment. The danger was peculiar to the particular place in which the employé was required to work. It is true that the accident was not actually foreseen or expected, but this is not necessary. It is sufficient that after the event it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

[3] The question of special exposure by reason of the employment has been considered in various cases. The general rule deducible therefrom is that, if the exposure of the employé to a particular danger differs substantially from the normal risk to which all are subject, if the employment necessarily accentuates and increases the danger to a higher degree than that to which persons generally are subjected, then it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment, even though unexpected or unusual and in no way actually anticipated. See *Martin v. Lovibond & Sons* (English Court of Appeal) 5 Neg. C. C. Ann. 985, and note; *Hoenig v. Industrial Commission*, 159 Wis. 648, 150 N. W. 996; *L. R. A.* 1916A, 839; 8

Neg. C. C. Ann. 192; State ex rel. People's Coal & Ice Co. v. Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 844; 9 Neg. C. C. Ann. 129; Adamson v. Anderson, Workmen's Comp. Cases 1913, p. 506, 2 S. L. T. 139.

[4] It seems clear that this case is one in which the accident and injury to Douglas can fairly be held to have "arisen out of the employment" within the meaning of that term as it is defined in *Re McNichols*, 215 Mass. 498, 102 N. E. 697, L. R. A. 1916A, 306, and the other authorities cited herein, and that the conclusion of the Accident Commission to that effect must therefore be sustained. As we have seen, it can make no difference that the danger was not known or anticipated; nor can it make any difference that the employer was entirely without fault. The liability for compensation created by our law is not founded on any want of care on the part of the employer; nor is it material that the dangerous condition of the place in which Douglas was working was due entirely to the fault of some third party. The room in which Douglas was required to do his work *had become* an unsafe place in which to be because of the danger of a collapse of the ceiling thereof, and solely by reason of his employment in that unsafe place he was specially exposed to such danger. We have said that an accident arises "out of the employment" where "it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes the employé," and that "it 'arises out of' the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury." *Coronado Beach Co. v. Pillsbury*, 158 Pac. 212. The italics are ours. Under the facts we apparently have here a risk to which the employer's business specially exposed the employé. The danger was a constant one, inherent in the place itself under the conditions there existing, and the injury was one which a person cognizant of those conditions would reasonably expect to occur.

[5] It has always been the law that it is the duty of the employer to use reasonable care to furnish an employé a safe place in which to do his work. If for any reason, whether due to the negligent or even criminal act of a third party or not, the place was in fact unsafe, the employer was liable to the employé for any injury due thereto, provided that if he had used reasonable care in the matter he would have known of the defect and would have remedied it. The condition as to the safety of the place in which the work was to be done is thus always a matter incident to the employment, and an injury arising from its unsafe condition has always been considered an injury arising out of the employment.

[6] Under the old law the employer's ex-

emption from liability where he was not negligent in the matter existed solely because he was not negligent, and not because the injury did not arise out of the employment. Our industrial compensation system has dispensed altogether with the element of negligence on the part of the employer, but it still must remain true that injury to an employé which is due to the dangerous condition of the very room in which he is required to do his work is an injury resulting from a "risk reasonably incident to the employment." Of course, there is no analogy between such a case as this and such cases as *Coronado Beach Co. v. Pillsbury*, supra, and *Fisbering v. Pillsbury*, 158 Pac. 215, in which it is held that there is no liability on the part of the employer to the employé for an injury inflicted by the "skylarking" of a fellow employé, because such an injury does not arise out of the employment.

In view of the suggestion as to the impossibility of the employer insuring against such an accident as this, it is proper to observe that if, as we hold the injury did arise out of the employment, it was one that would be covered by a policy insuring against liability for injuries to employés received in the course of employment and arising out of the employment.

The award is affirmed.

We concur: SHAW, J.; SLOSS, J.; LAW-LOR, J.

HENSHAW, J. I dissent. The case is the first of its kind before this court, and, because in my judgment the award is supported by an altogether strained and unwarranted extension of the language and meaning of our law, it has seemed to me fitting that I should express my views at length.

It is a part of familiar knowledge that the fundamentals of our Compensation Act are taken from the English law—a law which had been in existence for many years before the enactment of the similar measure by this state. The phrases of paramount and controlling importance in measuring the right to an award, namely, that the injury must have been sustained "in the course of the employment," and also must have "arisen out of the employment," are adopted bodily from the English law. As is to be expected, these phrases, as applied to accidents and injuries, came frequently before the English courts for interpretation. With only the latter of the two are we here concerned. Admittedly in this case the injury was sustained while the employé was properly engaged in his labors. The one question calling for answer is whether, within the language and spirit of our law, it can be said that the accident "arose out of the employment."

In considering the vast number of cases that have arisen and continue to arise under

the terms of the English act and of the similar enactments adopted by our states, it will not create surprise to find amongst them extreme cases and very doubtful cases. This is inevitably to be expected, since the jurists called upon to consider these acts are jurists trained in the principles of the common law, from which principles these acts are a wide departure, and also because these jurists are called upon to construe and to apply to these new conditions new phrases of description and definition. Nevertheless, in no one of these numerous adjudications which has passed under my review is there to be found any support for the extreme construction which is here given to our law in support of this award.

In so declaring I accept unreservedly the definition of the Massachusetts court in *Re McNichols*, which is adopted in the prevailing opinion, as being satisfactory and complete. But to my mind the very terms of that definition, in which the prevailing opinion finds support for this award, actually forbid it. I say this quite realizing the fact that my statement is necessarily a reflection upon my own powers of reasoning and understanding, or else that the language of the Massachusetts court furnishes a striking illustration of the grave limitations of English written words to convey exact thought.

It may not be amiss to consider for a moment precisely what these compensation acts design to accomplish. They were enacted under the sanction of the police power because it was believed that direct provision should be made for the support of an employé whose injuries grew out of his work, and for the maintenance of his family and dependents, where, under similar conditions, his injuries resulted in his death, and it was decreed that the employer—the industry—in all such cases should bear the burden of this compensation, the employer in some cases being allowed, in other cases being compelled, to insure against the losses which might arise from these causes. Elsewhere I have pointed out that the interest of the state in seeing that an injured workman receives compensation during the period of his incapacity is just as great whether that workman be injured in his hours of leisure or in his hours of labor, and equally that the loss to the workman and the economic loss to the state are just as great if the workman be injured in his hours of leisure as if he be injured in his hours of labor. Nevertheless these laws limit their beneficence with much rigidity to injuries received by the employé during his hours of labor which injuries must also arise "out of the employment." If this last phrase "arise out of the employment" means any injury (not willfully occasioned by the employé himself) which he sustains because as an employé he is working at a given place—and this unquestionably is the meaning of the prevailing decision—then there was no occasion for the lawmakers to have used this

phrase at all, for that construction is the exact equivalent of saying that a workman shall be compensated for any injury which he sustains during the course of his employment, or, in other words, while at work.

In the broadest sense, whenever accident and consequent injury befall a workman who is duly in the performance of his duties, it may be said that such accident and injury arose "out of his employment." But some of them arise out of the employment only because of the fact that by virtue of his employment the workman was at a given place at the given time when the accident happened. Is this latter class of accidents included within the meaning of our law? The prevailing opinion holds that it is. I am convinced that it is not. I construe our law to embrace only that class of injuries which may for convenience be described as "occupational injuries," precisely as we use the phrase "occupational diseases." To this broad class belong all injuries which result to an employé from the performance of his work, even though occasioned by his own negligent performance of it. Second, all of those injuries resulting to the employé, with or without negligence on his part, because of the employer's failure to perform some duty which he owes to his employé. And in this large class belong all of those cases where injury results from unsafe and inadequate appliances, place of labor, etc. And, third, all of those injuries resulting from extra hazard either inherent in the character of the labor or occasioned by the act of the employer.

Into one of these three classes must fall every injury for which compensation may properly be awarded, or otherwise there is no limitation whatsoever to the right of an award if the employé has been injured while at his labors. But it will not be disputed that our law does not grant compensation for every injury sustained while the employé is engaged in his labors. For example, it is not questioned that, saving in exceptional cases hereinafter distinguished, the employé is not entitled to compensation for injuries sustained by the so-called acts of God. Indeed, this was very early held and decided by our accident commissioners in *Fensler v. Acc. Com.*, 1 Cal. Ind. Accd. Com. Dec. No. 21, p. 41. There an employé engaged in piling and unpling bags of cement in a warehouse on a hot day was overcome by heat, and, after laying down the general principle that the employer is not liable for accidents occurring by the act of God, it was found that this employé was especially exposed by his employment to the danger of sunstroke, and that his injury was therefore compensable, thus following the unbroken line of authority of the English and American courts; nor yet, saving in exceptional cases, is an injury compensable which is occasioned by the tortious act of a fellow employé, or the tortious or negligent act of a stranger.

Touching injuries arising from the act of God, it is said by Mr. Ruegg (Ruegg's Employers' Liability and Workmen's Compensation [8th Ed.] p. 338):

"The question has arisen, Could an operation of the laws of nature—as earthquake, flood, lightning, or extraordinary tempest—occasioning personal injury to a workman whilst engaged in his employment, be said to be 'accident arising out of and in the course of the employment'? It is thought not. It may be granted that, but for the fact of his being engaged in the employment at the time, the accident would not have happened to him. In this sense it may be said to have happened to him in the course of his employment. But in what fair sense could it be held to have arisen out of the employment? The employment may have been a cause *sine qua non*, but we do not think it could be regarded even as an effective cause of the accident."

As illustrating the application of the principle and of the exception to its application may be cited *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, where a workman engaged in cleaning out gullies to prevent the road from being flooded was struck by lightning and killed. Compensation was denied him, the judge saying:

"I am unable to find any special or peculiar danger from lightning to which these men were exposed from working on the road. * * * It is only under very special circumstances, when the employment of the workman exposes him to peculiar risk from lightning, not shared by men in other employments, that an accident by lightning can be said to arise out of his employment."

The same principle was declared by the Supreme Court of Michigan in overruling an award granted by the Michigan Industrial Accident Board in *Klawinski v. Lakeshore & Mich. Southern Ry. Co.*, 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342. *Klawinski* was a section laborer. During a violent storm, under directions of the foreman of the gang, all took refuge in a barn. A bolt of lightning struck the barn and killed *Klawinski*. It was conceded that he met his death in the course of his employment, but it was held that his death did not occur by reason of an accident arising out of his employment. Such also was the ruling of the Supreme Court of Wisconsin in *Hoenig v. Industrial Commission of Wisconsin*, 159 Wis. 648, 150 N. W. 996, L. R. A. 1916A, 339, where *Hoenig* was killed by a stroke of lightning while working on a dam in the Fox river. The Industrial Accident Commission, notwithstanding the introduction of certain testimony seeking to show that a workman so employed was exposed to an extra hazard from lightning, declined to consider the evidence sufficient to establish this extra hazard and refused to grant an award. The judgment of the commission was sustained by the Supreme Court. Upon the other hand, the exceptional cases where an award from death by lightning has been sustained because of the extra hazard growing out of the special occupation are typified by *Andrew v. Falls-worth Industrial Society Limited*, [1904] 2 K. B. 32, 6 W. O. C. 11, where a bricklayer was

killed by lightning while working on a scaffold 23 feet above the level of the ground. Expert evidence was given showing that his position exposed the deceased to extra hazard and special danger from lightning. The county court held under this showing that compensation should be allowed, and the award was sustained for the indicated reasons. Such also was the decision of the Supreme Court of Minnesota in *State ex rel. People's Coal and Ice Co. v. District Court*, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, 9 Neg. C. C. Ann. 129, under certiorari to review an award, where the driver of an ice company, compelled by his duties to be out in stormy weather, left his team and went toward a tall tree, either for protection or in the performance of his duties soliciting orders. He was killed by a bolt of lightning. The authorities are reviewed and the award sustained on the ground of the unusual risk and special hazard.

It will be instructive at this point to consider other cases where the question of extra hazard pertaining to the employment has been considered and the claim allowed or disallowed. In *Armitage v. Lancashire & Yorkshire R. R. Co.*, [1902] 2 K. B. 178, the accident happened to a workman engaged in his work, through the willful wrongful act of a fellow workman, and it was held the accident did not arise out of and in the course of his employment. *Falconer v. London, etc., Ship Building Co.*, 3 Fed. 564, arose under the following facts: The accident befell a workman through the negligence of a fellow workman who was indulging in horseplay, and it was held that the accident did not arise in the course of his employment. To the same effect are our own cases. In *Coronado Beach Co. v. Industrial Accident Commission*, 158 Pac. 212, an employé going down a flight of stairs in the performance of his duties was tickled by a fellow employé. He fell and seriously injured his knee. Compensation was denied him upon the ground that the injury was not from an accident arising out of the employment or incidental to the employment. To the same effect is *Fisheing v. Industrial Accident Commission*, 158 Pac. 215, where an employé lost the sight of an eye by a missile fired into it from a trick camera operated by a fellow employé in sport. In the first of these cases this court accepts the unquestioned rule so frequently noted above that the injury must be the result of a "risk reasonably incident to the employment." Upon the other hand, in *Challis v. London & S. W. Ry. Co.*, [1905] 2 K. B. 154, an engine driver received injuries resulting in his death through being struck by a stone thrown from a railway bridge at his engine by a malicious boy. Here *Collins*, Master of the Rolls, uses the phrase so often found in the decisions "a risk incidental to the employment," and his exposition clearly shows the meaning with which he employs these words; for he says that an accident arising out of an em-

ployment necessarily involves the consideration of the question, "what risks are commonly incidental to the particular employment in question?" And it is held that the temptation of boys to throw stones, whether done maliciously or heedlessly, is so well known that the risk to which the engine driver was exposed from this source was an extra hazard of his business, even though it were not a hazard common to other businesses. And this is exemplified by the language of Cozens-Hardy, Master of the Rolls, in *Craske v. Wigan*, [1909] 2 K. B. 635, where, discussing the *Challis* Case, he says:

"That case really turned on this: That there was evidence which satisfied the county court that there was an irresistible temptation to small boys to drop stones onto a train as it passes under a railway bridge. In that case a boy dropped a stone which hit the glass of the cab of the engine where the driver was, with the result that the fragments of glass were driven into his eye. We there held that that was a risk incidental to his employment. To quote a few words from my own judgment in that case, I said: 'It seems to me that the risk of such an occurrence is one which may reasonably be looked upon as incidental to the employment of an engine driver, though it might not be incidental to other employments.'"

The principle that only risks incidental to the service are covered by the act stood established as the interpretation of the English law long before and at the time our own act, with identical language, was adopted. *Wilson v. Laing*, 46 S. L. R. 843. This condition, namely, that the accident is incidental to the employment, must be found to exist in all cases, even those where the award is based upon the exceptional hazard. Thus in *Rowland v. Wright*, [1909] 1 K. B. 963, known as the stable cat case, a stableman, in the recognized discharge of his duty, was taking his meal quietly in the stable, when the cat, without any provocation, flew at him and bit him. The cat was the proprietor's cat. It remained in and about the stable at the instance of the proprietor. For it and its conduct he was held responsible. His employés were thus subject to this extra hazard at the instance of the employer, and the injury which resulted to this one thus became incidental to his employment, the court, in discussing the case in *Craske v. Wigan*, *supra*, declaring that:

"The stable cat was really a part of the furniture of the stable. The accident was just as much an accident arising out of his employment as if he had been kicked or bitten by a horse in the stable."

In *Nisbet v. Rayne, etc.*, [1910] 2 K. B. 689, a cashier was traveling in a railway carriage to a colliery, with a large sum of money for the payment of his employer's workmen. He was robbed and murdered. It was held that he was the victim of an accident within the meaning of the law, and that the extra hazard which he underwent in carrying this large sum of money was "a risk incidental to his employment and likely to have been in the contemplation of the parties when *Nisbet* was engaged," Cozens-Hardy, Master of

the Rolls, affirming this view upon appeal, and declaring that *Nisbet* was exposed to this special risk incidental to his employment. The same view was taken and principle announced in *Anderson v. Balfour*, 2 I. R. 97, where a gamekeeper was attacked by poachers. Notwithstanding the act of the poachers was criminal, it was held that this extra hazard to which the gamekeeper was exposed was incidental to his occupation. It is a generally accepted principle that risks to which all persons similarly situated are equally exposed are not risks incidental to the business.

Having thus pointed out certain exceptions distinguishing those engaged in particular employments and exempting them from the operation of the rule upon the ground of a special hazard incidental to the employment, another class of cases now merits mention. The ordinary perils of a highway or of a crowded street are common to all upon the highway or street. Yet it is held that, where the nature of one's employment compels his continuous presence on and use of the streets, and even perhaps where a special and particular service requires his presence upon a street for a limited time, if injured he becomes entitled to compensation, but always upon the same ground of the special hazard incidental to the business. Thus a collector was kicked by a passing horse while riding in the street on his bicycle in the course of his employment, and was allowed compensation for the indicated reason. *M'Neice v. Singer Sewing Machine Co.*, 48 Scott. Law Rep. 15. To like effect in *Millar v. Refuge Assurance Co.*, 49 Scott. Law Rep. 67. And in *Martin v. Lovibond & Sons*, 5 N. C. C. A. 985, a drayman, whose duties took him into the street for many continuous hours while going his proper rounds, stopped outside a public house, left his dray, crossed the street, drank one glass of ale, and recrossing the street to his dray was run over and killed. The English Court of Appeal, first declaring that the drayman was still in his employment during this temporary absence for refreshment, held that the street risk that he ran was incidental to his employment, and that his hazard, since he practically spent his life upon the streets, was exceptional, and that he was "exceptionally exposed to street accidents; * * * whereas an ordinary member of the public not so exceptionally exposed would not be entitled to claim compensation." This principle was declared by the California Accident Commission in *Leary v. Fairchild, Gilmore, etc., Co.* (volume 1, No. 3), where *Leary*, engaged in repairing pavements in the street, was struck by an auto truck. And, finally, touching the proposition that it is not necessary that one's occupation should demand his continued presence upon the street, but that the same principle would apply to one who was required to be upon the street in the performance of some specially delegated duty, it is

sufficient to refer to Elliott, Workmen's Compensation Act (6th Ed.) p. 78, and to the language of Cozens-Hardy in McDonald v. Owners, etc., 2 K. B. 926, where he says:

"If I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to my friend's house, I should be liable. If, however, he, having a night off, goes, as he is at full liberty to go, to the Franco-British Exhibition for his own amusement, and meets with an accident at the same spot, I take it that I should not be liable."

I have heretofore said that all injuries to be compensable under our act must, in a broad sense, be occupational injuries, and that in the first subdivision will naturally fall all those injuries resulting to an employé and growing out of his performance of the work, even though the accident has its origin in his own negligent performance of it. The precise kind of accident or character of injury which an employé may thus sustain is immaterial, and the fact that it may be unusual or exceptional in character is equally immaterial. Thus in the case at bar, if this dishwasher had carelessly slopped water upon the floor and made it slippery, and then, taking up a knife for the purpose of cleaning it, had slipped and wounded himself with the knife, the accident would have been exceptional and unusual in character. But it would have arisen strictly out of the performance, though the negligent performance, of his duty. No one, I take it, will question the soundness of this classification nor of the right of the employé to compensation for any injury so arising.

As little doubt can be entertained over the soundness of the second classification—the right of the employé to compensation where the employer has failed in a duty owing to the employé, for this is but one of the forms of the familiar common-law right of action. It is within this class, as I read the prevailing opinion, that the accident to Douglas is placed. It calls for detailed consideration later. The third class, entitling the employé to compensation when the injury results either from an extra hazard inherent in the character of the labor or occasioned by the act of the employer, is typified by the cases above cited, such as the Challis Case, where the engine driver was struck by the stone thrown by a malicious boy, and the award was upheld upon the ground that engine drivers are exposed to an extra hazard inherent in the character of the work, and the Andrew Case, where the award in the case of the bricklayer killed by lightning upon a high scaffold was sustained upon like ground. The cases where liability is imposed upon the employer for extra hazard to his employes occasioned by his own act are typified by the Rowland (or stable cat) Case, and by the McNichols Case, where the award was sustained because the deceased employé had been beaten to death by a fellow workman in an intoxicated frenzy of passion; it being

known to the employer that the offending workman did so become intoxicated and did fall into violent fits of rage and would be liable to assault his fellow workmen when in such condition, but that nevertheless he was retained in the service of his employer.

It is in this case that the definition of an injury arising out of the employment is given and found acceptable by this court. The definition, it is proper to say, is but a compilation of the utterances of English judges, and it will be of advantage in determining the meaning of the language to quote some of these utterances. Thus says Hardy, M. R., in Butler v. Burton on Trent Union, [1912] W. C. Rep. 222:

"We have heard an argument from counsel for the respondent that it did arise out of the employment because it took place on premises where Butler was engaged in working. If he was right in this argument, the words in the act providing that the accident must arise 'out of' the employment might be omitted, and the words providing that the accident should arise 'in the course of' the employment alone be left. The provision that the accident must be an accident arising out of the employment has the meaning that the accident must arise out of some risk reasonably incidental to the employment. * * * There was nothing peculiar to his employment which rendered the risk of this accident happening greater than it would have been otherwise."

And says Buckley, L. J., in Fitzgerald v. Clarke & Son, [1908] 2 K. B. 796:

"The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incidental to the employment."

And says Kennedy, L. J., in the same case:

"The words [arising out of] appear to point to accidents arising from such causes as the negligence of fellow workmen in the course of the employment, or some natural cause incidental to the character of a business." "We conclude, therefore, that an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it. That this is so appears from an examination of Armitage v. Lancashire & Yorkshire Railway Co., supra, Collins v. Collins, [1907] 2 I. R. 104, Murphy v. Berwick, [1908] 43 Ir. L. T. R. 126, and Blake v. Head, [1912] 106 L. T. R. 822, in each of which recovery was denied because the act of the third party was not a risk reasonably to be contemplated by the employé in undertaking the employment." Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458.

Says Hardy, M. R., in Craske v. Wigan, [1909] 2 K. B. 635:

"I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the Court of Appeal since these acts came into operation, namely, to hold that it is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say, 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.' Unless something of that

kind is established, the applicant must fail, because the accident is not one arising out of and in the course of the employment. In my view we should not be administering law and justice if we did not hold that the learned judge was quite right. The appeal must be dismissed."

And says Lord Salvesen, in *Kinghorn v. Guthrie*, [1912-13] 50 S. L. R. 863, after setting forth with approval the language just quoted from *Craske v. Wigan*:

"It is, of course, true that he would not have met with the accident unless he had been in that particular place, and that he would not have been in that particular place unless he had been engaged in that particular employer's work; but, as the Master of the Rolls said, that is not enough; you must point to something in the nature of the employment that makes you peculiarly liable to a risk of that kind."

That it may not be thought they have been intentionally ignored, it is pertinent to refer specifically to the cases cited in the prevailing opinion as supporting this award. The first of these is *Martin v. Lovibond*. That case has already been considered. The drayman left his truck and crossed the street, drank one glass of ale, and returning was injured. The decision points out that the drayman, with his long hours of street service, was entitled, as a part of his employment, to adequate food, and that this included reasonable drink; that therefore he was engaged in his employment at the time the accident occurred, and, though he received his injuries upon the street, the nature of his employment exposed him to a peculiar hazard which brought the case within the compensatory terms of the act. *Hoenig v. Industrial Commission* also has been mentioned, and is the case where an employé working on a dam in the Fox river was killed by lightning, but the holding was that there was no special hazard in his employment which would entitle him to compensation. *People's Coal and Ice Co.* has also been mentioned. That also is the case of a special hazard by lightning growing out of the nature of the employment. The last case is *Adamson v. Anderson*, [1912-13] 50 S. L. R. 855. There a division of the Scottish court held that a workman who, during a violent gale, was engaged in erecting a stone-planing machine in an open yard, and who, while bending over, was struck and injured by a slate blown off the roof of an adjoining building, was entitled to compensation, because the character of his employment exposed him to this extra hazard. The case was declared by the court to be one of the border line and doubtful cases. But immediately following that case another division of the same court decided *Kinghorn v. Guthrie*, *supra*. There a carter, while leading his horse and wagon out of his employer's yard in the course of his employment, was struck by a piece of corrugated iron blown by a high wind from the roof of an adjoining building, and it was held that the accident did not arise out of his employment. A not

very successful attempt was made by the learned judges to distinguish this case from the preceding, the basis of the distinction seeming to be that in the *Anderson* Case the employé was bending over, looking at his work, and so was unable to detect his danger from the flying slate. It must be apparent, I think, that no one of these cases affords any support for upholding the award for an accident arising under the circumstances of the present case.

Attention may now be directed to a consideration of the definition in the *McNichols* Case and to the statement in the prevailing opinion that:

"It seems clear that this case is one in which the accident and injury to Douglas can fairly be held to have 'arisen out of the employment' within the meaning of that term as it is defined in *Re McNichols*."

But, before doing so, it should be pointed out that our own law is more specific than is the English law or the law of Massachusetts. With an apparent deliberate intent to limit the right of recovery to occupational or industrial accidents, it declares in terms the conditions which must exist before a recovery may be awarded, and one of those conditions is that the injury must have been "proximately caused by the employment." W. C. I. & S. Act, § 12, subd. 3, as amended by St. 1915, p. 1081, § 2.

Can it be said that this injury was proximately caused by the employment? If so, it is only in that very limited and discredited sense spoken of by Ruegg and again quoted:

"It may be granted that but for the fact of his being engaged in the employment at the time the accident would not have happened to him. In this sense it may be said to have happened to him in the course of his employment, but in what fair sense could it be held to have arisen out of the employment? The employment may have been a cause *sine qua non*, but we do not think it could be regarded even as an effective cause of the accident."

And this, as we have seen from the quotations above, is the precise view taken by all the English and American courts; also it is the precise view taken by the Massachusetts court. Says that court, compensation is to be allowed "if the injury can be seen to have followed as a natural incident of the work." But this accident was not an incident of the work, natural or unnatural. Compensation is allowed if the injury can be seen "to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment." There was nothing in the nature of this employment that exposed the injured person to this injury. Would any one say that, growing out of the nature of the employment of dishwashers, they are liable to be injured by the overloading of floors above the restaurants where they work? "It excludes," says the Massachusetts court, "an injury which cannot fairly be traced to the employment as a contributing proximate cause." This is nearly

the language of our own statute just quoted and discussed. "The causative danger must be peculiar to the work," as the lightning stroke, or the stone throwing at locomotive engineers. Was this danger in the slightest sense peculiar to the work? "It must be incidental to the character of the business." Will it be said that it is incidental to the character of the business of a dishwasher that he shall be injured by an outside agency in crushing down a ceiling over his head? "It need not have been foreseen or expected," which is perfectly true of most accidents, the precise form which they may take being beyond the reach of exact foreknowledge. But the accident "must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." This was a risk not in the slightest connected with the employment. It was an accident that happened to the man because his employment happened to place him where an independent tortious act of a third person inflicted injury upon him.

But it is said that the place where the injured man worked was unsafe, and that because it was unsafe the employer is liable. This pays not the slightest regard to all the other elements—that the employer has failed in some duty; that the special condition was or should have been known to him. But the prevailing opinion reasons that because a place of employment has become unsafe, regardless of the acts and conduct of the employer, regardless of the means or measures by which it has been made unsafe, the employer is liable. Here, to my mind, is the grave mistake in reasoning leading to a most unwarranted extension of the law. The act of piling bottles of grape juice upon the floor above was negligent and tortious. It was the act of an independent third person, performed without the knowledge of the employer. Admittedly the employer was in no way responsible for this act. If, then, the employer is to be held responsible for all such kinds of accident upon the theory that the premises have become unsafe, and all this without regard to his chargeable knowledge of the fact, it inevitably results in declaring the employer to be an insurer of his employes whenever accident has befallen them while engaged in their duties. There can be no distinction between a tortious act committed by negligence and one committed by design. The injury that results will be the same; the right of compensation to the injured person is the same (saving, of course, in the exceptional case where punitive damages may be added). What would be said, then, if the accident had occurred by the intent of the man who piled the bottles of grape juice to accomplish the result which his negligence brought about? The place of labor would have become equally unsafe. Is it possible that our law contemplates a

recovery for such a wrongful act not within the legitimate hazard of a business? Assuming that a destructive bomb had either carelessly or intentionally been left in the room above, and by its explosion the same injury had resulted—the premises were made equally unsafe—is the employer liable? The length of time when the premises became unsafe, or the knowledge of the employer that they have become unsafe, is utterly eliminated. The premises become equally unsafe whether the bomb is attached a one-minute fuse or clockwork which will explode it in 48 hours. And for any and all of these acts it is held that the employer is liable in compensation. Yet every decision is to the contrary and limits the employer's liability to accidents legitimately connected with the hazards of the business. Let us take the case of the boy descending the flight of steps and made to fall by the tickling of a fellow employé. Assume that, instead of so doing, the fellow employé, in horseplay, had greased the steps, and so occasioned the fall. Here would be another instance of the premises being unsafe, and here, under the authority of the prevailing opinion, the employer would be liable. Yet the decisions, as we have taken pains to point out, hold the employer to be exempt from liability for the willfully tortious act either of fellow employes or of outsiders, and for all the negligent acts of fellow employes, unless the negligent act has a bearing upon the performance of the duties of the injured employé. The boy who was tickled was in the performance of his duty. The other boy who negligently tickled him was not.

If the boy had greased the steps, the employer would have been liable, but because he tickled his companion the employer is exempt. Can this be the law? And if the unsafeness of the place of labor is the sole controlling consideration, what becomes of the Kelly Case, *supra*, the Klawinski Case, *supra*, and the Hoening Case, *supra*, where precisely as in the Andrew Case, *supra*, the men were killed by lightning stroke? In all these cases indubitably the places of labor became as unsafe when the men were struck and awards denied as was the place where Andrew was struck and an award given. No one of these cases adopts for an instant the reasoning that an employer without fault can be held liable for an untoward and unexpected injury occasioned by act of God or a third person, nor accepts the theory that an employer may so be held liable because at the instant of the accident the place of labor had become unsafe. So far as all the adjudications go, it is uncontroverted that acts by outside agencies willfully tortious or negligently done are not acts arising out of the employment, even though they make the place of labor unsafe, unless peculiar and exceptional circumstances distinguish them; a familiar proposition typified, as has

been said, by such cases as the Challis Case and the Bryant Case.

In my judgment the award should be annulled.

We concur: LORIGAN, J.; MELVIN, J.

ARUNDELL v. AMERICAN OILFIELDS CO. (Civ. 1520.)

(District Court of Appeal, Third District, California. Aug. 8, 1916.)

1. WORDS AND PHRASES—"TOWER."

In testimony that a driller in an oil well is supposed to be boss when he is on tower, "tower" means the same as "shift" in other mining operations.

2. MASTER AND SERVANT §279(5)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for injuries to a tool dresser, evidence held to justify the jury in finding that the driller under whom the tool dresser worked was negligent in raising a pipe by a rope rather than by elevator, and in leaving the pipe suspended at a height where the tools, when elevated, would interfere with it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. §279(5).]

3. EVIDENCE §587—WEIGHT AND SUFFICIENCY—NECESSITY FOR DIRECT EVIDENCE—"INDIRECT EVIDENCE"—"INFERENCE."

Under Code Civ. Proc. § 1832, defining "indirect evidence" as that which tends to establish a fact by proving another fact, which affords an inference of the existence of the fact in dispute; section 1958, providing that an "inference" is a deduction which the reason of a jury makes from the facts proved; and section 1960, providing that an inference must be founded on fact legally proved—the law does not require in all cases direct evidence of a fact in dispute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2436; Dec. Dig. §587.

For other definitions, see Words and Phrases, First and Second Series, Indirect Evidence; Inference.]

4. MASTER AND SERVANT §203(1)—INJURIES TO SERVANT—ASSUMED RISKS—"ORDINARY RISKS."

"Ordinary risks" assumed by a servant are such as may not be avoided by reasonable care by the master, or by his servant, who is superior to the injured servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-540, 542, 543; Dec. Dig. §203(1).]

For other definitions, see Words and Phrases, First and Second Series, Ordinary Risk.]

5. MASTER AND SERVANT §216(3)—INJURIES TO SERVANT—ASSUMED RISKS.

A tool dresser does not assume the risk of injury by the falling of a pipe, due to the negligence of the driller under whom he worked in leaving the pipe suspended where the tools would interfere with it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 570; Dec. Dig. §216(3).]

6. MASTER AND SERVANT §238(2)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The act of a tool dresser in tying a rope on a heavy pipe to be hoisted at the direction of the driller, through whose negligence in not hoisting the pipe far enough the tools interfered with it and caused it to slip from the rope and

fall, does not show contributory negligence of the tool dresser, barring recovery for his injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 744; Dec. Dig. §238(2).]

7. MASTER AND SERVANT §279(5)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence held to show that a driller of an oil well had a right to control or direct the services of a tool dresser, within Civ. Code, § 1970, providing that an employer shall be liable for injury resulting from the neglect of a person, employed by the employer, having the right to control or direct the services of the employé injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. §279(5).]

8. EVIDENCE §114—COMPETENCY—REMOTENESS.

In an action for injuries to a servant, a copy of a record of a land company of weather reports telephoned to the office from superintendents of farms in various parts of the county was not competent to disprove that it rained at the oil well where plaintiff was injured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 125-182; Dec. Dig. §114.]

9. NEGLIGENCE §134(1, 2)—ACTIONS—EVIDENCE—SUFFICIENCY.

Negligence, like any other fact, may be inferred from a preponderance of the evidence, whether circumstantial or direct, and plaintiff need not prove his case beyond a reasonable doubt.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267, 272; Dec. Dig. §134(1, 2).]

10. APPEAL AND ERROR §930(1)—INSTRUCTIONS—DUTIES OF JURY—BURDEN OF SHOWING ERROR.

The refusal of an instruction that the jury should not be governed by sympathy, but by the evidence, and that they should not be influenced by the fact that plaintiff is a laboring man, and defendant a corporation, in the absence of anything tending to show that the jury acted out of sympathy for plaintiff, or through prejudice against defendant, is not error; it being presumed that the jury obeyed their oath.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755, 3756, 3758; Dec. Dig. §930(1).]

11. MASTER AND SERVANT §291(12)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a servant, an instruction that a plaintiff cannot recover unless he has a preponderance of the evidence supporting the proposition that he was not at the time of the accident guilty of any failure to exercise ordinary reasonable care for his own safety, which proximately contributed to his injury, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1143, 1144; Dec. Dig. §291(12).]

12. APPEAL AND ERROR §901—REVIEW—BURDEN OF SHOWING ERROR—INSTRUCTIONS.

On appeal from a judgment for plaintiff, where plaintiff contends that the proper instructions which were refused were covered by instructions given, the burden is on defendant, by setting forth all the instructions, to show the error complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. §901.]

13. APPEAL AND ERROR §1066—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

An instruction correctly stating the law as found in Civ. Code, § 1970, as to the liability of

an employer for injuries to an employé, if not applicable, is not prejudicial to the employer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.]

14. TRIAL § 189 — INSTRUCTIONS — ASSUMPTION AS TO FACTS.

An instruction beginning, "If you believe from evidence that," etc., does not assume the existence of any facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 442-445; Dec. Dig. § 189.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Roy E. Arundell against the American Oilfields Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Olin Wellborn, of Los Angeles, and George E. Whitaker, of Bakersfield, for appellant. Shepard & Alm, of Los Angeles, and J. R. Dorsey, of Bakersfield, for respondent.

CHIPMAN, P. J. Judgment for \$10,000 followed the verdict of a jury as damages suffered by plaintiff for the loss of his right hand while in defendant's employ. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

In 1910 plaintiff, then 23 years of age, worked for defendant for about six months, receiving \$3.50 per day and board, including Sundays. He had had some previous experience in the oil fields, being employed principally as a "roustabout." For some weeks previous to November 15, 1910, he had been employed by defendant as a "tool dresser" and was working in that capacity on that date. He commenced work at midnight, the accident occurring at about 4:30 o'clock in the morning. The only other person at work on the derrick at the time was one A. F. Mellen, designated as a "driller." Plaintiff's testimony as to what he was doing and the cause of the accident was as follows:

"I was jarring on a pipe, running the spear to the bottom of the pipe, and jarring it up trying to free the pipe to get it loose in the well—it was froze. The well was somewhere in the neighborhood of 2,000 feet deep. A spear is a contrivance you put on the tools, the same as you do a bit; then you can go down into the casing and take hold of it. The string of tools was about 40 feet long. It may be a little more with the spear. I continued jarring on the pipe two or three hours. After I was through jarring I pulled on the casing trying to pull it loose. I got it partly loose, then I parted the pipe, it was hard to tell where. By 'parting the pipe' I mean pulled it in two. I next tried to take the spear out of the hole. I didn't succeed, because the top joint was crimped near the top, and the spear would not come through. We had to take the joint out and get it out of the road—the top joint. I unscrewed it. In the first place Mellen and I had to unscrew this joint loose from the rest of the pipe. We both helped to do it. After that was done I put a rope on the pipe and Mellen pulled it up in the derrick. If I remember right, I mentioned the fact about using elevators, I said that to Mr. Mellen. He said, 'No,' to use the rope. I tied the rope on with a timber hitch just below

the collar, probably 6 or 8 inches, maybe a foot. The collar is about 6 inches wide. The rope was about an inch or a little more thick. It was a strand out of a drilling cable, about 10 feet long. After tying the rope to the pipe I hooked it onto the block hook. It had an eye in it. Block hook is what they generally use for handling casing, the one that is permanently in the casing block. I slung the eye of the rope over that hook in the casing block. Mr. Mellen pulled the casing up in the derrick with the casing block by means of the engine and apparatus. At the time he was at the throttle. You can reach it from the derrick floor. This happened about 4 or 5 in the morning. It was dark. I could see about 20 feet in the derrick; above that I could not distinguish anything. After Mellen had hoisted that pipe I pulled the tools up and took that spear out. I lifted the tools just high enough so that I could take the spear off. It was on the lower end. The spear got above the floor. Mellen told me to elevate the tools at that time. Mellen had not got around to helping me yet. I put on the wrenches to break the joint. It would not take me but a few minutes to loosen that joint. When I removed it the tools were naturally moving around to a certain extent; jarring them rather. They were practically perpendicular all the time, but they would swing. I did not lower or elevate them. We didn't get the spear loose. This joint of pipe fell and caught my hand. I had my hand on the spear at the time. I just started to steady the tools to put on the wrench. The pipe dropped down around the tools. It struck me back of the thumb joint on the wrist. It removed my thumb, two fingers, and part of the others. The pipe was 6½ inches in diameter. It weighed, I think, 20 pounds to the foot. It was 14 or 15 feet long. * * * They amputated the hand at the wrist in the hospital."

Defendant makes the following points against the validity of the judgment: (1) Insufficiency of the evidence to show how the accident happened; (2) contributory negligence; (3) plaintiff assumed the risks of the employment; (4) plaintiff was not injured by the negligent act of an employé "having the right to control or direct the services" of plaintiff; (5) errors occurring at the trial.

[1] Plaintiff's testimony, above given, conveys some notion of how the accident happened; but it becomes necessary to inquire further into the particulars and plaintiff's relation to the work in hand. Much testimony was given explanatory of the relative duties of the driller and the tool dresser in a derrick for drilling an oil well. Witness Crites, who was superintendent of the Peerless Oil Company in the Kern River field, and had been in the oil business continuously since 1896, "in the operating department, drilling wells, etc.," and was "familiar with the custom and manner of performing work in and around derricks," testified:

"The driller is a man that has charge of the tools, and you look to him, of course, to do that part of the work. The tool dresser's business is to help the driller. If there is a boiler, he takes care of the boiler; keeps the fire up, and keeps water in the boiler, and attends to the work in and around the rig that the driller requires of him, dressing bits, helping him in all sorts of ways around the derrick. The tool dresser has certain duties which are strictly his duties, and the driller has certain other duties which are strictly his duties. As to the general work, the

driller is boss of the rig and directs the work in and around the derrick. In the performance of work that requires both the tool dresser and the driller to lend a hand, the driller directs the work. Attending to the boiler is one of the routine duties that the tool dresser is supposed to do. If he wants any help, he usually asks the driller to help him. In the actual work of sinking a well, handling the tools, hoisting the casing, and such matters, the driller directs that work. The driller controls the derrick; directs the tool dresser in and about his work in the derrick."

Other witnesses described the driller as "the man that does the work inside and does the directing of it. He is supposed to be boss when he is on tower." ("Tower" means the same as "shift" in other mining operations and in plaintiff's case was from midnight until noon.)

Witness Harry Arundell, who was "lease drilling superintendent" of defendant company, testified to the duties of the tool dresser and driller:

"The tool dresser's duties are to fire and look after the boiler, take care of the engine, and assist the driller around the rig, under the driller's orders. He works under the driller's orders entirely; the driller in a derrick has, in a way, a right to control and direct the services of the tool dresser at his work. All the tool dresser's work is generally under his supervision. He has to do the work to the driller's satisfaction. The meaning of 'tool dresser' is dressing and sharpening tools. * * * In this line of work it is necessary to use a timber hitch almost every day around a drilling rig, particularly hoisting pipe. If a timber hitch is properly tied with a dry rope, it would not permit a pipe to slip from the rope and fall; it could be tied with a wet rope so that it can't slip. A wet rope would be stiff and hard to use, and would not draw down tight, and would have a tendency to open up if the weight was taken off of it. * * * The scope of the duties of driller and tool dresser are understood by them usually, so that they can work without much said. Ordinary work, sometimes very little spoken; ordinarily each knows his duty and goes ahead and does it. It was the duty of the tool dresser to step to the throttle when the tools started up, and to run the engine while the tools are hoisted out. Custom made it the duty of the driller to be at the throttle when the pipe was hoisted. It is the tool dresser's duty, under the driller's supervision, to fasten the hoisting block and hook to the pipe."

It is not necessary to quote further from the testimony as to the relative duties of the driller and tool dresser. There is but little difference between the testimony of plaintiff and defendant on this point, and there is substantial agreement that the driller is the directing head of the work in the derrick and controls the movements of the tool dresser.

A. F. Mellen was the driller in charge of the work when the accident occurred. He and plaintiff were the only persons present. His deposition was taken by defendant and was introduced by plaintiff and read in evidence. As to the accident he testified:

"It is a kind of a mystery how the joint of pipe happened to fall. In raising the pipe to strip the tools through it while taking off the spear the pipe fell—fell from up in the derrick. We pulled it up there with a block and tackle, the casing block—I did. It was fastened to a

sling made of rope. Arundell fastened the rope to the piece of pipe that fell. It was his duty. He knew how to fasten it. Nobody directed him how to fasten it. As a rule we generally kept the block and tackle on the hook all the time. It is a tool dresser's place to put that on; it is almost always carried on the hook. The elevators generally hang on them. The elevators are used to put in a long string of pipe; and the sling is used for a small article. As a general thing they were both of them hanging on the same hook. I don't know whether they were on that night—as a rule they were on. I hoisted the pipe up with an engine. I ran the engine. * * * I could not say how high I hoisted it. All that I had to go by was the lines. I figured on hoisting it to the blocks at the top of the derrick—probably 40 feet. Arundell hooked it on. I could see for myself that the pipe was unscrewed when I hoisted. * * * The rope was put on after the pipe was unscrewed. While Arundell was putting the rope on it, I was at the engine. After I helped to unscrew it, I went to the engine and told him to let the blocks down while he connected with the rope. I saw when he got the rope finally connected. When the rope was on, I hoisted it. I could see for myself it was ready to be hoisted. I could not say definitely how high I hoisted it; I figured on how much line I had. I went by the coils on the shaft. I took the blocks to the top of the derrick, at least 40 feet from the bottom of the floor. I had a way of ascertaining whether it was at the top or not. It could not have been from the top 6 or 8 feet. I don't know just exactly. * * * It was dark at the time I hoisted it. I didn't look up to see."

It appeared that the derrick was lighted by four incandescent globes of 16 candle power and so placed under the roof of the derrick that they cast no light in the open space above the roof into which the pipe was hoisted. The roof was about 20 feet above the floor. The witness, continuing, testified:

"I don't know how the pipe happened to get loose from the rope that Arundell fastened it to. The rope didn't come down with the pipe; it stayed on the hook. When we took Arundell to the doctor, the rope was hanging onto the hook with the timber hitch still in it; that showed it slipped—showed the pipes slipped out of it. * * * I am sure the pipe slipped down the rope; the rope was still on the block, and the timber hitch was still in it when I came back; that was after 7 o'clock. Arundell was hurt between 4 and 5. * * * When I hoisted the string of tools up, I didn't hear any blow or jar as if it had hit up there. I didn't feel any indication of the tools hitting the pipe, when I ran the engine. It seems like you could have felt such a thing. The only thing I could figure on why the pipe slipped through the rope and came down, it must have become loosened—picked it up on the tools. That was a theory; I have no knowledge. * * * When you can see in the daylight it is the tool dresser's duty to watch for that. In the dark he could not see. * * * The man at the throttle, who is hoisting it, could not see it at the same time he was performing his duty at the engine there—it is impossible. * * * The man at the engine could not see anything in the top of the derrick. On the night in question I hoisted this block to the top of the derrick as far as I could possibly do. I had 6 or 8 feet more to run—I mean I could hoist it further. * * * I don't think it was possible to escape my attention, if it had been so adjusted that there was danger of it slipping out; at that distance it seemed all right. The rope knot was on the side away from me. I could see the turns of the rope on the pipe next to me."

He testified that after he had hoisted the pipe he set the brake to hold it with the calf wheel, and then pulled up the tools preparatory to taking it off the spear.

"While I was letting it back again, so the spear would not have to drop far, it stuck a little, enough to turn a twist in the rope two or three times when Arundell started to take it off. Of course, while he was doing that, I was letting it down with the brake. When I got it down 2 or 3 inches of the floor, I went to the tools myself, and had just got hold of them with my hands when I heard this racket; that was all there was to it."

On cross-examination he testified that when Arundell tied—

"that knot around the pipe it was pretty close to the collar; he tied it 2 or 3 inches. The collar is about 6 inches; it was 8 or 9 inches from the top. We lifted three or four joints of pipe with the same knot. It didn't show any tendency at that time to slip."

He testified that:

"The closer you get to the collar the better it is, as they most always slip some; and for that reason it is better to tie as close to the collar as you can."

Plaintiff testified further:

"At the time this accident happened it had been raining—everything was wet and slippery. There is always an opening in the center of the roof of the derrick. Of course, directly under the roof would not much water fall. The roof came to a peak, like this (illustrating), about 3 or 3½ feet opening clear across the derrick the full width of the rig from front to back. The roof covers each side; leaves the center open. * * * I didn't have anything to say about how the hoisting of this pipe and the removing of the spear was to be done. All told, I had worked in and around oil well derricks approximately 5 or 6 months. No similar state of circumstances arose in my experience during that time. It was the first time that I ever had exactly that kind of work to do, and it became necessary to remove a joint of casing out of the well in order to remove the spear. I personally tied the knot by means of which that particular pipe was hoisted. I tied a timber hitch. (Witness illustrates.) I tied a safe knot; I tied it in the usual manner. I had been experienced in tying knots of that kind ever since I had been working in the oil business. The tying of that knot is a frequent occurrence; use those knots every day. I could not say how high that pipe was hoisted by Mr. Mellen, because it went up where there was no light. It was none of my business to pay any attention to that. * * * There were no lights above the roof. The roof is about 20 feet high above the floor, I judge. * * * During the daytime or daylight I could have seen the position of the pipe, and the man who hoisted it could see; not after night. He could in the daytime by stepping out just a little. He could still hold the throttle and look up to the top of the derrick."

On cross-examination he testified that he had worked there for 4 months and was fit for the work he was expected to do, although he "was not what you call an experienced man in particular"; that "the string of tools would be about 40 feet from where the cable joins the rope socket down to the bottom of the spear." A working model of a derrick in operation was brought into court by defendant and used in the examination of witnesses. Plaintiff was called upon to and did illustrate by this model with much particu-

larly how he and Mellen conducted the work before and up to the time of the accident. Not having the model before us, we are deprived to considerable extent of the advantage enjoyed by the jury. There was testimony of several witnesses to the effect that it would have been the proper thing to do, and safer, to have hoisted the pipe with the elevators. Plaintiff testified:

"The elevators which I had been using when I broke the pipe [by "broke" we understand is meant unscrewing it] were set aside on the derrick floor. The elevator block was hanging somewhere in the derrick. I got that down far enough to hook the rope into it; then I pulled the pipe up in the derrick. After I hooked one end of the rope to the hook, one end was already on the casing. I tied the rope to the casing—that is the timber hitch I refer to in my testimony."

He then described how he hoisted the tools high enough to get at the spear which was at the lower end—

"high enough to unscrew it. The next step was to take the spear off. * * * When I was proceeding to unscrew the spear there, the joint of pipe that was held in the air dropped. The rope that held it did not break; the rope did not break loose from the hook; the rope remained aloft and the pipe came down. * * * Mellen was presumably at the throttle during the lifting of the pipe. * * * I knew my duties and went ahead with the performance of them; Mellen knew his duties and went ahead with the performance of his."

On redirect he testified:

"I mean by saying I knew my duties, as I testified a moment ago, that I knew my duties as tool dresser; that is, when I was told to do anything I knew how to go around and do it. * * * I don't know of my own knowledge that the pipe slipped through the knot. I know by what Mellen said afterwards. If I remember right, I asked before I tied this rope around there if we should not use the elevators—something to that effect. I did not have any particular reason for that, only I just took it that that would be the best way in doing it. He told me to use the rope."

On recross:

"Q. Did Mellen give you any directions about the tying of that knot, or any advice or any suggestions or anything, or did you know? A. I knew what knot to use."

His attention was called to testimony he had given, as we understand, in a deposition:

"Q. Did the pipe go clear down, or was it stopped by the piece of rope with the eye in it, which was fastened to it? A. It dropped through the knot. Q. It did not break the rope, then? A. No, sir. Q. But it slipped down there through the knot which you had tied around it and came through it? A. Yes, sir. Q. How did you ascertain that? A. Because it could not possibly happen without—that is, it could not have slipped through the knot without the pipe was raised and the weight was taken off the pipe to let the knot become slack. Q. How did you know that the knot was slack? A. The pipe could not have slipped through it without it did. Q. Could not the rope break? A. The rope did not break. Q. Did the rope remain hanging on the block hook? A. Yes, sir. Q. So that your theory of the manner in which the accident happened is that the tools were hoisted in such a way that they lifted the pipe enough to shake the rope loose from it sufficiently to let it drop down through the knot? A. Yes, sir. Q. You believe that is the way the accident happened? A. Yes, sir."

Expert witnesses were called by plaintiff to explain what they regarded as the proper and safe way to remove a spear from the tools under circumstances such as existed in the present case. Witness T. Phillips, a driller of many years' experience, testified:

"I was running the opposite tower the day Mr. Arundell was injured. There are two towers—the morning tower (from noon to midnight) and the afternoon tower (from midnight to noon.) * * * Assuming that the top joint was crimped, so that the spear would not pass through it; and assuming that I wanted to remove the spear from the lower end of the tools, the only way to go about it is to bring that spear up and take it off. I would take off the top joint of pipe and take it off. I would hoist it that high, probably (demonstrates with model). I would only hoist it above the floor here high enough so that I could break this joint. About there is where I would put the casing (demonstrating). I would suspend the casing about at that point, with the brake on the calf wheel; it would not be over 3 or 4 feet. * * * I would break it and take the spear off, then let the casing down and pull the tools out through it, * * * and after you get your tools out there is nothing in the way of putting the pipe anywhere you want to. I would take the elevator rather than use a 1-inch manilla rope to hoist it with. I think it would be more safe; with that rope there is a chance of slipping. Where the elevators are fastened onto the casing there is not much chance in the matter. If I merely hoisted it up that distance, there is a chance of the rope slipping; there is always a chance if the rope is wet; there is a chance for it to slip. It was raining that night, it had been raining when I went off tower. I don't think it is safe to hoist that pipe a greater distance than that under any circumstances—not with a hitch on, because, you see, if that rope is wet there is a chance for it to slip—anything loosens it up it is liable to slip through and you once loosen it and it won't take hold again. It would not be apt to slip without anything interfering with it, if it was properly tied. There would have to be something to interfere with it, if it was drawn up by a knot properly tied. * * * Up that high it is pretty close to the center of the derrick or to the pipe. Of course, there is a chance for it to swing over and catch."

Given the circumstances in this case of the pipe hoisted up toward the top of the derrick, and that the tools were hoisted out of the well so as to reach the spear to take it off, and in attempting to take it off the pipe fell, he testified:

"I would say that there is only one chance to cause the pipe to fall. If the knot was properly tied, the only chance would be catching the tools onto this pipe and raising it up and lifting the weight off the rope. The tools were approximately 45 feet in length. A pipe being hoisted in that manner, assuming it to be a 14-foot pipe with a rope, say 8 or 10 feet, that would have to get very near to the top to clear it from the tools."

Referring to the manner the pipe was hoisted and its height in the derrick, he testified:

"I should think it would be carelessness in a man to hoist it up where it was."

Other witnesses expressed similar opinion, though one or more testified that the upper joint of pipe should be unscrewed and drawn up a few feet above the floor of the derrick—3 or 4 feet—and the tools then drawn up through the pipe and the spear taken off at

this opening in the pipe. The tools could then be drawn up through the pipe and disposed of, and the pipe screwed on again and let down into its place, or laid aside if faulty. But all agreed that the pipe need not and should not be raised but a few feet above the floor.

Witness Cox testified:

"If I should hoist it [the pipe] up that way, and then afterwards hoisted the tools up so as to get at the spear, assuming that it was dark and I could [not] see any distance above the top of the roof there, I would not really know when I had that pipe in a safe place—I suppose it would be guesswork. I would not guess at it; I would not pull it up there; if I did, I would use the elevators. If I did pull it up with a rope, it is liable to fall—to come in contact with some part of the rig that you could not see, or something, and the rope might slip. If you hoisted the tools in order to get at that, in order to get at the spear, assuming the tools were about 40 feet in length, the rope socket would not likely pass through the pipe without catching on the bottom of the pipe. If the pipe was tied up by means of a rope—a sling—there would not be much chance to pull it up without hitting the bottom of the pipe. The pipe would not hang perpendicular, in my opinion; the tools would probably catch on the side of it. The chances are that would have an effect on the knot or rope, it would loosen up your knot; if your rope was wet or stiff, or a new rope, it would give you slack on your rope."

Witness Nangle, having explained the process of taking off the spear and removing the tools under the circumstances here, testified:

"I would raise the joint by means of an elevator. It is safer. I would not raise that joint of pipe above the roof. I would not consider it safe to do that."

Witness Hutchings testified:

"I would not think it was equally safe to hoist that pipe way up to the top of the derrick out of the reach of the tools and then hoist the tools—not in my experience I would not."

Speaking of the rope as attached in the present case and the pipe hoisted up as described, he testified:

"It would not slip unless the tools caught it and raised it up and loosened the hitch. The timber hitch will hold the pipe safely, I suppose, if there is not anything to interfere with it. * * * You see the tools are liable to catch on this joint here (indicating on model), and raise it up, and it will unhook the rope up there, if he was using a rope—raises that joint (indicating); it would not be apt to unhook if he used the elevator. (Witness demonstrates pulling tools up, showing how they would catch on the pipe.) If the pipe was lifted in that manner, it would loosen timber hitch. * * * This pipe is bound to hang out of the perpendicular. The tools would catch on the bottom of the pipe and raise that up, and it will loosen that knot; then, when they drop back, of course, it will slip—bound to slip. If this rope was a 1-inch manilla rope, and wet at the time, it would make a lot of difference on the holding qualities of the rope; it would be stiff, would not draw down tight; you could not make that knot as safe, it would not draw down as hard on the pipe, and would be more easily loosened, if anything raised the pipe and slackened the pull on the rope. If it was a manilla rope, and not a cotton rope, it would make a lot of difference—it is stiffer and won't draw down like this one. (Referring to sample piece of cotton rope in the courtroom.)"

Witness McManus testified:

"I would not lift a pipe to the top of a derrick by means of a rope tied in a timber hitch. I would consider it careless on the part of a man who did that, as long as he had an elevator there to handle it."

Witness Harry Arundell testified:

"Q. If, under the circumstances just stated, the driller hoisted the pipe to a great distance up in the derrick, up near the top, would you consider that a safe manner of proceeding or not? A. I would consider it dangerous to hoist anything to the top of the derrick by a rope, unless great care is taken. There would be danger of getting tangled up and falling, the knot slipping or becoming untied."

The height of the derrick is not certainly given by any witness. Witness Phillips thought is 82 feet; witness Harry Arundell stated that the standard derrick was 82 to 84 feet from below the crown block to the ground. "The bottom of the casing block, the hook, would be about 10 feet under the crown; that would be about 72 feet up." Witness Phillips thought the tools were about 45 feet long.

[2, 3] Expert witnesses called by defendant testified that a timber hitch, if properly tied, as the evidence showed was the case here, would not slip, even though interfered with, while holding up a pipe, for example, by the tools when elevated. But on this point the evidence is decidedly conflicting, as will be seen from the testimony introduced by plaintiff. There was sufficient evidence to justify the jury in finding that Mellen, who, for the time, represented the authority and responsibility of defendant, was guilty of negligence in raising the pipe so far above the roof of the derrick that the rope by which it was held suspended could not be seen, and leaving the pipe thus suspended at a height where the tools when elevated would interfere with it. Mellen was not at all certain to what height he lifted the pipe. He testified that all he had to go by was the lines; that he could not say how high he hoisted it. "I figured on how much line I had. I went by the coils on the shaft. * * * I figured on hoisting it to the blocks at the top of the derrick—probably 40 feet." In view of the testimony that it was not necessary to take the obvious risk of hoisting the pipe into a space of darkness and that in taking this unnecessary course care was not observed to make sure that the tools when elevated would not interfere with it, and that, if this happened, it was almost certain that the knot would become loosened and the pipe slip through it, the jury might well have inferred the negligence of defendant to have been the proximate cause of the accident.

The principles enunciated in the cases cited by defendant, that negligence will not be presumed merely from injury shown, or from facts unexplained that an accident has occurred, and that the burden of proof was on plaintiff to show defendant's negligence, need

not be gainsaid. But the law does not require in all cases direct evidence of a fact in dispute. The law recognizes the force of indirect evidence which tends to establish such fact by proving another which, though not in itself conclusive, affords an inference or presumption of the existence of the fact in dispute. Code Civ. Proc. § 1832. An inference is a deduction which the reason of a jury makes from the facts proved (Id. § 1958); but an inference must be founded upon fact legally proved (Id. § 1960). The testimony showed that Mellen adopted a plan of handling the tools and pipe, which the witnesses testified was unsafe, by hoisting the pipe into a dark space where the timber knot by which it was held could not be seen, or any tendency of its slipping be observed, and by not using the elevators which would have held the pipe in perfect security. This was his initial act of negligence, and it was followed by another step, testified to as unsafe, which was to elevate the tools without being assured that they would not interfere with the pipe, knowing, as he must be presumed to have known as a competent driller, that such interference might loosen the knot holding the pipe and permit the pipe to slip through.

One or more of defendant's witnesses testified, and it is urged in argument, that the danger was not increased by the height to which the pipe was hoisted, for had it been raised but 5 or 6 feet and had fallen it would as surely have injured plaintiff. This suggestion ignores the fact that, had the pipe been raised but a few feet from the floor, both plaintiff and Mellen could have observed any tendency of the pipe to slip, and, besides, there would in that case have been no tools hovering around the pipe and endangering the security of the knot in the rope. Defendant contends that the testimony shows a clear space between the tools and the lower end of the pipe, and hence the impossibility of the tools having had anything to do with the pipe's slipping through the rope. This contention is grounded on the assumption that Mellen hoisted the pipe to the top of the derrick, a fact not deducible from Mellen's testimony, the only witness who had any knowledge on the subject. The estimates given of the inside height of the derrick, the length of the tools and pipe, and the pieces of rope and the blocks used on each would leave but a small, if any, margin of space between the tools and pipe. Mellen said he hoisted the pipe probably 40 feet; again, that he did not know how high he hoisted it; again, that it was a few feet from the top; again, that he had only the lines to go by, or the coils on the shaft; but he did not say he counted the coils or examined his line. If he hoisted the pipe only 40 feet, it would not have cleared the tools, for they were 45 feet long, as Phillips testified. And this witness, who worked on this same der-

rick as driller, testified that the pipe "would have to get very near to the top to clear it from the tools." Defendant further suggests that the evidence is as consistent with the theory that the rope was carelessly tied by plaintiff as that the pipe was raised and the rope loosened by the tools. This suggestion derives no force from the testimony, for both plaintiff and Mellen testified that plaintiff tied a proper timber hitch, and the testimony of many witnesses was that a timber hitch properly tied is safe, and not likely to loosen its grip. We think the evidence was fairly responsive to the issues presented by the complaint and answer, and that there was sufficient evidence to justify the jury in attributing the injury to defendant's negligence.

[4, 5] It is contended that the injury to plaintiff was caused by an assumed risk. In support of this contention it is claimed that plaintiff "had the same opportunity of observing the situation as Mellen had"; that "he was in as good a position as Mellen to notice the danger and risk of the business"; that it is not charged that the appliances furnished were not adequate and the place a safe one in which to work or that Mellen was an unskillful driller. Under these circumstances it is urged that plaintiff's injury "was the result of an accident happening in the ordinary course of the business in which he was employed, and the risk of which he assumed as one of the hazards of his employment." The rule is relied on as stated by Labatt:

"That a servant assumes all the ordinary risks which are incidental to his employment," and that, "unless the plaintiff can adduce evidence which tends fairly to show that the injured person, by reason of his want of experience or his tender years, was not chargeable with that comprehension of the risk which, in the absence of such evidence, he is presumed to have possessed." 1 Labatt on Master and Servant, p. 2102.

Conceding the correctness of the rule, as it existed when the accident happened, that "the servant assumes all the ordinary risks which are incidental to his employment," the question is: What is meant by the term "ordinary risks"? It certainly is not meant that the servant assumes all risks of injury that may result in the ordinary course of his employment, for the master, under such a rule, would never be held liable. We take it the ordinary risks which the servant assumes are such as may not be avoided by the exercise of reasonable care by the master, or by his servant who is superior to the injured servant. It cannot be said that plaintiff and Mellen stood upon an equal footing, or that plaintiff's opportunities of observing what Mellen was doing and how he was doing it were equal. Plaintiff could not know, nor could he be presumed to have anticipated, the possibility or probability of Mellen's not having hoisted the pipe sufficiently far to clear the tools. Plaintiff was in no situation to observe what Mellen was doing or how he was doing it. He was at his

post of duty, endeavoring to "break" the spear, ignorant of his position of danger caused by Mellen's carelessness and negligence. By the exercise of ordinary care on Mellen's part the accident would not have happened.

[6] Appellant contends that plaintiff tied the timber hitch, raised the tools, and moved the tools after they were raised, and hence, if the tools caused the rope on the casing to be loosened, it was caused by plaintiff's negligence and he cannot recover. The testimony was that Mellen hoisted the pipe to a place above the roof and set his brake. Under Mellen's orders, and with his assistance, plaintiff hoisted the tools high enough above the floor to allow him and Mellen to remove the spear. Mellen testified:

"I pulled the tools up and prepared to take the spear out. * * * We pulled the tools up to the joint in the pipe, about even with the floor."

What plaintiff did in the matter was done under Mellen's orders, with his personal assistance, and without any knowledge or comprehension of the dangerous position of the pipe; and it seems to us the jury were justified in finding that he acted as a reasonably prudent and cautious man would have acted under the circumstances. The accident did not happen by reason of hoisting the tools too far—they were raised only sufficiently high to admit of removing the spear. The cause of the accident, as the evidence warranted the jury in finding, was that the pipe was not hoisted high enough. Of course, it was incumbent upon plaintiff to exercise his senses and reasoning faculties, and whether he did so in the present case was to be determined by the jury, taking into account all the attending circumstances. The accident cannot be traced to any act of plaintiff which was not performed in the line of his duty or directly ordered to be done by his superior. We do not think defendant sustained the burden of proving contributory negligence of plaintiff as the cause of his injury.

[7] The point urged that plaintiff "was not injured by the negligent act of an employé of defendant having the right to direct and control his services," we think, cannot be maintained. Section 1970 of the Civil Code provides that:

The "employer shall be liable for such injury when the same results from the wrongful act, neglect or default * * * of a person employed by such employer having the right to control or direct the services of such employé injured."

It seems to us the testimony of both plaintiff and defendant showed very clearly that the work in and around an oil well derrick is under the direct control of the driller. In the absence of the superintendent his authority is supreme. It is by virtue of this authority given by custom to the driller that he has the right to exercise it. One of defendant's witnesses, himself president or

vice president of several oil companies, testified:

"In removing a pipe from the well, as in this case, in determining what was to be done with the top joint of casing, the driller would tell the tool dresser what they were going to do and that if the tool dresser should say, 'No, I don't think that should be done,' the superintendent on the lease would get another tool dresser, if I was the driller."

We have called attention in the earlier part of this opinion, to sufficient testimony to show that Mellen had the right, and exercised it, to direct plaintiff in his work.

[8] Error is claimed in the court's not allowing defendant to prove by witness Munzer the condition of the weather in Kern county at the time of the accident. It had been shown by plaintiff that it was raining the night of the accident, and the purpose of the offered evidence was not so much to dispute a fact of no great importance in the case as it was "in determining which party spoke the truth." The report offered was made up by the Kern County Land Company at Bakersfield from reports sent in by superintendents of farms in various parts of the county. These reports were telephoned to the telephone operator in the office; he reported them to the stenographer, and she "makes the proper record of it." It was a purported copy of this record that was offered. Aside from its nonofficial and hearsay character, the reports from the Kern County Land Company's farms would not disprove that it rained at the oil well in question. The ruling was not error.

[9] Error is claimed in giving the following instruction:

"Presumptive or circumstantial evidence is admissible in civil cases. When direct evidence cannot be produced, minds will form their judgments on circumstances. So in this case it is not necessary that the plaintiff produce direct evidence as to what caused the casing, mentioned in this case, to fall, if any casing did fall; but such cause may be inferred from all of the circumstances in the case."

It is contended that:

"A jury is not permitted to infer the negligence of a defendant from circumstances, unless they are strong enough and convincing enough to exclude every other reasonable hypothesis than that of negligence."

We have already referred to the law that the fact of negligence may be proved by indirect as well as by direct evidence. *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811. Section 1832, Code Civ. Proc. Negligence, like any other fact, may be inferred from a preponderance of the evidence whether it be circumstantial or direct, and plaintiff is not required to prove his case beyond a reasonable doubt. The instruction, fairly considered, merely told the jury that they were at liberty to determine the question of defendant's negligence from evidence other than direct proof of the cause of the accident.

[10] The court refused the instruction, requested by defendant, to the effect that the

jury should not be governed by sympathy, but by the evidence, and that in considering the evidence the jury should not be influenced by the fact that plaintiff is a laboring man and defendant a corporation. A jury sworn to try the case and a true verdict rendered upon the evidence must be presumed to have obeyed their oath, and unless it should appear that they were influenced by sympathy or prejudice, and not by the evidence, we must presume that their verdict was based upon the evidence. Nothing in the record tends to show that the jury acted out of sympathy for plaintiff or through prejudice against defendant.

[11, 12] An instruction asked by defendant was refused in which the jury were told that plaintiff could not recover "unless they find he has a preponderance of evidence supporting the following propositions: First, that the plaintiff was not at the time of the accident guilty of any failure to exercise ordinary care for his own safety which approximately contributed to his injury; second, that the defendant was guilty of negligence in the manner charged in the complaint; third, that such negligence was the proximate or direct cause of the plaintiff's injuries in question"—and that if plaintiff has failed to sustain by evidence these propositions or any one of them he cannot recover. The first subdivision of this instruction is in effect an instruction that the burden is upon plaintiff to show by a preponderance of the evidence that he was not guilty of contributory negligence; for one who fails to exercise ordinary care for his own safety, if he is injured in consequence thereof, certainly contributes thereto. But this issue was presented by defendant, and upon it rested the burden of establishing it by a preponderance of evidence, and not upon plaintiff to prove the negative of that issue. That it was necessary for plaintiff to show that defendant was guilty of the negligence charged, and that such negligence was the proximate cause of plaintiff's injuries, is undoubtedly true. Defendant was entitled to these instructions, and plaintiff claims they were elsewhere given in the charge, which is not denied, but defendant contends that:

"If counsel wished these instructions to be considered they should have incorporated them in the record. Not having done so they cannot now rely upon them to show no error was committed by the refusal of the lower court to give the instructions."

The transcript does not purport to contain all the instructions, and it is apparent that it does not. Error must be shown, and if equivalent instructions, though not in the same language, were given no error was committed. If no such instructions were given, it was defendant's duty so to show. We have seen that the evidence was sufficient to justify the jury in finding the fact that defendant was guilty of negligence as charged and as the issues were tried, and that such neg-

ligence was the proximate or direct cause of plaintiff's injuries. Under such circumstances defendant was not prejudiced by the ruling of the court.

[13, 14] Instructions, given by the court, numbered 12 and 15, are criticized for the reason that by No. 12 "the jury were told that dangerous appliances or a danger in the work did not bar the right of the plaintiff to recover unless the employé 'fully understood, comprehended and appreciated' the danger," and that in No. 15 the instruction "assumes the existence of facts not in evidence." Instruction numbered 12 is the statement of the law as found in section 1970 of the Civil Code, and read in its entirety is not error, and if not applicable, we cannot see that it could have been prejudicial. Instruction numbered 15 appears to us to have been drawn with strict adherence to evidence admitted at the trial. It does not assume the existence of any facts. It stated: "If you believe from evidence that," etc.

We have given the case such attention as its importance seems to have demanded, and, finding no prejudicial error in the record, the judgment and order are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

Ex parte CENCININO. (Cr. 864.)

(District Court of Appeal, Third District, California. Aug. 9, 1916.)

1. FISH \S 8—CONSTITUTIONAL PROVISIONS—POLICE POWER—"MAY."

Const. art. 4, \S 25½ (see St. 1901, p. 948), declares that the Legislature may provide for the division of the state into fish and game districts, and enact laws for the protection of fish and game, and St. 1911, p. 426, enacted in pursuance thereof and dividing the state into six fish and game districts, was repealed by St. 1915, p. 589, dividing the state into 29 fish and game districts, including part of a county in districts 8 and 9. Const. art. 11, \S 11, grants to counties and townships the right to enforce local and police regulations not in conflict with general laws. Pen. Code, \S 628f, enacted by St. 1915, p. 112, makes the shipment, offer for shipment, or receipt for shipment of any species of crab taken in districts 8 or 9 a misdemeanor. An ordinance of a county board of supervisors made it unlawful to ship or transport any crabs or clams taken within the county to points outside of the county punishable as a misdemeanor. Held, that the word "may" in article 4, \S 25½, was not merely permissive but mandatory, and used in the sense of "shall" or "must"; that the section gave the Legislature exclusive power over the fish and game of the state and took from counties, etc., any right which they might have had under article 11, \S 11, so that the ordinance was void, and one arrested for a violation thereof would be discharged.

[Ed. Note.—For other cases, see Fish, Cent. Dig. \S 16; Dec. Dig. \S 8.

For other definitions, see Words and Phrases, First and Second Series, May.]

2. FISH \S 8—GAME \S 3½—REGULATION—POLICE POWER.

Fish and game constitute the property of the people of the state in their collective capacity, and the regulation of their pursuit is within the police power.

[Ed. Note.—For other cases, see Fish, Cent. Dig. \S 16; Dec. Dig. \S 8; Game, Cent. Dig. \S 2; Dec. Dig. \S 3½.]

3. CONSTITUTIONAL LAW \S 63(1), 81—"POLICE POWER"—WITHDRAWAL.

The "police power" is an attribute of sovereignty residing in the sovereignty of the states and exercised by the states under delegation from the people of the state, and the people may delegate or grant that power to any competent authority to be exercised exclusively or concurrently with some other authority, or to a limited extent with the residue of the power in some other authority, and may at any time withdraw from local authorities the police power granted to them by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 108, 111, 112, 114, 148; Dec. Dig. \S 63(1), 81.

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

Petition by Charles Cencinino for a writ of habeas corpus directed against the sheriff of Humboldt county. Petitioner discharged.

J. J. Carin and Leon E. Prescott, of San Francisco, for petitioner.

HART, J. [1, 2] The petition alleges that the petitioner is illegally held in restraint of his personal liberty by the sheriff of Humboldt county, and the return of that officer shows that he detains and is detaining the petitioner in custody under the authority of a warrant of arrest issued out of the justice's court of Trinidad township, said county, upon a complaint charging the petitioner with the violation of the provisions of Ordinance No. 118, passed by the board of supervisors of Humboldt county on the 16th day of November, 1912, and which, by virtue of a provision therein contained, went into effect on the 8d day of December, 1912.

Said ordinance reads in part as follows:

Section I. It shall be unlawful at any time to offer for shipment, ship, transport or receive for shipment or transportation from the county of Humboldt, state of California, to any place outside of said county of Humboldt, state of California, any crabs caught in or taken from any of the waters within the limits of the said county of Humboldt, state of California.

"Section II. It shall be unlawful at any time to offer for shipment, ship, transport or receive for shipment or transportation from the county of Humboldt, state of California, to any place outside of said county of Humboldt, state of California, any clams of any kind or character produced or taken from any ground, waters, or territory within the limits of said county of Humboldt, state of California.

"Section III. Every person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment."

The ordinance declares that the true intent and purpose thereof is "solely to secure

the better protection of the crabs and clams in the public waters and grounds within the county of Humboldt, state of California, and not for the regulation of the business of dealing in crabs and clams."

The petitioner, in support of his claim that his restraint is illegal, makes this point: That, by the adoption, in the year 1902, of section 25½ of article 4 of the Constitution (see Stat. 1901, p. 948), the people expressly vested in the Legislature of the state the sole and exclusive power over and control of legislation relating to the fish and game of the state. Manifestly, the effect of that construction of said provision is to exclude the legislative bodies of local political subdivisions of the state from any power or right to legislate with respect to those subjects. If this be a sound position, it follows, of course, that the ordinance whose provisions the petitioner has been charged with violating relates to a subject not within the legislative competence of the board of supervisors of Humboldt county, is therefore void, and, as a necessary consequence, under or upon the purported ordinance no complaint stating a public offense can be formulated.

The section of the Constitution in question reads as follows:

"The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game as it may deem appropriate to the respective districts."

The Legislature of 1911 (Stats. 1911, p. 425), in pursuance of the authority vested in it by that provision of the Constitution, passed an act whereby it divided the state into six fish and game districts. By said act the first district was made to embrace, among several other counties, the county of Humboldt. At its session in the year 1915, however (Stats. 1915, p. 589), the Legislature repealed said act and passed in lieu thereof another act, by the provisions of which the state was divided into 29 fish and game districts. By this law that part of Humboldt county constituting Humboldt Bay was placed in districts Nos. 8 and 9. At the same session, the Legislature enacted section 628f the Penal Code (Stats. 1915, p. 112), which, among other provisions, contains an inhibition, on pain of punishment as for a misdemeanor, the shipment or offer for shipment or receipt for shipment or transportation any species of crab taken in fish and game districts 8 and 9.

The ordinance under which the petitioner has been proceeded against, includes, in its inhibitions and penalty, all of Humboldt county, covering, therefore, those portions of Humboldt Bay which form parts of fish and game districts 8 and 9.

The authority vested in the Legislature by section 25½ of article 4 of the Constitution to divide the state into districts for the purposes of legislation affecting fish and game was undoubtedly inspired by the fact, based upon experience in that direction, that,

owing to the varied conditions with respect to fish and game existing in different parts of the state, no uniform legislation justly applicable and appropriate to the whole state and the diversified conditions therein existing as to game and fish was practicable or feasible. Regulations necessary and appropriate in one part of the state might be wholly unnecessary and, indeed, unjust, and therefore inappropriate in other parts thereof. This is the only rational explanation of the scheme with respect to the matter of taking fish out of the waters of the state and hunting for game contemplated by the above provision of the Constitution. And experience has demonstrated the necessity and efficacy of that scheme. Prior to the adoption of that amendment, it was within the competence of the boards of supervisors of the several counties to regulate the matter of taking and hunting fish and game within their respective territorial jurisdictions. These local regulations were often harsh and unjust and sometimes inadequate to the proper protection of fish and game, the object of all such legislation merely being to provide against their ultimate extinction, which would inevitably result from an absence of proper legal restraint upon their destruction or, in other words, to provide ample opportunity for their propagation in a degree commensurate with their nature in that respect. And to accomplish this highly important end the people finally conceived that the whole subject could be the better and more justly treated by legislation wholly in the control of the state Legislature and such as is authorized by the provision of the Constitution above quoted herein. So, in considering said provision, keeping in mind the reasons thus suggested as the animating cause of the adoption thereof, and at the same time keeping in view the nature or character of the power with which the Legislature is thus invested, the conclusion seems to be inevitable that, by said provision, it was intended, as the petitioner contends is true, to clothe the state Legislature with sole and exclusive control and power, so far as legislation is concerned, over the fish and game of the state, and therefore to take from local political subdivisions of the state any right which they might have had, prior to the adoption of said provision of the Constitution, legislatively to deal with or regulate the matter of pursuing fish and game. Therefore our opinion is that the language of section 25½ is mandatory and not merely permissive, as the use of the auxiliary verb "may" as among the operative words of the provision might, upon first blush, imply.

The word "may," as used in a statute or Constitution, is often interpreted to mean "shall" or "must". Such interpretation always depends largely, if not altogether, on the object sought to be accomplished by the law in which that word is used. It seems to be the uniform rule that, where the pur-

pose of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or private right requires that the thing should be done—then the language, though permissive in form, is peremptory. As was said by the Supreme Court of the United States, in *Supervisors v. United States*, 4 Wall. 436, 18 L. Ed. 419, construing a statute of the state of Illinois similarly phrased to the provision in question here:

"What they (public officers) are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. * * * It is given as a remedy to those entitled to invoke its aid."

See, also, *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766.

But the provision of the Constitution in question has been given by our own courts a construction in accord with the views above expressed. *Ex parte Prindle*, 7 Cal. Unrep. 223, 94 Pac. 871. In that case, which was decided by the District Court of Appeal of the Second District, so much is said which has a direct bearing upon the question before us here that it would extend this opinion to an unreasonable length to attempt to reproduce herein all that is contained therein which is forcibly pertinent to this case. It will suffice to say that the court in that case held that the provision of the Constitution under consideration is mandatory, notwithstanding the employment of the word "may" therein.

In the case of *In re Cole*, 12 Cal. App. 290, 107 Pac. 581, while not necessary therein to decide the question, this court, nevertheless, in considering the effect of section 25½ of article 4 of the Constitution, strongly intimated that its language and terms were mandatory. The court had under consideration an ordinance of Sonoma county prohibiting the catching of fish in rivers, streams, or sloughs in said county. The ordinance considered in that case was regularly passed by the board of supervisors previous to the adoption into article 4 of the Constitution section 25½, and the court held that, as the ordinance involved a valid act at the time of its enactment, and, as the constitutional provision was prospective and not retroactive in its operation, said provision could not be held, in view of article 22 of the Constitution, to have effected a repeal of said ordinance or impaired its validity in any respect. The court, however, used this significant language:

"The most that could be urged by the petitioners is that the power to regulate the pursuit of fish and game had been taken away from the board of supervisors and given exclusively to the Legislature."

In considering the question before us, we have not been unmindful of the fact that by section 11 of article 11 of the Constitution, the people have granted to the counties, cities, towns, and townships of the state the

right to make and enforce, within their respective limits, "all such local, police, sanitary and other regulations as are not in conflict with general laws." Nor are we antagonistic to the proposition that, although fish and game constitute the property of the people of the state in their collective capacity, the matter of the regulation of the pursuit of fish and game is within the police power (*Ex parte Maier*, 108 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129), and that it would be within the competence of local legislative boards to regulate that matter under the power granted to them by said section 11 of article 11 in the absence of any limitation placed by the people upon the exercise by them of said power and so long as such legislation did not contravene any general law of the state. But, as has been shown, and as is clearly manifest, the power of local boards to regulate, or legislate upon, the subjects of fish and game has been withdrawn by the people by their expression in section 25½ of the Constitution and subsequent to the delegation by them of the power which such local authorities may exercise under section 11 of article 11.

[3] That the people may, at any time, legally withdraw from local authorities the power of police or any portion thereof which they have by their Constitution granted to such authorities, is a proposition far beyond the realm of all debate. The police power, like the right of eminent domain, is an attribute of sovereignty. In this country it resides or inheres in the sovereignty of the states, and sovereignty, which means all the power inherent in a commonwealth, is generally exercised by the state itself, but it is so exercised because only the power has been delegated to it by the people of the state, in whom, primarily, it resides. It therefore follows as a matter of course that the people may delegate or grant that power to any competent authority, to be exercised exclusively or concurrently with some other authority or to a limited extent, with the residue of the power or its ultimate control in some other body or authority, or in the people themselves. In the case of the fish and game of the state, the people have, as seen, withdrawn or taken from counties, cities, and towns whatever power they might have exercised over those subjects by virtue of section 11 of article 11 of the Constitution. This they had the right to do, and in doing it still left to counties, etc., plenary power to make and enforce proper and necessary police regulations upon a variety of subjects coming within the scope and purview of the power of police. It follows that there cannot be justly claimed to exist any inconsistency or repugnancy between section 11 of article 11 and section 25½ of article 4. It is true, as has been suggested, that the Legislature might not have exercised the authority vested in it by section 25½ of article 4, and it is equally true that had it failed to do so, it could not be compelled by

any known legal process to legislate upon the subject of fish and game. But this does not mean that the exclusive power to regulate the pursuit of fish and game is not still in that body under that provision of the Constitution, or that counties and cities, etc., may regulate the matter on the failure of the Legislature to exercise the right and power so conferred upon it. It is, under the terms of the constitutional provision, solely for the Legislature to determine when and how the taking of fish and the killing of game shall be regulated, as well as to determine what portions of the state shall be included within fish and game districts and what portions shall be excluded therefrom and not subject to any regulations upon those subjects.

We conclude, from the reasons herein stated, that counties, cities, towns, and townships are no longer authorized to legislate upon or in any manner or degree interfere in the matter of the pursuit of fish and game, that, consequently, Ordinance No. 118, of Humboldt county, under and by virtue of the provisions of which it is sought to prosecute and punish the petitioner, is void, and that his arrest and restraint are therefore illegal.

The petitioner is accordingly discharged.

I concur: ELLISON, Judge pro tem.

BRYAN ELEVATOR CO. v. LAW. (Civ. 1465.)

(District Court of Appeal, Third District, California. Aug. 8, 1916. Rehearing Denied by Supreme Court Oct. 5, 1916.)

CONTRACTS — 282 — PERFORMANCE TO SATISFACTION — RIGHT OF PERSON FOR WHOM WORK IS DONE.

Where plaintiff contracted to install, to defendant's satisfaction, elevators in defendant's building, which was done, defendant expressing dissatisfaction only with the controllers, refusing to be satisfied unless Otis controllers were used, and claiming the right to exercise his refusal of the installation knowing that Otis controllers could not be obtained without purchasing Otis machines at great cost, at no time requesting plaintiff to obtain controllers other than the Otis, several of which were obtainable in the open market, removing plaintiff's machines and controllers without previous notice, and installing Otis machines and controllers, defendant's contract did not permit him so to act, and he was liable to plaintiff for the cost of the installation, less only the cost of the Otis controllers, since a stipulation in a contract to perform to the satisfaction of a party calls only for performance satisfactory to a reasonable person.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284-1289; Dec. Dig. — 282.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by the Bryan Elevator Company against Herbert E. Law. From a judgment for plaintiff and an order denying its motion for a new trial, defendant appeals. Judgment and order affirmed.

Edgar C. Chapman, of San Francisco, for appellant. Thomas, Beedy & Lanagan, of San Francisco, for respondent.

CHIPMAN, P. J. In the first count of the complaint plaintiff seeks to recover the sum of \$16,000 upon a written contract entered into by plaintiff and defendant, January 20, 1905, for the construction and installation of an elevator plant and service by plaintiff for the Monadnock Building in San Francisco. The second count was for necessary repairs to the elevators, elevator equipments, and elevator hatchways in said building of the alleged value of \$4,804.33. The third count is for elevator parts and supplies alleged to have been sold and delivered to defendant by plaintiff, for which defendant agreed to pay the sum of \$2,053.10. Plaintiff had judgment on the first count for the sum of \$13,375, with interest from May 1, 1908. The findings and judgment on the second and third counts were in favor of defendant.

Both parties appeal from the judgment. Defendant's appeal is presented in this record and plaintiff's appeal on the same transcript is presented in No. 1466 (160 Pac. 174). Defendant also appeals from the order denying his motion for a new trial. The cause was tried by the court without a jury. The issues tried may be understood from the findings of facts by the court:

"II. That thereafter, and on or about the 1st day of September, 1905, the said plaintiff entered upon and commenced the installation of said elevators, and proceeded with said installation as rapidly as the unfinished condition of said building would permit; that on or about the 18th day of April, 1906, and prior to the completion of the installation of said elevators, said building was injured and almost completely destroyed by earthquake and fire; that by reason of the damage suffered by said building, through said earthquake and fire, plaintiff was unable to continue with the performance of its said agreement for a long time thereafter; that as soon as said building was sufficiently repaired to make the work of installation of said elevators possible, the plaintiff continued the work of such installation; that plaintiff at all times in good faith proceeded with the performance of the obligations imposed upon it by said agreement, and furnished the materials and performed the labor required of it by said contract, and honestly and faithfully performed said contract and completed the performance thereof on or about the 1st day of May, 1908, except as regards the controlling devices furnished by said plaintiff on the five passenger elevators which were not satisfactory to defendant and on account of which said defendant declined to accept the same and removed them from the building, and in this behalf the court finds: That said controlling devices did not operate satisfactorily and defendant was justified in rejecting the same and in removing them from said building and putting in other controlling devices. The court also finds that, although said defendant declined to accept the said controlling devices as furnished by plaintiff, and was justified in removing them from said building and in putting in other controlling devices, said plaintiff substantially performed the said contract.

"III. That the agreement hereinabove referred

to was completed by said plaintiff on or about the 1st day of May, 1908, except that the defendant was not satisfied with the controllers on the said five passenger elevators and declined to accept the said controllers; that the length of time in completing said agreement by the said plaintiff was no greater than the amount of time said plaintiff was prevented from performing by the neglect of the said defendant in completing said building and by the earthquake and fire above referred to.

"IV. That in all regards, other than as above set forth, the plaintiff duly and faithfully performed all the conditions of said agreement above referred to on its part to be performed according to the terms of said agreement; that said plaintiff completely installed and equipped the elevators referred to in the said agreement in accordance with the plans and specifications attached to said agreement and made a part thereof, with the exception that the said defendant was not satisfied with said passenger elevator controllers or the elevator machines connected therewith, and he declined to accept the same and removed all of said controllers and all of said elevator machines from said building and replaced the same with other elevator controllers and other elevator machines, and installed said last-mentioned controllers and machines in said building; that the reasonable market value of said elevator controllers and elevator machines so installed by said defendant was and is the sum of \$15,156. And in this connection the court finds that the reasonable market value of said controllers so installed by defendant was and is the sum of \$2,625. But the court finds that defendant was not justified in rejecting the elevator machines so furnished by plaintiff or any of them, and was not justified in installing other elevator machines in place of them, and that said defendant could and did replace said controllers with controllers of a design, workmanship, and efficiency satisfactory to him for the sum of \$525 each, or a total sum of \$2,625. * * *

"VI. That the sum of \$21,375 is the reasonable value of the work done and the materials furnished by plaintiff in installing elevator machines and equipment for the defendant in said Monadnock Building, and the reasonable value of the materials furnished and accepted and the installation work accepted and used by defendant, and that said defendant has paid plaintiff the sum of \$8,000 and has suffered damages on account of plaintiff's failure to furnish controlling devices satisfactory to him in the sum of \$2,625, and that, after deducting from the contract price the said payment of \$8,000 and the sum of \$2,625 to indemnify and compensate the defendant for the damages so suffered by him, there is now due, owing, and unpaid from said defendant to said plaintiff the sum of \$13,375, together with interest thereon at the rate of 7 per cent. per annum from the 1st day of May, 1908. * * *

"And as conclusions of law from the foregoing facts the court finds the plaintiff is entitled to judgment against the said defendant for the sum of \$13,375, together with interest on said sum from the 1st day of May, 1908, at the rate of 7 per cent. per annum, amounting to \$4,228.72, and for its costs of suit herein expended."

Plaintiff was properly to install, furnishing all the labor and materials therefor, four passenger elevators and one passenger elevator and safe lifter, and to alter the old passenger elevator then in use in the Bishop Building into a freight elevator, and to install two hydraulic ram sidewalk elevators, together with a flash light signal system in accordance with certain plans and specifications made by Meyer & O'Brien, who were the architects of said building and of said work.

So far as this appeal reaches, the only dispute we are to settle relates to the installation of the five passenger elevators. And as to these the objection raised by defendant was to the unsatisfactory operation of the electrical controllers.

On November 5, 1906, defendant wrote plaintiff as follows:

"In conformity with the provisions of our contract for elevators in the Monadnock Building, I advise you that the controlling devices are unsatisfactory and in my judgment inadequate for the requirements, and therefore request that the control be replaced by that used by the Otis Elevator Company."

Plaintiff replied on November 9th, saying:

"We cannot at this time accept a decision as to the controllers in the Monadnock Building, because in no case are those controllers complete and such as the design of the apparatus which we are to give you contemplates. Moreover, as the writer explained to you some time ago, the present controllers are operating under conditions which are in no way a proper test of them, and, further, that the completion of the controllers is delayed purposely by us in order to keep machines in operation until the balance of the plant is ready to run, when the present controllers can be put into the condition which it is intended that they should be. The work on the permanent controllers is progressing as rapidly as circumstances will permit, and when completed and the present controllers finished and put in proper condition you will have no cause for complaint regarding them."

On June 5, 1907, defendant's manager, Mr. Huntington, wrote plaintiff as follows:

"As Mr. Law has already notified you, we wish the controllers on the elevators now in the Monadnock Building changed to the Otis Elevator Company's controller. You may place it first on No. 2 elevator, and we will try it out."

The matter drifted along, the correspondence and the testimony showing that each party attributed to the other party the alleged failure of the controllers to give proper service, until, October 15, 1907, we find that plaintiff wrote defendant as follows:

"Since writing to you yesterday we learn that you are taking our machines out of the Monadnock Building, and to this we make the most emphatic protest. We demand that we be allowed to demonstrate that these engines are all right by having them put entirely in our charge for sufficient time to prove our claims. All we ask of you is to have doors put on the engine room and have both your employees and all outsiders kept out of it. As our contract at the Monadnock Building is not completed, we desire to know from you at once whether we shall go ahead with this final work? Awaiting your immediate reply, we remain."

Defendant replied on October 17th:

"We have no objection to your completing your contract on the Monadnock Building in so far as it relates to the freight elevator in the back of the building and the two hydraulic ram sidewalk elevators."

On November 29, 1907, defendant wrote plaintiff as follows:

"We have taken out the passenger elevators from the Monadnock Building, and they are now in the basement. What disposition do you desire made of them by us?"

On December 3d, plaintiff replied to this letter, stating:

"We have turned the same over to our attorneys."

It does not appear at what date defendant removed the plaintiff's machines, but Mr. Robbins, manager of Otis Elevator Company, testified:

That the first bill rendered by his company was dated October 12, 1907, "and that was not made until after the Otis machines were put in the building—after they were put in, the machines which they substituted were removed. I don't just remember the date when that was done."

As we understand the evidence, the Otis machines were taken to the building about October 12, 1907, the plaintiff's controllers and machines were then removed from their settings, and the Otis machines and controllers put in their place.

Defendant states in his brief:

"The court found that the real defect in the elevator plant was in the controller, and we think it was justified in reaching this conclusion."

The correspondence as well as the testimony shows that the construction of the elevators, the machinery, and appliances used in operating the plant, except the controllers, was entirely satisfactory to defendant. The contract did not specify any particular type of controller, though doubtless plaintiff contemplated putting in the one it manufactured. The provision of the contract was:

"The contractor agrees that the elevator service going by the machines shall be continuous, and that the control of the car shall be positive, and the operation of elevators shall give satisfaction in every particular. In the event that the elevator machine or the controlling device proves unsatisfactory or inadequate to requirements, the contractor shall replace the machinery or controlling device with other machinery and control satisfactory to the owner. In the event of any dispute of the efficiency of any part of the elevator machinery or control, the decision of the owner is to be final and conclusive."

It appeared from the testimony that the controller was so far independent in its construction that a controller of the Otis or any other design than the Bryan controller could be substituted, and the engines and other machinery connected with and required in operating the completed elevator remain undisturbed. The court found and the evidence was that the Otis controllers had a value each of \$525, and the five installed \$2,625.

The court found that the reasonable value of all the work done and materials furnished by plaintiff in installing elevators and equipment "and the reasonable value of the materials furnished and accepted and the installation work accepted and used by defendant" was \$21,375, from which the court deducted the payment of \$8,000 and the value of the five Otis controllers, \$2,625, leaving due plaintiff \$13,375.

The portion of the findings to which defendant now objects is the following:

"That defendant was not justified in rejecting the elevator machines so furnished by plaintiff or any part of them, and was not justified in installing other elevator machines in place of them, and that said defendant could and did replace said controllers with controllers of a design, workmanship, and efficiency satisfactory

to him, for the sum of \$525 each, or a total sum of \$2,625."

Defendant's position is thus stated in his opening brief:

"These findings which we have just quoted cannot be harmonized in any way; for, if under the evidence defendant was justified in rejecting the controllers, he was equally justified in rejecting the machines, not because the machines were defective in any particular, but because it was impossible to buy any controllers that could be used with these machines. The only proper controllers on the market were those manufactured by the Otis Elevator Company, and these could not be had, as we have pointed out, without the purchase of the Otis Elevator machines. It follows, therefore, that as Mr. Law was compelled to pay \$15,156.00 for the Otis elevator controllers and machines that he is entitled to deduct that amount from the contract price."

The testimony was that the Otis Elevator Company would not sell its controllers to plaintiff or to defendant without also selling its machines to go with them. Witness Greenbaum, a mechanical engineer and president of plaintiff company at the time the contract was made and up to 1909, was asked whether there were high-speed controllers in the market other than the Otis controller, and answered:

"I believe one particularly was the Cutler-Hammer. Another was the one sold by the Scheurman people, from whom I did buy one. There were quite a number of different style high-speed controllers at that time. There was a firm in Baltimore whose name I can't remember at the present time; and one in Chicago, and these firms made a specialty of making controllers and nothing else. They were not elevator men at all in any sense of the word. They simply make controller machinery, and in that machinery they make elevator controllers. Q. And they would send those controls to anybody who made application? A. Yes, sir."

On cross-examination he testified that these controllers were all manufactured in the East, and the manufacturers had no agency here, that he did not "tell Mr. Law anything about them," and that he did not believe them any better controls than his own.

The testimony was that during all the time, and up to the day it learned its machines were being removed, plaintiff was endeavoring to bring its elevators up to a standard of emergency which would be reasonably satisfactory to defendant, and during all this time there was a constant controversy between the parties as to the way the elevators were being run by defendant's employees, plaintiff complaining that they were careless and inattentive to their duties in not properly caring for the machinery and in not properly operating the elevators, defendant complaining that this was not true and pointing out specific defects. And, finally, without previous notice of his intention so to do, defendant removed the machines and controllers and substituted Otis machines and controllers, and notified plaintiff to take its property away, which plaintiff did, under an agreement that in doing so the rights of neither party should be prejudiced. Witness

Greenbaum testified on cross-examination as follows:

"Q. What became of the machines after they were taken out? A. They were taken across the bay and stored. Q. Taken across the bay by yourself? A. We took them over there. Q. Where did you store them? A. In the Van Emon elevator plant. Q. What use was made of them subsequently? A. I junked them. Q. Was there anything the matter with the machinery? A. No; not that I know of. Q. Then why was they junked? A. Because they were secondhand machines, and you can't sell secondhand machines, particularly what you call high-speed secondhand machines, to be installed in the building again. People won't take them."

He testified that the reasonable value of the materials put in by plaintiff and removed from the building by defendant was \$10,500,—that is, the value of the controllers and engines and ropes or cables; "\$13,500 was the reasonable value of the work we furnished and left in the building at the time our machines were taken out, and that material and that construction were used by Mr. Law when he put in the new machines."

The inquiry seems to us to be narrowed to the question: Was defendant justified in substituting entirely new machines and controllers, entailing a loss to plaintiff of the machines and controllers installed by it? The court made no specific finding of the value of these machines and controllers, but it found the value of all the work done and machinery furnished to be \$21,375, from which it deducted the payment made, \$8,000, and the value of the controllers furnished by defendant, \$2,625. The court found that defendant was justified in putting in the Otis controller, but, in view of the testimony that a controller of other design could have been put in without removing plaintiff's machines, it found that the cost of these controllers, \$525 each, was the limit of defendant's damage. And this narrows the inquiry still further to the single question: Was the plaintiff properly chargeable also with the cost of the Otis machines, which was \$12,530?

What was the right with which the contract clothed defendant? It is not necessary to discuss the question as applicable to what defendant did in the present case. He decided that the Bryan controller was not satisfactory, and the evidence and the finding of the court sustained him in his decision. Neither is it necessary to discuss his right to have an Otis controller; for he got it, and the court allowed him the cost of it. It is claimed, however, that because he was obliged to take and pay for the Otis machines in order to get the Otis controller, defendant was within his rights in removing plaintiff's machines, although he had made no objection to them, and requiring plaintiff to pay for them. In support of this claim reliance is placed upon the case of *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207. In that case Thayer made the following proposition to Singerly:

"I proposed to put my patent hydraulic hoist in your new building on Chestnut street (including a duplex pump worth \$800.00), according to verbal specifications given by your architect, for \$2,300.00, warranted satisfactory in every respect."

Plaintiff in error accepted this proposition, and the elevator was substantially finished, but proved unsatisfactory. He therefore declined to accept it, and gave notice that he desired it to be removed. This Thayer refused to do, and thereupon "Singerly took it down and holds it subject to the order of Thayer, who brought the suit, claiming the contract price." In commenting upon the contract the court said:

"The proposition was made to induce him (Singerly) to purchase a kind of elevator not in general use. The fair inference is that he desired to procure one that would be satisfactory to himself. The manifest import and meaning of the language used is that it should be satisfactory to him. * * * He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was a fact which the contract gave him the right to decide. * * * To justify a refusal to accept the elevator on the ground that it is not satisfactory, the objection should be made in good faith."

The court found from the evidence, though conflicting as to the efficient working of the elevator, that it was sufficient "to show the plaintiff in error acted in good faith and not in mere caprice in refusing to accept it."

As we shall presently see, the authorities do not agree with the rule here stated—that it is sufficient if the purchaser "acts in good faith, and not in mere caprice." It will be observed that in the case cited the contract was for the purchase of an entire machine. In the present case the contract recognized two distinct parts—the machines and the controllers. In the case cited the hoist was regarded as a novelty in design, and the objection was to the working of the entire machine, which may have influenced the decision. It is possible the opinion would have been different had Singerly objected only to the duplex pump which could have been supplied in the open market if the one furnished had been objected to. In the case here the specifications carefully described all the various parts of the elevators which were to be furnished constituting the plant; the controllers being separately described.

"The rule very generally adopted," as was stated in *Dodge v. Kimball*, 203 Mass. 364, 89 N. E. 542, 133 Am. St. Rep. 302, "is that, to entitle the plaintiff to recover, he needs to show only that he proceeded in good faith in an effort to perform the contract, and that the result was a substantial performance of it, although there may be various imperfections or omissions that call for a considerable diminution of the contract price. The reason for this construction of such contracts is in part the difficulty of attaining perfection in the quality of the materials and workmanship, and of entirely correcting the effect of a slight inadvertence, and the injustice of allowing the owner to retain without compensation the benefit of a costly building upon his real estate, that is substantially, but not exactly, such as he agreed to pay for. In none of the courts of this country, so

far as we know, is the contractor left remediless under conditions like those above stated. The recovery permitted is generally upon the basis of the contract, with a deduction for the difference between the value of the substantial performance shown and the complete performance which would be paid for at the contract price." *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723; *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. 382.

In *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709, the contract was for the building of a heating apparatus. Among other things, the court said:

"A literal compliance with such contracts is not necessary to a recovery, but it will be sufficient that there has been an honest and faithful performance of the contract in all its material and substantial particulars, and no omission in essential points, or willful departure from the contract; and mere technical or unimportant omissions will not defeat a recovery of the contract price, less any damages, however, requisite to indemnify the owner." *Otis Elevator Company v. Flanders Realty Co. (Pa.)* 90 Atl. 624; Page on Contracts, § 1387.

The evidence showed an honest and faithful endeavor to install an efficient controller. It is true this part of the elevator can hardly be said to be of slight importance, and an omission to supply a controller reasonably satisfactory would not have fallen within the category of a slight deviation. But, slight or otherwise, the failure of the controllers first placed by plaintiff to prove themselves efficient was met and the cost allowed to defendant; in other words, the defendant got what he demanded and for the damage he was indemnified. If the cases cited do not apply strictly, the principle underlying them would seem to be applicable. We think, without doubt, had the Otis people allowed their controller to be used without compelling the purchase of their machines, defendant would have no ground of complaint.

The rule, as we understand it, found in *Singerly v. Thayer*, supra, that where the contract requires work to be done to the satisfaction of the person contracting for the work, his rejection of it cannot be called in question "if he acted in good faith and not in mere caprice in refusing to accept it," we think it too broad and is not in harmony with the generally accepted rule. It was said in *Gladding, McBean & Co. v. Montgomery*, 20 Cal. App. 276, 279, 128 Pac. 790, 792:

"A stipulation in a contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person"—citing cases.

In *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248, the action was to recover for certain grading and leveling done under a contract which provided that all grading was to be done to the satisfaction of said Keeler. The court said:

"Where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is that it must be done in a manner satisfactory to the mind of a reasonable

man. The plain construction of the contract in this regard is that the work was to be completed in accordance with the contract, in such a manner that appellant, as a reasonable man, ought to be satisfied with it." *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 812, 14 Am. St. Rep. 422; *Richison v. Mead*, 11 S. D. 639, 80 N. W. 131, and cases cited in the opinion.

Under the rule contended for by appellant it would be difficult, if not impossible, to show that the party was not acting in good faith and his right to say he was not satisfied would be practically arbitrary, excluding all question of its exercise being reasonable or unreasonable.

In the present case appellant not only refused to be satisfied unless Otis controllers were used, but he claimed the right to exercise this refusal, knowing that these controllers could not be obtained without purchasing machines, at great cost, which were not essential to their use. He at no time requested plaintiff to obtain controllers other than the Otis controllers, several of which were obtainable in the open market. Without previous notice to plaintiff or its consent, he removed plaintiff's machines and controllers and installed the Otis machines and controllers. Under the existing circumstances we think it would be unreasonable to hold that the contract permitted him to exercise what was little short of an arbitrary power.

The judgment and the order appealed from are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

BRYAN ELEVATOR CO. v. LAW. (Civ. 1466.)

(District Court of Appeal, Third District, California. Aug. 8, 1916.)

SALES \S 199—PASSING OF TITLE—RISK OF LOSS.

Where defendant sold and delivered to plaintiff certain elevator parts and supplies, the contract providing that defendant agreed "to sell for the sum of \$1.00 here in hand paid . . . all old elevator machinery now installed in the Bishop Block," plaintiff taking possession of the machinery and removing it to its shops, where it was destroyed by an earthquake and fire, title to the machinery was in plaintiff when destroyed, and the loss was upon it, and not upon defendant, though plaintiff intended to use the parts in defendant's new building in fulfillment of its contract to install elevators.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 516-523; Dec. Dig. \S 199.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by the Bryan Elevator Company against Herbert E. Law. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant. Edgar C. Chapman, of San Francisco, for respondent.

CHIPMAN, P. J. The appeal in this case is from the third cause of action set forth in the complaint. The transcript appears to be in all respects the same as the same case, No. 1465 (160 Pac. 170), this day decided. Why plaintiff's appeal was not urged in that case instead of making it the subject of a different number does not appear and is perhaps immaterial.

As a cause of action it is alleged that "plaintiff sold and delivered to defendant, at his request, certain goods, to wit, elevator parts and supplies," for which defendant agreed to pay the sum of \$2,053.10. The claim of plaintiff is that it is entitled to recover the sum of \$2,053.10, in addition to what it claimed in the first cause of action, which was disposed of in the case numbered 1465, for certain parts of the old elevator machinery formerly in the Bishop Building, and that when it was destroyed by the disaster of April 18, 1906, it belonged to defendant, and the loss was his. Among the provisions of the contract was the following:

"The owner agrees to sell for the sum of \$1.00 here in hand paid to the contractor all old elevator machinery now installed in the Bishop Block, situated as described heretofore, and hereby acknowledges and constitutes this his receipt for same."

Plaintiff took possession of this machinery and removed it to its shops, where it was when destroyed. We think it clear that the title to the machinery was in plaintiff when it was destroyed, and we find nothing in the contract that would fix the loss upon defendant by such casualty. Indeed, the provision intended to cover losses by act of God would seem to relieve defendant from such loss. It is true that Mr. Greenbaum, president of plaintiff company, testified that because of having received this old machinery which was to be altered and reinstalled in the Monadnock Building plaintiff reduced its bid in the contract \$1,600 "for the privilege of using that freight machine for installation in the building." But, if it was the property of plaintiff when destroyed, the use which plaintiff intended to make of it is immaterial. We cannot see that the loss was the less to it than it would have been had it purchased the machinery from some other person.

Plaintiff's claim is that the parts thus lost it had to supply, for which defendant should pay. The court, in its ninth finding, recites the facts and finds:

"That there is not now due, owing, and unpaid from the defendant to the plaintiff the sum of \$2,053.10 or any part thereof."

We think the finding supported by the evidence, and the judgment is therefore affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

LYNIP v. ALTURAS SCHOOL DIST. OF MODOC COUNTY et al.
(Civ. 1420, Sac. 2208.)

(District Court of Appeal, Third District, California. Jan. 7, 1916.)

On rehearing. Opinion modified.

For former opinion, see 29 Cal. App. 158, 155 Pac. 109.

PER CURIAM. It was unnecessary to pass upon the merits of the case; and, as we have reached the conclusion that further consideration of the matter should not be foreclosed, that portion of the opinion commencing with the words, "Moreover, upon the merits," and extending to and inclusive of the word, "guarantors," at the close of the opinion, is withdrawn.

SELLERS v. SOLWAY LAND CO. et al.
(Civ. 1826.)

(District Court of Appeal, First District, California. Aug. 15, 1916. Rehearing Denied Sept. 14, 1916. Denied by Supreme Court Oct. 12, 1916.)

1. BROKERS \S 43(1)—COMPENSATION—NECESSITY OF WRITTEN CONTRACT—STATUTE.

Civ. Code, \S 1624, subd. 6, providing that an agreement authorizing or employing an agent or broker to purchase or sell real estate for a commission shall be invalid unless it or some note or memorandum is in writing subscribed by the party to be charged or his agent, does not apply to an oral contract between brokers whereby one secures the co-operation of another to sell realty.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 44; Dec. Dig. \S 43(1).]

2. BROKERS \S 43(1)—EMPLOYMENT—NECESSITY OF WRITTEN CONTRACT—STATUTES.

Under such provision, and section 2039, requiring an oral authority to enter a contract required by law to be in writing to be given by an instrument in writing, a contract by the agent of an agent or broker stating the price asked for certain land, the terms of payment, and that he would pay a commission on such price to the party effecting a sale, in view of the fact that the broker employed had no knowledge that his employer was in fact an agent, and the absence of any agreement looking toward a division of the commission, was a direct contract of employment, so that where the authority of defendant's agent to employ plaintiff was not in writing, it was invalid and unenforceable.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 44; Dec. Dig. \S 43(1).]

3. ESTOPPEL \S 119—EQUITY—QUESTION FOR COURT.

The principle of estoppel is one of equity, and whether in a given case the facts shown are sufficient to create it is a question for the court.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 309; Dec. Dig. \S 119.]

4. BROKERS \S 43(1)—CONTRACT OF EMPLOYMENT—NECESSITY OF WRITING—ESTOPPEL.

In an action for a commission for the sale of realty under a direct contract with defendant's agent, not authorized thereto in writing, which under Civ. Code, \S 1624, subd. 6, and section 2309, was invalid, the defendant copartnership which knowingly held out its agent, the manager of its land department who handled all its correspondence in that department, and who was

authorized, though not in writing, to consult and deal with agents in regard to a sale of the defendant's lands, and which knew the plaintiff's efforts to sell the land, his expenses in procuring a purchaser, that the purchaser was first interested by the plaintiff, and which said nothing to the purchaser concerning the plaintiff's participation in the matter, was not estopped from pleading the bar of the statute of frauds.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. ¶43(1).]

5. BROKERS ¶82(4)—CONTRACT—INVALIDITY—EFFECT.

An agent selling real property under a contract of employment invalid because not in writing, cannot recover under the contract or on a quantum meruit.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 103; Dec. Dig. ¶82(4).]

6. TRIAL ¶173—MOTION TO DIRECT VERDICT—TIME.

In an action to recover a commission upon the sale of a ranch under an oral contract with the defendant's agent, where the court at the conclusion of plaintiff's case denied the defendant's motion for a nonsuit after the invalidity of the contract and the facts adduced by the plaintiff in support of his plea of estoppel had appeared, the subsequent granting of defendant's motion to direct the jury to return a verdict in its favor was not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 397; Dec. Dig. ¶173.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by George Sellers against the Solway Land Company and Balfour, Guthrie & Co., copartners, etc., and others. Dismissed as to defendant Solway Land Company, and judgment for defendants Balfour, Guthrie & Co. and others, and plaintiff appeals. Affirmed.

J. E. Rodgers and A. F. Bray, both of Martinez, and Sterling Carr, of San Francisco, for appellant. McCutchen, Olney & Willard, of San Francisco, for respondents.

Lennon, P. J. In this action the plaintiff sued the defendants for the sum of \$6,250, alleged to be due as a commission upon the sale of a large ranch in Contra Costa county, the complaint alleging that said sale was made through the efforts of the plaintiff under the contract hereafter set out. The land was the property of the defendant Solway Land Company, and was being managed and handled by the defendants Balfour, Guthrie & Co., a copartnership, consisting of a number of individuals, some of whom are named as defendants, and upon the sale referred to the copartnership received a commission of two and one-half per cent. upon its sale price of \$130,000, to wit, the sum of \$3,250, as compensation for the care of the ranch during a certain period and for its sale. The agency of the defendants Balfour, Guthrie & Co. was, however, unknown to the plaintiff, and the complaint charges them as owners. At the conclusion of the evidence a motion of defendant Solway Land Company

to dismiss as to it was granted, and no question is raised as to the correctness of the court's action in this regard. Hereafter in this opinion the term defendants will refer only to Balfour, Guthrie & Co.

The negotiations between the plaintiff and the defendants for his contract were conducted by him with one R. F. McLeod, an employee of the defendants and the manager of a department of their business known as the land and loan department. The contract was signed by McLeod on behalf of the defendants, and is in the following terms:

"San Francisco, 22d Sept., 1909.

"Mr. Geo. Sellers, Oakley, Cal.—Dear Sir: Replying to your letter of 21st inst., the price we are asking for the Solway ranch is \$125,000, including stock and implements and interest in the pumping plant. We would be willing to accept one-half cash and carry the balance at 6 per cent. net for a reasonable time. We will pay 5 per cent. commission on the above price to the party effecting a sale.

"You are no doubt aware that part of the ranch is rented to Japanese for potatoes, etc., and possession of same cannot be given until expiry of the lease this fall.

"Yours truly, Balfour, Guthrie & Co.,

"Per [Signed] R. F. McLeod."

"P. S.—There is about 1,700 acres all together." (It may be said parenthetically that at the time of the sale the price of the property had been increased.)

It is an established fact in the case and not disputed that the authority from the defendants to McLeod to enter into this contract was not conferred in writing. The action having been dismissed as to the defendant Solway Land Company the remaining defendants at the conclusion of the trial moved that the jury be directed to return a verdict in their favor upon the ground of the lack of written authority to McLeod; section 2309 of the Civil Code requiring that an authorization to an agent to enter into a contract required to be in writing must itself be evidenced by a written instrument. This motion was also granted, and the jury thereupon returned its verdict in favor of the defendants. From the judgment entered thereon the plaintiff takes this appeal.

In support of his appeal plaintiff urges that the court erred in directing the jury to find in defendants' favor for two principal reasons, viz.: First, that the plaintiff's contract being one between broker and broker, is not governed by section 1624, subd. 6, of the Civil Code, and that therefore McLeod's authority to enter into it was not required to be in writing; and, second, even if the contract sued upon be one that is governed by said section, the conduct of the defendants in reference thereto estops them from availing themselves of the bar of the statute.

[1] The authorities in this state, holding that an oral contract between brokers, whereby one employs or secures the co-operation of another to sell real estate, is valid and enforceable, may be roughly divided into

three classes. The first class comprises cases where the brokers' agreement was purely and simply one of partnership, such as *Coward v. Olanton*, 79 Cal. 23, 21 Pac. 359; *Gorham v. Helman*, 90 Cal. 346, 27 Pac. 269; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 183; and *Baker v. Thompson*, 14 Cal. App. 175, 111 Pac. 373; the second comprises cases where the agreement of the brokers was to divide between them, either equally or in a stated proportion, a commission or compensation to be received by one of them from the owner of the land to be sold, such as *Casey v. Richards*, 10 Cal. App. 57, 101 Pac. 36; *Hageman v. O'Brien*, 24 Cal. App. 270, 141 Pac. 33; *Reynolds v. Jackson*, 25 Cal. App. 490, 144 Pac. 305; *Hellings v. Wright*, 156 Pac. 365; *Jenkins v. Locke-Paddon Co.*, 157 Pac. 537; and the third class consists of cases, two in number, in which one broker, having a contract from the owner to sell real property, has agreed with a second broker to pay him for his services either in procuring a buyer for the property or assisting in that end—those cases being *Saunders v. Yoakum*, 12 Cal. App. 543, 107 Pac. 1007, and *Johnston v. Porter et al.*, 21 Cal. App. 97, 131 Pac. 69.

In the case at bar the contract, as we have seen, is one to pay a specific amount, viz. 5 per cent. on the purchase price, for the procuring of a purchaser, and would fall within the last-named classification and be governed by the authority of those cases, unless it contains elements differentiating it from them and making inapplicable the rule therein followed.

The leading case in this state upon the question is *Gorham v. Helman*, supra, and which has been cited in practically every decision upon the subject which has since been rendered. The agreement there was between brokers to co-operate in the selling of a mine and to divide commissions, and the court referring thereto used this language (page 358 of 90 Cal., page 292 of 27 Pac.):

"Counsel seem to rely on section 1624 of the Civil Code, subdivision 6. But, clearly, that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions."

It will be seen upon examination that all the cases in the first and second classification made above dealt with agreements between brokers to co-operate in the common object of procuring a purchaser for real property, and come squarely within the authority of *Gorham v. Helman*.

With regard to the remaining two cases, it appears that in *Saunders v. Yoakum*, supra—

"defendant agreed with plaintiff that if he would procure a purchaser for any or all of the property he would pay to the plaintiff a commission in the event of a sale."

Plaintiff performed his agreement, and the defendant received a commission of \$1,200,

and refused to pay plaintiff for his services. The latter thereupon brought suit, and recovered \$400 as the value thereof. Upon appeal the contention of the defendant that the contract was void because not in writing was overruled upon the authority of the leading case above cited, the court construing the agreement to be one between brokers to co-operate in making a sale for a share of the commission, and referring to the services of the plaintiff as being rendered "in assisting the defendant to earn his commission."

In the second case (*Johnston v. Porter et al.*) it appears that Johnston, the plaintiff, introduced the purchaser of the property to the defendant Morey, who was acting as the agent of the owner, and also assisted in conducting the negotiations which resulted in a sale. Morey orally agreed to compensate Johnston for his services. Upon the conclusion of the sale Morey received a commission of \$2,250, out of which he offered to pay Johnston \$250. Johnston being dissatisfied with the amount tendered by Morey, brought suit upon the oral agreement for the reasonable value of his services. The court allowed a recovery of \$1,500 out of \$2,250 received by Morey. Upon appeal the judgment was sustained, this court construing the agreement between Morey and Johnston as being one between two brokers to co-operate in the sale of real estate, using this language:

"Subdivision 6 of section 1624 of the Civil Code, which declares an agreement authorizing or employing an agent or broker to sell real estate for a compensation or commission to be invalid unless reduced to writing was designed only for the protection of real estate owners against the unfounded claims of brokers; and it was never intended to be applied to contracts between brokers co-operating in the sale of real property and agreeing to share commissions earned as the result of such sale"—citing *Gorham v. Helman*, supra.

If it be the law in this state, as stated in *Gorham v. Helman*, that the section of the Code under consideration "was only designed to protect owners of real estate against unfounded claims of brokers," then the authorization to the employé of the defendants McLeod did not need to be in writing. But, as was said in the later case of *Aldis v. Schleicher*, 9 Cal. App. 372, 99 Pac. 526, that section is—

"equally applicable to any contract whereby one, whether owner or not, employs another to effect a sale of real estate, and agrees unconditionally to pay a stipulated sum for the performance of such services."

It will be observed that in *Gorham v. Helman*, in which the rule was first laid down that the provisions of subdivision 6 of section 1624, Civil Code, apply only to contracts between the owners of real estate and brokers, the contract there being considered was literally an agreement between brokers, dealing with each other as such, to unite their efforts in the disposal of a mine, and to divide the compensation to be earned in the

event of success, and that there was no employment by one of the other. Evidently such a contract was one of partnership, and did not come within the terms of the section, whether the legislative intent in enacting it was merely to protect owners of real estate, or its scope was much broader. As already pointed out, the cases following *Gorham v. Helman* with the exception of the two noted all dealt with agreements between brokers to divide commissions to be received as the result of their joint efforts; and even in those two, while the agreement as to the compensation of the complaining broker was more in the nature of a direct promise by the other to compensate him for services already or thereafter to be rendered, it is still apparent that they dealt with each other as agents, that they were both interested in the result of their common efforts, and that the compensation agreed to be paid, or allowed by the court, was a part only of the compensation of the employing broker, thus preserving in some degree the idea of co-operation between broker and broker for a division of the fee, and enabling the court in its desire to prevent the defeat of an equitable claim to construe the agreement as one for the division between brokers of a compensation jointly earned.

[2] In the case at bar there is no such partnership between the brokers, nor any agreement to divide compensation, and no effort on the part of the plaintiff to obtain a division of the commission received by the defendants. On the contrary, the amount sued for is almost double the sum which the employing brokers received as their compensation for the share of the property and its sale. There was, moreover, no knowledge on the part of the broker employed that his employers were in fact agents, and the contract is one of employment for a specific compensation. In the complaint the employing brokers are charged as the owners of the property; and it was only during the progress of the trial that the plaintiff discovered that they were not such owners, and when such discovery was made there was no amendment of the complaint requested. If we hold this case not to come within the provisions of section 1624 of the Civil Code we must ignore the careful insistence to be discerned in the cases upon the existence of a partnership, or of an agreement to divide commissions, or of the existence of a fund received by one broker in which the second broker may be allotted a share—and lay down the rule that all these things are immaterial, and that a direct contract of employment to sell real estate for a specific compensation is invalid if made by the owner of the property with a broker, but is valid if made between two brokers—contrary to the rule declared in *Aldis v. Schleicher*, supra, and which appears to us to be plainly applicable to the case at bar.

We are therefore constrained to hold that the plaintiff neither by the allegations of his complaint nor his proof upon the trial brought his case within the authority of those holding that a contract between brokers to co-operate in the sale of real estate for a division of the compensation to be thereby earned is valid and enforceable, although not in writing. The first contention of the appellant must accordingly be disallowed.

[3-5] The second contention of the appellant is that even if the contract sued upon be one that is required to be in writing, the conduct of the defendants in reference thereto estops them from availing themselves of the bar of the statute for three reasons, viz.: First, because the defendants knowingly held McLeod out to the world as having the authority he assumed; second, because the defendants knew that McLeod was dealing with the plaintiff; and, third, because the defendants accepted the benefits of McLeod's acts.

The principle of estoppel is one of equity; and whether in a given case the facts and circumstances shown are sufficient to create it is a question for the court. It is also well settled that estoppels are not favored, their effect being to prevent the truth being shown.

The facts on which the plaintiff's plea of estoppel is based are, briefly, that McLeod was the manager of the department of the defendants' business known as the land and loan department; that as such manager he answered all correspondence addressed to the defendants on matters relating to that department; that he had authority, though not in writing, to consult and deal with agents in regard to a sale of the defendants' lands; that a contract similar to the one given to the plaintiff was subsequently entered into by him on behalf of the defendants with a person other than the plaintiff; that the efforts of the plaintiff to sell the ranch were known to McLeod and to the foreman and superintendent of the ranch, which the plaintiff visited a number of times in the company of prospective buyers; that plaintiff expended money in advertising the ranch in his endeavor to procure a purchaser; and, finally, that the persons to whom the ranch was sold were first interested in its purchase by the plaintiff, who sent them to McLeod for the purpose of arranging terms and closing up the transaction, but without advising McLeod that he had done so.

It further appears, however, that the negotiations were conducted by the purchasers with McLeod, and that nothing was said by them concerning the plaintiff's participation in the matter, and that the sale was made to them without knowledge on the part of McLeod that the plaintiff was interested in it other than a verbal notification made some time previously that he was endeavoring to sell the land to these people.

We are of the opinion that the court correctly held that the above facts were insufficient to constitute an estoppel as against the plea of the statute of frauds.

It has long been held in this state that an agent having sold real property under a contract of employment invalid because not in writing can recover neither upon the contract nor upon quantum meruit. *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. 523; *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642; *McPhail v. Buell*, 87 Cal. 115, 25 Pac. 266; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *McGeary v. Satchwell*, 129 Cal. 389, 62 Pac. 58; *Jamison v. Hyde*, 141 Cal. 109, 74 Pac. 695. Although in these cases no question of estoppel is considered, they offer a strong analogy to the case at bar, for all the facts present here and claimed by the plaintiff to constitute an estoppel were necessarily present in those cases, viz. an invalid employment, knowledge of its invalidity, knowledge of rendition of services under the contract, and acceptance of the benefits arising from the performance of the contract by the agent. The statute of frauds, however, was held to bar the agent's recovery.

In the case of *McRae v. Ross*, 170 Cal. 74, 148 Pac. 215, the question of estoppel under circumstances somewhat similar to those in the case at bar was considered. In that case a ranch in Solano county had been sold. A. T. Ross and three other respondents (sisters and brother of A. T. Ross) were owners. *McRae* claimed to have found the purchaser, and relied upon a broker's note from A. T. Ross alone. There was no written authority from the other respondents to A. T. Ross, but *McRae* claimed that they had held him out as their agent and that they were stopped from raising the defense of the statute of frauds, particularly Civil Code, § 2309. This alleged holding out (one of the elements claimed in the estoppel in the case at bar) consisted of statements claimed to have been made to *McRae* by the respondents to the effect that A. T. Ross was authorized to act for them, and that he was in charge of the ranch. It was held that there was no estoppel, the court saying (Mr. Justice Sloss writing the opinion):

"It is clear that the findings in favor of the defendants Raymond H. Ross, Mabel I. Ross, and Mrs. Henry are in accord with the undisputed evidence. A contract for the sale of real estate, or for the employment of a broker to sell real estate, must be in writing. Civ. Code, § 1624; Code Civ. Proc. § 1973. None of these three defendants ever made any written contract with plaintiff or even had any written communication with him. Plaintiff attempted to show that each of them had referred him to a brother, their codefendant, Albert T. Ross, as the person in charge of the ranch. But the testimony was that Albert did not have any written authority to bind them, and this was necessary to empower him to make a contract, on their behalf, to sell real estate or employ an agent to sell it. Civ. Code, § 2309. Even if the making of the oral statements had been shown without contra-

diction—which is not the case—such statements would not have bound these defendants. There is no ground for the contention that the alleged declarations raised an estoppel against the three defendants. To so hold would destroy the statutory requirement that authority to sell real property must be in writing."

The appellant strongly relies on the case of *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. In that case the plaintiff Seymour sued for damages for breach of a contract of employment; his employment to cover a period of ten years. The contract was not in writing, and therefore void under the statute of frauds. The claim of estoppel was based upon the ground that the defendants when negotiating for his employment promised him a written contract, and had induced him, in order to permit him to accept the employment, to resign a life position carrying a good salary with a right to a pension upon retirement. Through circumstances arising subsequent to his entering upon his employment the written contract was not given to Seymour, and after rendering services under the verbal contract for a period of three years he was dismissed. In holding the defendants estopped to set up the statute of frauds the Supreme Court laid emphasis upon the fact that it was not because of the rendition of services under the contract that the estoppel was allowed, but because of the change of position suffered by the plaintiff through having resigned a lucrative position—and which he could not now regain—in order to accept the employment. It was held that it would be a fraud upon the plaintiff if the defendants after having induced him to resign from his position upon the promise of a ten-year written contract, and having failed to reduce the contract to writing, were permitted to set up the invalidity of the oral contract to defeat recovery. The court emphasized the fact that the plaintiff was not helped by the performance of services. On this subject it says:

"Under this claim, the fact of part performance by plaintiff plays no part whatever. * * * Plaintiff's case, in this regard, would be just as strong if after his resignation he had been prevented by defendants from beginning to perform."

Thus far we have considered the question of estoppel only so far as it is affected by the evidence offered by the plaintiff; but since plaintiff's claim is based upon the alleged holding out by the defendants of their employé McLeod as having authority to enter into the contract, upon their knowledge of the plaintiff's activity in the performance of the contract, and upon their accepting the benefit of the results of his labors, we think it plain that the court in considering whether the estoppel claimed had been established was bound to consider all of the evidence offered upon those matters whether by the plaintiff or the defendants. In that view of the case the plaintiff's position becomes still more untenable, for the defendants offered

evidence tending to show that the plaintiff's contract had expired long before the sale took place, that he had been warned to desist from his efforts to sell the ranch, and that the plaintiff recognized by his acts that his contract was no longer in effect; and that even if the sale of the property was made to persons who were first interested in it by the plaintiff, the latter was guilty of gross negligence in failing to report to the defendants that he had brought the property to the attention of its ultimate buyers, thus allowing the defendants to deal with them in ignorance of their liability to pay to the plaintiff a commission. These facts would have a strong bearing upon the question of whether the defendants received any benefit from the contract made by this agent, and consequently upon the potency of the plaintiff's appeal to the equitable jurisdiction of the court for the application of the principle of estoppel in his favor.

[8] There is no merit in the final point urged by the appellant that the court having at the conclusion of the plaintiff's case denied defendants' motion for a nonsuit, the invalidity of the contract and the facts adduced by the plaintiff in support of his plea of estoppel at that time appearing, it was error to subsequently grant the motion of the defendants to direct the jury to return a verdict in their favor.

For the foregoing reason the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

BOSCUS et al. v. WALDMANN et al.
(Civ. 1428.)

(District Court of Appeal, Third District, California. Aug. 14, 1916. Rehearing Denied by Supreme Court Oct. 12, 1916.)

1. MECHANICS' LIENS §271(1) — FORECLOSURE—PLEADING—COMPLAINT—SUFFICIENCY. Complaint of subcontractor claiming mechanic's lien held sufficient to state a cause of action.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 494; Dec. Dig. §271(1).]

2. MECHANICS' LIENS §271(10)—FORECLOSURE—PLEADING—COMPLAINT—SUFFICIENCY. Complaint of subcontractor claiming mechanic's lien, alleging that the building was completed according to the terms of the contract, "on or about October 26th," and that lien claim was filed November 19th, is sufficient to warrant proof of exact date of completion, though it may not specifically show that completion took place within 30 days prior to November 19th; nor is such allegation objectionable for alleging completion of building rather than completion of contract, since it sufficiently shows the latter.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 504; Dec. Dig. §271(10).]

3. MECHANICS' LIENS §96 — SUBCONTRACTORS—FAILURE TO REQUIRE CONTRACTOR'S BOND.

Under Const. art. 20, § 15, and Code Civ. Proc. § 1183, in pursuance thereof, providing a lien for mechanics for labor and materials fur-

nished, and that one in charge of construction shall be regarded as the owner's agent, and providing for filing of bond of contractor to protect other claimants, if the owner fails to require such bond, he is liable to pay all liens to the value of the work done and materials furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 128; Dec. Dig. §96.]

4. MECHANICS' LIENS §132(7)—NOTICE OF COMPLETION — STATUTORY COMPLETION — EFFECT ON LIEN CLAIM.

Under Code Civ. Proc. § 1187, providing that every person, save the original contractor, claiming a lien, within 30 days after he has ceased to labor or furnish materials, or both, or at his option, within 30 days after the completion of the original contract under which he was employed, must file for record a claim of lien, and that any of the following shall be deemed equivalent to a completion; the occupation or use of a building by the owner, or his representative, or the acceptance by owner or agent, or cessation from labor for 30 days upon any contract or building, or the filing of the notice provided for; and that the owner may, within 10 days after completion of any contract, or 40 days after cessation from labor thereon, file for record notice setting forth the date of completion or cessation from labor with his name and nature of his title, and description of the property, and that if such notice is not filed, the owner and all persons derailing title from him shall be estopped in proceedings for foreclosure of lien from maintaining any defense on the ground that lien was not filed in time, but that all claims of lien must be filed within 90 days after completion of any building; the requirement as to notice of completion applies to statutory completion by occupation, and the owner who fails to file such notice is estopped to defend for failure to file lien in time.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 198, 199; Dec. Dig. §132(7).]

5. PLEADING §129(1)—ANSWER—FAILURE TO MAKE DENIAL—EFFECT.

An averment of the complaint not denied in the answer stands as an admitted fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270, 274, 275; Dec. Dig. §129(1).]

6. MECHANICS' LIENS §281(2)—COMPLETION OF CONTRACT—EVIDENCE—SUFFICIENCY.

Finding that building was completed on October 26th is justified by the owner's statement that the last work was that of the painter who on that date worked two hours, especially in view of averment, undenied by the owner, that such date was the date of completion.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 568, 569; Dec. Dig. §281(2).]

7. MECHANICS' LIENS §290(2)—COMPLETION OF CONTRACT—"ON OR ABOUT."

Finding that building was completed "on or about October 26th" is sufficiently definite, in view of record, admission that such was the date; "on or about" meaning the day mentioned or one in close proximity thereto; one or two days either before or after being implied.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 592, 593; Dec. Dig. §290(2).]

For other definitions, see Words and Phrases, First and Second Series, On or About.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by John M. Boscus and another, individually and as copartners under the firm name of Boscus Bros., against Charles H. Waldmann, wife, and Felix Marcuse. From the judgment for plaintiffs, Waldmann and wife appeal. Affirmed.

Alexander D. Keyes, of San Francisco, for appellants. A. P. Dessouslavy and P. A. Bergerot, both of San Francisco, for respondents.

HART, J. This is an action of foreclosure under the mechanic's lien law.

On the 11th day of April, 1912, the appellants, the Waldmanns, and the defendant Marcuse entered into an agreement in writing whereby the latter agreed to erect upon certain real property of the first-named parties, situated in the city of San Francisco, a three-story frame building, for the sum of \$18,915, which sum was to be paid in certain specified installments at specified times, the last installment (\$4,728.75) being made payable 35 days after the completion of said building. Said contract was filed for record in the office of the county recorder of the city and county of San Francisco on said 11th day of April, 1912, but there was not filed with said contract, before the work was commenced, or at any other time, the bond provided by section 1183 of the Code of Civil Procedure, or any bond whatever.

Immediately after the 11th day of April, 1912, the defendant Felix Marcuse commenced the erection of said building upon the real property described in the complaint, in pursuance of the terms of said contract between him and the Waldmanns, and the complaint alleges that he completed the same "on or about October 26, 1912; that no notice of the completion of said building or contract was ever filed in the office of the county recorder of said city and county of San Francisco; that all the terms and conditions of said contract to be by said Felix Marcuse kept and performed have been by him duly kept and performed." It is averred that of the contract price for said building not more than the sum of \$10,000 has been paid by the Waldmanns to said Marcuse, and that:

"There ever since has remained and still remains due and unpaid from defendants (the Waldmanns) . . . to said Felix Marcuse, under said contract, and for said extra work and materials, a sum exceeding \$10,000."

On the 6th day of May, 1912, said Marcuse, as such contractor, entered into an agreement with the plaintiffs by which the latter undertook and promised to do all the plumbing work for said building and to install the steam heating plant and the radiators therein, in accordance with the plans and specifications adopted by the Waldmanns and said Marcuse, said plans and specifications being attached to and forming a part of the contract for the erection of the building; that plaintiffs by said agreement agreed to furnish all the materials and necessary labor,

to commence said work at once, to prosecute the same without delay, and to have said work finished as soon as possible; that said Marcuse agreed to pay the plaintiffs therefor \$2,190, as follows: 75 per cent. of the work done as the same should progress, and the remaining 25 per cent. 35 days after the completion of the building.

It is alleged that, during the course of the erection of the building, the plaintiffs, at the request of said Marcuse, performed certain extra work and furnished certain extra materials. The various and several items of extra work and materials so performed and furnished are separately set out and described in the complaint and the total amount thereof, stated in money, is \$315.65. There are eleven of these items of extra work performed and extra materials furnished, and the complaint alleges that as to the first six items of such extras in the order in which they are set forth in that pleading, the prices therefor were fixed and agreed upon between plaintiffs and the said Marcuse; that as to the remaining five items thereof, no price was fixed or agreed upon for the same but that the amounts claimed for the said last five items constitute the reasonable value thereof. It is alleged that no time within which said extra work was to be done was fixed or agreed upon, except that it was agreed that the same was to be done during the course of the erection of the building and as soon as possible, and that no time was fixed for the payment to the plaintiffs for said extra work; "that plaintiffs have further performed all the conditions of said agreement of May 6, 1912, to be by them performed; that said extra work was agreed to be done and was actually done, and that said extra materials were furnished to be used and were actually used in the construction of said building." It is further averred that all said extra work was done and the extra materials were furnished by the plaintiffs upon the order of said Marcuse and with the consent of the said defendants Charles H. and Nellie V. Waldmann; "that the said price of \$2,190 is and was the reasonable value of the work provided by the said agreement of May 6, 1912, to be done by plaintiffs."

It is alleged that the sum of \$750 only has been paid on the price fixed in the agreement of May 6, 1912, and that nothing has been paid the plaintiffs on account of the extras aforesaid, and that, with the sum due on account of said extras added to the balance remaining unpaid and due under the said written agreement of May 6, 1912, there is now due the plaintiffs from the appellants the total sum of \$1,755.65.

The complaint is in two counts. The first alleges that the plaintiffs on the 19th day of November, 1912 (admitted by all the parties to have been the 20th instead of the 19th of November as alleged), filed their claim of lien, duly verified, in the office of the county

recorder of the city and county of San Francisco. In the second count it is alleged:

"That, on November 30, 1912, defendants Charles H. Waldmann and Nellie V. Waldmann filed for record in the office of the county recorder of said city and county of San Francisco their notice wherein it was stated that a cessation of labor on said building had occurred October 26, 1912, and that, on November 25, 1912, there had been a cessation of labor for 30 days; that on December 10, 1912, plaintiffs, for the purpose of securing a lien for the amount due them as aforesaid, filed in said recorder's office their claim of lien, duly verified by the oath of John M. Boscus, one of said plaintiffs," etc.

A demurrer on both general and special grounds interposed by the defendants Waldmann was overruled, and said defendants thereupon answered the complaint, specifically denying all the averments of the same, with the exception, however, of paragraph 6 thereof, relating to the extra work done and the extra materials furnished by the plaintiffs, and as to said extras they admitted that they were done and furnished by the plaintiffs, but, it is alleged, upon an express agreement that there would be no extra charges therefor, some of them merely involving the correction of work which was called for by the building contract but which was defectively executed.

As separate and distinct defenses the answer in substance alleges: (1) That the plaintiffs ceased to labor and ceased to furnish materials in the construction of said building prior to the 8th day of October, 1912, and that the claim of lien set forth in each of the causes of action declared upon was filed for record more than 30 days after the plaintiffs ceased to labor and ceased to furnish materials to be used in the construction of said building; (2) that the defendants Waldmann, as owners, began the occupation and use of said building on the 17th day of October, 1912, "and that the claims of lien of the said plaintiffs were filed more than 30 days after such occupation and use commenced, to wit, on the 20th day of November, 1912, and on the 10th day of November, 1912, respectively, and were therefore filed for record after the time allowed by law, and these defendants allege that such occupation and use by these defendants as such owners was open, notorious, and continuous."

Finally, answering both causes of action relied upon by the plaintiffs, the answer points out the requirements as to plumbing prescribed by the specifications, and then charges that the plaintiffs failed to comply with those requirements in a number of specifically mentioned material particulars.

The court's findings are in substance as follows: That the building, except as to certain trivial imperfection, involving items, aggregating, in money, the sum of \$17, for which credit was allowed the appellants, was completed by Marcuse "on or about October 26, 1912, and subsequent to October 20, 1912"; that, barring the trivial imperfec-

tion referred to in the construction of said building, all the terms and conditions of the contract to be by said Marcuse kept and performed have been by him duly kept and performed; "that ever since on or about October 20, 1912, there remained, and now remains, due and unpaid from defendants Charles H. Waldmann and Nellie V. Waldmann to said Marcuse under said contract a sum exceeding \$6,500." It is further found that all the terms of the contract of May 6, 1912, between Marcuse, as agent of the defendants, and the plaintiffs, whereby the latter were to do the plumbing work in and upon said building, and provide the labor and materials therefor, were duly performed by the plaintiffs, and that the latter performed the extra work and furnished the extra materials alleged in the complaint and above referred to, the said agreement of May 6, 1912, and the extra work all being executed and performed according to the specifications forming part of the building contract. It is also found:

"That, on October 17, 1912, defendants Charles H. Waldmann and Nellie V. Waldmann entered into, and ever since have been in, the actual and exclusive use and occupation of said building."

It was alleged in the answer and, as seen, admitted to be true by counsel for both parties, that the first claim of lien by the plaintiffs was filed on the 20th day of November, 1912, and not on the 19th day of November, 1912, as the complaint alleges.

It was also admitted by the appellants that no notice of completion of the building was ever filed by them, but that (so the plaintiffs allege and admit) a notice of cessation of labor was filed on November 30, 1912, stating that, on November 25, 1912, there had been a cessation of labor for 30 days.

It is alleged by the complaint and not denied by the answer that the bond mentioned in section 1183 of the Code of Civil Procedure was not filed with the original contract in the office of the county recorder, and thus the failure to file such bond was admitted.

Upon the findings and the admissions mentioned the court entered its decree, awarding the plaintiff the sum of \$1,738.65, or the sum of \$1,755.65, minus the said sum of \$17 allowed for the "trivial imperfection," decreed that the plaintiffs were entitled to a lien on the real property described in the complaint and the building thereon and a foreclosure thereof and a sale of said property at public auction to satisfy their claim. The Waldmanns have appealed from said judgment under the alternative method.

The findings and the judgment are, as is obvious, based upon the first count of the complaint—that is, the decree, in accordance with the findings, adjudged the plaintiffs to be entitled to the lien and the benefits thereof filed on the 20th day of November, 1912, upon the theory that the building was completed on the 26th day of October, 1912.

The contract between the plaintiffs and the original contractor, Marcuse, was made and filed and the work performed and the materials furnished thereunder after the existing law providing for the enforcement of mechanics' and laborers' liens was passed by the Legislature of 1911, and hence by the provisions of that law must the questions presented by this appeal be tested.

[1, 2] The complaint, which is not to be indorsed as a perfect pleading in a case of this character, is, nevertheless, sufficient and states a cause of action in the first count, upon which the judgment is based. We shall not consider all the objections to which it is urged that it is amenable. One of these objections may be noticed, however. It is that the allegation that the building was completed according to the terms of the contract "on or about October 26, 1912," and that the claim of lien was filed on the 19th day of November, 1912, is too indefinite, and is not equivalent to the statement that completion took place within 30 days before November 19, 1912, citing *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643. The case cited has reference particularly to a finding in the criticized language of the complaint. We think, however, that the language may and should be held sufficient in a complaint in a case of this character to warrant proof of the exact date, and that no substantial injury to the appellants could have followed from the ruling on the demurrer, so far as that language of the pleading is concerned. It is further insisted that the complaint was defective in that it alleged that the building rather than the contract was completed. The complaint, as we have seen, declares that the building was completed according to the terms of the contract, and this sufficiently showed that the contract was completed, assuming that there is any substantial merit to the distinction sought to be drawn by appellants. We think the court made no error in overruling the demurrer.

[3] The most important objection to the judgment, however, is that certain of the vital findings upon which it is founded are not supported by the evidence, and this involves the principal question around which the controversy submitted here revolves and upon which its solution hinges, viz. whether the plaintiffs filed their claim of lien—that of November 20, 1912—within the time prescribed by the statute; and, furthermore, whether said finding is sufficiently definite to constitute a clear and distinct finding of the fact to which it is addressed. The appellants also attack the finding respecting the extra work and materials above spoken of.

Section 1188 provides for a lien in favor of all persons for labor performed upon or for material used in the construction of any building, etc., for the value of the labor so done and the materials so furnished. This provision is only declaratory of the right expressly guaranteed by our Constitution to

artisans, mechanics, laborers and materialmen to a lien upon property upon which they have bestowed labor and materials in the improvement thereof or the erection of a building thereon. Article 20, § 15, Constitution. The same section, however, further provides that any person having charge of the construction, etc., of the building or other improvement "shall be held to be the agent of the owner for the purposes of this chapter," thus binding the owner to any subcontracts with other persons in the construction or repair of the building or other improvements, provided, of course, such subcontracts are within the scope or the terms, conditions, and specifications of the original contract. A bond (heretofore referred to) is also provided by this section. It is the duty of the owner to exact this from the contractor and file the same in the office of the county recorder with the contract if he would restrict his liability to laborers and materialmen or subcontractors for their claims to the contract price. If he fails to require such bond to be executed and filed and none is filed, there is then imposed upon him "the penalty of paying all the liens to the extent of the value of the work done and materials furnished." *Roystone Co. v. Darling & American Surety Co.*, 171 Cal. 526, 154 Pac. 15.

[4] But the provisions with which the principal question here is concerned are in section 1187. Said section, among other things, provides that:

"Every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder * * * a claim of lien containing."

Then follows a specification of the facts which the lien must contain and recite. Said section proceeds:

"Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building * * * by the owner, or his representative; or the acceptance by said owner or said agent, of said building * * * or cessation from labor for thirty days upon any contract or upon any building; * * * the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder * * * a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. * * * In case such notice be not so filed then the said owner and all persons deigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in

this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building," etc.

It is not contended, nor could it be successfully, that under section 1187 a lien claimant, other than the original contractor, may not file his lien within 30 days after the happening of any one of two events, viz.: (1) After he has ceased to labor or ceased to furnish materials, as the case may be, or both, if he has both performed the labor and furnished the materials; (2) after the completion of the original contract. The appellants do contend, however, that the plaintiffs should have filed their lien within 30 days after the 17th day of October, 1912, the date upon which it is found by the court that the Waldmanns, owners of the property, entered into the occupation of the building. The argument is that a lien claimant, other than the original contractor, must file his claim of lien within 30 days after the first act constituting a completion of the building, whether it be an actual or only a statutory completion, and that if he fails to do so, then his right to a lien is lost. To be more explicit, the argument is: That, if a completion is effected, either by occupation or a cessation from labor or by acceptance, the time for the filing of the lien begins to run on that day, and the claimant cannot then claim the right to file his lien within 30 days after the building has actually been completed if such actual completion occurs on a date subsequent to the completion by occupation or by acceptance or by cessation from labor, as the case may be.

In reply to the proposition so advanced, the plaintiffs say that, even if it be true that in this case the occupation and use of the building constituted a statutory or constructive and not an actual completion of the building, the defendants were, nevertheless, required to file the notice of completion required by section 1187, and, having failed to file such notice, they are now estopped under the terms of said section, from maintaining any defense in this action "based on the ground that said lien was not filed within the time provided in this chapter." The defendants argue, however, that the provision with regard to the notice of completion to be given applies solely to an actual completion and not to the statutory or constructive completion.

In the case of *Roystone v. Darling & American Surety Co.*, supra, the Supreme Court, for the first time because it was the first case calling for it, elaborately reviewed the lien law of 1911, which constitutes a general revision of the law theretofore existing upon that subject in this state. In that case, through Mr. Justice Shaw, the scope, the intent, and the meaning of the several provisions of that statute were thoroughly explored and lucidly exposed and explained.

The question as to the application of the requirement of the statute that notice shall be given of the completion of the building to the several events constituting the equivalents of completion, when actual completion has not been effected, did not arise in that case. And, since the amendment of section 1187 (Stats. 1897, p. 202), whereby, for the first time, provision for notices of completion and cessation from labor were incorporated into that section, the proposition has been touched upon in but one case (*Meyer v. Street Improvement Co.*, 164 Cal. 645, 648, 130 Pac. 215, 216), which was decided before the revision of 1911, whereby, however, no change was made in respect of the requirement of notices prescribed by the 1897 amendment. In that case the court uses language strongly intimating, if not directly deciding, that notices should be filed in all cases. The precise language of the court is:

"The first paragraph requires a notice of completion to be filed by the owner in every case in which a lien may be filed under section 1183."

And no sound reason has been suggested in the briefs, and none has occurred to us, for holding that the requirement as to notice was not intended as well to apply to the statutory completion of a building as to the actual completion thereof.

"The words 'shall be deemed equivalent to a completion' mean shall be equal in legal effect to a completion; that is, shall be treated, for the purpose of filing a lien, as an actual completion." *Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 84, 24 Pac. 648.

The object of the statute in requiring notice to be given in any case is not only to prevent the filing of premature liens, and thus the unseasonable and unnecessary embarrassment of the property of the owner, but, principally, to protect the claimant from losing his right to a lien or suffering it to lapse by default, due to his want of knowledge of some sort of the date on which the time within which he is required to file his lien has commenced to run so that he may preserve and have the benefit of the remedy granted to him by the Constitution. The Legislature certainly could not have intended that lien claimants, in the cases of statutory completion, other than those where the owner is required to file a notice, should be compelled to exercise constant vigil over the movements of the owner to see whether he had commenced occupation of the building or had accepted it before its actual completion. Indeed, it would be impossible for the claimant to know whether occupation before actual completion had taken place, since clearly "occupation," within the meaning of the statute, involves not a question of fact alone, but also a question of law. An owner, for reasons of convenience, might enter into the occupation of a building while it is still in course of completion, with the understanding that it is not then to be accepted and that the work of completion shall be proceeded

with. Hence occupation is a question of law to be determined upon the circumstances under which it occurs. The argument that, following out to its logical conclusion that the provision as to notice applies to all the events constituting a constructive completion, would lead to the absurdity of requiring notice to be given of the filing of the notice of the completion of a contract or of the cessation from labor, is far-fetched and fallacious. The notice of the completion of the building, or of the cessation from labor, is itself notice of the event. The effect of filing a notice of the completion of a building in the office of the county recorder is, it is true, only to give constructive notice of that fact, but it is the legal and common method for giving such notice and by it parties whose rights in the subject to which the notice relates are affected are, according to the legislative judgment, the more likely to obtain actual knowledge of the facts which the notice must contain. But, whether they do or do not acquire actual knowledge of the fact or facts which the notice must contain, there should be, as a matter of public policy, some legal foundation for charging them with notice, which cannot be done where the act as to which some kind of notice should be had is left to the capriciously exercised option of an individual.

It follows from the views thus ventured that, conceding it to be true that lien claimants must file their claims of lien within 30 days after the happening of the first act which constitutes a completion, whether the same be actual or statutory, or, in other words, that they cannot exercise the option of filing their liens within 30 days after any one of several events of completion which have occurred on different dates, the plaintiffs were not bound by the fact of the occupation of the building on the 17th of October, assuming that such occupation amounted to the completion of the building within the contemplation of the statute in such case. They, in other words, could not be charged with notice of such completion, and even if they had been shown to have had actual knowledge of the fact, the defendants, under the express and mandatory terms of the statute, would have been estopped from basing any defense against the assertion of their right to the lien on the ground of the failure to file the same within time.

It further follows from the views above expressed that the finding that "on October 17, 1912, defendants Charles H. Waldmann and Nellie V. Waldmann entered into, and ever since have been in the actual and exclusive use and occupation of said building" was wholly unnecessary, and, indeed, supererogatory, and is therefore immaterial, assuming that the finding was intended to declare as a fact that the building or contract had been constructively completed by occupation.

[5, 6] The lien upon which the plaintiffs rely, however, has reference to the actual completion of the building on the 26th day of October, 1912. This lien, as we have seen, was filed on the 20th day of November, 1912, and is the lien pleaded in the first count of the complaint and the one to which the court found the plaintiffs to be entitled.

As above stated, it is contended by the appellants that the evidence does not support the finding that the building was actually completed on the 26th day of October, 1912. The record does not support the contention.

The defendant C. H. Waldmann testified that the last work done on the building was by the painter on the 26th day of October, 1912. On that day he did some work of painting on the house. It required him about two hours to do the work. This work was done, it is to be assumed, in pursuance of the building contract or the specifications attached thereto as a part thereof. The court was justified from this testimony in finding, as it did, that the building was completed on the 26th day of October. So long as the work performed was called for by the contract and essential to the completion of the building, the extent of the work or the length of time required to do it is wholly immaterial, for in such case the last stroke of the painter's brush marked the time of the completion. It may be true that if, when the lien was filed and it was sought to enforce it through a judicial decree, the two hours' work of the painter was still unfinished, and such work constituted all that was necessary to complete the building according to the terms and conditions of the contract and specifications, the omission to do that work might justly be treated as a "trivial imperfection" in the work of completion; but this argues nothing against the proposition above stated that the finishing of the work of painting marked the date of the actual completion of the building, said work being all that was necessary actually to complete it.

But there is some other testimony, or, strictly speaking, an admission by the appellants, which tends to support the finding that the building was actually completed on the 26th day of October. The complaint, in the second cause of action therein stated, alleges that the appellants, on the 30th day of November, 1912, filed for record in the office of the county recorder of the city and county of San Francisco their notice "wherein it was stated that a cessation of labor on said building had occurred October 26, 1912," etc. This averment is not denied by the answer, and it therefore stands in the record as an admitted fact. It matters not what the purpose of the filing of said notice by appellants or the pleading of the fact by the plaintiffs was, the fact is consistent with and supports the finding that the building was actually completed on October 26th, and it constituted

a fact in the case which it was competent and proper for the court to consider in reaching a conclusion upon the question of actual completion.

[7] But it is further insisted, with respect to the finding of actual completion, that it constitutes no finding at all upon that question, inasmuch as the finding does not definitely fix the date upon which the actual completion occurred. The finding is, as seen, that the building "was duly completed and constructed, except for a trivial imperfection in such construction, by Felix Marcuse, according to the terms of the contract * * * on or about October 26, 1912, and subsequent to October 20, 1912."

The finding would, ordinarily, be held to be rather indefinite and, perhaps, would, standing alone, be insufficient to support the judgment. But, as has been shown, the appellants admitted that there was a cessation from labor on October 26th, and this admission must be viewed as a part of the findings. And viewed as a part of the findings and considered with the finding above referred to, it becomes reasonably clear and certain from the findings that the actual completion of the building occurred on the 26th day of October. But we think that the phrase "on or about" should be held to mean either the day mentioned or a day in very near proximity thereto. It cannot reasonably be held to mean, in other words, if not the day designated, a day 10, 15, or 20 days therefrom. Ordinarily, it is understood to refer to a day or two before or subsequent to the day specifically named. The lien of the plaintiffs was filed on the 20th day of November, 1912; the finding declares that the building was completed subsequent to the 20th day of October and "on or about" or within a day or two of the 26th day of October. In this view, the finding makes it reasonably clear and definite that the lien was filed within 30 days after the completion of the building.

The next objection is that the finding as to the extra work done and extra materials furnished by the plaintiffs and as to the reasonableness of the value of the same does not derive sufficient support from the evidence.

We cannot, at the expense of extending this opinion beyond its present length, reproduce herein testimony or the substance thereof of which we think sustains the finding referred to. It must suffice for us to say that we have carefully examined the testimony and therefrom have been convinced that the court was amply justified in making said finding. There are no other points requiring special notice.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

JACKISCH v. QUINE. (No. 8635.)

(Supreme Court of Colorado. Oct. 2, 1916.)

1. PLEADING \S 345(1) — JUDGMENT ON THE PLEADINGS—MOTION—DEMURRER.

In an action for slander, the sustaining of defendant's motion for a judgment on the pleadings on the ground that the complaint failed to state a cause of action, setting out the specific reasons, was erroneous, since the motion could not take the place of a general demurrer, and since the right to cure a defective complaint by amendment cannot be cut off by converting such a motion into a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1055, 1057-1059; Dec. Dig. \S 345(1).]

2. LIBEL AND SLANDER \S 10(6)—ACTIONABLE WORDS—SHORTAGE IN ACCOUNT.

An employer's statement that plaintiff, an employe and confidential clerk, was short in his accounts, is actionable per se, since, taken and construed in their commonly accepted meaning, it would be understood to imply that he was guilty of wrongfully converting to his own use the funds or property of the employer.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. \S 10(6).]

3. PLEADING \S 345(1) — MOTION FOR JUDGMENT—CAUSE OF ACTION.

Where issue has been joined by the filing of a complaint, answer, and replication, the defendant's motion for judgment on the pleadings should not be granted, unless the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced; as the pleadings in such case must show that in no event can the plaintiff recover.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1055, 1057-1059; Dec. Dig. \S 345(1).]

Error to District Court, San Miguel County; Thomas J. Black, Judge.

Action by L. C. Jackisch against James F. Quine. Judgment for defendant dismissing the case, and plaintiff brings error. Reversed and remanded, with direction to permit the parties to amend their pleadings.

Plaintiff in error, as plaintiff below, alleged in his complaint that he was, and for several years had been, a resident and citizen of Telluride, Colo., engaged as a pharmacist and confidential clerk, and had enjoyed the business confidence of the community; that October 31, 1913, defendant (defendant in error), in a certain discourse and statement made by him in the city of Telluride in the presence and hearing of divers persons, maliciously spoke and published of and concerning plaintiff the false and malicious words following, to wit:

"That he (plaintiff) was short in his (plaintiff's) accounts in the sum of \$515, meaning thereby to falsely and maliciously charge the plaintiff with having stolen and embezzled from defendant the sum of \$515."

There are two other causes of action alleged; but this one is sufficient to present the questions herein involved. Defendant answered, admitting the residence of plaintiff; denying on information and belief that he enjoyed the business confidence of the community, admitted that on or about the time

alleged he stated to plaintiff, and possibly to others, that plaintiff was short in his accounts with defendant, but denied that he ever at any time stated to any person or persons that plaintiff was short in the sum of \$515, and denied that any statement made by him concerning plaintiff's accounts was false or malicious, but avers that plaintiff was at the time defendant made the statement, and still is, short in his accounts with defendant. As a further defense defendant alleged that during the absence of defendant from the city of Telluride he left plaintiff in charge of his drug and jewelry store, during which time plaintiff converted to his own use certain articles and wholly failed either to pay for or to charge them to his own account on the books of defendant, or in any way to account for their value, the value of these articles being a part and parcel of the alleged shortage; that on or about April 5, 1913, plaintiff, with the authority and consent of defendant, loaned \$10 to one L. C. Bailey from defendant's cash drawer, which amount was duly charged on defendant's books to Bailey; that thereafter, as defendant is informed and verily believes, plaintiff falsely represented to Bailey that defendant had either charged him (plaintiff) with the money or was holding him personally responsible for it, and by virtue of such false representation secured the payment of the amount from Bailey to plaintiff, who converted it to his own use, which \$10 constitutes a part and parcel of the alleged shortage. The answer contains further allegations of defensive matter which our disposition of the case makes it unnecessary to consider. A reply was filed denying the allegations of new matter. After the issues were joined, defendant presented what is denominated a motion for judgment on the pleadings upon the grounds:

"I. Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against the defendant [and under subheadings a, b, c, d, and e sets out the specific reasons].

"II. Plaintiff's complaint fails to state a cause of action against the defendant, in that the words alleged to have been slanderously used by the defendant are not actionable per se.
* * *

This motion was sustained, and judgment of dismissal of plaintiff's case duly entered by the court. Plaintiff brings the case here on error.

Carl J. Sigfrid and David C. Stemen, both of Telluride, for plaintiff in error. L. W. Allen, of Telluride (H. R. Kaus, of Denver, of counsel), for defendant in error.

GARRIGUES, J. (after stating the facts as above). Numerous questions are presented and argued in the briefs, two of which only will be considered.

[1] 1. The ruling of the court in sustaining defendant's motion for judgment on the pleadings was erroneous, for the reason that the document filed under the name of a "mo-

tion for judgment on the pleadings" was a general demurrer to the complaint. We have often held that the right to cure a defective complaint, if any defect exists, by amendment, cannot be cut off by converting a motion of this kind into a general demurrer. Such a motion by defendant could not take the place of a general demurrer to the complaint. *Roberts v. C. S. & I. Ry. Co.*, 45 Colo. 189, 101 Pac. 59; *Shuler v. Allam*, 45 Colo. 372, 378, 101 Pac. 360 and cases cited; *Whitehead v. Johnson*, 51 Colo. 587, 119 Pac. 472; *Eppich v. Blanchard*, 58 Colo. 139, 143 Pac. 1035.

[2] 2. The principal question presented by the record is as to whether the words "short in his accounts," spoken of a clerical employé, are actionable per se. Defendant in error in discussing the subject, claims the gist of the action is based upon the word "short," and proceeds to argue that such word is not actionable per se. No one would seriously contend that saying of another he was short would be actionable per se; but for an employer to say of his clerk that he was "short in his accounts" is quite another matter. The words must be taken and considered in their commonly accepted meaning, and there is no doubt that people generally would understand that the person to whom they were applied was guilty of wrongfully converting to his own use the funds or property of his employer. Taking this view, we must hold that, used as they are charged to have been in this complaint, the words are actionable per se. In *Sunley v. Insurance Co.*, 132 Iowa, 123, 109 N. W. 463, 12 L. R. A. (N. S.) 91, it is said, in substance, that the statement that an employé is "short in his accounts" charges him with a criminal act, but, if this were not so, it imputes to him dishonesty and unfaithfulness and is actionable per se.

[3] It would have been error to have granted a motion by defendant for judgment on the pleadings. We have held, where issue has been joined by the filing of a complaint, answer, and replication, and defendant then moves for judgment on the pleadings, the motion should not be granted unless the pleadings are not sufficient to sustain a different judgment, notwithstanding any evidence which might be produced. The pleadings in such a case must show that in no event can plaintiff recover. *Rice v. Bush*, 16 Colo. 489, 27 Pac. 720; *Mills v. Hart*, 24 Colo. 507, 52 Pac. 680, 65 Am. St. Rep. 241; *Roberts v. C. S. & I. Ry. Co.*, 45 Colo. 188, 101 Pac. 59; *Larimer & Weld Co. v. Ft. Collins Co.*, 60 Colo. 241, 152 Pac. 1160; *Stuart v. Colo. Eastern Co.*, 61 Colo. —, 156 Pac. 152; *Wallace v. Collier*, 59 Colo. 148, 147 Pac. 660.

The judgment will be reversed, and the cause remanded, with directions to permit the parties to amend their pleadings as they may be advised.

Reversed and remanded.

WHITE and SCOTT, JJ., concur.

GERMAN-AMERICAN TRUST CO. et al. v. TEN WINKEL et al. (No. 8920.)

(Supreme Court of Colorado. Oct. 2, 1916.)

1. INSURANCE — 587 — CHANGE OF BENEFICIARY — WILL.

Where an insured holding two valid contracts of life insurance called certificates of membership, whereby on his death the insurer agreed to pay his surviving wife one-quarter and the remainder to a trust company "in trust for his children," a direction in his will that the sum due or to become due to his estate from the insurer should be applied as far as necessary on payment of an incumbrance on his house, the balance to revert to his residuary estate, without any attempt in the manner and form prescribed to change the beneficiaries, did not constitute a change of the beneficiaries named in the certificates, nor a legal or equitable transfer of the fund arising therefrom.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. — 587.]

2. INSURANCE — 589 — PROCEEDS OF POLICY — PERSONS ENTITLED.

And upon the death of the insured, one-fourth of the proceeds of the certificates of insurance vested in his surviving wife, and the remaining three-fourths in equal parts in his three children, and, where the wife died intestate and before her actual possession of her share of the funds, her administrator might sue for and collect it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1472-1474; Dec. Dig. — 589.]

En Banc. Error to District Court, City and County of Denver; Granby Hillyer, Judge.

Suit by Fred H. Ten Winkel, as administrator of the estate of Aleta Hall, deceased, and others, against the Bankers' Life Company and Paul Ray Hall, and another, in which the German-American Trust Company, as administrator to collect the estate of B. R. Hall, deceased, intervened. Judgment for plaintiffs, and the intervener and defendant Paul Ray Hall bring error, and apply for a supersedeas. Application denied, and judgment affirmed.

Charles F. Miller, of Denver, for plaintiffs in error. Tolles & Cobbe, of Denver, for defendant in error Fred H. Ten Winkel, as administrator, etc., and P. M. Kistler, of Colorado Springs, for defendants in error George M. Hall and William C. Hall.

WHITE, J. Burroughs R. Hall died testate in Denver on April 1, 1915, leaving him surviving his widow, Aleta Hall, and three adult children, George M. Hall, William C. Hall, and Paul R. Hall. At the time of his death he had in his possession two valid contracts of insurance on his life, called certificates of membership, issued by the Bankers' Life Association, an Iowa corporation, in and by which said company agreed to pay to Aleta Hall, the wife of deceased, one-fourth, and to the International Trust Company of Denver, the remainder arising from each contract of insurance "in trust for his children" upon the death of the said Hall.

The German-American Trust Company was appointed by the county court of the proper county, and qualified, as administrator to collect of the estate of Burroughs R. Hall pending the probate of his will. Burroughs R. Hall had neither changed, nor attempted to change, the beneficiaries named in said contracts of insurance in the manner and form provided and required by the rules and laws governing the Bankers' Life Company; nor had such company been advised in any way whatever that he desired to change the same. There was, however, embodied in his will a provision directing that a certain sum of \$4,000 due or to become due to his "estate from the Bankers' Life Insurance Company of Des Moines, Iowa, on a certain insurance policy, be applied so far as necessary on payment of certain indebtedness and incumbrance" on his dwelling house and "that any balance of said insurance money" to revert to his "residuary estate." Thereafter, on the 2d day of April, 1915, Aleta Hall died, intestate, and subsequently Fred H. Ten Winkel, one of the parties to this suit, was duly appointed and qualified as the sole administrator of her estate, and as such administrator and in conjunction with William C. Hall and George M. Hall, brought suit against the Bankers' Life Company, the International Trust Company, as trustee, and Paul R. Hall, to collect the sums due under the contracts of insurance and have the same properly distributed. The German-American Trust Company intervened, and claimed the fund as belonging to the estate of Burroughs R. Hall. The International Trust Company disclaimed any interest in the subject-matter in controversy, and the Bankers' Life Company admitted its liability on the certificates of insurance and, under order of the court, paid the full sum due thereon into the registry of the court to be distributed to whomsoever it might belong. The court found that Burroughs R. Hall never changed, or attempted to change, the beneficiaries of the certificates of insurance; that the International Trust Company, named as trustee for the children of Burroughs R. Hall in the certificates of insurance, "was a dry or naked trustee," and that the beneficiaries therein named, to wit, Aleta Hall, William C. Hall, George M. Hall, and Paul R. Hall, were, upon the death of Burroughs R. Hall, each entitled to one-fourth part of the total sum due under said certificates; and that upon the death of Aleta Hall, intestate, her interest in such fund passed to and vested in Fred H. Ten Winkel as administrator of her estate. The German-American Trust Company and Paul R. Hall have brought the case here on error and applied for a supersedeas.

[1] We have read the record and are certain that the court arrived at the proper conclusion under the facts of the case and the

law applicable thereto. It is conceded that no attempt was made, in the manner and form prescribed, to change the beneficiaries designated in the certificates of insurance; but it is contended that the provisions of the will, to which reference has heretofore been made, constituted a change in that regard. There is no certainty that the language of the will had reference to the insurance and money here involved. The reference therein is to a "certain insurance policy due, or to become due," his "estate." The insurance here involved is represented by two contracts or policies and were never payable to his "estate." However, were we to assume that the testator had in mind the particular insurance in question, the language employed neither constituted a change of the beneficiaries named in the policies nor a legal or equitable transference of the fund arising therefrom. Such is the settled law in this jurisdiction. *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Johnson v. New York Life Ins. Co.*, 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A, 868; *Rollins v. McHatten*, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260.

[2] *Eo instante*, upon the death of the assured, one-fourth of the proceeds of the certificates of insurance became vested in Aleta Hall; and the remaining three-fourths, in equal parts, in William C., George M., and Paul R. Hall. As Aleta Hall died intestate, and before she actually got possession of her share of the fund, her administrator has the right to sue for and collect the same.

The application for supersedeas is therefore denied, and the judgment affirmed.

GABBERT, C. J., and BAILEY, J., not participating.

In re NASH. (No. 9049.)

(Supreme Court of Colorado. Oct. 2, 1916.)

HABEAS CORPUS \Leftrightarrow 26—**GROUND**—**AUTHORITY FOR RESTRAINT**—**JUDICIAL PROCESS**—**NE EXEAT**.

The scope of the writ of ne exeat as a mesne process of equity has not been enlarged by Code Civ. Proc. § 469, providing that district courts and judges thereof shall have authority in ne exeat proceedings according to usual practice in such cases in courts of chancery; and, the facts underlying an action for slander being insufficient to authorize the writ, petitioner is entitled to discharge from custody under such writ, under the habeas corpus act (chapter LXI, Colo. St. Ann.).

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 13, 21; Dec. Dig. \Leftrightarrow 26.]

En Banc. Application of one Nash for a writ of habeas corpus. Writ granted, and petitioner discharged.

John T. Bottom, of Denver, for petitioner. W. B. Wiley, of Craig, for respondent.

WHITE, J. The sole question involved herein is whether petitioner may be legally

held in custody by the sheriff of Moffat county under and by virtue of a writ of ne exeat republica issued out of the district court for that county in an action at law there pending to recover of petitioner herein damages for slander.

The scope of the writ of ne exeat has not, in this state, been enlarged by statute (section 469, Code of Civil Procedure), and if there are exceptions, as claimed, to the rule that the writ is a mesne process of equity, the underlying facts in the action for slander were insufficient to authorize the issuance of the writ. *People ex rel. v. Barton*, 16 Colo. 75, 80, 81, 26 Pac. 149; 29 Cyc. 334, 336, 387.

The petitioner is therefore entitled to relief under the habeas corpus act, and is accordingly discharged from custody.

PAULSON v. BERGMAN. (No. 8653.)

(Supreme Court of Colorado. Oct. 2, 1916.)

1. PLEADING \Leftrightarrow 412—**IRREGULARITIES**—**FAILURE TO REPLY**—**WAIVER**.

Where defendant proceeds with the trial in all respects as he would have done if the issues had been regularly formed, and by introducing evidence to prove the affirmative of the allegations in his answer has treated them as controverted, he waives the objection to want of a replication.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1387-1394; Dec. Dig. \Leftrightarrow 412.]

2. PLEADING \Leftrightarrow 426(3)—**JUDGMENT ON PLEADINGS**—**WAIVER**.

Where no replication was filed to an amended answer and defendant moved for judgment on the pleadings after plaintiff had rested, but proceeded with the trial after the motion was overruled, he waived the motion.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1426; Dec. Dig. \Leftrightarrow 426(3).]

Error to District Court, Denver County; J. E. Rizer, Judge.

Action by Albert H. Bergman against John P. Paulson. Judgment for plaintiff, and defendant brings error. Affirmed.

John H. Reddin, of Denver, for plaintiff in error. Charles W. Waterman, Caldwell Martin, and J. A. Gallaher, all of Denver, for defendant in error.

SCOTT, J. This is an action by Bergman, defendant in error, against Paulson, plaintiff in error, to recover the purchase price of ten shares of the capital stock on the J. P. Paulson Company, a Utah corporation, at the alleged agreed price of \$1,060. The cause was tried to the court and jury, and verdict and judgment rendered in the sum of \$1,422. The defendant filed an amended answer to the complaint, in which he pleaded two separate special defenses. No replication was filed to this amended answer. The parties proceeded to trial, and at the close of plaintiff's testimony the defendant moved orally for a judgment on the pleadings, on the

ground, as now alleged, that there was no replication to the verified amended answer of the defendant. This motion was overruled by the court, and this ruling is the sole alleged error relied on. After the motion was overruled the defendant proceeded to introduce testimony in support of his amended answer. At the request of the defendant the court instructed the jury that either one of the two defenses relied on by the defendant was sufficient, if proven, to justify a verdict for the defendant. The cause was tried in every respect as if there had been a replication to the amended answer.

The contention of the plaintiff in error is that because he moved for judgment on the pleadings before he introduced any testimony, though after plaintiff had rested his case, his motion was in apt time and there was no waiver of the defect in the pleadings. It will be seen that the cause was tried upon the theory that the issues were fully joined, and that the alleged defenses were good and sufficient if proven. In fact these defenses so pleaded constituted the only issue in the case. There is no objection but that every issue raised by defendant was not fully and fairly tried.

[1] It has so frequently been held in this jurisdiction that, where a defendant proceeds with the trial in all respects as he would have done if the issues had been regularly formed, and by introducing evidence to prove the affirmative of the allegations in his answer, and has treated them as controverted and put in issue, he thus waives the objection that it seems amazing that counsel continue to raise the question. It involves no claim of denial of substantial justice, and is purely technical. *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462; *Anderson v. Sloan*, 1 Colo. 484; *Taylor v. McLaughlin*, 2 Colo. 12; *Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570; *Schechter v. White*, 41 Colo. 219, 92 Pac. 700; *Florence & C. C. R. R. Co. v. Jensen*, 48 Colo. 28, 108 Pac. 974; *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623, 112 Am. St. Rep. 1036.

Proper practice requires that the question should have been raised before proceeding to trial, and that defendant should not have waited until after announcement for trial, and until after the plaintiff had offered his testimony. Upon this point it was said in *Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1037, 17 L. R. A. 602, 31 Am. St. Rep. 340:

"A practice which would allow the raising of other objections to a pleading at the trial is not to be encouraged. Cases should be conducted in court with the least possible expense and annoyance to litigants consistent with the proper administration of justice. The Civil Code requires all mere technical or formal objections to be raised by motion or demurrer before trial. If not so raised, they are to be deemed as waived. To wait until witnesses have been subpoenaed and the cause reached for trial before raising such objection would be to entail a needless expense upon litigants, as well as subject

to unnecessary annoyance the court, witnesses, and jurors."

[2] But if the defendant intended to rely on his motion for judgment on the pleadings, he should not have proceeded further after that motion was overruled. In proceeding with the trial in an effort to establish his rights he waived his motion.

It has been expressly held by this court that a party who, after his motion for judgment on the pleadings is denied, goes to trial, attempting to establish his right by proof, waives the motion. *Althoff Mfg. Co. v. Althoff et al.*, 52 Colo. 501, 123 Pac. 328.

Courts have sufficient demand upon their time in the effort to ascertain and render substantial justice without being required to waste time in academic discussions of immaterial technical errors, in cases where neither party can possibly have been prejudiced. The judgment is affirmed.

WHITE and GARRIGUES, JJ., concur.

MCCARTNEY v. BADOVINAC. (No. 8645.)
(Supreme Court of Colorado. Oct. 2, 1916.)

CONTRACTS §—282—PERFORMANCE—SATISFACTION OF PARTY—COMPENSATION.

Where defendant employed a detective to discover who stole a certain diamond, agreeing to pay him a fixed sum if he established the guilt of the thief to his satisfaction, and the contract was performed, and there was no doubt the person accused by the detective committed the theft, the defendant's professed dissatisfaction in bad faith was no defense to an action for the amount.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1284-1289; Dec. Dig. §—282.]

Error to District Court, Pueblo County; C. S. Essex, Judge.

Action by Nicholas Badovinac against F. A. Campbell, interpleading O. W. McCartney. Judgment for plaintiff, and the interpleaded defendant brings error. Affirmed.

Robert Cowles and John W. Davidson, both of Pueblo, and Fred A. Sabin, of La Junta, for plaintiff in error. F. R. McAliney, of Pueblo, for defendant in error.

SCOTT, J. This is an action growing out of a written contract as follows:

"Whereas, Dr. Ragsdale, of La Junta, Colo., has accused Mrs. O. W. McCartney of the theft of a certain diamond, and O. W. McCartney is desirous of learning the facts concerning the said affair, and Nicholas Badovinac is a detective engaged in the business of detecting crime. It is hereby agreed by and between the said O. W. McCartney and Nicholas Badovinac that the said Badovinac will undertake to discover who actually took the said diamond, if the same was stolen, or whether or not the same was stolen. And the said O. W. McCartney has this day deposited the check of Crooks and Campbell for the sum of \$500 with E. F. Chambers to be by him turned over to the said Badovinac in the event he shall determine the above questions to the satisfaction of the said McCartney;

otherwise the said check to be returned to the said O. W. McCartney.

"Dated Pueblo, January 10, 1911. Said check is made for \$500, payable to Nicholas Badovinac.

Nicholas Badovinac.
"O. W. McCartney.
"F. A. Campbell.

"Witness:

"E. F. Chambers."

It appears that the check for \$500 mentioned in the contract was caused to be cashed by Mr. Chambers, who held the money subject to the result of the agreement. Each of the parties demanded the money, and this suit was to determine the rights of the principal parties in the premises. The suit was instituted by Badovinac as against Chambers, and McCartney was interpleaded. The trial was to the court without a jury. The court found for the plaintiff, Badovinac, and judgment was rendered accordingly. The findings of fact and conclusions of law by the court were as follows:

"But as to the facts presented by this record as to the theft of the diamond and the connection of the wife of the interpleader therewith the court is compelled to say that we have met few contentions with so little want of merit and apparent lack of good faith. A more complete and perfect case of larceny could not well be conceived of. It contains the proof of every element thereof beyond all reasonable doubt: (1) Its taking away by stealth; (2) the opportunity limited to the accused; (3) her possession of it and mission to Pueblo; (4) her disposition of it for gain; (5) her similar act with reference to interpleader's own diamond; (6) her identifications as to the transactions; (7) the establishment of the ownership of the diamond and adjudication thereof; (8) her confession of the theft; (9) her flight from the state and absence ever since; (10) interpleader's participation therein as accessory after the fact.

"Evidence much more abundant to establish guilt than ordinarily adduced; so that, if the interpleader is not satisfied from this record of her guilt of the offense charged to her, he is perhaps the only intelligent person to whom it could be presented who would conscientiously entertain any reasonable doubt. It even passes the point of reasonable doubt and reaches the plane of certainty as certain as anything in human knowledge can be. Categorically he answered his counsel that he was not satisfied on either of the questions mentioned in the contract, either that Mrs. McCartney stole the diamond ring, or even that it was stolen at all, without assigning any reasons for his pretended disbelief. In the face of this record it is too apparent for argument that the answers are a mere subterfuge and pretext, without reason or sincerity. He even intimates a belief that Mrs. Ragedale might have stolen her own ring and pawned it in order to charge Mrs. McCartney with the theft. An examination of his entire testimony would justify either jury or court in finding that his categorical answers are not true, and that he was in fact satisfied with the determination of both of the questions as shown by the proof at hand.

"The plaintiff undertook to discover whether or not the diamond was stolen, and, if stolen, who was the thief. He performed his undertaking by proof in hand sufficient to satisfy any reasonable man, acting reasonably, and in good faith, and sufficient to warrant a conviction of the accused had she not been spirited out of the state by the interpleader and should have been permitted to stand trial.

"The court therefore, sitting as a jury, find all issues of fact in favor of the plaintiff and against the intervener, and that he has fully

complied with the terms of the contract in letter and spirit. This finding disposes of all questions of law which might possibly arise upon a finding that, while plaintiff had fully complied with his undertaking, yet that it was not done 'to the satisfaction of the said McCartney.' Hence the court will not undertake to review the authorities cited by respective counsel. The finding of fact settles the law questions.

"However, as to such cases the court will say that in such contracts, where a party simply says he is not satisfied, and stands upon that without more, we must not overlook the element of 'good faith' in such expressed dissatisfaction. A capricious, unreasonable, invalid, designed, feigned, arbitrary, dishonest, insincere, pretended, mercenary expression of dissatisfaction will not be regarded by the courts to defeat the payment of a just claim. When one party to a contract has performed his part of it, the court will say to the other party: 'That which in reason you ought to be satisfied with the law will say you are satisfied with.' To permit such a defense to prevail could not be on the ground of a bona fide dissatisfaction, but would amount to fraud and to clothe it with dignity of a legal defense."

The findings of fact appear to be fully justified by the evidence, and will not be disturbed. The sole question to be considered is as to the court's conclusions of law under the state of facts presented.

It seems to be the contention of plaintiff in error that under the contract McCartney was the person to be satisfied, and that he alone may determine as to whether or not he was satisfied, regardless of the question of his good faith in that regard. Counsel urge that this contention is fully sustained by *Bush v. Koll*, 2 Colo. App. 48, 29 Pac. 919, and 6 Colo. App. 294, 40 Pac. 579. To this we cannot agree. Koll was employed by Bush & Morse as a chef under an agreement providing for a monthly salary of \$130 per month for the term of one year, with the provision that:

"The said party of the second part agrees to give his entire attention to the business for which he is employed, and to render good and satisfactory service."

The court held that the jury did not follow the instruction of the court as to the law in such case, and that it disregarded the evidence, which clearly established that Koll's services were unsatisfactory. It is true that there were some things said in the opinion which tend to support the contention of plaintiff in error. But Judge Bissell in his dissenting opinion asserted the rule applicable in such cases to be:

"In cases of this sort the true rule is: 'That which the law will say a contracting party ought in reason to be satisfied with that the law will say he is satisfied with.' *Duplex Safety Boiler Co. v. Garden et al.*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; *Clark v. Rice*, 46 Mich. 308, 9 N. W. 427; *Daggett & Graves v. Johnson*, 49 Vt. 345; *Roy v. Goings*, 96 Ill. 361, 36 Am. Rep. 151; *Braunstein v. Insurance Co.*, 1 East & Smith, 783, 101 E. O. L. 782."

The case was again before that court in 6 Colo. App. 294, 40 Pac. 579, where by an undivided court it was said:

"The instruction which was claimed to have been erroneous appears to be the correct con-

struction warranted by the wording of the document, and well sustained by authority. It was: "The court instructs you that, under the contract in evidence in this case, the plaintiff contracted to render satisfactory service to defendants, and the defendants had the right to discharge the plaintiff at any time when the service of the plaintiff was not satisfactory to them; but to entitle defendants to discharge plaintiff on that ground the claim made by them that such services were not satisfactory must be made in good faith; that is, the defendants must have been really dissatisfied with the service of the plaintiff to authorize his discharge upon that ground. And if you believe from the evidence that the defendants discharged the plaintiff because they were really dissatisfied with the services in the line of his employment, then you must find for the defendants, and it is not necessary that the defendants should have any cause for such dissatisfaction; but if you believe from the evidence that defendants were not really dissatisfied with the service of the plaintiff in the line of his employment, and that such claim is not made in good faith, then defendants were not authorized to discharge the plaintiff on that ground."

"It appears to have been entirely disregarded by the jury; for, taking all the testimony, that of both plaintiff and defendant, and it establishes the fact that under the existing circumstances, and as they had for some time existed, the performance of the duties and services could not be satisfactory to either party by reason of continued jarring and friction, while the proper prosecution of the business of defendants was so intimately dependent upon the chief cook and his subordinates, employed by him, that any want of harmony or laxity of discipline was of necessity destructive of business."

The rule stated in this instruction, so adopted and approved in that case, was followed by the trial court in this case, and upon that authority, as well as upon sound reason and justice, must be sustained. Here the trial judge found as a fact that the claim of McCartney to the effect that the proof furnished by Badovinac was not satisfactory to him was not made in good faith, but was made in such bad faith as, if permitted to prevail, would amount to a fraud.

It is true that courts have been somewhat confused and divided in opinion upon the question under consideration, but a careful review of the authorities discloses that, where a contrary view has been adopted to that announced by the Colorado Court of Appeals, it is generally in cases which, as stated by Judge Bissell, relate to busts, clothes, and cases of the description which relate to the satisfaction of the persons for whom they are to be constructed, or in cases where work is to be done to the satisfaction of a party clothed with a discretionary and quasi judicial power to determine the character of what has been performed. But seemingly in all other well-considered cases it has been held that contracts may not be so construed as to give to either party the right at his whim and caprice, to reject that which he has contracted, or to refuse to pay the price of what has been supplied under the agreement that he shall be satisfied.

In this case the plaintiff undertook by his agreement to discover who actually took the diamond, if the same was stolen, or whether

or not the same was stolen. Under the finding of the court this agreement was fully and completely performed. No impartial person could hold otherwise. The question then is: Shall the plaintiff in error because of his own selfish interest, by reason of his own will, at his own ipse dixit, and in bad faith, deprive the defendant in error of the full and completely earned compensation under the agreement? To so hold would be to countenance and approve a palpable fraud.

The agreement in this case was to furnish proof of a fact, and the same principle is to be applied as in the vast number of cases involving the satisfaction to insurance companies of an agreement to furnish proof of injuries, of death, of condition of health in cases of reinstatement, etc.

In the English case of *Braunstein v. Accident Ins. Co.*, 1 East & Smith, it was provided "that before payment of the sum insured by the policy proof satisfactory to the directors of the company should be furnished by the claimant of the death or accident," and it was there held that the company might require only such proof as was reasonable and necessary to establish the fact, and could not defeat the claim for reasons chimerical, capricious, or unjust, and that the term "to the satisfaction of the directors" must be understood to mean to their reasonable satisfaction. And in *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709, the condition of payment was that "when the defendants were satisfied that the boilers so changed were a success" it was said by the court:

"Performance must, of course, accord with the terms of the contract; but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered remuneration shall be paid, but here the parties have so agreed."

In *Dennis v. Massachusetts Benefit Association*, 120 N. Y. 496, 24 N. E. 843, the court said:

"The provision in such policy that the member might be relieved from the effect of forfeiture for nonpayment of an assessment on giving a 'valid' excuse to the officers of the association does not vest in the officers, the exclusive right to determine the validity of an excuse. Their determination is reviewable in the courts. * * * The word 'valid,' as here used, is equivalent to 'good,' 'sufficient,' or 'satisfactory.'"

The words "satisfactory proof" entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty. *Buffalo Loan Co. v. Knights Templar*, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839. And in *Traiser v. Com. Trav. Ass'n*, 202 Mass. 292, 88 N. E. 901, the court said:

"The proofs to be furnished by the plaintiff were by the terms of the policy to be satisfac-

tory to the defendant's board of directors. This, to be sure, does not mean that the judgment of the defendant's board was to be necessarily final on the matter, but only that the proofs must be such as ought to be satisfactory to reasonable men acting reasonably. Accordingly it ordinarily will be for the jury, looking at the proof actually furnished, to say whether it was such as reasonably should have satisfied the directors. *Noyes v. Eastern Accident Association*, 190 Mass. 171, 182, 76 N. E. 685, and cases cited; *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220, 85 N. E. 446; *Cashman v. Proctor*, 200 Mass. 272, 86 N. E. 284."

In *Manufacturing Co. v. Brush*, 43 Vt. 528, involving a sugar evaporator sold, "to be satisfactory to the purchaser," it was said:

"The trial upon which the defendant took the evaporator was to be had for the purpose of ascertaining whether the defendant liked it or not, and not for the purpose of ascertaining whether it was equal to the plaintiff's recommendations of it or not. The trial was to be had solely with reference to the defendant's wishes in respect to the machine for such uses as he might find he could make of it, and not with any reference to any usefulness of it for other persons. To this trial the defendant was bound to bring honesty of purpose; anything short of that would not determine his wishes fairly, but only his willful caprice or his dishonorable design."

In *Mackenzie v. Minis*, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723, the court stated the rule to be:

"The promisor, whose satisfaction is thus made the test, must act honestly and in good faith. His dissatisfaction must be real, not merely pretended. Thus, if a suit of clothes were agreed to be made to the satisfaction of the purchaser at a fixed price, if they were in fact satisfactory to him, he could not feign dissatisfaction in order to get out of the contract, merely because another similar suit was offered to him at a less price. This would not be dissatisfaction; it would be fraud."

It has been generally held that "to be dissatisfied" is a fact, and must be a verity, and not a pretext. It is not, "I will not accept it, will not have it," but it is, "It is not satisfactory," or "I am really and honestly dissatisfied with it." *Exhaust Ventilator Co. v. C. M. & St. P. Ry.*, 68 Wis. 226, 28 N. W. 343, 57 Am. Rep. 257; *Pierce v. Cooley*, 56 Mich. 552, 23 N. W. 310; *Southern v. Cunningham*, 11 Rich (S. C.) 533; *Halldie v. Sutter St. Ry. Co.*, 63 Cal. 575; *Dubinsky v. Wells Bros. Co.*, 218 Mass. 232, 105 N. E. 1004; *Hawken v. Daly*, 85 Conn. 16, 81 Atl. 1053; *Schwartz v. Cohn*, 129 N. Y. Supp. 464; *Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410; *Tobin v. Kells*, 207 Mass. 304, 93 N. E. 596.

The case at bar does not come within any well-defined exception to the general rule thus announced. Indeed, it has been held by this court that, even in a case where the question was to be submitted to a third party, his conclusion and determination is binding only when made in good faith.

In *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546, we said:

"In other words, the rule of law is that, where parties to a contract designate a party who is authorized to determine questions relating to its execution, and stipulate that his determination shall be final and conclusive, both parties are conclusively bound by his determination of those matters which he is authorized to determine, except in case of fraud, or such gross mistake upon his part as would necessarily imply bad faith, or a failure to exercise an honest judgment."

The judgment is affirmed.

WHITE and GARRIGUES, JJ., concur.

NEW YORK LIFE INS. CO. v. MACDONALD. (No. 8633.)

(Supreme Court of Colorado. Oct. 2, 1916.)

1. ACCORD AND SATISFACTION ⇐7(1)—LIQUIDATED DEMAND—PART PAYMENT—EFFECT.

Where a liquidated sum is due, the payment of a less sum in satisfaction thereof is not binding as such for want of consideration, but the rule is strictly construed.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. § 46; Dec. Dig. ⇐7(1); *Payment*, Cent. Dig. § 133.]

2. ACCORD AND SATISFACTION ⇐10(1)—"LIQUIDATED DEMAND"—PART PAYMENT—EFFECT.

The mere fact that a sum is due under an insurance policy of fixed value does not make the demand liquidated, where the insurer claims a set-off for sums due from the insured as its agent and for a loan on the policy.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 67-72; Dec. Dig. ⇐10(1).]

3. ACCORD AND SATISFACTION ⇐11(1)—COMPROMISE AND SETTLEMENT ⇐6(2)—UNLIQUIDATED DEMAND—PART PAYMENT AS PAYMENT IN FULL.

Where there is a bona fide dispute as to the sum due on an insurance policy, and the insured accepts a check for less than the face value, marked as "payment in full," he takes it on such terms and there is accord and satisfaction, the condition of payment being express, though even an implied condition would be sufficient.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75, 79-82; Dec. Dig. ⇐11(1); *Compromise and Settlement*, Cent. Dig. §§ 36-38; Dec. Dig. ⇐6(2).]

Error to District Court, City and County of Denver; Charles O. Butler, Judge.

Action by Malcolm MacDonald against the New York Life Insurance Company. Judgment for plaintiff and defendant brings error. Reversed and remanded.

Chas. W. Waterman and Caldwell Martin, both of Denver (James H. McIntosh, of New York City, of counsel), for plaintiff in error. L. F. Crawford, of Denver, for defendant in error.

TELLER, J. The defendant in error was plaintiff below, in an action to recover a balance alleged to be due him from the plaintiff in error on one of its policies. One of the defenses was accord and satisfaction. The trial court rejected this defense on the ground that no accord and satisfaction was

shown, in that there was no consideration for the alleged contract, under which the plaintiff was paid a sum less than he claimed to be due. The correctness of this ruling is the only question necessary to be determined, in the view we take of the case.

It appears that the plaintiff had been an agent of the defendant company, and the latter claimed that on the agency account there was due to it the sum of \$555.93. On the trial, the defendant introduced in evidence the following letter:

"April 8, 1913.

"Mr. Malcolm MacDonald, Leadville, Colo.—
My Dear Mr. MacDonald: I am pleased to advise you that the company has acted upon the Insurance Commissioner's instructions, in this case, and you will find inclosed herewith our check for \$3,367.05, which represents the total amount due you in full settlement of the policy, after making deductions as follows:

Dec., 1912, premium	\$ 176 95
Agency balance for credit of Colo. branch	555 93
Loan interest due	2 07
Outstanding policy loan	898 00
	<hr/> \$1,632 95

"Trusting that this is clear to you, and that you have now fully recovered from your illness.
"Very truly,

"Fred B. McConaughy, Cashier."

Plaintiff, by replication, admitted that the check mentioned in said letter was received, but alleged that it was received in part payment only. The check contained this statement on its face:

"In full settlement of all claims under policy No. 30002431."

On the back it contained this receipt, signed by the plaintiff:

"Received payment in full as specified on reverse side."

The check was paid in due course.

[1] The rule invoked by the trial court, as it is stated by counsel, that where a liquidated sum is due, the payment of a less sum in satisfaction thereof is not binding as such for want of consideration is well established, though often criticized. It is regarded with so much disfavor as to be confined strictly to cases within it. *Railway Co. v. Clark*, 178 U. S. 353-365, 20 Sup. Ct. 924, 44 L. Ed. 1099. The rule is said to be "technical, and not very well supported by reason"; and it is said, further, that "courts have therefore departed from it upon slight distinctions." *Kellogg v. Richards*, 14 Wend. (N. Y.) 116.

Was the trial court, then, correct in its rejection of this defense? This court in a series of cases has held that the acceptance of a sum less than the claim, with knowledge that it was intended as full payment, is, in the absence, at least, of some protest or indication that it was not taken in satisfaction of the claim, a bar to an action for an alleged balance, when the debt is unliquidated or disputed; there being no fraud or mistake in the case. *Berdell v. Bissell*, 6 Colo. 162; *Guldager v. Rockwell*, 14 Colo. 459, 24 Pac. 556; *Com'rs of La Plata County*

v. Morgan, 28 Colo. 322, 65 Pac. 41; *Harvey v. D. & R. G. Ry. Co.*, 44 Colo. 253, 99 Pac. 31, 130 Am. St. Rep. 120; *Bassick Co. v. Beardsley*, 49 Colo. 275, 112 Pac. 770, 83 L. R. A. (N. S.) 852.

[2] The defendant in error contends that the claim was liquidated, since the policy was for a certain sum, and that the balance on account, not being connected with the policy, could not be regarded as making the claim unliquidated. This contention is clearly wrong. The question at issue was, How much did the defendant owe the plaintiff? That could be determined only by deducting from the amount due under the policy whatever sum the defendant was entitled to as a set-off. Until the amount of the set-off was determined it was uncertain what the defendant's debt to plaintiff was. That a set-off or counterclaim which is uncertain in amount renders the debt unliquidated, though plaintiff's claim is not in dispute, is settled by eminent authorities. *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687; *Railway Co. v. Clark*, supra; *Greenlee v. Mosnat*, 116 Iowa, 535, 90 N. W. 338; *Pollman Coal Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563. In the case first cited on this point the Supreme Court of Illinois said:

"It is claimed that the account of the plaintiff was liquidated because its items were not disputed. But if there was a controversy over a set-off, and the balance due the plaintiff was fairly in dispute, the claim could not be treated as liquidated."

In the Michigan case the court said:

"While the controversy was over the offset, it is plain that the amount due plaintiff was in dispute."

The other cases cited are to the same effect.

[3] There was, then, a dispute as to the sum due plaintiff; and, when plaintiff accepted the check, which bore upon its face the statement that it was given in full payment of all claims under the policy, and signed a receipt on the check which was to the same effect, he must be held to have taken it on the terms under which it was offered. If he did not wish to accept the check on those terms, he should have refused it. *La Plata County Com'rs v. Morgan*, supra; *Hills v. Sommer*, 53 Hun, 392, 6 N. Y. Supp. 469. The Supreme Court of the United States has said:

"It has been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand, in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake." *Railway Co. v. Clark*, supra.

Here the condition upon which payment was made was express, though an implied condition is sufficient. 38 Cyc. 165. Under the circumstances surrounding the payment it cannot be doubted that the defendant in error knew that it was intended as settling

the entire controversy, and the taking of the check was an acceptance of the conditions on which it was offered. This constituted an accord and satisfaction under the principles above mentioned.

The judgment is therefore reversed, and the cause remanded for further proceedings in harmony with the views above expressed. Judgment reversed.

GABBERT, C. J., and HILL, J., concur.

SNIDER et al. v. OSTRANDER. (No. 9024.) (Supreme Court of Colorado. Oct. 2, 1916.)

1. APPEAL AND ERROR §=281(1)—REVIEW—NECESSITY OF MOTION FOR NEW TRIAL.

Under Civ. Proc. 1908, § 237, relating to motions for new trials, the time of filing and the extension of time therefor, and rule No. 19, of Practice and Procedure in Civil Causes (148 Pac. xviii), adopted by the Supreme Court and effective September 14, 1914, the filing of a motion for new trial within the time and manner prescribed therefor is a condition precedent to have the judgment in question reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3281; Dec. Dig. §=281(1).]

2. APPEAL AND ERROR §=356—WRIT OF ERROR—TIME—RULE OF COURT.

Under rule No. 14 of rules of Practice and Procedure in Civil Causes (148 Pac. xviii), adopted by the Supreme Court, effective September 14, 1914, a writ of error will be dismissed where the plaintiff in error fails to institute proceedings in the Supreme Court to have the cause reviewed on error until after the expiration of the time limited therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. §=356.]

En Banc. Error to District Court, Grand County; H. C. Class, Judge.

Action by Joseph N. Ostrander against Ida M. Snider and others. Decree for plaintiff allowing defendants ten days in which to file a motion for a new trial, and from the overruling of a motion for new trial, defendants bring error. Writ of error dismissed.

George B. Campbell, of Denver, for plaintiffs in error. Howard & McCrillis, of Denver, for defendant in error.

WHITE, J. The decree involved herein was entered in the trial court on July 15, 1915, and ten days allowed defendants therein, who are plaintiffs in error here, in which to file a motion for a new trial. No motion was filed within the time designated, but on August 5th thereafter, without permission of the court first had and obtained, a motion to modify the decree was filed, and subsequently, on September 25th, overruled, and, over

the objection of plaintiff, the defendants therein were given an additional ten days in which to file their motion for a new trial. No action was taken in the premises, however, until October 11, 1915, when, without permission of the court, a motion for a new trial was filed. This being overruled, the cause was lodged here and writ of error issued August 2, 1916.

[1] The defendant in error has interposed a motion to dismiss the writ of error, and contends that the decree or judgment of the trial court is not subject to review in this court, because no motion for a new trial was filed within the time and manner prescribed by the Code of Civil Procedure, or within the time allowed by the trial court for that purpose, and that the decree is not subject to review, because the writ of error was not sued out within one year from the rendition thereof. The filing of a motion for a new trial, within the time and manner prescribed by the Code of Civil Procedure, was a condition precedent to have the judgment in question reviewed by this court. Section 237, Code of Civil Procedure 1908; No. 19 (148 Pac. xviii), Rules of Practice and Procedure in Civil Causes, adopted by this court and effective September 14, 1914.

[2] Apart from this, the plaintiffs in error failed to institute proceedings in this court to have their cause reviewed on error until after the expiration of the time provided and limited for that purpose. No. 14, Rules of Practice and Procedure in Civil Causes.

The writ of error is therefore dismissed.

GABBERT, C. J., and BAILEY, J., not participating.

QUINTANILLA v. QUINTANILLA.
(No. 8993.)

(Supreme Court of Colorado. Oct. 2, 1916.)

En Banc. Error to District Court, Las Animas County; A. Watson McHendrie, Judge.

Action between Refugita Quintanilla and Juan C. Quintanilla. Judgment for Juan C. Quintanilla, and Refugita Quintanilla brings error. Writ of error dismissed.

T. McChesney, of Trinidad, for plaintiff in error. J. C. Bell, of Trinidad, for defendant in error.

WHITE, J. In all substantial respects the same questions are involved herein that have just been determined at this term in cause No. 9024, Snider et al. v. Ostrander, 160 Pac. 195. The plaintiff in error in the instant case has made like default to that of the plaintiff in error there.

The writ of error is therefore dismissed.

GABBERT, C. J., and BAILEY, J., not participating.

PAYNE v. WILLIAMS. (No. 8647.)

(Supreme Court of Colorado. Oct. 2, 1916.)

1. GIFTS ⇐47(1) — EVIDENCE — BURDEN OF PROOF.

In an action to recover money alleged to have been loaned by plaintiff to defendant under an oral contract, to be used in purchasing real property and claimed by defendant to have been a gift, the burden was on plaintiff to prove by a preponderance of testimony an alleged oral promise and agreement to repay, as the rule putting the burden on defendant to establish all essentials to the validity of an alleged gift relates to specific property.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81-83; Dec. Dig. ⇐47(1).]

2. GIFTS ⇐45—PLEADING—GENERAL DENIAL—ISSUES.

In an action to recover money alleged to have been loaned by plaintiff to defendant, to be used in purchasing real property, where defendant admitted ownership of the property, but pleaded general denial to every other allegation, defendant could introduce evidence of the precise terms of the transaction to show that plaintiff advanced the money as a gift, and that there was no promise to repay.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 80; Dec. Dig. ⇐45.]

Error to District Court, Denver County; John W. Sheafor, Judge.

Action by E. D. Payne against Fanny L. Williams. Judgment for defendant, and plaintiff brings error. Affirmed.

Zimmerhackel & Avery, of Denver, for plaintiff in error. Frazer Arnold and John A. Ewing, both of Denver, for defendant in error.

SCOTT, J. This is an action for debt upon an alleged verbal contract for moneys advanced by the plaintiff in error, plaintiff below, to defendant in error, defendant below, used in partial payment for a residence property in the city of Denver, now owned by defendant.

The substance of the complaint is: That the plaintiff on the 21st day of June, 1910, entered into a contract to purchase from the owner the premises involved, for the sum of \$3,350, in payments as follows: \$600 upon the execution of the contract; \$500 on or before September 21, 1910; \$750 on or before July 21, 1911; and the remainder to be paid by the assumption of a mortgage in the sum of \$1,500. That the plaintiff paid the sum of \$600 at the time of the execution of the contract and the sum of \$500 on the 21st day of September, 1910, as agreed. That thereafter and on the 9th day of November, 1910, the plaintiff and defendant entered into a contract whereby the plaintiff agreed to and did transfer his interest in said premises, to the defendant, and whereby the defendant agreed in consideration thereof to pay the plaintiff a sum equal to the amount therefore paid by him on account of said purchase price, and further agreed to pay the remainder of the purchase price of said premises as provided in his said original contract

with the owner, and that the defendant further agreed that in the event that she should fail to so pay such balance, and the plaintiff thereby be compelled to pay the same, the defendant would repay to the plaintiff the sums which the plaintiff should so pay, and that defendant further agreed to repay to the plaintiff any sums which he might be compelled to pay as interest on the \$1,500 mortgage debt. That on May 5, 1911, at the request of the defendant and in order to prevent a forfeiture of the original contract, the plaintiff paid \$450 on account of the purchase price of said property, and on the same day paid \$45 as interest on the \$1,500 due under the mortgage. That on August 5, 1911, the said property, pursuant to the said contract of purchase and the payments made thereunder, was conveyed to the defendant, who ever since has been and is now the owner thereof. That the defendant has not repaid to the plaintiff any of the sums so paid by him.

The prayer was for judgment for \$1,859.70, and for a vendor's lien to secure the payment thereof.

The answer admits that the defendant is the owner of the property, and pleads a general denial to every other allegation in the complaint. The cause was tried to court and jury, and verdict and judgment rendered in favor of defendant.

The contention of the defendant was that the moneys advanced by the plaintiff, and all that he did in the premises, was as a gift to her, and that at no time was there any agreement upon her part or of any other person to repay to the plaintiff the sums of money so advanced, or any part of them.

The assignments of error are: (1) That the court erred in permitting the defendant, under her general denial, to show that the payments made by the plaintiff were by way of gift; (2) that the court erred in refusing an instruction to the jury to the effect that the burden was upon the defendant to establish by a preponderance of the evidence that the moneys advanced by the plaintiff were a gift.

The undisputed facts are, in substance, that at the time of the contract between plaintiff and the owner, the plaintiff, and for a long time thereafter, was a roomer at the residence of the defendant and her husband. The family consisted of the defendant, her husband, a daughter of marriageable age, and another child. The plaintiff was very friendly with defendant and her husband; had proposed marriage to the daughter. This proposal was not accepted, but plaintiff appears to have continued his suit for the hand of the daughter in marriage. The Williams family were poor, without a home of their own, the husband earning \$30 per month, and the daughter working as a stenographer, employed by the plaintiff at the time of the contract by plaintiff to purchase. The plain-

tiff proposed the purchase of a dwelling for use of defendant and her family. He in company with defendant and her husband inspected two properties, and afterward the one involved, which seemed to be satisfactory to all. The defendant and her family moved in this property and the plaintiff moved with them, still retaining a room.

Prior to August 25, 1910, the plaintiff executed what is termed an informal agreement by which he purported to transfer his interest in the contract to the daughter.

The plaintiff was unable to meet the final payment of \$750, and thereafter, by the apparent consent of all parties, the old contract between plaintiff and the owner was canceled, and an agreement between the owner of the premises and the defendant entered into, whereby the defendant agreed to pay the sum of \$850 in monthly payments of \$25; the additional \$100 being in consideration of a waiver of forfeiture of the old agreement. The defendant made such payments for several months, and on May 5, 1911, the plaintiff paid the owner of the property the sum of \$450, to be applied on the contract of defendant. This left a balance due of \$100, which defendant finally paid on August 5, 1911, and received a deed for the premises.

Under what appears very complete and proper instructions by the court the jury found the issues of fact to be with the defendant. The contention then is that while the evidence upon the part of the defendant was admissible in a case properly pleaded, yet it was error to admit it under a general denial.

The complaint alleged the advance of moneys by the plaintiff under a parol agreement by the defendant to repay. The advance of the moneys is admitted, but before recovery can be had, the plaintiff must establish a promise or agreement either express or implied to repay, which was denied.

To what extent may the defendant produce evidence in opposition to the testimony of the plaintiff to the effect that there was such agreement to repay, under the plea of general denial, in this case. Counsel contends that the same rule applies here as in case of the plea of payment. We cannot agree to this, for in such a case the plea of payment admits the contract to pay and pleads a performance.

Here the contract or promise itself is denied. May the defendant show by what she contends were the precise terms of the transaction, that there was no promise to repay? That is, will she be permitted to show that by the language, facts, and conduct of the parties, that the money was advanced as a gift, a donation, and not with a promise or agreement, either express or implied to repay? The terms "to give" or "to donate" are the precise antithesis of the term "to loan," which latter implies a promise to repay or return. To establish that the money was a gift is to disprove that it was a loan.

[1, 2] It was the burden of the plaintiff to prove by a preponderance of the testimony the alleged parol promise and agreement to repay, and it would seem to be the province of the jury to consider and weigh all the words, acts, and conduct of the parties, in order to determine whether or not these constituted an agreement to repay. The general rule in this respect is stated in Bliss on Code Pleading (3d Ed.) §27, to be:

"Evidence of facts which admit the act charged but which avoid its force or effect, or which discharge the obligation, is inadmissible; but, on the other hand, facts may be proved, although apparently new matter, which, instead of confessing or avoiding, tend to disprove those alleged by the complaint. Such facts support the denial. The plaintiff's allegations cannot be true because of certain other facts which are inconsistent with them. * * * Under a general denial the defendant may introduce any evidence that goes to controvert, without admitting them, the facts which the plaintiff is bound to establish in order to sustain his action."

See, also, *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912.

Counsel contend that the burden of proof is on one claiming to be the donee of property to establish all facts essential to the validity of such gift. This must be conceded, but cases of this sort relate to title or an interest therein to specific property. But the rule to be applied to the present case is a very different one in principle.

The question here is not one of title or interest in property. It is simply a question of whether or not the plaintiff loaned or donated certain sums of money to the defendant, and the plaintiff must sustain the issue he has raised.

A very similar case to the present was *Jennings v. Rohde*, 99 Minn. 835, 109 N. W. 597, in which the rule is very clearly stated, supported by authority. The court there said:

"The action was commenced to recover the sums of \$200 and \$1,235, respectively, alleged to have been loaned to respondents by appellant. The answer is a general denial. At the trial respondents admitted having received the money, but contended it was a gift. A verdict was returned for respondents. * * * Appellant objected to the introduction of any evidence to prove a gift, on the ground that it was inadmissible under the pleadings. It is unnecessary to plead facts which directly contradict the allegations and proofs of the opposite party. There was no confession and avoidance in the defense that the money was paid as a gift and not as a loan. *Hanson v. D. I. M. Co.*, 87 Minn. 505, 92 N. W. 447; *Loftus-Hubbard Co. v. Smith-Alvord Co.*, 90 Minn. 418, 97 N. W. 125."

Under a general or specific denial of any part of the complaint which the plaintiff is required to prove to maintain his action, the defendant, upon principle and authority, is at all times at liberty to prove anything tending to show the plaintiff's allegation is untrue. *Wheeler v. Billings*, 38 N. Y. 263; *Greenfield v. Massachusetts Mut. Life Ins. Co.*, 47 N. Y. 480; *Paris v. Strong*, 51 Ind. 389; *Morgan v. Wattles*, 69 Ind. 260; *McWilliams v. Bannister*, 40 Wis. 489; *Scott v. Morse*, 54 Iowa, 732, 6 N. W. 68, 7 N. W. 15;

Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582.

What has been said disposes of both assignments of error.

The judgment is affirmed.

WHITE and GARRIGUES, JJ., concur.

HALL LITHOGRAPHING CO. v. CRIST
et al. (No. 20183.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

PARTNERSHIP §41—EXISTENCE OF RELATION
— LIABILITIES TO THIRD PERSONS — PROMOTERS OF CORPORATION.

All who participate in a project to found a corporation are liable as partners for the debts thereby incurred when the project is abandoned before completion, following *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355; *Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 56, 58, 59, 74; Dec. Dig. §41.]

Appeal from District Court, Finney County.

Action by the Hall Lithographing Company against J. E. Crist and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

McClintock, Quant & Krauthoff, of Topeka, for appellant. H. O. Trinkle, of Garden City, for appellees.

DAWSON, J. The plaintiff sued the defendants for the value of certain stationery and supplies for a bank which they had undertaken to establish at McCue, in Finney county, but which project was abandoned before its completion.

On March, 10, 1910, certain of the defendants and others met at the town of Friend and determined to start a bank at McCue. To that end, stock subscriptions were made, and an application for a bank charter was executed, naming five of their number as the proposed incorporators, and these five persons signed and acknowledged the application. A charter for the new bank was prepared some time later, naming five of the defendants as directors for the first year and giving a list of the stockholders and the number of their shares of stock. This charter was signed and acknowledged on May 20, 1910, by five of the defendants. John R. Gunn was one of the promoters of the proposed corporation, and he was one of the signers of both the application and the charter and designated in the charter as one of the directors. He also paid to the secretary of state the charter fee of \$39.50 on behalf of the contemplated corporation.

The subsequent facts are in dispute, but it appears tolerably clear that the leadership in the entire matter was assumed by Gunn in the expectation that he would be the cashier of the new bank. He negotiated for a site for the new bank, set about the erec-

tion of a bank building, and ordered furniture and equipment for the bank, including the bill of stationery which is the subject of this action. Some of the subscribers paid a portion of their stock subscriptions to Gunn, but the capital subscribed was never paid, the bank commissioner never checked in nor certified the new bank, nor did it ever open its doors for the transaction of banking business. The whole project was abandoned. Some of the defendants informally agreed among themselves that one of their number who had the most money invested in the project should take over the bank building and pay the debts, or some of the debts, pertaining to the abandoned undertaking.

The plaintiff grounds its action against the defendants on the familiar principle of law that all who participate in the preliminary transactions of a proposed corporation which is abandoned before its completion are liable as partners for the debts incurred in the abortive enterprise.

Defendants' answers were mere general denials, but their chief defense was that John R. Gunn contracted this debt without authority from his associates in their project to incorporate and establish the bank, and that it was his individual obligation, not theirs nor the bank's.

The general verdict was for the defendants. Plaintiff appeals, and the gist of its assignment of errors is the net result—that the defendants, having the liability of partners in this proposed corporation, are permitted to escape their responsibilities. The case was tried on the defendants' theory that unless authority was granted by them to Gunn to contract this debt on behalf of the proposed corporation they were not liable.

The true rule is founded on a very simple philosophy. A number of persons may undertake to accomplish a certain enterprise, be that to build a house, to run a store, or to found a banking corporation. In any such enterprise they are partners. As such they have all the responsibilities of partners so far as their dealings with third parties are concerned. If they offend against each other, they have their several legal remedies. But in their dealings with others in furtherance of their common purpose each partner may bind the partnership. John R. Gunn, a partner in their enterprise to found a bank, contracted this debt in the proposed bank's behalf and consequently in defendants' behalf. The stationery and supplies were necessary and pertinent to the proposed corporate business and in furtherance of their common purpose. They are therefore liable to the plaintiff. *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355; *Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340; *Bank v. Sheldon*, 96 Kan. 492, 152 Pac. 765.

Are all the defendants liable? That we cannot determine from the record. Those

who in any manner participated in the common enterprise to found and establish the bank are liable; and to ascertain that fact the judgment of the district court must be reversed, and the cause remanded for a new trial. All the Justices concurring.

SIMMONS v. SHAFER et al. (No. 20187.)
(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

**CANCELLATION OF INSTRUMENTS § 6, 57 —
GROUNDS—FAILURE OF CONSIDERATION.**

Where a deed to land was made for an expressed money consideration, but the real consideration was an agreement by the grantee to provide for the care and maintenance of the grantor, who was about 70 years of age, during the remainder of his life, and where such care and maintenance were provided by the grantee for a number of years and until he died, and where after the death of the grantee his widow and the grantor were unable to live harmoniously together, whereupon she declined to stay longer in the home with him, but did offer to pay for his care and maintenance furnished by others, it is *held*, in an action brought by the grantor to cancel the deed, that although there is power in the court to cancel a conveyance for a substantial breach of an agreement to support the grantor where that is the most effective remedy, a partial noncompliance with the agreement does not necessarily require a cancellation of the deed, and *held*, further, that the judgment herein which made the future care and support of the grantor a charge upon the land is an appropriate remedy, and not inequitable.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 4, 114-118; Dec. Dig. § 6, 57.]

Appeal from District Court, Neosho County.

Action by J. O. Simmons, revived in the name of W. J. Metcalf, as administrator with the will annexed, etc., against Effie Shafer and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Cline & Stratton, of Erie, for appellant.
Smith & Brobst, of Chanute, for appellees.

JOHNSTON, C. J. J. O. Simmons commenced this action against Effie Shafer and Ivan Shafer, her son, to cancel a deed executed by the plaintiff to J. W. Shafer, husband of the defendant, for the expressed consideration of \$1,000, and to have his title quieted in the land included in the deed.

The plaintiff, who was about 70 years old, feeble and unable to properly take care of himself or his farm, entered into an oral agreement with J. W. Shafer, a grandson who had been living with the plaintiff, whereby he was to live with the plaintiff on the farm, care for and support him during his life, and in return he was to give Shafer an undivided one-half interest in the land. At that time a deed was executed conveying to Shafer the half interest in fee, subject to a mortgage of \$650, half of which the grantee assumed and agreed to pay, and the deed was recorded. The remaining half interest

was conveyed to Loyd Shafer, another grandson. After receiving their deeds the two Shafers placed an additional incumbrance of \$2,000 upon the land. The plaintiff lived with and was taken care of by J. W. Shafer until the latter's death. Shafer, having married in the meantime, left surviving him his wife and child, the defendants herein, and the plaintiff continued to live with them about three months, after which the defendants went elsewhere to live, being unable to live in friendly relations with the plaintiff. He brought this action claiming that the defendant had failed to fulfill the agreement to support and take care of him, which was the sole consideration for the deed. The trial court decided that the defendant had not complied with the contract, but held that, as there had been a partial performance of the consideration, the deed should not be canceled. The court decreed, however, that the plaintiff should have all the rents and profits from the land for the rest of his life, provided that he should pay the taxes and the interest on the mortgage debt against the land; and it was further decreed that the defendants should renew the mortgage from time to time during the life of the plaintiff for an amount and at a rate of interest not greater than those of the present mortgage debt. While the appeal was pending the plaintiff died, and the administrator of his estate was substituted.

The plaintiff contends that, the trial court having found noncompliance with the terms of the contract which formed the consideration for the transfer of the title, it necessarily follows that the deed should have been canceled, and that the judgment rendered is outside of the issues and unauthorized. The deed purported to convey an absolute title. There was delivery, and every step necessary to a transfer of the legal title was taken. The actual consideration was the agreement of the grantee to provide future care and support for the plaintiff. It appears that these conditions were faithfully carried out for a period of about five years and as long as the grantee lived. During this period improvements were made upon the land, and the incumbrance was enlarged by the grantee and his brother, to whom the other half of the land had been conveyed. No claim was made that there was any misrepresentation or fraud in the making of the contract which resulted in the transfer of the title to J. W. Shafer. There was no failure to observe its terms by either party to the contract, nor were there any grounds for canceling the deed during the life time of the grantee. The plaintiff and the widow were unable to live together harmoniously. Each complained that the other was inconsiderate and quarrelsome which made life together unbearable, and it appears that each had some grounds for complaint. The testimony is that the

widow left the plaintiff in possession of the house on the farm, and at the time of leaving made some effort to have a renter and another care for the plaintiff. For a few months the plaintiff lived there with the son Loyd, who had been given the other half interest in the farm, and afterwards he occupied one part of the house and the tenants the other part. There is testimony that the defendant stated she would pay for his care and maintenance, and that she also told him to go to a store and get anything that he wanted and she would pay for it. She left considerable fruit and some groceries in the house at the time she left the farm, but it appears that no other contribution was made by her towards his maintenance during the short period (about three months) between the time she left the farm and the commencement of this action. There was therefore partial noncompliance with the terms of the contract which formed the consideration for the deed; but a partial failure of consideration does not necessarily work a forfeiture or require the cancellation of the deed. *Holland v. Holland*, 97 Kan. 169, 155 Pac. 5; *McCardle v. Kennedy et al.*, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85; *Russell v. Robbins*, 247 Ill. 510, 93 N. E. 324, 139 Am. St. Rep. 342; *Dixon v. Milling*, 102 Miss. 449, 59 South. 804, 43 L. R. A. (N. S.) 916; *Knight v. Jones*, 93 S. C. 376, 76 S. E. 978; *Elliott v. Elliott*, 50 Tex. Civ. App. 272, 109 S. W. 215; note 43 L. R. A. (N. S.) 916.

In case of fraud in the making of such a contract, or of a purpose on the part of the grantee to avoid the obligation to provide future support, or where it is the only effective remedy, a court of equity is justified in setting aside a conveyance. *Martin v. Martin*, 44 Kan. 295, 24 Pac. 418. The plaintiff appealed to a court of equity for relief, and, the parties interested being before the court, it is justified in settling the rights of the parties upon equitable principles. There having been full performance of the contract for years, the death of the grantee, a change as to the improvements and mortgage debt against the land, and an offer by the defendant to provide for the care and maintenance of the plaintiff after it became evident they could not live together in friendly relations, the court naturally concluded that equity required a remedy other than absolute forfeiture and the cancellation of the deed. Equity is satisfied where the rights of the parties to the contract are substantially attained or provided in the decree. The care and maintenance which J. W. Shafer undertook to give to the plaintiff and which were contemplated under the contract were largely of a personal nature. These the plaintiff had so long as Shafer lived. Upon his death the obligations, of course, passed to his widow. Whoever may have been at fault, it is reasonably clear that she and the plaintiff could not live un-

der the same roof. It was incumbent upon her to provide proper care and maintenance for the plaintiff in some practical way, and these she offered to furnish. The decree provided that his care and maintenance should be made a charge upon the land, and that all the rents and profits, except taxes and interest charges, should be devoted to this purpose so long as he lived. This substantially accomplished the purposes of the original contract between the plaintiff and Shafer, and does not appear to be inequitable. *Holland v. Holland*, 98 Kan. 698, 158 Pac. 1116.

The judgment is affirmed. All the Justices concurring.

PENS v. KREITZER. (No. 20376.)

(Supreme Court of Kansas, Oct. 7, 1916.)

(Syllabus by the Court.)

1. HIGHWAYS—§184(3)—USE FOR TRAVEL—ACTIONS FOR INJURIES—QUESTION FOR JURY.

The question of contributory negligence is one of fact in an action for damages sustained by the driver of a team and wagon in a collision with an automobile coming from behind at a dangerous rate of speed, both going in the same direction on the left side of the road, where the driver of the team and wagon did not have time to turn to the right after he heard the automobile coming.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 473, 473½; Dec. Dig. §184(3).]

2. SUFFICIENCY OF EVIDENCE.

The evidence has been examined, and it is found sufficient to support the verdict of the jury.

Appeal from District Court, Allen County.

Action by Henry Pens against A. O. Kreitzer. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Oyler, of Iola, for appellant. Ewing, Gard & Gard, of Iola, for appellee.

MARSHALL, J. The plaintiff recovered judgment for damages for injuries to himself and to his horse and wagon. The defendant appeals.

The plaintiff and his son were driving home from Humboldt in a spring wagon drawn by a team of horses. The plaintiff was driving in the traveled way on the left side of a macadamized road. The defendant, with his family, was driving in an automobile on the same side of the road and going in the same direction at what was, under the circumstances, a high and dangerous rate of speed. It was in the nighttime and dark. The front lights of the defendant's automobile were out. The side lights were burning and he could see 50 or 60 feet in front of him. The engine was not working properly and was making a noise. The plaintiff did not have time to turn to the right after he heard the defendant's automobile coming, before it struck the plaintiff's wagon. The defendant, when he saw that the plaintiff was not going to turn to the

right, attempted to turn to the right and pass the plaintiff, but struck the right hind wheel of the wagon with the left front fender of the automobile, overturned the wagon, threw the plaintiff out, and frightened his horses, and caused them to run away.

[1] 1. The defendant pleads that the plaintiff was guilty of contributory negligence in driving on the left side of the road and in not turning to the right when he learned that the automobile was coming. The defendant insists that this conduct on the part of the plaintiff was such as compels this court to say, as a matter of law, that the plaintiff was guilty of such contributory negligence as prevents his recovery. Under the circumstances disclosed by the evidence, the question of contributory negligence on the part of the plaintiff was a proper one to submit to the jury. The finding of the jury on that question is conclusive in this court. Section 8 of chapter 65 of the Laws of 1913 is cited by the defendant. That statute does not prohibit a person from driving on the left side of a road. It requires him to turn to the right when another overtakes him and indicates a desire to pass. The fact that the plaintiff was, at the time of the accident, violating the law of the road in not turning to the right after he heard the automobile does not, as a matter of law, preclude his recovery. *Anderson v. Sterritt*, 95 Kan. 483, 148 Pac. 635; *McComas v. Dry Goods Co.*, 96 Kan. 467, 152 Pac. 615; note, *L. R. A.* 1915E, page 961.

[2] 2. The defendant contends that the verdict of the jury was not supported by sufficient evidence. This contention is based on the failure of the plaintiff to turn to the right when he heard the automobile coming. This is another way of stating that the plaintiff was guilty of contributory negligence. That question has been disposed of. The evidence as abstracted has been examined, and it is found sufficient to support the verdict of the jury.

The judgment is affirmed. All the Justices concurring.

AHNERT et al. v. AHNERT et al.
(No. 20880.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. WILLS §55(1), 166(1) — REQUISITES — MENTAL CAPACITY — UNDUE INFLUENCE.

The testimony received in a contest of a will examined, and he'd to be sufficient to sustain the findings of the trial court that the testator had sufficient mental capacity to make a will, and that he was free from undue influence when he executed it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-140, 148-150, 161, 421; Dec. Dig. §55(1), 166(1).]

2. WILLS §111(3) — EXECUTION — SIGNATURE.

Having mental capacity the will executed by a testator is not invalid because his name was written by another, he having made his

mark, providing his name was written by his directions and in his presence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 270-272; Dec. Dig. §111(3).]

Appeal from District Court, Stafford County.

Action by Louis Ahnert and others against Ernestine Ahnert and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

F. L. Martin, Van M. Martin, and C. M. Williams, all of Hutchinson, for appellants. Paul R. Nagle, of St. John, for appellees.

JOHNSTON, O. J. This action was brought to contest a will purporting to have been made by William Ahnert, who died August 24, 1914. As the result of an early marriage a daughter was born, who is designated in the will as Mrs. Jake Lay. In 1876 he was married to Lena Ahnert, and from that marriage six children were born, named William, Albert, Bertha, Walter, Nellie, and Louis. In 1903 he obtained a divorce from Lena, who was given the custody of the minor children, and the property rights of the parties were adjudged. He married Ernestine Uhleman on January 15, 1908, and from that marriage no children were born, but she had two daughters by a former marriage, one of whom became the wife of Albert Ahnert, the son of the testator, and her other daughter married Arnold C. Hitz. It appears that an antenuptial contract between him and Ernestine had been made, under which each was to own and control and finally dispose of his or her own property free from any right of or interference by the other, except that at his death she was to receive \$2,000 and some property. In the will his son Albert was given a tract of land on the condition that he should pay to the estate \$8,500, including a \$2,000 mortgage on his property. Arnold C. Hitz was given a half section of land in Gray county, Kan., while his sons Louis and Walter were each given \$1,000. His son William was given \$5, his daughter Mrs. Jake Lay \$5, and to his daughters Bertha and Nellie he gave each certain city lots in Hudson which are said to be of little value. He gave his wife in addition to the \$2,000 provided for her by the antenuptial contract city property of considerable value and the residue of his personal property. He also made a gift of \$145 to the German Church in Hudson. All of the sons, except Albert, to whom a bequest was made, and the two daughters, joined in contesting the will alleging that it was not in fact executed by the testator, that his name was attached to the will by another, that it was never read to him, and that he did not know or understand its contents. It was also alleged that it was executed when he was in a dying condition and did not have capacity to make a will. There was a further allegation that his wife and her daughter

ter Mrs. Hitz exercised an undue influence over him and fraudulently induced him in his weakness to disinherit his own children and give the greater part of his estate to his wife and her daughter. A jury was called to aid the court in determining the facts, and special findings were returned that were somewhat conflicting, and some of them were not approved by the court. The jury found that the will was executed at the instance of the testator, that he dictated its terms, and that at the time of its execution, he had mental capacity sufficient to understand the character, locality, and extent of his property and its value, and that he knew the manner in which it was being disposed of and the persons to whom he was giving it. On the other hand, the jury found that he was not in full possession of his mental faculties when the will was executed, that he was unduly influenced by his wife, and that she exercised undue influence over him by continually nagging him about making a will. The court disapproved the latter findings, holding that there was no evidence to sustain the findings of undue influence and no testimony in the case that she had ever spoken to him as to the manner in which he was to dispose of his property or the persons to whom he would give it. The court found too that the testator had mental capacity to make the will, and accordingly it was adjudged to be valid.

The questions presented for decision on this appeal are: Did the testator have mental capacity to make a will? Was it in fact executed by him? And was he unduly influenced to execute the will so that it expressed the mind of another rather than his own? These are questions of fact, and under the testimony in the case must be deemed to be settled by the findings and judgment of the trial court.

[1, 2] A question has been raised as to the capacity of the testator to make the will, principally because it was executed just a few minutes before he died. His last sickness was of but two or three days' duration. The day prior to his death he sent for a neighbor, with whom he had done considerable business, to write his will, and upon the arrival of the scrivener the testator gave him a description of the property and the names of the persons to whom it was to be given, and appeared to have no difficulty in describing the property which he owned, or in stating the names of his children as well as the persons to whom he desired to give his property. The scrivener made notes of his directions, and after each notation was made it was read to him and received his approval, and the notes so made were used in preparing the will. This was done on Sunday, and the testator as well as the scrivener had an opinion that a will could not be legally executed on Sunday. It was arranged then to prepare the will and have it executed after midnight, and the testator watched the

clock and indicated considerable anxiety lest he should not live until Monday. After the will was written it was read to him in the presence of the witnesses, and he called their attention to the fact that they had overlooked the gift to the German Church, which indicated that his memory was stronger than that of the scrivener. Just after midnight a table was brought to the bedside and the will as prepared and read was laid before him, and he was then able to sit up without assistance, but when he undertook to sign his name he was very nervous and requested the scrivener to write his name, and that he would make his mark, and this was done. The will had been previously read to him in the presence of witnesses, and they signed it in his presence at the time his name was attached to the instrument. About 20 minutes later he passed away. His illness was of an asthmatic character and he experienced considerable difficulty in breathing, but the testimony tends to show that when he executed the will his mind was clear and the contents of the will were understood and approved by him. Having mental capacity, the execution is not insufficient because he only made his mark when his name was written by another. The hand may be guided or the signature written by another, the testator making his mark, without impairing the validity of the signature, providing it is done by his direction and in his presence. 40 Cyc. 1102.

On the question of undue influence there is little room for the contention that the evidence is insufficient to support the finding of the court. It is argued that the fact that he devised the Gray county land to Hitz instead of his own sons Walter and Louis is a circumstance tending to show that he must have been under some undue constraint when the will was made. Testimony was offered to the effect that shortly after purchasing the land he expressed an intention to give it to these sons. He had stated to the sons and to others that his purpose was to place the sons on the land if they would furnish teams and implements and ultimately to give it to them. They did not furnish these farming facilities and they were not given the land or its possession. The change of mind may have been occasioned by his fear that they would not have the means to improve and properly farm the land, or it may have been an apprehension that they would be unable to pay the mortgage lien that existed against the land, or it may have been because the boys had always made their home with their mother from whom the testator had been divorced, and they had failed to visit at his home after his marriage to Ernestine. It is said to be an unnatural act to give the property to his wife's son-in-law instead of his own sons, but the mere fact that a testator may make an unnatural disposition of his estate does not raise a presumption of

fraud or undue influence. *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; 40 Cyc. 1154. It is not uncommon for testators to give to one child in preference to another, or to disinherit entirely members of their own families, and many go so far even as to bestow their bounties on strangers who have no claim upon them to the exclusion of relatives. As the property was owned by the testator he could make such disposition of it as he pleased, and if he had testamentary capacity and no undue influence was exercised upon him no one can question his choice of beneficiaries, nor can any court set aside the will which he chose to make in conformity to the statutory requirements.

It is said that his wife and those to whom his property was given were close to him during his illness, while his own children were not brought in until shortly before his death. It is true that the beneficiaries of his will had an opportunity to exercise an influence over him. His wife especially had an opportunity as well as a motive to influence his mind as to the disposition to be made of his property, but as said in *Ginter v. Ginter*, supra:

"The authorities are unanimous that power, motive, and opportunity to exercise undue influence do not suffice to authorize the inference that such influence has in fact been wielded." Page 741 of 79 Kan, page 642 of 101 Pac. [22 L. R. A. (N. S.) 1024].

It was also determined in that case that while unequal and unnatural provisions in a will may be considered in determining whether the will was the free act of the testator, they do not of themselves shift the burden of proof which rests upon those who assert that undue influence was exercised. While the wife on the day before his death twice mentioned the fact that a will had not been made by the testator, it is not shown that she took any part in the making of the will, nor that she attempted to influence or control the disposition of the property. Objection was made to the exclusion of remarks made at one time by the testator to the effect that he wanted his boys to go out to Gray county and farm his land. It appears, however, that the testimony was subsequently received as it went to show his relations with his sons. The testimony had little to do with his state of mind when the will was made. Besides there was considerable testimony of statements made by him not only that he wanted the boys to go out and farm the land, but also of a purpose to give the land to them. Evidently there was a change of purpose in this respect as he made a different disposition of the land. A letter, said to have been written by the testator to his brother about two years before his death, was offered in evidence, which, upon objection, was excluded. It appeared to be incomplete, part of it written with a pen, part with a lead pencil, and a part of it

seems not to have been in his handwriting. Nothing in the letter was pertinent to the case except a statement that he had purchased the Gray county land which he said was to be for his two youngest sons, and these facts were brought out in the testimony and received without objection.

The exclusion of the letter furnishes no ground for a reversal of the judgment. It will be affirmed. All the Justices concurring.

==
AHNERT v. AHNERT. (No. 20381.)
 (Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. DEEDS — 143—CONSTRUCTION—PROPERTY CONVEYED—RENTS AND PROFITS.

A deed reserved the rents, issues, and profits of the land to the grantor for his life and after his death to his wife for her life. *Held*, the widow of the grantor took no title to rent wheat grown on the land, which was harvested, threshed, and placed in granaries before her husband's death, as against the executor of his estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 453-455, 465-468; Dec. Dig. ¶ 143.]

2. EXECUTORS AND ADMINISTRATORS — 72—TITLE TO PROPERTY—ESTOPPEL.

The probate court, acting under the impression that the wheat belonged to the widow, directed the executor to correct his inventory accordingly. *Held*, the executor was not estopped from claiming the wheat as assets of the estate by participating in the probate court proceeding.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 321; Dec. Dig. ¶ 72.]

Appeal from District Court, Stafford County.

Action by Ernestine Ahnert against Albert Ahnert. From a judgment for defendant, plaintiff appeals. Affirmed.

Paul R. Nagle, of St. John, for appellant. F. L. Martin and Van M. Martin, both of Hutchinson, for appellee.

BURCH, J. The action was one by a widow against the executor of her husband's estate for the value of a quantity of wheat claimed by the executor as assets of the estate. The plaintiff was defeated, and appeals.

The plaintiff and William Ahnert were married in 1908. An antenuptial agreement provided that each should continue to own and control his own property. The husband owned a tract of land which he afterwards conveyed, the plaintiff joining him, by a deed containing the following reservation:

"The parties of the first part hereby expressly reserve to themselves and their assigns the full benefit and use of the above-described premises and the rents, issues, and profits thereof, for and during their natural life, and on the death of either of the first parties the survivor shall have the benefit, use, rents and profits for and during his or her natural life."

In the fall of 1913 the land was sown to wheat. In 1914 the crop was harvested,

threshed, and placed in granaries on the premises. Afterwards and in August, 1914, William Ahnert died leaving a will, which was duly probated. The executor marketed the decedent's share of the wheat and declined to turn over the proceeds to the plaintiff.

[1] The plaintiff says that her husband could increase the amount of property she was allowed by the antenuptial contract and could create an estate in her favor in the land and its rents, issues, and profits by reservation in his deed, all of which is not disputed by the defendant. The difficulty with the plaintiff's claim consists in this: According to the terms of the reservation in the deed the rents, issues, and profits of the land which accrued before the death of William Ahnert belonged to him. The plaintiff may claim rents, issues, and profits arising subsequent to her husband's death, but she has no title to rent wheat placed in the bin before his death.

[2] The status of the wheat under the reservation contained in the deed was considered informally by the probate court which reached the conclusion the wheat belonged to the plaintiff and directed the defendant to correct his inventory accordingly. The defendant took legal advice, became satisfied the wheat belonged to the estate, and so treated it. The probate court had no jurisdiction to make a final adjudication of title to the wheat (*Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642), and the defendant did not estop himself from claiming the wheat in his official capacity by participating in the probate court proceedings.

The judgment of the district court is affirmed. All the Justices concurring.

STATE v. WALES. (No. 20625.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

EMBEZZLEMENT — 39 — EVIDENCE — ADMISSIBILITY.

In the prosecution of a warehouseman for the alleged embezzlement of 735 bushels of wheat, it was error to reject evidence offered by the defendant touching his efforts to keep his mill a going concern, to obtain funds to meet his obligations, and a contract signed by the prosecuting witness tending to show a recognition of the defendant as a creditor instead of a bailee, and other evidence fairly going to the question of intent.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 62; Dec. Dig. — 39.]

Appeal from District Court, Harper County.

Emory A. Wales was convicted of embezzlement, and appeals. Reversed and remanded.

Donald Muir, of Anthony, and W. A. Briggs, of Woodward, Okl., for appellant. S. M. Brewster, Atty. Gen., and Vernon Day and George E. McMahon, both of Anthony, for the State.

WEST, J. The defendant appeals from a judgment of conviction on the charge of embezzling 735 bushels of wheat of the value of \$1,075. The 26 assignments of error cover many points not necessary to discuss.

The defendant began the operation of a mill and elevator, and in the summer of 1914 numerous farmers stored their wheat with the defendant. Among these was A. W. Mentze who put 735 bushels into the elevator and took a receipt:

"Rec'd of Mr. A. W. Mentze, 628 Bu. test 77# and 107.05 at test 59# for storage at the rate of one-half cent per bu. per month, and if sold to the mill there is no charge."

The defendant claims to have purchased this wheat, but the prosecuting witness testified:

"It was left between me and Mr. Wales whether we could agree on the price and sell to him, or whether he was to load it out for me on cars. If it was not loaded, I was not to haul it out in wagons, but he was to load it in cars. It was no sale at all."

In the following January Mentze talked to Wales about buying the wheat, and was told by him that Wales had a deal on hand and to wait a few days, to which Mentze assented. When the wheat was stored it was worth about 90 cents, and at the time of this conversation it was worth from \$1.25 to \$1.30. Afterwards Mentze tendered the storage, which tender was refused.

From all the evidence the jury were justified in believing that the wheat was stored, and not sold to the defendant; that he became involved; that a company was incorporated to which he sold the mill, taking certain shares of stock; that the wheat in storage was ground up, and afterwards a proceeding in bankruptcy was had respecting the company. The case was carefully tried, and the instructions, while unnecessarily prolix, carefully stated the law and were fair to the defendant, except that, as the fact, and not the amount, of the alleged embezzlement was in dispute, it would have been better to omit the repeated mention of petty larceny.

We find no material error touching any of the rulings of the trial court except as to the rejection of certain items of evidence. One of the reasons why Wales claims to have become involved was that he had to wait some time for the proceeds of a shipment of wheat to New York, but after he had gone East to make the collection, and succeeded with considerable expense, he put the proceeds into the business. Afterwards the contract known as Exhibit 1 was prepared by the company's counsel, which was, in substance, that the milling company being indebted from \$15,000 to \$20,000 to certain named persons, and, being insolvent by reason of such indebtedness, such persons were to buy the assets of the company for \$16,000, provided this would liquidate its debts. It was proposed to pay the creditors \$10,700

whenever all the creditors who signed the agreement should agree to release the company in full for their pro rata share of that sum; further, that as the exact amount of indebtedness was unknown, it was agreed that \$9,200 was to be disbursed immediately upon the execution of the contract by the known creditors, and the balance held for six months, and then disbursed. This instrument was signed by numerous persons, including the prosecuting witness, and bore date of February 12, 1915; the embezzlement being charged as committed on or about February 8, 1915. This was offered in evidence, and an objection thereto was sustained and of this the defendant complains. It was also offered to show that about the latter part of January, 1915, the company entered into negotiations with Mr. J. C. Elvin relative to making an assignment of the mill property to him on condition that he pay for all the wheat which had been delivered to the milling company by farmers to be paid for at a future date, including that of Mr. Mentze, and all other claims against the milling corporation. This offer was rejected. The theory on which this evidence was offered was that the prosecuting witness by signing the contract recognized Wales as his creditor rather than his warehouseman; that instead of harboring a design to commit the crime of embezzlement Wales was honestly endeavoring to arrange for the protection of the prosecuting witness and payment to him for the wheat. The transactions with two other farmers, one at about the same time, and the other after the company had been incorporated, were permitted to be shown by the state under the familiar rule that evidence of similar transactions is competent on the question of intent. The entire history of the mill venture by the defendant indicates a series of attempts to put it in the attitude of a going concern, and we think under all the circumstances the defendant had a right to the benefit of the evidence now under consideration both for the purpose of giving the jury all the facts concerning the claimed relations of bailee and purchaser, and for the purpose of showing the intent which actuated the defendant. While the defendant was permitted to state at some length what Exhibit 1 was, the document itself was not received in evidence, and hence all the jury had was his somewhat partial description of it. The defendant's offer to show that the company was, by its president, thrown into bankruptcy while he was absent in Oklahoma City, was rejected; neither was he permitted to show that he received nothing in return for the \$18,000 or \$19,000 which he put into the property. His offer to show that he paid a great number of depositors at the mill who had received the same sort of certificate as that given the prosecuting witness, and that they were paid in cash

on the dates appearing thereon and upon demand of the holders, was likewise refused.

The crime with which the defendant was charged being one involving moral turpitude and wrongful intent, and there being a square conflict between the prosecuting witness and the defendant as to the nature of the storage transaction, all of these matters should have been received in evidence in order that the jury might have fully understood the entire situation.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

EDWARDS v. AMERICAN LAND & CATTLE CO. et al. (No. 20173.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §318(1)—POSSESSION OF PREMISES—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for damages alleged to have been sustained by the plaintiff by being dispossessed by the defendant of land alleged to have been leased by the plaintiff from the defendant through its agents, it is proper to introduce in evidence written leases for the land to another person, for the same time, and to show that the other person leased the land to the plaintiff, where the answer alleges that the defendant did not lease the land to the plaintiff nor authorize any one to do so.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1845, 1847; Dec. Dig. §318(1).]

2. LANDLORD AND TENANT §94(2) — TERMS FOR YEARS—TERMINATION—NOTICE.

To terminate the rights of a sublessee of land, it is not necessary to give him notice to quit, where the lessor of the sublessee holds from the landowner under a written lease which fixes the time for the termination of the tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 317; Dec. Dig. §94(2).]

3. LANDLORD AND TENANT §318(1) — POSSESSION OF PROPERTY—ACTIONS—INSTRUCTIONS.

The instructions given have been examined, and are found to have correctly stated the position of the defendants.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1845, 1847; Dec. Dig. §318(1).]

Appeal from District Court, Clark County.

Action by John A. Edwards against the American Land & Cattle Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. W. Harvey, of Ashland, for appellant.
F. C. Price, of Ashland, for appellees.

MARSHALL, J. The plaintiff sought to recover judgment for damages for the dispossession of the land on which he was pasturing and watering cattle. Judgment was rendered in favor of the defendants. The plaintiff appeals.

The American Land & Cattle Company owned a large tract of land in Clark county. From some time in 1905 until in July, 1913, the plaintiff pastured and used about 1,600 acres of this land, lying along Snake creek. The plaintiff owned other large tracts of land contiguous to, and fenced with, that of the cattle company. The plaintiff paid \$200 a year for the use of the land owned by the cattle company. This rent was paid to different parties. The plaintiff's leases were oral, and were for a year at a time. There was a conflict in the evidence concerning the parties from whom the plaintiff leased the land. The plaintiff's evidence tended to show that he rented the land from agents of the cattle company, while the defendants' evidence tended to show that the plaintiff rented the land from the company's tenants. These tenants had written leases which provided for the surrender of possession of the land on the 30th day of April of each year. J. P. Campbell had this and other land of the cattle company leased annually from May 1, 1911, to April 30, 1913. For the year May 1, 1913, to April 30, 1914, Campbell had the other land leased, but for that year his leases omitted the lands in controversy. In July, 1913, the cattle company fenced its land along Snake creek, drove the plaintiff's cattle off, and ordered the plaintiff to keep off the land and to keep his cattle out. The plaintiff was pasturing a large number of cattle on the land owned by himself and that owned by the cattle company. These cattle obtained water at Snake creek, on the land of the cattle company. The plaintiff did not have a supply of water on his land sufficient for his cattle. On account of being deprived of water, his cattle were greatly damaged. To recover damage he brought this action. The case was tried to a jury, and a general verdict was returned in favor of the defendants.

[1] 1. One of the plaintiff's complaints is that the court erred in admitting in evidence leases from the defendant cattle company to J. P. Campbell for the years 1911, 1912, and 1913. In their answer the defendants denied that they had, at any time, leased to the plaintiff any of the land belonging to the cattle company, and denied authorizing any person to do so. Under these allegations it was proper for the cattle company to prove that it had leased the land in controversy to J. P. Campbell, and then to prove that J. P. Campbell had leased the land to the plaintiff. This evidence contradicted that of the plaintiff, which tended to show that the plaintiff leased the land directly from the cattle company through its agents. If the plaintiff rented this land from J. P. Campbell, his leases were properly introduced in evidence to show his, and necessarily the

plaintiff's, rights under the leases, together with the rights of the defendant cattle company.

[2] 2. No notice that the plaintiff's right to the use of the land would be terminated was given to the plaintiff by the cattle company, or by any one for it. For this reason the plaintiff contends that he was wrongfully deprived of the use of the land and of the water on it. This question is presented in different ways. The plaintiff asked instructions that notice was necessary before his rights could be terminated. These instructions were refused. The court instructed the jury, in substance, that if Edwards was a subtenant under J. P. Campbell, and that if J. P. Campbell was a lessee under the written leases offered in evidence, no notice to the plaintiff was necessary in order to terminate his right to the use and possession of the land in controversy. Campbell's leases provided for the termination of his interest on April 30, 1913. To terminate his right to use the land for any period of time after April 30, 1913, it was not necessary to give him notice. If it was not necessary to give Campbell notice, it was not necessary to give the plaintiff notice in order to deprive him of his right, if any he had, to the use of the land. Section 4693 of the General Statutes of 1909 governs this question and is as follows:

"Where the time for the termination of a tenancy is specified in the contract, or where a tenant at will commits waste, or in the case of a tenant by sufferance, and in any case where the relation of landlord and tenant does not exist, no notice to quit shall be necessary."

The instructions requested by the plaintiff ignored the defendants' evidence, tending to show that the plaintiff was the tenant of J. P. Campbell, and for that reason were properly refused. They withdrew from the jury the power to determine between the evidence of the plaintiff and that of the defendants as to the source of the plaintiff's right to use the land. If the jury believed that the plaintiff's contention concerning the leasing of the land was the correct one, the plaintiff's rights were fully protected by the instructions given.

[3] 3. The plaintiff contends that the instructions of the court did not correctly state the position of the defendants. The part of the instructions toward which this contention is directed was as follows:

"The defendants claim that the lands were leased to J. P. Campbell under written leases which specify the date of expiration. Further, that plaintiff, Edwards, was a subtenant under Campbell, under a verbal lease."

This was a correct statement of the position of the defendants.

The judgment is affirmed. All the Justices concurring.

DE SOTO STATE BANK v. RANDALL et al.
(No. 20348.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

MECHANICS' LIENS §73(1)—RIGHT TO LIEN—EFFECT OF CONTRACT.

Notes taken for building material cannot, in the absence of a materialman's lien, be made a lien on the premises.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 87; Dec. Dig. §73(1).]

Appeal from District Court, Johnson County.

Action by the De Soto State Bank against John W. Randall and others. From a judgment for plaintiff, defendants Frank Hodges and others appeal. Affirmed.

S. D. Scott, of Olathe, for appellants. J. W. Parker, of Olathe, for appellee.

WEST, J. The defendants, having sold some lumber to go into a house after the plaintiff bank had taken a mortgage to secure a loan on the property, took notes for the payment of this material bill, but neglected to file a lien upon the premises. When the bank's mortgage was foreclosed the notes for material were sought to be transformed into a judgment and lien prior to that of the mortgage. The court gave the defendants judgment, but declined to make the amount thereof a lien, thereby following the plain and thoroughly settled law of this state. *Greeno v. Barnard*, 18 Kan. 518; *Hurd v. Hixon & Co.*, 27 Kan. 722; *Perry v. Conroy*, 22 Kan. 716; *Conroy v. Perry*, 26 Kan. 472; *Potter v. Conley*, 83 Kan. 676, 112 Pac. 608. Counsel for the defendant frankly says in his brief that:

"This is a case where the moral rights of the parties and the equities appear to conflict with strict technical rules of law, and, perhaps, in some degree, with former decisions of this court."

The authorities, however, unquestionably sustain the trial court in its ruling, and the judgment is affirmed.

All the Justices concurring.

SCHAAKE et al. v. BRUNE et al. (No. 20745.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. BRIDGES §7—CONSTRUCTION—AUTHORITY OF COUNTY COMMISSIONERS.

When building a county bridge, a board of county commissioners is authorized to construct, as part of the bridge, railroad tracks to be used in transporting street railway, interurban, and railroad cars.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 9-13, 15, 16; Dec. Dig. §7.]

2. BRIDGES §11—CONSTRUCTION—AUTHORITY OF COUNTY COMMISSIONERS.

Under chapter 71 of the Laws of 1913, a board of county commissioners may build a bridge costing more than \$200,000, where interested parties contribute to the expense of its

construction so that the total amount to be collected by taxation is reduced to \$200,000.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 23; Dec. Dig. §11.]

Appeal from District Court, Douglas County.

Action by William Schaaque and others against Gus H. Brune and others, as the Board of County Commissioners of the County of Douglas, and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. E. Emick, of Lawrence, for appellants. J. S. Amick, of Lawrence, and C. F. W. Dasher, of Leavenworth, for appellees.

MARSHALL, J. The plaintiffs seek to enjoin the defendants from building a bridge across the Kansas river at Lawrence. Judgment was rendered in favor of the defendants, and the plaintiffs appeal.

[1] 1. After properly submitting the question to the voters of Douglas county, the board of county commissioners of that county determined to build a cement bridge across the Kansas river at Lawrence, under chapter 71 of the Laws of 1913. The board made provision for the bridge to carry telephone and telegraph wires, gas and water pipes, and for the construction on the bridge of a railroad track to be used in the transportation of street railway, interurban, and railroad cars. The plaintiffs contend that the commissioners had no authority to build such railroad tracks.

A bridge is a part of a public highway. It may connect parts of a street or of a public road, or a street and a public road. A board of county commissioners has the same authority in constructing a bridge as it has in building a public road. Gas mains may be laid in public roads. *La Harpe v. Gas Co.*, 69 Kan. 97, 76 Pac. 448. Telephone lines may be constructed and maintained on public roads. *McCann v. Telephone Co.*, 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, 2 Ann. Cas. 156. Public roads must now be constructed to carry loads and vehicles that were unthought of 100 years ago. They must now be so constructed as to accommodate present means of transportation. This requires stronger bridges and more solid masonry. Heavy engines, cars, and automobiles are constantly on all public highways. Automobiles and traction engines have become every day necessities. Electric railroads are being built in streets and on and along public roads. Street railroads are necessary for the existence of modern cities. Interurban railroads are becoming a public necessity. Under these circumstances it was proper for the board of county commissioners of Douglas county to take into consideration the needs of the people of that county and of the city of Lawrence, and to build a bridge that will accommodate all kinds of

travel and transportation. The board had authority to build a railroad track on the bridge.

[2] 2. The plaintiffs insist that the bridge will cost more than \$200,000. The commissioners contracted with the Missouri Valley Bridge & Iron Company to build the bridge complete with the railroad tracks for \$199,910. Another contract was made by which the commissioners agreed to pay engineers \$10,000 for work in connection with designing and constructing the bridge. There were other expenses amounting to several hundred dollars. These items make the entire cost of the bridge about \$211,000.

One span of the bridge will cross the Santa Fé Railway tracks. That railroad has agreed to pay \$14,359.19 as its pro rata share of the expense of constructing the bridge. Deducting this sum from the entire cost of the bridge leaves the amount to be paid by Douglas county less than \$200,000. In *Anderson v. Cloud County*, 88 Kan. 419, 111 Pac. 464, this court said:

"Section 655 of the General Statutes of 1909, authorizing county commissioners to make an appropriation of \$4,000 to build or repair a bridge, and requiring an affirmative vote of the electors before a greater sum may be appropriated, does not preclude the building of a bridge which costs more than \$4,000, without a vote of the electors, where another municipality and other interested parties contribute so much of the cost of the bridge as exceeds \$4,000, and where no more than \$4,000 of the funds of the county is appropriated for that purpose." Paragraph 1, syllabus.

This principle in *Anderson v. Cloud County* is controlling in the present case.

Section 2 of chapter 71 of the Laws of 1913 reads:

"The money so collected by the levy of the tax as provided in section one of this act, shall be known as the special bridge fund, and shall never exceed the sum of two hundred thousand dollars, for the construction of any one bridge and its necessary approaches."

This statute does not restrict the cost of the bridge, but limits the amount that may be raised by taxation for its construction. The plans and specifications contain this provision, as found in the opinion of the trial court:

"The maximum amount which the county is authorized by the law to expend from the county treasury for the construction of this bridge is \$200,000, to be raised by a tax levy. More than one-half of this amount has been collected, and it is expected that the Santa Fé Railway Company will contribute an extra sum, and if such contribution is made, a sum available will be in excess of it, * * * but in no event will the amount expended from the county treasury exceed the sum of \$200,000, and bidders must take this into account in preparing their tender."

Under this provision of the contract the county cannot be compelled to pay more than \$200,000 for the construction of the bridge. The entire cost to Douglas county will not amount to \$200,000.

The judgment is affirmed. All the Justices concurring.

FARMERS' & DROVERS' BANK v. BASHOR. (No. 20189.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 283—LIABILITY OF INDORSER—PERSONS SECONDARILY LIABLE.

The payee of a note who transfers it by an indorsement guaranteeing payment becomes secondarily liable within the meaning of section 127 of the Negotiable Instruments Act (Gen. Stat. 1909, \S 5373).

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 627; Dec. Dig. \S 283.]

2. BILLS AND NOTES \S 301—LIABILITY OF INDORSER—PERSONS SECONDARILY LIABLE.

A person secondarily liable is discharged by any agreement binding on the holder to extend the time of payment unless the agreement be made with such person's assent or unless recourse against him be expressly reserved. Negotiable Instruments Act, \S 127 (Gen. Stat. 1909, \S 5373).

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 706-721; Dec. Dig. \S 301.]

3. BILLS AND NOTES \S 301—LIABILITY OF INDORSER—"ASSENT."

Assent, as used in section 127 of the Negotiable Instruments Act (Gen. Stat. 1909, \S 5373), means concurrence in the agreement to extend the time of payment when made. Without such assent an agreement to extend time of payment ipso facto discharges the person secondarily liable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 706-721; Dec. Dig. \S 301.]

For other definitions, see Words and Phrases, First and Second Series, Assent.]

4. BILLS AND NOTES \S 301—LIABILITY OF INDORSER—EXTENSION.

Knowledge of an extension does not alone constitute assent, and it is not necessary that an extension be expressly objected to to entitle a person secondarily liable to his discharge.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 706-721; Dec. Dig. \S 301.]

5. BILLS AND NOTES \S 301—LIABILITY OF INDORSER—REVIVAL.

After a person secondarily liable has been discharged by an extension made without his assent his liability can be revived only by virtue of a new contract or by virtue of conduct creating estoppel.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 706-721; Dec. Dig. \S 301.]

Appeal from District Court, Morris County.

Action by the Farmers' & Drovers' Bank against J. C. Bashor. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Edwin Anderson, of Council Grove, and Samuel & Hartley, of Emporia, for appellant. Nicholson & Pirtle, of Council Grove, for appellee.

BURCH, J. The action was one to recover on a promissory note given to the defendant and by him indorsed and delivered to the plaintiff under an indorsement guaranteeing

payment. The plaintiff recovered, and the defendant appeals.

The note was given to the defendant by R. E. Rader and was payable on September 1, 1913. Before maturity the defendant transferred the note to the plaintiff under the following guaranty indorsed on the back:

"For value received I hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at the rate of 8 per cent. per annum until paid, waiving demand, notice of nonpayment and protest."

[4] On August 26th the bank extended the time of payment, without consideration, to October 1st. On September 2d the defendant paid \$25 on the note, which sum he had obtained from Rader for the purpose. There was evidence that at that time the defendant was informed of the extension to October 1st. On October 1st the time of payment was extended to December 1st, Rader paying interest in advance for the extension. The president of the bank testified to the negotiations for the purchase of the note, consummated by execution of the guaranty and delivery of the note. He further testified that he had a number of conversations with the defendant in which he told the defendant about the extensions. The court instructed the jury that if the defendant had knowledge of the extension he was liable. The instruction was erroneous. No right to extend the time of payment was reserved to the bank in the guaranty, and in order to be bound by the second extension it was necessary that the defendant assent to it. Negotiable Instruments Act, § 127 (Gen. Stat. 1909, § 5373). Knowledge alone does not constitute assent, and it is not necessary that a surety or guarantor having knowledge of an extension should expressly object to it to entitle him to his discharge. 1 Brandt, Suretyship and Guaranty (3d Ed.) § 379.

[1-3, 5] The court gave the jury an instruction relating to ratification of the extension by the defendant by treating the guaranty as a subsisting obligation. This instruction was also erroneous. It was broad enough to permit the jury to find against the defendant because of the payment made on the note after the first extension. That extension did not discharge the defendant, and if it had been binding on the bank and had been assented to by the defendant, those facts would not have authorized the bank to grant a second extension. 1 Brandt, Suretyship and Guaranty (3d Ed.) § 379. Furthermore, the defendant was a party secondarily liable. Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149. He was discharged by any agreement binding on the bank, to extend the time of payment unless the agreement were made with the defendant's assent or unless recourse against him were expressly reserved. Negotiable Instruments Act, § 127 (Gen. St. 1909, § 5373). Assent to an agreement extending time of payment means

concurrence in the agreement when made. An extension without such assent ipso facto discharges the party secondarily liable and he can again become liable only by virtue of a new contract or by virtue of conduct creating estoppel.

The judgment of the district court is reversed, and the cause is remanded for a new trial. All the Justices concurring.

SOUTHERN SURETY CO. v. HUDSON et al.
(No. 20387.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

MECHANICS' LIENS—226—RIGHT TO LIEN—EFFECT OF BOND.

A contract entered into by a board of education for building a schoolhouse required the contractor to give a bond for its faithful performance, and also a bond for indemnity against mechanics' liens in accordance with the statute. The same surety company executed both bonds. That for faithful performance made liability thereunder contingent upon certain conditions which were not referred to in the other bond. Several lien statements were filed. The surety company procured assignments from the claimants and sued to enforce the liens on the ground that the conditions referred to had not been complied with. Held, that as the statute provides that no lien shall attach where a bond such as it describes is given for the payment of claims that might be a basis of liens, the giving of such a bond prevented a lien from attaching, irrespective of any failure of the board to comply with the terms of the other bond.

[Ed. Note.—For other cases, see Mechanics' Liens Cent. Dig. § 409; Dec. Dig. § 226.]

Appeal from District Court, Cowley County.

Action by the Southern Surety Company against R. L. Hudson and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Albert Faulkner and C. Ward Wright, both of Arkansas City, and A. G. Moseley and W. W. Herron, both of St. Louis, Mo., for appellant. C. T. Atkinson, of Arkansas City, for appellees.

MASON, J. The board of education of the city of Arkansas City entered into a contract with R. L. Hudson for the building of a school house, which required the contractor to give two bonds, one for its faithful performance, and the other for indemnity against mechanics' liens, "as required by the laws of the state of Kansas." Several lien statements were filed. The surety company procured assignments of the rights of the claimants, and brought an action to foreclose the liens, based upon a contention that the conduct of the board had released it from liability upon the bonds, thus making the situation practically the same as though no bond had been given. A motion of the board for judgment in its behalf upon the pleadings was sustained, and the plaintiff appeals.

A copy of the contract is set out in the

answer, which must be regarded as accurate, since its correctness was not denied under oath. It shows that the clause upon which the plaintiff chiefly relies reads as follows:

"It is further agreed by the party of the first part [the contractor], that a sum of money equal to 10 per cent. be reserved and shall be held by the party of the second part [the board of education] as part security for the faithful performance of work and may be applied under the direction of the superintendent in liquidation of any damages under this contract."

The bond against liens was approved and filed by the clerk of the district court, and was in the form provided by statute (Code Civ. Proc. § 660; Gen. Stat. 1909, § 6255), running to the state for the benefit of persons in whose favor liens might accrue, the condition being expressed in these words:

"The condition of this obligation is that R. L. Hudson will make payment of all claims arising from the furnishing of labor or material for the purpose hereinbefore recited, which might be the basis of lien under the provisions of the laws of the state of Kansas."

The bond for the faithful performance of the contract contained this language, the italics showing the portions particularly relied upon by the plaintiff:

"Provided, however, that this bond is issued subject to the following conditions and provisions:

"First. That no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the obligee shall promptly, upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the surety at its office in the city of Muskogee, Oklahoma, written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office aforesaid, and the consent of the surety thereto obtained, before making to the principal the final payment provided for under the contract herein referred to.

"Second. That in case of such default on the part of the principal, the surety shall have the right, if it so desire, to assume and complete or procure the completion of said contract; and in case of such default, the surety shall be subrogated and entitled to all the rights and properties of the principal arising out of said contract and otherwise, including all securities and indemnities theretofore received by the obligee and all deferred payments, retained percentages and credits, due to the principal at the time of such default or to become due thereafter by the terms and dates of the contract."

The petition and reply allege in substance that the board was estopped from insisting upon the surety's liability on the bonds, because it failed to retain 10 per cent. of the contract price, but paid it to the contractor at the time of the completion of the building, making it impossible for the surety to protect itself against any claim that might be made the basis of a lien. The plaintiff's contention is that the contract and the two

bonds are to be interpreted as parts of one entire agreement, and that the violation by the board of a provision of the bond for faithful performance of the contract precludes its enforcing the other bond against the surety. It is at least doubtful whether sufficient facts are pleaded to show that any loss to the surety resulted from a premature settlement with the contractor—a condition necessary to a defense to the bond based on that ground. *School District v. McCurley*, 92 Kan. 53, 142 Pac. 1077, Ann. Cas. 1916B, 238; *Y. M. C. A. v. Ritter*, 92 Kan. 467, 140 Pac. 892, L. R. A. 1915C, 177. But that question need not be determined, for the case is controlled by another consideration. The requirement regarding notice to the surety before the making of the final payment, and that relating to the subrogation of the surety to the rights of the board, were made conditions of the surety's liability upon the bond for faithful performance of the contract, but the bond for indemnity against mechanics' liens was complete in itself and contained no such limitation. The present action, so far as the board of education is concerned, is purely one for the enforcement of mechanics' liens against the schoolhouse. Such a lien can exist only by virtue of the act of the Legislature, under the conditions there laid down. And the statute in so many words provides that where the contractor gives such a bond against liens as that here given, and it is approved and filed, no lien shall attach. Gen. Stat. 1909, § 6255. While the obligation to furnish the bond was assumed by the contractor as a part of his contract, its effect is determined by the statute, with which it complied in all respects. It gave protection to third persons, and when it had once been executed, approved, and filed, it was not subject to nullification by reason of the relations of the builder and contractor. The statute says that where such a bond is given there shall be no lien. The bond was given and all basis for a lien was thereby removed. The laborers and materialmen had no claim against the building and their assignment could transfer none to the plaintiff.

The appellant suggests that at all events the court committed reversible error in failing to render a personal judgment, as prayed in the petition, against the contractor. The ruling complained of is the sustaining of the motion of the board of education for judgment in its favor dismissing the suit. This ruling and the ensuing judgment are to be interpreted as defining the rights of the plaintiff with respect only to the board, and not as affecting its action regarded as a personal one against the contractor.

The judgment is affirmed. All the Justices concurring.

EAGLE v. MATTHEWS. (No. 20150.)
(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §172(1), 173—POSSESSION OF PREMISES—EVICTION.

In order to constitute a constructive eviction, the acts complained of must be those of the landlord or those for which he is responsible, and acts of third persons, impairing the usefulness or enjoyment of the premises, do not amount to an eviction by the landlord unless committed under his direction or at his instance or with his consent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695, 697, 700, 702, 705-707; Dec. Dig. §172(1), 173.]

2. LANDLORD AND TENANT §233(1)—RENT—DEFENSES—EVICTION.

In an action to recover rent where the defense is a constructive eviction, a general verdict in favor of the defendant will be set aside, where the special findings show that none of the grounds upon which the defendant claims the right to abandon the premises resulted from any wrongdoing of the plaintiff or by his direction or consent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 940, 944; Dec. Dig. §233(1).]

3. LANDLORD AND TENANT §178 — POSSESSION OF PREMISES—EVICTION—WAIVER.

Where a tenant claims that circumstances have arisen which give him the right to abandon the lease and he claims an eviction, he must act within a reasonable time after the discovery of the conditions; and where he remains in possession of the premises under the lease for 11 months, and the conditions were the same before and after the execution of the lease, he will be held to have waived any claim that he has been evicted by reason of the conditions.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 713; Dec. Dig. §178.]

Appeal from District Court, Shawnee County.

Action by Charles S. Eagle against Todd Matthews. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Garver & Garver, of Topeka, for appellant. Hungate & Heinz, of Topeka, for appellee.

PORTER, J. This is an action by a landlord to recover rent. The petition set forth a written lease of the south half of a store-room on Kansas avenue in the city of Topeka, for a term of 16½ months from July 15, 1913, at a rental of \$125 a month payable in advance. The defendant went into possession and paid the rent until June, 1914, when he abandoned the premises and refused to pay the rent for the rest of the term. The plaintiff gave him notice that he would be held for the agreed rent until the termination of the lease, but that in the meantime plaintiff was willing to co-operate with him in finding another tenant for the room and would report any application that might be made. The answer set up a constructive eviction, and alleged that the premises were leased for the purpose of conducting a shoe and hat

shop; that the plaintiff occupied the north half of the room as a retail cigar and tobacco shop, the premises being divided by a partition; that the front door of the plaintiff's place of business and that of the defendant opened from a common vestibule; that in the east end of the premises a large plate glass show window was of great value as an advertising feature to the defendant's business; that during all the time the defendant occupied the premises the plaintiff willfully permitted a group of young men who frequented plaintiff's place to stand and loiter in front of defendant's show window, obstructing the view from Kansas avenue and destroying the usefulness of the window as an advertising medium; and that these loafers maintained their position in front of the defendant's place with the consent and encouragement of the plaintiff. Another defense alleged was that plaintiff permitted gambling in his cigar store, where numbers of young men congregated early in the morning and remained until late at night, and that they indulged in loud, profane, and indecent talk which could be heard in the defendant's store by himself and his customers. The answer alleged these grounds for the abandonment of the lease. The jury returned a general verdict in favor of defendant, and at the request of the plaintiff, answered a number of special questions. The plaintiff moved for judgment on the special findings, and the sole question for determination is whether the court erred in refusing to sustain the motion.

The special findings are, in substance, that persons did not congregate in front of Matthews' show window or in the front entrance at the instance, direction or with the consent of the plaintiff or any of his employees; that there was no gambling conducted at Eagle's place "that interfered with the defendant's occupancy of the store," and that Eagle had instructed his employees not to permit gambling on the premises; that neither Eagle nor any of his employees used loud, profane, or indecent language on the premises; that they did not consent to nor encourage others to use such language; and that the conduct of persons congregating at Eagle's premises was no different from the conduct of a like body of persons under similar circumstances. The findings are, too, that Matthews was familiar with the fact that Eagle was conducting a cigar store at this place before entering into the lease, and that Matthews was familiar with the place and its surroundings at the time the lease was made, and that the conditions were no different during his lease than before.

[1, 2] None of the grounds upon which the defendant claims the right to abandon the premises resulted from any wrongdoing of the plaintiff. The space in front of the show window on the side occupied by the defendant was not under the control of the plaintiff,

and he could not be held responsible for the presence of persons congregating there. If the defendant was dissatisfied with having persons standing in front of his window, he should have complained to the police. It is said that:

"Trespasses, or other acts of third persons impairing the usefulness or enjoyment of the demised premises, do not amount to an eviction by the lessor, unless the acts from which the eviction is asserted to result were committed under the direction of or at the instance or with the consent of the lessor." 24 Cyc. 1132.

The rule is that in order to constitute a constructive eviction, the acts complained of must be those of the landlord or those for which he is responsible.

[3] Moreover, the defendant remained in possession of the premises under the lease for 11 months after the commencement of

the term. The findings are that the conditions remained the same before and after the execution of the lease, so that he must be held to have waived any right to claim that he had been evicted from the premises by reason of the conditions. Where a tenant claims that circumstances have arisen which give him the right to abandon a lease, he must act within a reasonable time after he discovers the conditions. *Seaboard Realty Co. v. Fuller*, 33 Misc. Rep. 109, 67 N. Y. Supp. 140, 8 N. Y. Ann. Cas. 418; 24 Cyc. 1134.

The findings are in direct contradiction of the general verdict and must control.

The judgment is reversed, and the cause remanded, with directions to sustain the plaintiff's motion for judgment. All the Justices concurring.

GILLIES v. LINSKOTT. (No. 20156.)

(Supreme Court of Kansas. Dec. 9, 1916.)

Appeal from District Court, Leavenworth County.

On rehearing. Former opinion adhered to. For former opinion, see 98 Kan. 78, 157 Pac. 423.

A. E. Crane, of Atchison, Woodburn Bros., of Holton, Coddling & Coddling, of Leavenworth, and Charles Hayden, of Holton, for appellant. John D. Myers, of Kansas City, Mo., and M. N. McNaughton, of Leavenworth, for appellee.

PER CURIAM. For sufficient reasons, a rehearing in this case (Gillies v. Linscott, 98 Kan. 78, 157 Pac. 423) was granted and a reargument ordered. Since then every phase of this controversy has been reconsidered, but the court can discern no way to disturb the judgment of the trial court, nor does it seem advisable either to amplify or modify our former opinion and judgment.

STATE v. POWELL. (No. 20698.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW ⇨942(2)—**NEW TRIAL—**
GROUND.

Assignments of error, relating to the introduction of evidence, misconduct of a juror, misconduct of counsel, an instruction to the jury, and the overruling of the motion for a new trial, examined, and held to be without merit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2332; Dec. Dig. ⇨942(2).]

Appeal from District Court, Decatur County.

Neil Powell was convicted of gambling, and appeals. Affirmed.

J. P. Noble, of Oberlin, for appellant. S. M. Brewster, Atty. Gen., L. M. Parker and A. C. T. Geiger, both of Oberlin, and John L. Hunt, of Topeka, for the State.

BURCH, J. The defendant was convicted of gambling and appeals.

All the circumstances indicated gambling, and the checks which were captured and introduced in evidence were quite corroborative.

The evidence relating to misconduct on the part of a juror was conflicting, and the trial court decided in favor of the juror. Accepting his statements as true, his impropriety in suffering himself to be interrogated at all about the case did not amount to misconduct from which prejudice is presumed, and no prejudice whatever was made to appear.

The evidence given by the sheriff at the trial of one of the defendant's associates was not radically different from the affidavit of the county attorney. The facts stated were essentially the same. Conclusions contained in the affidavit depended on the facts, and doubtless the jury drew its own conclusions. The defendant consented that the affidavit might be read. The subsequent evi-

dence of the sheriff was not newly discovered evidence. At most it was merely evidence somewhat at variance with previous evidence of the same witness, and new trials are not granted on that ground. Besides this, the evidence was ample to sustain a conviction without the affidavit.

Misconduct of the county attorney which was not committed needs no discussion. The instruction on the subject of reasonable doubt was correct.

The judgment of the district court is affirmed. All the Justices concurring.

STOTHARD v. JUNIOR COAL & MINING CO. (No. 20370.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

TRIAL ⇨139(1)—**SUFFICIENCY OF EVIDENCE.**

The plaintiff's testimony as to how the injury occurred was susceptible of two different constructions. The trial court, after directing a verdict for the defendant, granted a new trial. Held not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. ⇨139(1).]

Appeal from District Court, Crawford County.

Action by Lew Stothard against the Junior Coal & Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. M. Sheppard, of Joplin, Mo., for appellant. T. J. Karr and B. B. Haney, both of Girard, for appellee.

WEST, J. The plaintiff sued to recover damages alleged to have been received while working in the defendant's strip pit by firing a blast without giving the plaintiff proper warning. In his account of the matter his story of what occurred made out a case. In his attempt, however, to fix the chronological limits of the affair his mathematical estimates took him out of court. After having directed a verdict for the defendant the trial court acting upon the theory of Acker v. Norman, 72 Kan. 586, 84 Pac. 531, as applied in Cornwell v. Moss, 95 Kan. 229, 147 Pac. 324, concluded that it would be proper for a jury to choose between the descriptive and the chronological testimony of the plaintiff and granted a new trial.

This ruling was right for two reasons: First, because the court was not satisfied with the former decision (Civil Code, § 307 [Gen. St. 1900, § 5901]); and, second, because when the evidence even of one witness or one party is fairly susceptible of two different constructions leading to diverse results it becomes the province of the jury to weigh such evidence and reach the proper conclusion.

The judgment is affirmed. All the Justices concurring.

LOOPE v. CHICAGO, B. & Q. R. CO.
(No. 20160.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

COURTS \Rightarrow 222(1)—**JUSTICES OF THE PEACE** \Rightarrow 87(3)—**GARNISHMENT—AMOUNT IN CONTROVERSY—CONSTITUTIONAL QUESTION.**

Under section 3654 of the General Statutes of 1909 the justice of the peace had no right to entertain the garnishment proceeding involved herein, but the district court, although acting erroneously, was not without jurisdiction, and the amount involved being less than \$100, and no constitutional question being involved, the appeal must be dismissed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 595, 598; Dec. Dig. \Rightarrow 222(1); Justices of the Peace, Cent. Dig. § 297; Dec. Dig. \Rightarrow 87(3).]

Appeal from District Court, Wyandotte County.

Action by James Loope against the Chicago, Burlington & Quincy Railway Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Warner, Dean, McLeod & Langworthy, and James P. Kem, all of Kansas City, Mo., for appellant. E. E. Martin, of Kansas City, Kan., for appellee.

WEST, J. The defendant railroad company was called upon to answer in a justice court a proceeding in garnishment involving wages earned out of this state, payable out of this state, the cause of action arising out of this state, the defendant in the garnishment action not being personally served with process. The justice ordered the railroad company to pay, and an action was brought in the district court to compel obedience to this order. The defendant, having been defeated, appeals, asserting that although the amount involved is less than \$100 it has been deprived of its property without due process of law, and that the refusal of the trial court to make findings of fact and conclusions of law in writing was a deprivation of a remedy guaranteed by the Kansas Bill of Rights.

In view of section 3654 of the General Statutes of 1909 we unhesitatingly hold that the justice of the peace was utterly without right to entertain jurisdiction of the proceeding except to dismiss it. The difficulty, however, is that when the matter was taken to district court that tribunal had jurisdiction to determine, erroneously, as it did, against the rights of the railroad company and the plain provisions of the statute in question. The refusal to make findings of fact and conclusions of law was erroneous merely, but not jurisdictional. It was sought by answer and by requests for declarations of law to induce the trial court to treat the enforcement of the order of the justice as a deprivation of certain constitutional rights. The case, however, really involves no constitu-

tional question, and hence on account of the smallness of the amount in controversy an appeal will not lie. Civ. Code, § 566 (Gen. St. 1909, § 6161); *Clevenger v. Figley*, 68 Kan. 699, 75 Pac. 1001; *Caldwell v. Bigger*, 76 Kan. 49, 55, 90 Pac. 1095; *Ayres v. Deering*, 76 Kan. 149, 90 Pac. 794; *Brenholts v. Miller*, 80 Kan. 185, 101 Pac. 998; *In re Luttgarding*, 83 Kan. 205, 210, 110 Pac. 95; *Griggs v. Hanson*, 86 Kan. 632, 121 Pac. 1094, 52 L. R. A. (N. S.) 1161, Ann. Cas. 1913C, 242; *Wheeler v. Ballard*, 91 Kan. 354, 360, 137 Pac. 789.

The appeal is dismissed. All the Justices concurring.

McCULLOUGH v. MISSOURI PAC. RY. CO.*
(No. 20143.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. COURTS \Rightarrow 489(9)—**CONFLICTING JURISDICTION—STATE COURTS AND UNITED STATES COURTS—MISROUTING SHIPMENTS.**

The state courts have jurisdiction of an action against a carrier for damages occasioned by the misrouting of an interstate shipment, by which a privilege of milling in transit was lost, which would have been available if the shipping directions had been followed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1326; Dec. Dig. \Rightarrow 489(9).]

2. TRIAL \Rightarrow 85—**CARRIAGE OF GOODS—LIABILITY FOR MISROUTING—ADMISSIONS AT TRIAL.**

In an action against an initial carrier for misrouting, a statement made at the trial by the defendant's attorney that it admitted that it did misroute the goods, but denied the loss claimed by the plaintiff, dispenses with the necessity of proof that the defendant was in fault, even if the situation is such that it was not liable for the misconduct of a connecting carrier.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 88; Dec. Dig. \Rightarrow 35.]

3. CARRIERS \Rightarrow 94(4)—**CARRIAGE OF GOODS—LIABILITY FOR MISROUTING.**

Where a shipper of grain is required to submit to a reduction in the selling price because a milling in transit privilege was lost through misrouting, he is entitled to recover the amount of his loss from the carrier in fault.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 388-395, 456; Dec. Dig. \Rightarrow 94(4).]

4. APPEAL AND ERROR \Rightarrow 1010(1)—**REVIEW—QUESTIONS OF FACT.**

The evidence held sufficient to support a finding that a privilege of milling in transit would have been exercised if it had been available.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8979-8981; Dec. Dig. \Rightarrow 1010(1).]

5. CARRIERS \Rightarrow 63 — **REGULATIONS — TARIFF — CONSTRUCTION.**

Language of a carrier's tariff giving a privilege of milling in transit "subject to the conditions herein named," held to refer to conditions on which like privileges had been granted in preceding portions of the tariff, as well as to those stated in the same paragraph.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 210, 211; Dec. Dig. \Rightarrow 63.]

6. CARRIERS \Rightarrow 94(4)—**CARRIAGE OF GOODS—MISROUTING—PROVISIONS OF CONTRACT.**

Damages for the loss of the privilege of milling in transit through misrouting cannot be

recovered where the privilege was available only where a reference to it was noted on the shipping order and bill of lading, and no such notation was made.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 388-395, 456; Dec. Dig. § 94(4).]

Appeal from District Court, Sedgwick County.

Action by W. F. McCullough, doing business as the McCullough Grain Company, against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. P. Waggener and J. M. Challiss, both of Atchison, for appellant. Blake, Ayres & McCorkle, of Wichita (A. E. Helm, of Topeka, of counsel), for appellee.

MASON, J. W. P. McCullough sued the Missouri Pacific Railway Company for damages resulting from the misrouting of wheat shipped by him from points in Kansas to Monticello, Ind. He recovered a judgment for \$852.86, and the defendant appeals. He had directed the grain to be sent by way of Chicago, and from there to its destination by the Panhandle Route, but it was not moved through Chicago, and was delivered to the Panhandle Company at Logansport, Ind. The tariff of the Panhandle Route gave a privilege of milling in transit with respect to all grain destined to milling stations such as Monticello, which originated west of Chicago and was there delivered to that company. This privilege, if the shipping directions had been followed, would have inured to the benefit of the buyer at Monticello, by virtue of his contract with the shipper, and would have been worth to him $5\frac{1}{2}$ cents to the hundred pounds. In settling with the plaintiff the buyer made a deduction at that rate from what he would have been required to pay if the wheat had been routed as agreed upon, so that he could have had the benefit of the privilege referred to. The plaintiff submitted to the deduction, and his action against the defendant is to recover on account of the loss he thereby suffered.

[1] 1. The defendant maintains that the state courts have no jurisdiction of the subject-matter, that the plaintiff can obtain relief for any injury he has suffered, only through the interstate commerce commission or the federal courts, because his claim is based upon the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), and upon the provisions of a tariff filed thereunder. No attack, however, is made by the plaintiff upon the validity of any regulation adopted, and no administrative problem is involved. The jurisdictional question presented is substantially the same as that considered in a recent case (*Rock Milling & Elevator Co. v. Railway Co.*, 158 Pac. 859, decided July 8, 1916), and upon the same reasoning, and up-

on the authorities there cited, we hold that the action was properly brought.

[2] 2. The defendant, which was the initial carrier, contends that the misrouting was the act of a connecting road to which it had properly made delivery; that by the terms of the bill of lading it was exempted from liability for the fault of a subsequent carrier; and that this provision was valid because the prohibition of the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]) against contracts of that character relates only to claims for physical loss and damage to the property shipped. The record shows that in response to a question by the trial judge as to the issues involved, a stipulation having been entered into as to a part of the facts, the attorney for the defendant said:

"Our position is that we did misroute this stuff; that is agreed. But the amount of damage which the plaintiff suffered is not the amount of the milling in transit privilege, but anything else that he can prove, for the reason that the milling in transit privilege does not apply to plaintiff, and these shipments are not covered by it."

This statement relieved the plaintiff of the necessity of proving the defendant's responsibility for the misrouting.

[3] 3. The defendant also maintains that whatever injury resulted from the loss of the milling in transit privilege fell upon the consignee, and created no cause of action in behalf of the shipper. The plaintiff was entitled to receive the agreed purchase price upon the delivery of the wheat in such manner as to give the purchaser the advantage of that privilege. Not having made delivery in this manner he was compelled to submit to a corresponding reduction—he suffered a loss of the amount involved, through the failure of the defendant to perform its duty, and therefore had a right to look to it for compensation. The carrier's mistake reduced the selling value of the property shipped. The case is not analogous to one (for instance) where a demand for increased damages for the loss of goods is based upon a contract for their sale at a price above the market. In that situation the carrier's liability could not be affected by a special contract of which it had no notice. 6 Cyc. 450, 529. Here the loss of an advantage that would have accrued under the published tariff if the grain had been routed as directed was one reasonably to have been anticipated from a misrouting; it followed as naturally as damage results from sending goods by a route involving unnecessarily high charges for carriage. The amount of the damage claimed was not fixed by the contract of the shipper and consignee, but by the Panhandle Route tariff.

[4] 4. The milling in transit privilege is exercised in this manner: Upon the delivery of the grain at the mill the full rate to that point is paid; if the product is shipped in a

specified time, a stated portion of this payment is credited upon the charges for such further shipment. The defendant asserts that here it was shown that the purchaser of the wheat from the plaintiff had a greater amount of credits of this character than he had opportunity to use within the time limited, and therefore would have derived no advantage from the privilege if it had been preserved. This was a question of fact. A part of the evidence tended to show that the privilege would have been used if it had been available, and the decision of the trial court on the point is therefore final.

[5] 5. A more serious objection to the judgment is raised by the contention that by the terms of the tariff the milling in transit privilege is only available where a reference thereto is noted on the shipping orders and bill of lading, and where shipment is made to a mill, and that here no such notation was made, and the wheat was consigned to the shipper's order. The shipment may perhaps in view of all the circumstances be regarded as having been made to the mill within the meaning of the requirement in that regard. The question whether the absence of the notation was fatal to the privilege depends upon the construction of the language of the tariff. Four of its paragraphs, numbered as indicated, read thus:

"(1) Grain to be milled or malted, may be shipped from a station on the P., C., C. & St. L. Ry., or the C. & M. V. R. R., or from stations on a direct connection of the P., C., C. & St. L. Ry. or the C. & M. V. R. R., as specified herein, to another station on the P., C., C. & St. L. Ry. or the C. & M. V. R. R. and eastward thereof, taking the same or less rate basis to eastern cities on the following conditions:

"(2) Shippers must note on their shipping orders 'For Milling or Malting Purposes' and the billing agent must make a like notation on his waybills and bills of lading.

"(3) The grain must be shipped in carloads, to a mill doing business at a station on the P., C., C. & St. L. Ry. or the C. & M. V. R. R. and must be waybilled at tariff rate to milling station, and the tariff rate must also be shown on the bill of lading issued for the grain.

"(4) The agent at milling station must take up the bill of lading on delivery of the grain, and on receiving from the mill within six months after the delivery of the grain thereto, carload shipments of the products of such grain, limited to: [An enumeration of various products of grain is given, followed by directions as to manner of settlement.]"

The paragraph numbered (12) reads as follows, the clause the effect of which is in dispute being italicized:

"(12) Grain in carloads, originating at points beyond Chicago, Ill., and delivered to this company at Chicago or Chicago junctions, named above, when destined to milling stations on the

P., C., C. & St. L. Ry. or C. & M. V. R. R., to be milled or malted, *will be subject to the conditions herein named*; and the net rate will be the joint through rate on grain products from point of shipment on rate basing point to destination, plus one-half cent per 100 pounds (minimum charge \$3.00 per car), provided the milled product is forwarded via the P., C., C. & St. L. Ry., or the C. & M. V. R. R., to western termini points located on the P., C., C. & St. L. Ry., Pennsylvania Company or Pennsylvania Railroad, or to points taking same rates (see list of points below), or to points east of western termini via Union Line, as shown in Union Line Bases for Freight Rates, I. C. C. 11, supplements thereto and reissues thereof, and in the absence of joint through rates the net rate will be published reshipping rate on grain products from Chicago or Chicago Junction, plus one-half cent per 100 pounds (minimum charge \$3.00 per car). The western termini referred to above are: Allegheny, Pa.; Bellaire, Ohio; Buffalo, N. Y.; Erie, Oil City, Pittsburg, Titusville, Pa.; and Wheeling, W. Va."

The plaintiff contends that the twelfth paragraph is complete in itself; that the requirement concerning the notation on the shipping directions and bill of lading applies only to shipments originating on the Pan-handle Route, or at stations on a direct connection therewith. This interpretation involves regarding the words "subject to the conditions herein named" in the italicized clause as relating to the conditions named in that particular paragraph. We feel constrained to hold that the expression quoted refers to the conditions named in the entire tariff of which this paragraph is a part. The punctuation and the connective "and" seem to suggest additional conditions rather than an enumeration of those referred to in the preceding clause. The requirements set out in the earlier paragraphs, especially those concerning the notation, and the character of products to which the privilege applies, are as well adapted to shipments originating on one side of Chicago as on the other, and without them the provisions of paragraph 12 appear rather incomplete.

[6] 6. If (as we have concluded) the privilege of milling in transit was available only where the words "For Milling or Malting Purposes" had been noted upon the shipping orders and bills of lading, the absence of such notation was of course destructive of the right in the present case, for the carrier could allow no advantage to the shipper except in accordance with the published tariff, and the plaintiff therefore suffered no injury from the misrouting of his shipments.

It results that a reversal must be ordered, and the cause remanded, with directions to render judgment for the defendant. All the Justices concurring.

STATE ex rel. AMICK, Co. Atty., v. FRANCISCO, Mayor, et al. (No. 21037.)
(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 907 — BONDS — STATUTORY PROVISIONS.

Section 7 of chapter 124 of the Laws of 1913 does not repeal chapter 101 of the Laws of 1905 as amended, except in so far as the provisions of the law of 1905 as amended are in conflict with the provisions of chapter 124 of the Laws of 1913.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1895; Dec. Dig. \S 907.]

2. MUNICIPAL CORPORATIONS \S 918(4) — BONDS — SUBMISSION OF QUESTION TO VOTERS — VALIDITY.

An election, held under chapter 101 of the Laws of 1905 as amended, is not vitiated because the polling places were held open from 7 o'clock in the morning until 7 o'clock in the evening.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1922; Dec. Dig. \S 918(4).]

3. MANDAMUS \S 103 — SUBJECTS OF RELIEF — ISSUANCE OF BONDS.

The state may maintain mandamus to compel city officers to issue bonds which have been voted for the purchase of a waterworks plant.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 220-222; Dec. Dig. \S 103.]

Original proceeding by the State, on the relation of J. S. Amick, as County Attorney, etc., for mandamus to W. J. Francisco, as Mayor of the City of Lawrence, and others. Peremptory writ allowed.

J. S. Amick and S. D. Bishop, both of Lawrence, and J. H. Harkless and Clifford Histed, both of Kansas City, Mo., for plaintiff. Thos. Harley, J. Q. A. Norton, Walter Thiele, and Ord Clingman, all of Lawrence, for defendants.

MARSHALL, J. In this action the state seeks to compel the mayor and commissioners of the city of Lawrence to issue certain bonds.

Under chapter 101 of the Laws of 1905 as amended, that city voted to issue bonds in the sum of \$175,000, for the purchase of a waterworks plant. The defendants refused to issue the bonds, and contend: First, that there is no law providing for their issuance; second, that the election at which they were voted was improperly conducted.

[1] 1. The defendants' argument on their first proposition is that section 7 of chapter 124 of the Laws of 1913 repealed chapter 101 of the Laws of 1905, and for that reason there is no authority in that law for issuing bonds. The law of 1905 has been amended, but we will now discuss this question the same as if these amendments had been in the law at the time of its enactment. The title of chapter 124 of the Laws of 1913 is as follows:

"An act authorizing cities of the second and third class whose total indebtedness shall not

exceed 15% of its total assessed valuation now owning and operating a system of waterworks to issue bonds for the purpose of enlarging, repairing, extending, and improving such system."

This law is composed of eight sections, the first six of which are restricted in their application to the classes of cities named in the title of the act. There is nothing in these six sections that applies to any city other than those of the classes named in the title. Section 7 of the act reads:

"Chapter 101, Laws of 1905, being sections 53, 54, 55, Compiled Laws of 1909, section 165, chapter 18, Compiled Laws of 1909, section 1, chapter 75, Laws of 1911, and all other acts or parts of acts in so far as they conflict with the provisions of this act, be, and the same are hereby repealed."

Section 8 is immaterial in this discussion.

The defendants argue that the grammatical construction and punctuation of section 7 of the act show that it was the intention of the Legislature to repeal all of chapter 101 of the Laws of 1905, and to repeal all other acts or parts of acts in so far as they conflict with the provisions of chapter 124 of the Laws of 1913. The language used in section 7 of this act is capable of two constructions. One is the construction contended for by the defendants. The other is that all of the laws specifically named, and all other acts or parts of acts are repealed, in so far as the laws specifically named and the other acts, or parts of acts, conflict with the provisions of chapter 124 of the Laws of 1913. "They," in the clause "all other acts or parts of acts in so far as they conflict with the provisions of this act," may refer to all the laws specifically named and to all other acts or parts of acts conflicting with the provisions of chapter 124 of the Laws of 1913, or it may refer only to the other acts or parts of acts. That this section was carelessly drawn is conclusively shown by its reference to "sections 53, 54, 55, Compiled Laws of 1909." Those sections refer to matters altogether foreign to the subject now under consideration. Under these circumstances, it is proper to examine the title of the act and the body of the act itself to ascertain the intention of the Legislature as declared in section 7. Note, 2 L. R. A. 610; 36 Cyc. 1128. There is nothing in either the title or the body of the act that shows any intention whatever on the part of the Legislature to interfere with any law on the subject of issuing bonds for the purpose of purchasing or building public utility plants by cities in this state.

Chapter 123 of the Laws of 1913 may be taken into consideration to determine whether or not the law of 1905 has been repealed. Chapters 123 and 124 were passed by the same session of the Legislature, and were approved two days apart. Chapter 123 takes the place of chapter 75 of the Laws of 1911, which last-named chapter amended section 1 of chapter 101 of the Laws of 1905. Under the statutory rule of construction (Gen. Stat.

1909, § 9087) chapter 123, so far as its provisions are the same as those of any prior statute, must be construed as a continuation of the provisions of the prior statute, and not as a new enactment. Chapters 123 and 124 of the Laws of 1913 must be construed together and harmonized. In re Hall, Petitioner, 38 Kan. 670, 17 Pac. 649; Telegraph Co. v. Austin, 67 Kan. 208, 212, 72 Pac. 850; State v. Pauley, 83 Kan. 456, 461, 112 Pac. 141; Hibbard v. Barker, 84 Kan. 848, 851, 115 Pac. 561; Railway Co. v. Railway Commissioners, 85 Kan. 229, 233, 116 Pac. 896. Effect must be given to all the provisions of each act, except where their provisions are so antagonistic that both cannot be made to operate. Chapter 124 does not cover all the ground embraced in chapter 123, and for that reason chapter 124 does not repeal chapter 123, at least so far as it applies to cities not owning and operating a system of waterworks.

The repeal of chapter 101 of the Laws of 1905, except in so far as that chapter conflicts with the provisions of chapter 124 of the Laws of 1913, is not embraced within the title of the latter act. That title is very restricted. It applies to cities of the second and third classes now owning and operating a system of waterworks. Any legislation not embraced within the title would be in violation of section 16 of article 2 of the state Constitution. It is not necessary that the title of an act shall state that it repeals other laws, where the laws repealed are within the contemplation of the title. However, if the law repealed is not within such contemplation, the repealing clause violates the constitutional provision the same as if the act itself contained an unconstitutional provision. In State v. Sholl, 58 Kan. 507, 49 Pac. 668, this court said:

"Section 16 of article 2 of the Constitution applies as well to bills which change the law by repealing acts already in force as to the enactment of new laws; and where it is sought to change the law by repealing statutes then in force, the bill for that purpose must contain only one subject, which must be expressed in its title." Syl. par. 2.

See, also, Northern Pac. Exp. Co. v. Mettschan, 90 Fed. 80, 32 C. C. A. 530; Abel v. Eggers, 36 Nev. 372, 136 Pac. 100; 36 Cyc. 1032.

If the construction of section 7 of the act of 1913, contended for by the defendants, were the correct one, that section would be unconstitutional. Under repeated decisions of this court, the section should, if possible, be held to be constitutional. Comm'rs of Cherokee Co. v. State ex rel., 36 Kan. 337, 13 Pac. 558; In re Pinkney, Petitioner, 47 Kan. 89, 95, 27 Pac. 179; State v. Guiney, 55 Kan.

532, 534, 40 Pac. 926; Rathbone v. Hopper, 57 Kan. 240, 244, 45 Pac. 610, 34 L. R. A. 674; Wilson v. Herink, 64 Kan. 607, 609, 68 Pac. 72.

Our conclusion is that the Legislature, by section 7 of chapter 124 of the Laws of 1913, did not intend to take from the cities of Kansas the power to purchase or build public utility plants.

[2] 2. The polling places were held open from 7 o'clock in the morning until 7 o'clock in the evening. The defendants contend that this vitiated the election; that the polls should have been opened at 9 o'clock in the morning and closed at 6 o'clock in the evening. There is no pretense of fraud or other irregularity. In Russell v. State, 11 Kan. 308, it was said:

"A mere irregularity in conducting an election, which does not deprive a legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, should be overlooked in a proceeding to try the right to an office depending on such election." Syl. par. 1.

This principle has been followed in Jones v. State of Kansas ex rel. Atherby and Kingsbury, 1 Kan. 273, 279; Gilleland v. Schuyler, 9 Kan. 569; Morris v. Vanlaningham, 11 Kan. 269; Jones v. Caldwell, 21 Kan. 186.

If the defendants are correct in their contention that this election was not conducted as directed by the statute, it was a mere irregularity, and such a one as does not render the election invalid. The polls were open during the entire time required by the law. Unless a wrong result was produced, the election must be upheld. No such result has been shown.

[3] 3. The defendants claim that this action cannot be maintained because the plaintiff is not the real party in interest; that the real party in interest is the owner of the waterworks system, which the city, by its election, determined to buy. When the city voted to issue bonds to purchase the waterworks plant, it became the duty of the city officers to issue the bonds as directed by law. When they refused to do so they refused to perform a duty imposed on them by law. If the law makes it the duty of the city officers to issue the bonds, a proceeding to require the performance of that duty may be brought by the state, since it has an interest in seeing that public duties are not disregarded by public officers. State ex rel. v. Faulkner, 20 Kan. 541; State v. Lawrence, 80 Kan. 707, 103 Pac. 839; State v. Dolley, 82 Kan. 533, 536, 108 Pac. 846; State ex rel. v. Doane, 98 Kan. 436, 158 Pac. 38.

A peremptory writ is allowed, commanding that the bonds be issued.

DESPAIN v. DESPAIN. (No. 20141.)
(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

TAXATION \S 805(1)—CLAIMANTS UNDER TAX
TITLE—ACTIONS AGAINST.

A landowner suffered his land to be conveyed for taxes by deed regularly issued and valid on its face. The tax deed holder did not take possession or commence proceedings to recover the land within two years. After expiration of the two-year period a grantee of the former owner purchased the tax title. The purchaser took possession and held possession for more than five years. The widow of the former owner, who had lived apart from her husband and who had not joined in his deed, then commenced an action to recover her interest in the land. Held, the action was barred by the five-year statute of limitations.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1593, 1597; Dec. Dig. \S 805(1).]

Appeal from District Court, Morris County.
Action by America L. Despain against William L. Despain. From a judgment for defendant, plaintiff appeals. Affirmed.

Nicholson & Pirtle, of Council Grove, for appellant. J. M. Miller and H. E. Snyder, both of Council Grove, for appellee.

BURCH, J. The action was one by a widow to recover her interest in land which belonged to her husband in his lifetime and of which she had made no conveyance. She was defeated, and appeals.

In 1884 the plaintiff was a resident of this state and lived with her husband, John D. Despain, on the land in controversy. In March, 1885, she was compelled to leave her husband because of his misconduct, and she went to the state of Missouri, where she has ever since resided. No divorce was ever granted. In August, 1894, John D. Despain mortgaged the land to W. H. White. The land was sold for taxes, and in order to protect his security White took an assignment of the tax sale certificate and took out a tax deed which was executed and recorded in September, 1898. In April, 1900, John D. Despain conveyed the land by warranty deed to his son, W. H. Despain, the defendant. In December, 1900, the defendant satisfied the mortgage and received a quitclaim deed of the land from White. In 1907 or 1908 John D. Despain died intestate. In September, 1912, the defendant's deeds were filed for record. The action was commenced in 1914. John D. Despain remained on the premises until the time of his death, but there was no evidence that he claimed any rights in the land after the date of his warranty deed to his son. The petition alleged that the defendant had been in possession of the land for more than five years before the action was commenced, which fact the answer admitted. The regularity of the tax deed and of the proceedings on which it was based was not questioned.

The plaintiff is in the position of a land-

owner whose land has been conveyed for taxes and who assails the title of the tax deed holder, and her action was barred by the five-year statute of limitations. It is said that in December, 1900, White had nothing to convey to the defendant because he did not, within two years from September, 1898, take possession or bring an action for possession of the land. That was a matter between White and the defendant. In the case of Cone v. Usher, 86 Kan. 880, 884, 122 Pac. 1049, 1050, it was said:

"The statute provides that a tax deed—not a tax deed plus possession—'shall vest in the grantee an absolute estate in fee simple.' Gen. Stat. 1909, \S 9479. The plaintiff's deed is valid on its face. Consequently, when it was recorded and when it was introduced in evidence, it carried with it, *prima facie*, the force and attributes designated in the statute. It is true that a tax deed may lose its virtue through failure to take possession under it. But no presumption arises immediately after the lapse of two years that it has thus become devitalized. The two-year statute of limitations merely conditions the remedy in the event that remedy to enforce possession be necessary. It applies only in the event that the right of possession conferred by the deed be obstructed or denied. It does not begin to run unless and until adverse possession exists; and, in the absence of proof of such possession the fee-simple character of the grantee's ownership presumptively continues."

While the defendant might have resisted any attempt which White might have made to assert rights under the tax deed, the defendant was not bound to do so. If he had yielded possession to White the plaintiff could not complain. The deed was not "dead," as the plaintiff says, except for use as the basis of affirmative action by the holder or by those in privity with him, and the plaintiff cannot complain because the defendant chose to recognize it and to purchase from White. The opinion in the case of Cone v. Usher reviews the decisions in the cases of Thornburgh v. Cole, 27 Kan. 490, and Smith v. Jones, 37 Kan. 292, 15 Pac. 185, and Coale v. Campbell, 58 Kan. 480, 49 Pac. 604, cited by the plaintiff, follows those decisions and calls particular attention to the fact that the distinction between actions instituted by the person commonly designated as the tax title purchaser, such as White and the defendant as White's grantee, and actions instituted against the tax title purchaser or his grantee in possession by the person commonly designated as the owner of the fee, such as the plaintiff, has always been maintained. The decisions in the cases of Corbin v. Bronson, 28 Kan. 532, and Douglass v. Boyle, 42 Kan. 392, 22 Pac. 316, cited by the plaintiff, illustrate the principle. They were actions instituted by the tax title purchaser, and were resisted by the owner in possession on the ground that the two-year statute had run. In this case the tax title purchaser, the defendant as White's grantee, brings no action. He has title by virtue of the tax deed, and he has possession. The plaintiff,

the owner whose title was cut off by the tax deed and who is out of possession, brings the action. The statute reads as follows:

"Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter." Gen. Stat. 1909, § 9483.

Whatever the character of the plaintiff's objection to the tax deed may be, her action was one to recover land sold for taxes and to defeat and avoid a conveyance of land for taxes. The taxes have not been paid, the land has not been redeemed, and the action was barred when it was commenced.

The judgment of the district court is affirmed. All the Justices concurring.

HESSEN et al. v. SAPP et al. (No. 20333.)
(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨1050(1)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The fact that, in an action to set aside a conveyance, for want of capacity, witnesses were permitted to testify that in their opinion the grantor was not competent to make a deed *held*, under the circumstances here presented, not to constitute prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⇨1050(1).]

2. APPEAL AND ERROR ⇨1065 — HARMLESS ERROR—SUBMISSION OF ISSUES TO JURY.

The rule that where the findings of a jury are purely advisory the giving of an erroneous instruction is not a ground of reversal, unless it shows that the court misconceived the law by which the rights of the parties were to be determined, applies as well where the court adopts the findings of the jury and makes none in addition thereto as where it frames independent findings of its own. An instruction which included the reasonableness of the grantor's act in making a deed as one of the matters to be considered in an action to set it aside for want of capacity and undue influence *held* to be nonprejudicial under that rule.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⇨1065.]

Appeal from District Court, Allen County.

Action by Eliza Hessen and others against Rebecca Sapp and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

A. H. Campbell and C. S. Ritter, both of Iola, for appellants. F. J. Oyler and Morse & Pees, all of Iola, for appellees.

MASON, J. On March 6, 1914, Samuel Culbertson, being then 78 years of age, executed a deed to a quarter section of land in Allen county to his sister, Rebecca Sapp, in consideration of her agreement, inserted in the deed, to care for him during the remainder of his life. He died on the 28th of the following June. Some of his heirs

brought an action against her and other defendants to have the conveyance set aside on account of want of capacity and undue influence. They recovered a judgment, from which she appeals.

Findings were made by the jury and approved by the court sustaining both branches of the plaintiffs' case. Those relating to undue influence were so qualified as perhaps to render them dependent upon those regarding want of capacity. The former may be disregarded, allowing the judgment to rest upon the latter. *Hays v. Patterson*, 97 Kan. 478, 155 Pac. 932. The plaintiffs ask the dismissal of the case for the reason that a complete transcript of the evidence has not been made. *Davidson v. Timmons*, 88 Kan. 553, 557, 129 Pac. 133. The appellant presents enough evidence in the abstract to show the basis of her contentions, and asks leave to complete the record if that shall be deemed necessary. The plaintiffs object to further time being given for that purpose. The consideration of these matters is made unnecessary by the view taken of the rulings attacked.

[1] 1. The principal ground upon which a reversal is asked is that two physicians were permitted to testify, in response to a hypothetical question, that in their judgment, assuming the conduct of the grantor to have been as stated, he was not mentally competent to make a deed to his property or to transact important business; and the testimony of several nonexpert witnesses was received to the effect that from their observation of him they thought him incapable of transacting important business. This method of undertaking to show want of capacity to execute a deed, for instance, has been condemned because it amounts to allowing a witness to give his opinion as to what degree of capacity was necessary for its execution, that being one of the elements necessarily involved in the answer, and being a matter of law to be determined by the court. *Coblentz v. Putifer*, 87 Kan. 719, 125 Pac. 30, 42 L. R. A. (N. S.) 298. The mere form in which evidence is given is not always of vital importance, and here it does not seem probable that any actual prejudice resulted. The court correctly stated the rule as to the conditions that would justify setting aside the deed, and findings were made that the grantor was not of sound mind and memory, and did not have sufficient capacity to fairly understand what he was doing and how he was doing it. The hypothetical question submitted to the medical witnesses included these assumptions, among others, of a similar tendency: That Samuel Culbertson had hallucinations, believing his brothers and others were after him, trying to kill him, and trying to get a deed to his land, or get his property away from him; that he would walk 2½ miles to a neighbor's

in his stocking feet, carrying his shoes, and on arrival tell that his brothers and others were after him and were going to kill him and were trying to get a deed to his property; that about a week before his death he jumped from a second story window, and said he did it because there was murder up there. The appellant has not brought up the evidence, and it must be assumed that there was support for the assumptions set out in the hypothetical question—otherwise the answers would have had no practical importance. The physicians also said that they would consider a person in the condition indicated by the question as incapable of transacting any business. The statements of the nonexpert witnesses that they regarded Culbertson as incapable of transacting important business seems unlikely to have influenced the jury's conception of what impairment of his faculties was necessary to render the deed inoperative. Moreover, the jury were acting only in an advisory capacity. The decision finally reached was that of the judge, and there is no likelihood that he was in any way misled by the form in which any of the evidence referred to was presented.

[2] 2. A further complaint is based on the fact that in the charge to the jury the court enumerated, as one of the matters they were authorized to consider, the reasonableness or unreasonableness of the grantor's act in making the deed. Such an instruction under somewhat similar circumstances has been held to constitute error. *Blodgett v. Yocum*, 80 Kan. 644, 103 Pac. 128; *Coblentz v. Puttifer*, 87 Kan. 719, 125 Pac. 30, 42 L. R. A. (N. S.) 298. Here, however, the matter was referred to quite incidentally as one of a number of things to be considered, and it seems very unlikely that it should have had a controlling influence with the jury. The jury were specifically told that:

"All persons may dispose of their real or personal property or any part thereof, to whom they choose, or, in any manner they may choose so long as not in violation of law, and in contravention of public policy."

The instruction complained of does not indicate that the court misconceived the law by which the rights of the parties were to be determined, and, that being true, the mere fact that it contained an erroneous statement does not justify a reversal. This principle is sometimes spoken of as though it applied only where the court disregards the findings of the jury, or makes new ones of its own. *Vickers v. Buck*, 60 Kan. 598, 605, 57 Pac. 517; *Munn v. Gordon*, 87 Kan. 519, 125 Pac. 7. But whether or not the judge accepts any or all of the jury's findings, and whether or not he adds to them, he exercises his independent judgment, and his adoption of a finding already made by the jury involves no different mental process from formulating it on his own account. A defective instruction involves no more serious conse-

quences in the one case than in the other. *Linscott v. Conner*, 85 Kan. 865, 118 Pac. 693; 16 Cyc. 422.

The judgment is affirmed. All the Justices concurring.

ROBERTS v. CHARLES WOLFF PACKING CO. (No. 20362.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §419—WORKMEN'S COMPENSATION ACT—MODIFYING JUDGMENT—TIME FOR APPLICATION.

Where a lump sum judgment has been rendered under the Workmen's Compensation Act (Laws 1911, c. 218), an application by the defendant to modify it, because subsequent developments show that the impairment of the plaintiff's earning capacity was not so great as found by the jury, is in the nature of a petition for a new trial on the ground of newly discovered evidence, and cannot be entertained unless made within one year.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §419.]

2. MASTER AND SERVANT §419—WORKMEN'S COMPENSATION ACT—MODIFYING JUDGMENT—TIME FOR APPLICATION.

Where on appeal such judgment is modified by applying a different method of computation, and, as so modified, is affirmed, the proceedings in this court do not extend the time within which such application could be made.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §419.]

3. MASTER AND SERVANT §419—WORKMEN'S COMPENSATION ACT—MODIFICATION OF JUDGMENT.

The provision of the Workmen's Compensation Act, authorizing a subsequent increase or decrease in the amount allowed, applies only to proceedings based on agreement or arbitration.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §419.]

Appeal from District Court, Shawnee County.

Action by Zelora Roberts against the Charles Wolff Packing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sherman & Landon, of Kansas City, Mo., and Edwin A. Austin, of Topeka, for appellant. Monroe, McClure & Monroe, of Topeka, for appellee.

MASON, J. Zelora Roberts, on April 14, 1914, recovered a lump sum judgment for \$1,979.90 against his employer, the Charles Wolff Packing Company, under the Workmen's Compensation Act. On an appeal by the defendant the judgment was ordered to be reduced to \$1,928.87, and, as so modified, was affirmed. *Roberts v. Packing Co.*, 95 Kan. 723, 149 Pac. 413. On July 29, 1915, after the mandate had been spread of record and an execution had been issued, the defendant filed in the district court an application to enjoin the enforcement of the judgment and to reduce it to such an amount as would afford the plaintiff compensation up to

that time, on the ground that his incapacity had ceased, and that he was able to earn, and was earning and receiving, from \$8 to \$10 a week, whereas the jury had found that his earning capacity had been permanently reduced to \$3 a week; that the plaintiff had refused an offer by the defendant to employ him at \$12 a week; that these facts were developed after the rendition of the judgment, and could not have been presented at the trial. The application was denied, and the defendant appeals.

[1] 1. In the application it was alleged:

"That there was no issue tendered by the pleadings and no evidence produced by either party at the trial as to the extent of his [the plaintiff's] future disability and future earning capacity."

That contention was necessarily disposed of by the ruling on the prior appeal, and need not be further considered. Upon the hearing of the application evidence was given that the plaintiff had been employed for two months in driving a "jitney," at from \$8 to \$10 a week, and that he had been offered employment by the defendant as elevator man at \$12 a week, but had refused it. The plaintiff made affidavit that he had been employed at driving a make of car which required the use of but one foot; that he did not know how long that employment would continue, and that the condition of his leg still incapacitated him from any other work that he knew of; that because of his condition he thought himself unable to fill the place offered him by the defendant: and that for various reasons, which he stated, he believed the offer was not made in good faith. The defendant invokes a rule which has been thus stated:

"As a general rule, any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself there, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to enjoin the adverse party from enforcing such judgment." 23 Cyc. 991.

In a proper case for the application of that principle the precise procedure by which relief is sought is doubtless of little importance. The defendant's application is substantially a petition for a new trial on account of newly discovered evidence which could not have been produced at the trial, relating to the extent of the plaintiff's permanent disability and the resulting diminution of his earning capacity. The new evidence was pertinent to the issue, and was not cumulative. *Bousman v. Stafford*, 71 Kan. 648, 81 Pac. 184. It was not so persuasive, however, as to amount to absolute proof that the judgment was unconscionable. The offer of employment under the circumstances was not entitled to great weight. Note, L. R. A. 1916A, 144, 261. Nor was the circumstance that the plaintiff had been able to procure temporary work at an exceptional employ-

ment, requiring the use of but one leg, at all conclusive of the injustice of the judgment. But in any event the Legislature has seen fit to limit to one year the time within which an application may be made for a new trial upon grounds which could not have been discovered before the expiration of the term at which a verdict was rendered. Civ. Code, § 308 (Gen. St. 1909, § 5902). That limitation may sometimes cause injustice. But the desirability of reaching an absolutely final result at some state of litigation has been deemed by the Legislature a sufficient compensation for any such occasional hardship, and the whole matter is one of legislative policy. The attention of the lawmaking body having been directed to the subject, and the determination having been reached that, in the absence of fraud in its procurement, a judgment should not be reopened for any reinvestigation of the facts after the lapse of a year, the limitation applies without regard to the procedure to which resort is had. In this state statutes of limitation apply to equitable as well as to legal remedies (*Chick et al. v. Willetts*, 2 Kan. 384), and—

"an election between mere statutory forms of procedure does not give a right to extend the statutory period of limitation for the commencement of such procedure." *Cottrell v. Manlove*, 58 Kan. 405, 409, 49 Pac. 519.

The statute, having undertaken to give relief at any time within a year, where facts affecting an issue are developed too late for use at the trial, must be deemed to have attached that limitation to any exercise of the right referred to, irrespective of the form in which it is asserted. See, also, note, 54 Am. St. Rep. 227.

[2] 2. On the first appeal the judgment was modified by applying a different rule of computation to the facts as found, and the judgment, as so modified, was affirmed. In this situation the time in which a new trial might be asked on account of newly discovered evidence was not extended by reason of the proceedings in this court.

[3] 3. It often happens that the amount of a verdict is made to turn upon a present estimate of future conditions, the tribunal trying the matter making use of whatever information is available at the time, and necessarily acting upon its best judgment as to what changes are likely to take place. Subsequent developments may, in a particular case, show that a mistake has been made in that regard, but this does not warrant the overturning of the judgment. The fact that the permanent effect of a workman's injury is often doubtful may be a good reason for postponing the time when a judgment awarding compensation therefor shall become final, or for reserving means for varying the amount according to later developments. But that question is one for the Legislature. The present statute makes no distinction in that regard between such a judgment as that here

involved and one rendered in any other action for the recovery of money. If in an action under the present Workmen's Compensation Act the plaintiff recovers on the theory that his disability will cease within a year, and that proves not to be the case, that fact will not enable him to obtain any increase of the judgment. The statutory provision for a re-examination by the court of the amount of compensation allowed by its terms applies only where agreements or awards have been filed with the clerk (Laws 1911, c. 218, §§ 29, 32), and cannot be extended to cover judgments rendered in actions brought without agreement or arbitration, as authorized by a subsequent section of the same act (section 36). This was declared on the first appeal of this case. *Roberts v. Packing Co.*, 95 Kan. 723, 728, 149 Pac. 413. See, also, in this connection, note, L. R. A. 1916A, 172, note 45. Moreover, the right referred to of asking a modification of the amount is required to be exercised, if at all, within one year.

The judgment is affirmed. All the Justices concurring.

Ex parte MOTE. (No. 20903.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW —105—VENUE—CONSTITUTIONAL GUARANTY.

The constitutional guaranties in section 10 of the Bill of Rights, which insure to every person accused of crime a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, etc., are personal privileges which the accused may waive, and when they are freely waived by a person charged with crime, by a plea of guilty in a district court of general jurisdiction, it is too late thereafter to challenge the constitutionality of the statute conferring jurisdiction upon the court which imposed judgment upon him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 216-218; Dec. Dig. § 105.]

2. HABEAS CORPUS —49—SCOPE OF INQUIRY—CONSTITUTIONAL QUESTIONS.

The constitutionality of section 6640 of the General Statutes of 1909 (Code Cr. Proc. § 66), authorizing the prosecution of a bigamist "in the county in which the offender may be apprehended," cannot be raised in a habeas corpus proceeding by a person who has waived his constitutional privileges and pleaded guilty to the crime of bigamy as charged in the information filed against him in the district court of the county in which he was apprehended.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 49.]

3. CRIMINAL LAW —995(4)—JUDGMENT AND COMMITMENT—DEFINITENESS.

A judgment and commitment in a bigamy case recited that "thereupon the defendant * * * being duly arraigned enters his plea of guilty to the charge of bigamy as charged in the information filed in this case * * * and the court thereupon finds the defendant guilty of bigamy as charged in the information."

"It is therefore by the court considered, ordered and adjudged that the said defendant, Bob Mote, be confined at hard labor in the Kansas State Penitentiary, located at Lansing, Leaven-

worth county, Kansas, until discharged therefrom as by law provided," etc.

Held, that such judgment and commitment are not void for uncertainty, and that the duration of the petitioner's imprisonment is governed by sections 225, 226, and 227 of the Crimes Act (Gen. St. 1909, §§ 2711-2713), and by the provisions of the Indeterminate Sentence Act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2521, 2523; Dec. Dig. § 995(4).]

Original application by Bob Mote for writ of habeas corpus. Denied.

Paul C. Malls, Jesse A. Hall, and Le Roy T. Hand, all of Leavenworth, for petitioner. S. M. Brewster, Atty. Gen., for respondent.

DAWSON, J. This is an application for a writ of habeas corpus. The petitioner was apprehended and prosecuted in Reno county on an information charging him with having committed the crime of bigamy in Finney county. On arraignment he pleaded guilty and was sentenced to confinement in the state penitentiary "until discharged therefrom as by law provided." After serving some 18 months of this sentence, he brings this proceeding, and contends: (a) That the district court of Reno county did not have jurisdiction to accept his plea of guilty and to render judgment against him; and (b) that the duration of his sentence cannot be ascertained from the judgment and commitment, and that they are therefor void for uncertainty.

[1, 2] The statute under which the petitioner was prosecuted in Reno county, in part, reads:

"An indictment [or information, Gen. Stat. 1909, § 6640] for bigamy as defined in the preceding sections may be found, and proceedings, trial, conviction, judgment and execution thereon had, in the county in which such second or subsequent marriage or the cohabitation shall have taken place, or in the county in which the offender may be apprehended." Gen. Stat. 1909, § 2714.

It is contended that the last clause of the statute just quoted violates section 10 of the Bill of Rights, which provides:

"In all prosecutions, the accused shall be allowed to appear and defend in person or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense." Section 10.

But none of these constitutional privileges were arbitrarily withheld from him. He might have invoked any or all of them. He might have demanded a jury trial in Finney county. He did not care to contest the state's accusation. He waived these privileges. He entered a plea of guilty.

In the early case of *State v. Potter*, 16 Kan. 80, it was held:

"The constitutional right of a defendant in a criminal action to be tried by an impartial jury

of the county or district in which the offense is alleged to have been committed' (Const. Bill of Rights, § 10) is a mere personal privilege which the defendant may waive or insist upon at his option. It is not a right conferred upon him from considerations of public policy; and public interests would not be likely to suffer by a waiver thereof."

To the same effect are *State v. Kindig*, 55 Kan. 113, Syl. par. 3, 39 Pac. 1028; *Lightfoot v. Commonwealth*, 80 Ky. 516; *Hourigan v. Commonwealth*, 94 Ky. 520, 23 S. W. 355; *Ledgerwood v. State*, 184 Ind. 81, 33 N. E. 631; *State v. Fitzgerald*, 51 Minn. 534, 53 N. W. 799; *In re Blum*, 9 Misc. Rep. 571, 30 N. Y. Supp. 396.

The case of *State v. Smiley*, 98 Mo. 605, 12 S. W. 247, cited and pressed by counsel, does not touch the question of waiver. As we read that report, it would appear that the accused who was charged with the crime of bigamy committed in Johnson county contested the jurisdiction of the Madison county court from the inception of the proceedings against him. That questions as to the jurisdiction of the court may be waived in Missouri as elsewhere, see *State v. Gamble*, 119 Mo. 427, 24 S. W. 1030.

Until the statute (Gen. Stat. 1909, § 2714) is assailed by one whose constitutional guaranties are being taken or withheld from him without his waiver or consent, we need not positively determine its constitutionality.

[3] We perceive no legal infirmity nor uncertainty in the judgment and commitment. The petitioner pleaded "guilty to the charge of bigamy as charged in the information." This crime is defined by sections 225, 226, and 227 of the Crimes Act (Gen. Stat. 1909, §§ 2711-2713). The punishment may be a jail sentence, or confinement not exceeding five years in the penitentiary. Since he received a penitentiary sentence, the Indeterminate Sentence Act controls (Gen. Stat. 1909, § 6837 et seq. [Code Cr. Proc. § 272a]; Laws 1908, c. 375), and his confinement will be dependent largely upon his own good behavior, the minimum being for one year and the maximum five years (*State v. Page*, 60 Kan. 664, 57 Pac. 514).

Nor does the slightest confusion arise from the fact that there is another statute (Gen. Stat. 1909, §§ 6269, 6270; Code Civ. Proc. §§ 674, 675) pertaining to premature marriages of divorcees and which is also declared to be bigamy for which a penitentiary sentence is imposed. In this latter sort of bigamy which is purely statutory the par-

ticulars would necessarily have to be recited in the judgment to show that the merely statutory offense was the one upon which the prosecution was based. The older statute covers the common-law crime of bigamy, and is so well known and understood that the details of the offense were not required to be set forth in the judgment and commitment with such minute particularity. Furthermore, if the petitioner in fact did intend merely to plead guilty to the statutory offense defined by section 6269 and 6270 of the General Statutes of 1909, then his grievance is not that his sentence and commitment are void, but that he is entitled to be discharged "according to law" under the latter statute when the duration of his sentence thereunder has expired. But even in that view of the case, his action at this time would be prematurely brought.

Even in the case of *In re Howard*, 72 Kan. 273, 83 Pac. 1032, where the judgment and commitment were held void for uncertainty, the petitioner was not given an absolute discharge, but was ordered returned to the district court for a definite and certain sentence and judgment. This procedure was followed in the case of *In re Spaulding*, 75 Kan. 163, 88 Pac. 547. In the case of *In re McLean*, 84 Kan. 852, 115 Pac. 647, 35 L. R. A. (N. S.) 653, it was held in syllabus 3 that the information may be looked to for the purpose of interpreting the verdict in a criminal case, and the same reasoning permits its use for the proper interpretation of a judgment and commitment. The information in this case reads, in part:

"That on the 22d day of January, A. D. 1915, in said county of Finney and state of Kansas, one Bob Mote then and there being, and then and there having a true wife living, to wit, Lillian Mote, and having actual knowledge that he had said wife living, did then and there unlawfully, feloniously, and willfully marry another person, to wit, Elizabeth Brooks, and said Bob Mote was apprehended in Reno county, Kan."

This clearly shows that the petitioner was charged with the familiar common-law crime of bigamy, as defined by the Crimes Act, §§ 225, 226, and 227 (Gen. Stat. 1909, §§ 2711-2713), and his commitment "until discharged therefrom as by law provided" is for a term not less than one year nor more than five years, and it is not void on the grounds urged by the petitioner.

The writ is denied. All the Justices concurring.

BANK OF CALIFORNIA, NATIONAL ASS'N, v. ROBERTS, State Treasurer. (S. F. 6602.)

(Supreme Court of California. Sept. 21, 1916.
Rehearing Denied Oct. 20, 1916.)

1. TAXATION — 127, 128 — PERSONS LIABLE — BANK STOCK — DOUBLE TAXATION.

Under Const. art. 13, § 14, as to taxation of personalty and bank stock, the proper procedure is to tax the stock in the hands of the holder, and it may also be taxed against the bank.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 230-232, 233, 234; Dec. Dig. — 127, 128.]

2. TAXATION — 47(1) — DOUBLE TAXATION — VALIDITY.

In the absence of express constitutional provision, there is no necessary or inherent objection to taxing the same property twice to different persons, so long as there is some kind of estate or right in both persons taxed to the taxed property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 104, 111, 112, 114; Dec. Dig. — 47(1).]

3. TAXATION — 47(6) — DOUBLE TAXATION — BANK STOCK.

Although Const. art. 13, § 1, originally provided that all property must be taxed in proportion to its value, it does not, as it now stands, providing that it must be taxed according to its value except as otherwise provided, limit the power under art. 13, § 14, to tax bank stock against the holders thereof and against the bank.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 110; Dec. Dig. — 47(6).]

4. TAXATION — 10 — POWER TO TAX — NATIONAL BANKS.

Rev. St. U. S. § 5219 (U. S. Comp. St. 1913, § 9784), authorizing states to include all the shares of national banks in the valuation and assessment of personal property of the owner of such shares subject to restrictions, one of which is that the tax shall not be at a greater rate than on other moneyed capital, contemplates taxation of shares in state banks owned by national banks.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 23-26; Dec. Dig. — 10.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Bank of California, National Association, against E. D. Roberts, Treasurer of State. Judgment for plaintiff and defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Dep. Atty. Gen., for appellant. Pillsbury, Madison & Sutro, A. E. Roth, and A. D. Plaw, all of San Francisco, for respondent.

SLOSS, J. Plaintiff brought this action to recover taxes paid under protest, and recovered judgment for \$7,479.68. The defendant appeals from the judgment, which was rendered on the pleadings. The plaintiff is a banking corporation organized under the National Banking Act of the United States. It has a capital stock of 85,000 shares, of the par value of \$100 each. In the year 1911, the state board of equalization assessed these 85,000 shares at the sum of \$15,531,588, and as-

essed and levied a tax of 1 per centum thereon. During the year 1911, the plaintiff was the owner of 2,501 shares of the capital stock of the National Bank of D. O. Mills & Co., likewise a corporation organized under said National Bank Act. It was also the owner of 1,049 shares of the capital stock of the Mission Bank, a banking corporation organized under the laws of the state of California. The board of equalization, in assessing the 85,000 shares of the capital stock of the plaintiff, included in its valuation the value of the 2,501 shares of stock in the National Bank of D. O. Mills & Co. and the value of the 1,049 shares of stock in the Mission Bank. The shares of stock of the National Bank of D. O. Mills & Co. and of the Mission Bank were assessed in like manner by the state board of equalization, and the tax was levied upon all of the shares of these banks, including those owned by the plaintiff. The plaintiff claimed that this course of procedure resulted in a double taxation of the shares of stock in the two banks owned by it, and applied to the board of equalization to exclude from the assessment of its shares the value of the said shares of the two other banks. This application having been denied, the plaintiff paid its tax under protest. The tax on the 2,501 shares of the stock of the National Bank of D. O. Mills & Co. amounted to \$6,278.67. The tax upon the 1,049 shares of the Mission Bank came to \$1,201.01. These sums having been paid under protest, the plaintiff brought this action to recover them.

[1] The taxes here involved were levied in accordance with the provisions added to the Constitution by the amendments adopted in November, 1910. Article 13, § 14. As we have heretofore said, these amendments—

“worked a radical change in the system of taxation in this state. Broadly speaking, the purpose of the change, as is well known, was to divide the subjects of state and local taxation by imposing upon persons and corporations engaged in certain callings—those of public service corporations, insurance companies, banks, and trust companies—the obligation to pay certain taxes, to be applied exclusively to state purposes. At the same time, the persons engaged and the property employed in these callings were, to a greater or less degree, to be free from the burden of local taxation. * * * Under the old system, the property and franchises of the corporations above referred to were taxed for both state and local purposes. The amendment creates a new mode of taxing such property and franchises, and appropriates the revenue so raised to state purposes solely.” City and County of San Francisco v. Pacific Tel. & Telegraph Co., 166 Cal. 244, 247, 135 Pac. 971, 973.

Subdivision (c) of section 14, thus added to the Constitution, provides in detail for the method of assessing and taxing banks. It is provided that the shares of the capital stock of all banks incorporated under the laws of any state or of the United States and located in this state shall be assessed and taxed to the owners or holders thereof by the state board of equalization, and that there shall be levied and assessed upon such

shares an annual tax, payable to the state, of 1 per centum upon the value thereof. The value of each share of stock is to be taken to be the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits. In reaching this result, deduction is to be made of the value of real estate owned by the bank and taxed for county purposes. It is provided that the banks shall pay the tax to the state on behalf of the stockholders and shall have a lien upon the shares and any dividends to secure the amount so paid.

This subdivision contains a detailed and comprehensive scheme for the valuation of the shares of stock of banks. It declares that the value shall be taken to be the amount paid in on the stock, together with the pro rata of the accumulated surplus and undivided profits. Provision is made for the deduction of one item of property, to wit, real estate taxed for county purposes. No other deduction is directed to be made, and it seems clear, under the most familiar rules of interpretation, that none other was contemplated. So far as the face of the constitutional provision goes, the value of the shares is to be computed by including, in addition to the amount paid in on the stock, every item of property embraced within accumulated surplus and undivided profits, with the single exception of real estate taxed for county purposes. The board of equalization acted, therefore, in strict compliance with the constitutional method when it fixed the value of the shares of stock in the plaintiff bank by taking the amount paid in, together with the pro rata of the accumulated surplus and undivided profits, subject to a deduction of the value of the designated real estate alone. The shares of stock in other corporations, whether engaged in banking or other business, were necessarily included in determining the amount on which this pro rata was to be reckoned. Similarly, in fixing the value of the shares of stock in the National Bank of D. O. Mills & Co. and in the Mission Bank, the board was required to follow the same course. Its ascertainment of the value of the shares of stock in those banks, by whomsoever owned or held, was reached by adding to the amount paid in the pro rata of the accumulated surplus and undivided profits of the respective banks after making the deduction of real estate.

The respondent claims that by a long line of decisions beginning with *Burke v. Badlam*, 57 Cal. 594, this court has established the doctrine that the sum total of the value of the shares of stock in a corporation is the equivalent of the value of all of the property of every kind, including franchises, owned by the corporation. *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 115, et seq.; *City and County of San Francisco v. Anderson*, 103 Cal. 69, 36 Pac. 1034, 42 Am. St. Rep. 98; *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 60, 55 Pac. 685, 45 L.

R. A. 747, 69 Am. St. Rep. 32; *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102. It was upon this theory that the court held that section 3608 of the Political Code, prohibiting any assessment of the shares of stock of state corporations, was not in conflict with section 1, art. 13, of the Constitution, which declared that all property should be taxed in proportion to its value, and defined the word "property" as including, among other things, "stocks." *Burke v. Badlam*, supra. The cases have, for their foundation, the proposition that an assessment and taxation of every item and element of property owned by the corporation and giving value to its stock is, in effect, an assessment and taxation of the stock itself. And, basing its argument upon this proposition, the plaintiff bank contends that, when the shares of stock issued by it are assessed and taxed upon a valuation which includes the value of shares of stock owned by it in other banks, and those shares are again assessed upon a separate ascertainment of their value, the state is undertaking to tax the same property twice. On the other hand, the appellant argues that there is not, in reality, any question of double taxation here. In assessing the shares of stock in the plaintiff a tax is imposed upon the owners and holders of those shares. The plaintiff pays the tax only on behalf of the holders. In assessing the shares of stock in the National Bank of D. O. Mills & Co. and the Mission Bank, the tax is imposed, not upon those banks, but upon the holders of the shares, whoever they may be. The plaintiff as one of such holders is, so the appellant contends, no more entitled to exemption from the tax than is any other shareholder. The Supreme Court of the United States has consistently held that a tax upon the shares is not the equivalent of a tax upon the capital of the bank (see *Owensboro N. B. v. Owensboro*, 173 U. S. 677, 19 Sup. Ct. 537, 43 L. Ed. 850, and cases cited), and that the state may properly impose a tax upon the full value of the shares of stock in a national bank, regardless of the fact that the property of the bank, which gives those shares their value, may be in part composed of bonds of the United States or other property exempt from taxation (*Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *People v. Tax Com'rs*, 4 Wall. 244, 18 L. Ed. 344).

[2] We need not stop to inquire whether these decisions proceed upon a theory in conflict with the views announced by this court in *Burke v. Badlam* and subsequent decisions to like effect. Let it be assumed that the assessment here complained of did result in double taxation. In the absence of express constitutional provision, there is, however, no necessary or inherent objection to taxing the same property twice to different persons "so long, at least, as there is

some kind of estate or right, in both persons taxed, to the taxed property." Gray on Limitation of Taxing Power, §§ 1361, 1363; Cooley on Taxation (3d Ed.) p. 389 et seq.

Such taxation does not contravene any provision of the federal Constitution. "It is no doubt within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them [i. e., property of the corporation and shares of stock in the hands of the individual stockholders], in a way to subject the corporation or the stockholders to double taxation." *Tennessee v. Whitworth*, 117 U. S. 129, 136, 137, 6 Sup. Ct. 645, 29 L. Ed. 830.

[3] Does the Constitution of California prohibit such double taxation as may be involved in the assessment here complained of? No doubt our Constitution, as it stood prior to the amendments of 1910, did contain such prohibition. Section 1, art. 13, as it originally read, provided that: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." This is the language which was held, in the cases above cited, to forbid double taxation. "All property" is not taxed in proportion to its value if some of it is taxed once and some of it more than once upon the ascertained value. *Burke v. Badlam*, supra. But when the new system of taxing certain corporations for state purposes was embodied in the Constitution, section 1 was also amended. That section was made to read as follows:

"All property in the state *except as otherwise in this Constitution provided*, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided."

The change consisted in the addition of the italicized words. Here is an express declaration that the general rule, requiring property to be taxed in proportion to its value, shall be subject to the qualification that such proportionate method of taxation shall not apply where the Constitution makes other provision. It has, as we have seen, made other provision for the assessment of bank property. The respondent claims that the words "except as otherwise in this Constitution provided" qualify merely the subject of the sentence, to wit, "all property in the state." In other words, the contention is that this qualifying clause was meant to cover only the exemptions specifically provided for in section 1 and subsequent sections of article 13. This is a strained interpretation of the language. The amendments to section 1 and to section 14 were proposed and adopted at the same time, and there can be no doubt that the changes formed parts of a single comprehensive scheme. The plan of section 14 is in various respects inconsistent with the idea that the property therein described shall be assessed in proportion to its value.

The taxes levied, while described as taxes upon the property of corporations, are not based upon any mode of ascertaining either the proportionate or the absolute value of such property. Thus, in subdivision "a," railroad, telegraph, telephone, gas or electric and certain other companies are subjected to a tax of a certain percentage of their gross receipts from operations within this state. Subdivision "b" imposes upon insurance companies a tax of $1\frac{1}{2}$ per cent. upon the amount of the gross premiums received. Such taxes cannot, upon any fair construction, be said to comply with a requirement that all property shall be taxed in proportion to its value. Surely it was not believed, when section 14 was adopted, that the method of taxation therein provided for should be limited or controlled by any general provision such as that theretofore contained in section 1. The amendment of section 1 was designed to avoid any possible conflict with section 14. Even if, however, there should be any opposition between the general terms of section 1 and the provisions of section 14, the latter, as the more specific and particular enactment, would prevail.

[4] The respondent makes a further point. Since national banks constitute an agency of the United States, created for the carrying out of governmental purposes, property of such banks and shares of stock in the same cannot be taxed by a state except in so far as such taxation is permitted by act of Congress. The requisite permission is granted by section 5219 of the Revised Statutes. That section authorizes the several states to include all the shares of national banks in the valuation and assessment of personal property of the owner or holder of such shares, subject to the restrictions: (1) That the tax shall not be at a greater rate than is assessed upon other moneyed capital, and (2) that shares owned by nonresidents of the state shall be taxed in the city or town where the bank is located. The claim is made that this statute does not authorize the assessment of the personal property of national banks to the banks, and that the state is not therefore authorized to assess to the plaintiff, through the Mission Bank, the plaintiff's shares in that bank. In *Bank of Redemption v. Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689, it was decided by the Supreme Court of the United States that section 5219 of the Revised Statutes does not prevent the taxation of the shares of a national bank in the hands of another national bank. No different rule could be applied to the taxation of shares in a state bank owned by a national bank without violating the provision of section 5219 requiring "other moneyed capital" to be assessed at a rate equal to that imposed upon shares in national banks. If the section authorizes the taxation of shares owned by a national bank in another national bank, it must necessarily

contemplate a like taxation of shares in states banks similarly owned.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

PALERMO LAND & WATER CO. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA et al. (Sac. 2883.)

(Supreme Court of California. Sept. 21, 1916. Rehearing Denied Oct. 20, 1916.)

1. WATERS AND WATER COURSES — 257(1)—WATER COMPANIES—"PUBLIC UTILITY."

Relative to a company, which sold land with covenant to furnish water for irrigating it, being a public utility, and so subject to the jurisdiction of the Railroad Commission, the provision of the covenant, that the water was to be supplied "at such rates as may be fixed by law in the district in which said lands are situated," shows that the parties contemplated that the rates should be fixed by public authority; and the fixing of rates by public authority implies that the service is to be that of a public utility, the right to regulate a service existing only when such service is one affected by a public interest.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. — 257(1).]

For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. WATERS AND WATER COURSES — 257(1)—WATER COMPANIES—PUBLIC UTILITY—SUBMISSION TO COMMISSION.

The submission to the Railroad Commission, by a company selling land with covenant to supply water for irrigating it, of the establishment of its rates for water, makes the use a public one, and it a public utility, subject to jurisdiction of the Commission.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. — 257(1).]

3. WATERS AND WATER COURSES — 256 — WATER COMPANIES—JURISDICTION OF RAILROAD COMMISSION.

Under Public Utilities Act (St. 1911, Extra Sess. p. 35) § 31, empowering the Railroad Commission to regulate every public utility, and to do, in addition to everything specifically designated, anything necessary in the exercise of such power, and St. 1913, p. 84, authorizing it to regulate water companies and require them to serve additional consumers, on application for an order requiring service, it has jurisdiction to determine the disputed fact whether applicant is within the class of those entitled to the service.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. — 256.]

4. WATERS AND WATER COURSES — 156(9)—WATER RIGHTS—COVENANTS—FORFEITURE.

The covenants, in deeds of land, that the grantor will furnish water for irrigation, if the grantee shall at any time plant trees or vines, or otherwise cultivate the lands, being the consideration for the payment of prices for the lands above their value without water, are a present grant of a water right, constituting a burden or servitude on the grantor's water system, and not a mere agreement to sell personal property in the future, so that the grantees, being the owners of an interest in the water right, do not lose their right to water by mere failure

to cultivate and to demand water, or by cessation of cultivation and of demand for water after cultivation was begun and water was furnished; but there must be notice of forfeiture and lapse thereafter of the period of limitation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 183; Dec. Dig. — 156(9).]

In Bank. Certiorari by the Palermo Land & Water Company against the Railroad Commission of the State of California and its members to review its order. Order affirmed.

McCutchen, Olney & Willard, of San Francisco, for petitioner. Norman A. Elsner, of San Francisco, for Security Inv. Co. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondents.

SLOSS, J. Certiorari to review an order of the Railroad Commission. The Palermo Land & Water Company (hereinafter termed the "Palermo Company") was incorporated in 1888. It acquired a tract of land, known as the "Palermo Colony," situate in Butte county, and also the right to divert water from the South fork of the Feather river. It acquired or constructed canals, ditches, and the necessary appurtenances for conducting such water upon the lands in said Palermo Colony for purposes of irrigation. It has offered for sale and sold certain lands in said Palermo Colony, the conveyance in each case containing a provision for supplying water. The Security Investment Company, a corporation (which, for brevity, we shall call "Investment Company"), is the successor in interest of purchasers of three lots thus sold by the Palermo Company. Said Investment Company demanded of the Palermo Company that it furnish water for said lots. The demand was refused. Thereupon the Investment Company applied to the Railroad Commission for an order requiring the Palermo Company to furnish said water. The application was resisted, and after a hearing an order was made requiring said Palermo Company to supply the water as demanded. It is this order which is brought under review by the present proceeding.

The land owned by the Investment Company is described as lots 1 and 8 of block 88, and lot 1 of block 87, of subdivision No. 1 of the Palermo Citrus Tract; said tract being within the Palermo Colony. Lot 1 of block 87, containing 7.17 acres, and lot 1 of block 88, containing 8.43 acres, were conveyed to the predecessors of the Investment Company by the Palermo Company on November 30, 1891. The deed of conveyance (in which the grantor was the party of the first part) contained the following covenant:

"And it is further agreed that if the party of the second part, or his heirs or assigns, shall at any time plant trees or vines, or otherwise cultivate said lands, or any part thereof, the party of the first part will furnish from its ditches, up to the line of said land nearest to the main or branch ditch, pipe, or flume of said party of

the first part, such water as may be necessary to irrigate such trees, vines, or cultivated crops, not exceeding one miner's inch for every seven acres so improved or cultivated, at such rates as may be fixed by law in the district in which said lands are situated. * * *

Lot 8 of block 88, containing 8.36 acres, was conveyed to the predecessor of the Investment Company on May 25, 1888. The deed in this instance contained a covenant like the one above quoted, except that it made the right to water conditional upon the planting of trees or vines or the cultivation of the lands at any time prior to July 1, 1889, and provided for the furnishing of water without charge for four years after the commencement of cultivation.

A portion of lot 1 in block 88, containing 4.78 acres of land, has received water for many years, and the right to water for this parcel is not in controversy. The remainder of this lot was planted to olive trees in 1913. When the Investment Company demanded water for its irrigation, the demand was refused. No water has ever been delivered to this part of lot 1 of block 88. Lot 1 of block 87 has never received water from the Palermo Company. It was planted to olive and peach trees in 1914, and a demand then made for water was refused. Lot 8 of block 88 was planted to olive trees prior to July 1, 1889, the date named in the deed conveying this lot, and water was furnished up to 1892. Some new trees were planted by the Investment Company in 1912 and 1913, and demand for water for this lot was made in 1911 or 1912, and refused. The ground upon which the Palermo Company refused to furnish the water was that lot 1 of block 87 and the portion of lot 1, block 88, which had not received water, had lost the right to be so supplied, for the reason that there had been no planting or cultivation of said lands and no demand for water for over 20 years after the conveyance of said lots by the Palermo Company to the predecessors of the Investment Company. With respect to lot 8 of block 88 the claim was that, while the right to have water had once attached by the planting of trees and the delivery of water, such right had been lost by a cessation of cultivation and demand for water, extending over a like period of about 20 years.

The Commission found that the Palermo Company had a sufficient supply of water to enable it to supply the lands of the Investment Company in addition to all of the other lands in the Palermo Colony which were then being irrigated. It found further that the complainant, the Investment Company, was entitled to receive water from the system of the Palermo Company, and directed that such water be supplied.

[1] The petitioner contends that it is not a public utility, and is, therefore, not subject to the jurisdiction of the Commission. The Palermo Company, it is claimed, has not offered its water to the pub-

lic, but has merely entered into "private contractual obligations * * * to deliver water to certain lots which it has sold with a water right." *Burr v. Maclay R. W. Co.*, 160 Cal. 268, 280, 116 Pac. 715, 721. Attention is directed to several decisions of this court holding that such disposition of water "is essentially a matter of private contract and it shows no intent to create a public use." *Thayer v. California D. Co.*, 164 Cal. 117, 128 Pac. 21; *Burr v. Maclay R. W. Co.*, supra; *Hildreth v. Montecito, etc., Co.*, 139 Cal. 22, 72 Pac. 395; *Barton v. Riverside W. Co.*, 155 Cal. 518, 101 Pac. 790. It is further argued that, if our statutory provisions (St. 1913, p. 84; St. 1915, p. 1273) are to be construed as declaring that water companies of this character are public utilities, such statutes are in violation of both the federal and state Constitutions. We do not, however, feel called upon to go into the constitutional questions thus suggested, for the reason that we feel satisfied that, without regard to statutory provisions, the conduct of the Palermo Company was such as to take its operations out of the category of a private use as defined by *Thayer v. Development Co.* and like cases.

In the first place, the covenants providing for the furnishing of water to land sold by the Palermo Company provided that the water was to be supplied "at such rates as may be fixed by law in the district in which said lands are situated." In the very inception of the right, therefore, it appears that the parties contemplated that the rates to be charged should be those fixed by public authority. The fixing of rates by public authority in itself implies that the service is to be that of a public utility. The right to regulate the price of a service exists only when such service is one affected by a public interest.

[2] But, apart from this consideration, it appears that in December, 1912, the Palermo Company applied to the Railroad Commission to have its rates for water established and that the Commission made its order allowing an increase in the rates theretofore in effect. Vol. III, Opinions and Orders of the Railroad Commission, p. 1247. The case, therefore, falls directly within the doctrine of *Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 Pac. 161, where we held that as against the water company such submission to the authority of the regulating body was effective to "change the use from a private and particular use to a public use, so as to make the service and terms of delivery subject to regulation and control by public authority." No valid distinction can be drawn between the *Franscioni* Case and the one before us.

[3] The petitioner's next contention is that the Railroad Commission was without jurisdiction, because the Palermo Company was in good faith disputing the right of the Investment Company to have water supplied to its lands. The argument is that the Rail-

road Commission is primarily an administrative body, and that it has no authority to act judicially in determining the existence of a disputed right. We see no force in this contention. By the Public Utilities Act (St. 1911, Extra Sess., p. 18) the Commission is vested with power and jurisdiction "to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." Section 31. The act of 1913 (St. 1913, p. 84) expressly authorizes the Commission to regulate water companies and to require them to serve additional consumers. We may concede, for the purposes of the discussion, that the authority to order service does not include authority to compel a water company to supply water to persons or lands not within the scope of the dedication which has been made. Nevertheless, on an application for an order requiring service, the Commission must necessarily determine, as a preliminary issue, whether the applicant is within the class of those entitled to the service. Whenever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or non-existence of the requisite facts. 11 Cyc. 701; *In re Grove Street*, 61 Cal. 438, 453. Its jurisdiction cannot be affected by the circumstance that these facts are denied.

[4] We come to the final contention of the petitioner, which is that the Investment Company was not, in law and fact, entitled to have water supplied to its lands. The argument is that the only dedication to public use was one limited by the terms of the covenant contained in the deeds executed by the Palermo Company. The deeds conveying lot 1 of block 87 and lot 1 of block 88 provide that "water shall be furnished if the grantee, his heirs or assigns, shall at any time plant trees or vines or otherwise cultivate said lands." The position taken with respect to the effect of this clause is thus stated in the opening brief:

"Petitioner's offer that, if at any time the land is placed under cultivation, petitioner will supply it with water, cannot be construed as running in perpetuity. It must be held to be limited to a reasonable time."

Cases are cited declaring that where no time is specified the law implies a reasonable time, and that the use of the phrase "at any time" will not prevent the implication. The soundness of the rule thus declared is not open to question. We think, however, that it is not applicable to the situation here presented. The cases cited had to do with contracts giving a party the right, at his election, to claim a privilege. Here we have something more. The findings of the Com-

mission show that the Palermo Company sold its land at prices ranging from \$50 to \$100 per acre in excess of the value of the land without water, and that the additional price was paid in reliance on the agreement of the company to supply the necessary water. It can hardly be supposed to have been in the contemplation of a grantee taking land under these conditions that the water right for which he had thus paid would be forfeited to the grantor because of his failure to make use of it within any given time. The covenants in the deeds were not a mere agreement to sell personal property in the future. They were a present grant of a water right, which constituted a burden or servitude upon the water system of the grantor. *Stanislaus Water Co. v. Bachman*, 152 Cal. 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359; *Southern Pacific v. Spring Valley Water Co.* (S. F. No. 6846, decided August 22, 1916) 159 Pac. 865. The grantees thus being the owners of an interest in the water right, the case falls directly under the authority of *Copeland v. Fairview Land Co.*, 165 Cal. 148, 131 Pac. 119. As is there pointed out, an easement acquired by grant is not lost by mere disuse. *Smith v. Worn*, 93 Cal. 212, 28 Pac. 944; *Currier v. Howes*, 103 Cal. 431, 37 Pac. 521; *People v. Southern P. Co.*, 172 Cal. —, 158 Pac. 180. In the *Copeland* Case the court says that where one acquiring a water right sells an interest in it to another, and thereafter continues to divert the water himself for the vendee, the fact that the vendee does not demand or use the water he has bought will not—

"forfeit his right thereto to the vendor, who has in the meantime continued the diversion, unless such vendor in some manner informs the vendee that such forfeiture will be claimed because of nonuse, or asserts it against him by some hostile act. Mere failure to take and use the water for which he has, at the time, no need, will not forfeit the right to the vendor, in such a case." 165 Cal. 166, 131 Pac. 126.

The Palermo Company never gave the Investment Company or its predecessors any notice that it regarded the right to water as terminated until 1912, about 2 years before the proceeding was instituted before the Railroad Commission. The right was, of course, not lost by limitation during that period. We conclude, therefore, that there is no merit in the claim that the Investment Company lost its right to demand water, either by reason of its failure to plant trees and demand water for lot 1, block 87, and lot 1, block 88, or by reason of its cessation of cultivation and of demand for water for lot 8 of block 88.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

CITY OF SAN BERNARDINO v. HORTON
et al., Board of Sup'rs of San Bernardino
County. (L. A. 4937.)

(Supreme Court of California. Sept. 21, 1916.
Rehearing Denied Oct. 20, 1916.)

TAXATION ¶909—**STATE AND LOCAL TAXES—**
REIMBURSEMENT—"DISTRICT."

A city is not a "district" within Const. art. 13, § 14, providing that the Legislature shall reimburse districts for loss by withdrawal of property from local taxation, when taxed for state purposes only, or within Stats. 1911, p. 556, § 32, effectuating such provision.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1741; Dec. Dig. ¶909.

For other definitions, see Words and Phrases, First and Second Series, District.]

In Bank. Application for writ of mandate by the City of San Bernardino against S. V. Horton and others, as the Board of Supervisors of San Bernardino County. Application denied.

Byron Waters and Willis & Guthrie, all of San Bernardino, for petitioner.

PER CURIAM. This is an application for a writ of mandate. The sole question presented is whether a municipality, the city of San Bernardino in this instance, is a "district" within the meaning of that word as used in that part of subdivision "f" of section 14 of article 13 of the Constitution reading as follows: "The Legislature shall provide for reimbursement from the general funds of any county to districts therein where loss is occasioned in such districts by the withdrawal from local taxation of property taxed for state purposes only"—and in section 32 of an act of the Legislature to carry into effect the provisions of section 14 of article 13 of the Constitution, approved April 1, 1911 (Stats. 1911, pp. 530, 556).

The court is unanimously of the view that it is not a district within the meaning of the word as used in these provisions.

The application for a writ of mandate is denied.

MOLERA v. COOPER. (S. F. 7619.)

(Supreme Court of California. Aug. 4, 1916.)

1. PLEADING ¶8(7)—**FACTS AND CONCLUSIONS**
OF LAW.

Where defense to action on note by executor was that defendant agreed, in 1911, in consideration of release by testator of obligation on the note, to hold the amount of the note and interest in trust for and during the minority of two beneficiaries, but did not allege that defendant then had in her possession or under her control the money owing on the note, or that she had at any time since devoted it to the trust, or that she was then and had been since solvent, the allegation that the defendant had, ever since that agreement, "held and does now hold said amount of money upon the trust proposed" was not to be construed as meaning that the defendant then had the money in hand, or had at any time since then possessed the same and devoted it to said trust, but was a conclusion of the pleader upon

the facts previously stated in the endeavor to allege a valid trust.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 18; Dec. Dig. ¶8(7).]

2. TRUSTS ¶35(1)—**CREATION—EXISTENCE OF**
RES.

A mere promise to obtain money and thereupon hold it in trust does not create a trust until it is at least so far executed that the money has been obtained in accordance with the promise.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45, 49, 50; Dec. Dig. ¶35(1).]

3. BILLS AND NOTES ¶437 — **EXTINGUISH-**
MENT—CREATION OF TRUST.

A parol agreement by maker of note with the payee, in consideration of release of note, to hold the amount thereof in trust for minor beneficiaries, which agreement did not appear to have been carried out by the appropriation of any specific sum for that purpose, was ineffectual to extinguish the note, since it was an attempt to alter a written agreement by an unexecuted parol agreement, contrary to Civ. Code, § 1698, providing that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1275, 1276, 1279, 1280; Dec. Dig. ¶437.]

4. NOVATION ¶7 — **SUBSTITUTION OF NEW**
CREDITOR.

Under Civ. Code, § 1531, defining a novation, agreement by the maker of a note with the payee to hold the amount thereof in trust for minor beneficiaries in consideration of release of the note was not effective as a novation, where the minor beneficiaries did not accept the arrangement or agree to it.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 7; Dec. Dig. ¶7.]

5. NOVATION ¶6—**WHAT CONSTITUTES.**

Agreement by maker of note with the payee to hold the amount thereof in trust for beneficiaries named does not constitute a novation under Civ. Code, § 1531; no new obligation being created and no new creditor being substituted.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 6; Dec. Dig. ¶6.]

6. INTEREST ¶50—**TENDER OF INTEREST—EFFECT.**

Under Civ. Code, § 1504, providing that an offer of payment duly made stops the running of interest on the obligation, the tender of interest due after maturity of a note, on which both principal and interest were owing, did not stop the running of interest upon the principal, but only on the interest tendered.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. ¶50.]

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Eusebius J. Molera, as executor of the last will of Ana M. Wohler, deceased, against Mabel Ellsworth Cooper. From judgment for plaintiff, defendant appeals. Affirmed.

Carlton W. Greene, of Paso Robles, for appellant. Chas. W. Slack and Chauncey S. Goodrich, both of San Francisco, for respondent.

SHAW, J. The plaintiff sued upon a promissory note for \$1,000 executed to the testatrix, Ana M. Wohler, by the defendant. A

demurrer to the third amended answer was sustained, and judgment was thereupon given for the plaintiff. From this judgment the defendant appeals.

The note sued on was dated July 2, 1909, and was payable two years after date. The first count of said answer alleges that on April 10, 1911, it was agreed between the defendant and Mrs. Wohler that in consideration of the extinguishment of said note by Mrs. Wohler and the release by her of all obligation of the defendant upon said note, the defendant would thereupon hold said amount of \$1,000 and interest from the date of said note, in trust, and would thenceforth apply and pay the same to the joint use and benefit of Isabel Ellsworth Cooper and Gladys Greene Cooper, in equal shares; that during the minority of said two beneficiaries the defendant would apply said moneys according to the discretion of her, said defendant; that said Ana M. Wohler accepted said agreement and declaration of trust of the defendant in full satisfaction and extinction of said note and then and there verbally released the defendant from the obligation thereof, and that the defendant has ever since April 10, 1911, held said amount of money upon the said trust, and that said Isabel and Gladys own the entire beneficial interest in said sum of money, subject to the trust stated.

[1] It is not alleged that the defendant then had in her possession or under her control the money owing upon said note, or that she has at any time since procured the same and devoted the same to said trust, or that she was then, or has been since, solvent and able to do so. One ground of demurrer was that the answer was uncertain, in that it cannot be ascertained therefrom what particular moneys the defendant held in trust as set forth therein, or whether or not any specific amount of money was held in trust. In view of this ground of demurrer the allegation that the defendant has ever since April 10, 1911, "held and does now hold said amount of money upon the trust proposed" is not to be construed as meaning that the defendant then had the money in hand, or has at any time since then possessed the same and devoted it to said trust. If she had desired to allege these facts, she should have done so more specifically. The agreement is to be taken as a conclusion of the pleader upon the facts previously stated in the endeavor to allege a valid trust. The case must be considered upon the theory that all she did in regard to the creation of a trust was to agree that she would thenceforth hold the sum of money specified in the note in trust for the two children mentioned. It is alleged that these two children were minors, then of the age of eight and four years, respectively, and that the defendant and their father were joint guardians of the estates of said minors, and it is not alleged that either of them as guardian

has agreed to the said arrangement with Mrs. Wohler.

[2, 3] It is clear that no trust was created by the aforesaid arrangement. There never was any property in existence which could be the subject of the trust. The debt owing from the defendant to Mrs. Wohler was a property right vested in Mrs. Wohler, but no property or estate therein was vested in the defendant which could be the subject of any trust. A mere promise to obtain money and thereupon hold it in trust does not create a trust until it is at least so far executed that the money has been obtained in accordance with the promise. Considered in that light, the agreement between the payor and the payee was ineffectual to alter or extinguish the note, since it was an attempt to alter a written agreement by an unexecuted parol agreement. Civ. Code, § 1698.

The decision in *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370, is not authority for the proposition that a trust can be created by the mere promise of a debtor to the creditor to obtain money and hold it in trust for a third person. The subject-matter involved in that case was money on deposit in the bank. It is clear from a reading of the decision that the money was considered by the court as money actually in possession of the bank belonging to the depositor, and that the effect of the transaction was that the bank thereupon agreed to hold the money so on deposit in trust for the benefit of sisters of the depositor. In the present case, as we have said, there is no sufficient allegation that there was anything on hand to be made the subject of a trust.

[4, 5] Considered as a novation, it was ineffectual for the reason that the persons to whom the obligation was to run, the two children, did not accept the same or agree thereto. Under section 1581 of the Civil Code a novation is made—

"1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;

"2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,

"3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

The second mode is not involved. It is not claimed that any new debtor was substituted. It was ineffectual as a novation under the first mode and under the third mode because no new obligation was created and no new creditor was substituted. The proposal was to create a new obligation in favor of the two children. A novation whereby a new obligation to a third party is substituted cannot be made unless all agree. As is said in 3 Elliott on Contracts, § 1867:

"All must agree, for it requires the consent of the original parties to change the old contract or their relations to it and extinguish the liability, and of the parties to the new contract to create it."

The following cases announce the same doctrine: *McKinney v. Alvis*, 14 Ill. 83; *Reid v. Degener*, 82 Ill. 508; *Commercial Bank v. Kirkwood*, 172 Ill. 568, 50 N. E. 219; *Kirchman v. Standard Coal Co.*, 112 Iowa, 673, 84 N. W. 939, 52 Am. St. Rep. 318; *Darling v. Rutherford*, 125 Mich. 70, 83 N. W. 999; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742. There was no new obligation created to the children, for neither they nor their guardians consented to it or accepted it. For the same reason there was no transfer to them of the rights of the original obligee. The arrangement lacked these essential elements of a novation.

[6] In the second count of the answer defendant alleged that on August 19, 1911, which was after the maturity of the note, she had tendered to the payee the amount of interest due upon the note which the payee refused to accept. This, it is claimed, stops the running of interest upon the note. Civ. Code, § 1504. At that date the defendant owed not only the interest but the principal of the note. The tender of the interest alone could not stop the running of further interest upon the principal, but at most only the running of interest upon the interest then tendered and refused. As no compound interest is demanded, this count is insufficient as a defense.

Addition to Opinion.

PER CURIAM. It appears from the record herein that the judgment entered in the superior court is erroneous in the matter of interest. In view of the provisions of the note, the plaintiff was entitled to interest at 5 per cent. per annum only to the date of judgment, while the judgment as entered awarded interest at the rate of 7 per cent. per annum from the maturity of the note to the date of judgment.

The judgment heretofore given by this court is modified to read as follows:

The portion of the judgment of the superior court commencing: "Now, therefore, it is hereby ordered, adjudged, and decreed that the said plaintiff have judgment herein," etc., be and the same is hereby modified to read as follows, viz.: "Now, therefore, it is hereby ordered, adjudged, and decreed that the said plaintiff have judgment herein against the said defendant for the sum of one thousand (\$1,000) dollars, in gold coin of the United States, with interest thereon at the rate of five (5) per cent. per annum, from the 2d day of July, A. D. 1910, to the date hereof, and for his costs herein, amounting to the sum of \$14.75. Dated this 25th day of March, A. D. 1914"—and, as so modified, is hereby affirmed. Appellant shall not recover her costs.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

NEWBY v. TIMES-MIRROR CO. (L. A. 3569.)

(Supreme Court of California. Sept. 21, 1916.)

1. LIBEL AND SLANDER — 54 — TRUTH OF ASSERTION—FELONIOUS ALTERING OF RECORD.

As regards truth of the assertion of an alleged libel that plaintiff was accused of a felony in altering a public record, it is enough that at his request the judgment book clerk marked out a satisfaction of judgment though for the purpose of bringing about justice and preventing a fraud; the intent in defacing the record being, under Pen. Code, §§ 113, 114, immaterial.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 152; Dec. Dig. —54.]

2. LIBEL AND SLANDER — 48(1) — PRIVILEGE—POLITICS.

A libelous newspaper article is not privileged within Civ. Code, § 47, subd. 3, merely because about a person active in promoting his own political views.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 144, 147; Dec. Dig. —48(1).]

3. LIBEL AND SLANDER — 49 — DEFENSE — PRIVILEGED OCCASION.

A libelous newspaper article cannot be excused on the ground that the occasion is privileged.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 148; Dec. Dig. —49.]

4. LIBEL AND SLANDER — 56(1) — JUSTIFICATION—HUMOROUS ARTICLE.

That a libelous newspaper article tends to cause merriment or is a facetious rejoinder to adverse criticism by others does not justify it.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 154; Dec. Dig. —56(1).]

5. LIBEL AND SLANDER — 6(1) — CHARGING HYPOCRISY.

It is libelous per se to falsely charge that a person is a hypocrite.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 6; Dec. Dig. —6(1).]

6. TRIAL — 251(2) — INSTRUCTIONS—APPLICABILITY TO ISSUES.

An instruction authorizing verdict for defendant if it was proved true that plaintiff was a hypocrite was not within the issues; the answer merely denying that the published cartoon was susceptible of the imputation that he was a hypocrite.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 589; Dec. Dig. —251(2).]

7. APPEAL AND ERROR — 882(12) — INVITED ERROR—INSTRUCTION.

Plaintiff, having requested it, may not complain of the giving of an instruction not within the issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3602; Dec. Dig. —882(12).]

8. APPEAL AND ERROR — 882(17) — INVITED ERROR—SCOPE.

Though, plaintiff having requested it, may not complain of the giving of an instruction not within the issues, he may make the point that the implied findings thereunder are not supported by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3607; Dec. Dig. —882(17).]

9. LIBEL AND SLANDER — 112(3) — TRUTH — EVIDENCE.

Evidence in libel that at plaintiff's request to frustrate fraud of a party, satisfaction of judgment against whom plaintiff had just entered,

the clerk marked out the satisfaction, is insufficient to sustain any implied finding that plaintiff was a hypocrite or in the habit of altering public records, but merely shows he was in error as to the lawful method of correcting the attempted fraud.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 332-340; Dec. Dig. ¶ 112(3).]

10. LIBEL AND SLANDER ¶19 — IMPLICATION FROM CARTOON.

An implied finding that a newspaper cartoon would not to an ordinary reader bear the meaning that plaintiff in libel was a hypocrite posing as a reformer is unwarranted, it being headed, "And These are Our Leading 'Reformers,'" below it being, "All hypocrites are sinners, but, thank God, all sinners are not hypocrites," and the persons, other than plaintiff, shown, being portrayed as engaged in transactions disreputable, dishonest, or ridiculous, and plaintiff with a sinister expression.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. ¶19.]

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Nathan Newby against the Times-Mirror Company. From an adverse judgment and order, plaintiff appeals. Reversed.

E. A. Meserve, Lewis R. Works, and William F. Palmer, all of Los Angeles, for appellant. Hunsaker & Britt, Denis & Loewenthal and John A. Powell, all of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from the judgment and from an order denying him a new trial. The action is in damages for libel. The complaint contains six counts, each setting forth a different publication claimed to be libelous. The defendant is the publisher of the Los Angeles Times, a daily newspaper, of large and general circulation, published in the city of Los Angeles. The alleged libels consist of articles published in that newspaper. There was a trial by jury, resulting in a verdict for the defendant.

There was no substantial conflict in the evidence nor any serious dispute concerning the facts. The following are the facts to which the articles complained of relate and upon which they were founded:

Nathan Newby, at the time of the publications, in September, October and November, 1909, had been practicing law in Los Angeles for the preceding 14 years. He was a man of good character and reputation, and was a well-known lawyer in active practice and in good standing, being one of a firm of lawyers practicing as Valentine and Newby. Prior to July, 1909, one Blumer had obtained a judgment by default in the superior court of Los Angeles county against Felix Mayhew for the recovery of \$8,750. An execution had been duly issued thereon to the sheriff of Los Angeles county. A motion by Mayhew to set aside the judgment was pending. Valentine and Newby were attorneys for the plaintiff in the judgment and

Percy R. Wilson was the attorney for Mayhew. On or about July 23, 1909, the parties agreed on a settlement whereby the plaintiff was to accept \$5,000 in money in full satisfaction of the judgment. Mayhew procured a check on the National Bank of California for \$5,000, payable to himself and duly certified by the cashier for that sum, and Newby, for the plaintiff, agreed to accept this check, properly indorsed, in lieu of the money, upon the settlement. Pursuant to this agreement, and by arrangement, on the following day, July 24, 1909, Newby, Mayhew, Wilson, and McCabe, a lawyer, also acting for Mayhew, went together to the office of the county clerk in order that Mayhew might there deliver the check to Newby, and Newby there enter satisfaction of the judgment, and thereupon deliver to Wilson an order to the sheriff to release any property held by him under the execution. In the meantime the check had been duly indorsed by Mayhew to Valentine & Newby, and Mayhew, in collusion with McCabe, but without Wilson's knowledge, had surreptitiously prepared, ready for filing, a complaint in his own name against Blumer, the National Bank of California, Newby, and others, to enjoin payment of the check about to be delivered, together with a restraining order to the same effect ready for the signature of the judge on presentation. None of the other parties had any knowledge of the preparation or existence of these papers or of the design to enjoin the payment of the check after its delivery.

At the clerk's office, which was in the courthouse, Ross, the judgment book clerk, produced the judgment book, and with a rubber stamp impressed on the margin of the entry of the judgment of Blumer v. Mayhew an entry of satisfaction thereof. Mayhew then delivered the \$5,000 check to Newby, who thereupon signed the firm name, "Valentine & Newby, attorneys for plaintiff," to the entry of satisfaction, handed to Wilson the order to the sheriff for the release of property levied on, and passed to the deputy clerk \$1 to pay the fee of 25 cents for the entry. The deputy then went back to the cash drawer for change, and Newby stood awaiting it. McCabe and Mayhew, saying that they supposed they were through, hurriedly left the room. Wilson also left the room with the order of release for the sheriff. While the deputy was getting the change and Newby was waiting for it, Mayhew and McCabe proceeded to the chambers of a judge of the superior court, presented to him the complaint and order for the injunction against payment of the check just delivered, and the judge signed the order and delivered it to them. All this occupied but two or three minutes. While Newby was still awaiting change, the injunction aforesaid, together with a summons in the injunction

suit, which had been begun by the filing of the papers in that short space of time, were served upon him by some person other than McCabe or Mayhew.

Quickly examining the papers served on him, Newby perceived the gross fraud attempted, and at once called out to the clerk that he had been "flim-flammed" in the satisfaction of judgment, and that he desired immediately to mark it out, showing the deputy the said injunction order. The deputy thereupon turned to the entry of satisfaction, took a pen, and drew several cancelling lines across it and wrote beneath it the words: "Marked out at my request." Newby then signed the name "Valentine & Newby" under said words. He then left the room, intercepted Wilson before he had delivered the release to the sheriff, and told him of the injunction. Wilson expressed his indignation, and he and Newby then went together to the bank. There they found a person serving the injunction papers on the officers of the bank. Newby presented the check, the bank declined to pay it, and it never has been paid.

All this occurred on Saturday. On the following Monday Wilson withdrew his name as attorney for Mayhew in the case of Blumer v. Mayhew, and Newby procured from the judge an order denying Mayhew's motion to vacate the judgment. Newby afterwards began proceedings by motion for a formal order by the court setting aside the said entry of satisfaction. This motion came on for hearing on September 21, 1909. At that time an attorney in the interest of Mayhew called the matter to the attention of the defendant's city editor, who immediately detailed a reporter of that paper to get the facts and write up the "story." He proceeded to do so, and the article set forth in the first count of the complaint published in the Times on September 22, 1909, was the result. It states the facts substantially as above related, but added that Newby was accused of a felony in altering a public record, that the district attorney was considering the facts, and that Mayhew was willing to swear to a complaint charging Newby with such offense. Although not material to our consideration of the case, it is but just to add that the court, after investigation, granted the motion to set aside the entry of satisfaction, and that it does not appear that Newby was ever prosecuted for having it "marked out."

The second count is based on a publication in the issue of the Times of October 4, 1909. This consisted of a cartoon picturing Newby and several other citizens of Los Angeles, all caricatures and obviously intended to subject the persons to ridicule and obloquy. Above the cartoon were the words: "And These are Our Leading 'Reformers.'" Below it were the words: "All hypocrites are sinners, but, thank God, all sinners are not hypocrites." Newby was portrayed with

a large open book in front of him, labeled "Public Records," a pen in his hand in the act of writing or marking in the book, and a sinister leer in his eyes, and was represented as saying: "I'll Change 'Em." The complaint alleged that by this the defendant intended to bring him into public discredit and obloquy and to convey the meaning that the plaintiff was in the habit of changing public records, that he was not sincere in his political activities, but was a hypocrite, and that it was so understood by those who saw the cartoon.

The third count is based on two publications in the Times of October 5, 1909. The first related the evidence given in court the day before on the hearing of the motion to set aside the aforesaid satisfaction of judgment. It is not materially different from the facts related in the publication of September 22d. The second article was the following paragraph in the editorial columns:

"If it were not for court records and newspaper files and the like of that, there are some Los Angeles 'reformers' who would exude de cologne instead of the familiar stench that now accompanies them on their devious peregrinations."

These, it is alleged, were intended, and were understood by those who read the articles, to mean that plaintiff was unworthy of confidence and could not be trusted, and that his record, when exposed, was a stench in the nostrils of all decent citizens.

The fourth publication complained of was made on October 29, 1909. It referred to an initiative petition filed with the city clerk of Los Angeles by Newby on behalf of the Church Federation for the passage of an ordinance to prohibit gaming, and which, the article suggested, would forbid the shaking of dice for cigars and all forms of gambling. The article referred to Newby as "the arch-reformer, Nathan Newby," and stated that he and others had "volubly and defiantly expressed to the counsel a desire to stop humble citizens from shaking dice for cigars," "before it was found Newby had been tampering with the county records." It was alleged that this was intended and understood to mean that Newby was insincere in his efforts to better moral conditions in Los Angeles and was unworthy of confidence.

The fifth publication, on November 16, 1909, referred to the same matter, and was as follows:

"Then Nathan Newby's anti-gambling ordinance will have place in the question box. It aims to prevent smokers from joining in a friendly game of dice with the cigar store clerk with the cigars at stake. This so shocked Nathan that he forgot to alter any more public records."

This, it is alleged, was meant and understood to mean that Newby was in the habit of altering public records.

The sixth count is based on a publication of November 25, 1909. It is not important to our discussion.

[1] It would perhaps puzzle a person not

familiar with the Penal Code to discover in the conduct of Mr. Newby, as detailed above, anything immoral or reprehensible, or other than a commendable zeal to protect his client against palpable fraud. But sections 113 and 114 of the Penal Code declare that it is a felony for any person to deface or alter a record or any part thereof kept officially in any public office. The marking out of the entry of satisfaction by drawing lines across it with a pen was done by the deputy clerk at the request of Newby, who is, consequently, equally responsible therefor with said deputy. It was a defacement of a public record. It is clear from the facts stated that Newby was actuated solely by the praiseworthy purpose of frustrating the fraudulent acts of Mayhew in procuring the entry of satisfaction to be made without consideration, and that his intent was not in anywise criminal in character. It was but an irregular method of effecting a righteous result. Nevertheless, so great is the care of the state that the public records shall remain unchanged except when changed in an authorized manner, the statute is so drawn as to make even such laudable defacement a felony. The intent is immaterial. The act itself, without intent other than that of doing it, constitutes the offense, regardless of the object. This has been expressly decided in this state, and is the general rule in respect to statutory offences of that kind. *People v. O'Brien*, 96 Cal. 175, 31 Pac. 45; *People v. Tomalty*, 14 Cal. App. 229, 111 Pac. 513. Therefore, although the plaintiff was guilty of no moral wrong or bad intent in the matter, it was technically true that he was accused of the commission of a felony. The answer alleges as a defense to the first count that the several matters complained of therein as libels upon the plaintiff were and are true, setting forth the particular facts which it is claimed establish the truth of that charge. In so far as the publications assert that the plaintiff was accused of the commission of a felony, confined as they all are to the act of crossing out the entry of satisfaction of the judgment in *Blumer v. Mayhew*, the defense of truth is established by the evidence, although the offense was entirely technical, was without moral guilt, and was intended to bring about justice.

[2-5] The truth of this part of the matter complained of, however, does not establish a defense to the other libelous publications concerning plaintiff. With reference to the cartoon or caricature of plaintiff and others with certain inscriptions upon it published in the *Times* of October 4, 1909, the defendant in its answer alleged it was made in the midst of a strenuous local political campaign in which the plaintiff was identified with and prominent in the party opposed by the *Times* newspaper, and known as the Good Government League, or Reformers; that cartoons were frequently published by or in be-

half of the respective parties in the conduct of the campaign; that in carrying on its part of the campaign the *Times* published said cartoon as "a merry and harmless pictorial allusion to the leaders of said reformers as a political class, and not as private individuals, and merely by way of facetious rejoinder to many political criticisms and censures" of the party supported by the *Times*, made by said reformers in public speeches and newspapers. These facts could only be considered in mitigation of damages. They do not constitute a defense. The case does not come within the rule as to privileged communications, as laid down in subdivision 3 of section 47 of the Civil Code. In *Wilson v. Fitch*, 41 Cal. 382, the court said:

"Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives." *Edwards v. San Jose, etc., Soc.*, 99 Cal. 438, 34 Pac. 128, 37 Am. St. Rep. 70; *Gilman v. McClatchy*, 111 Cal. 614, 44 Pac. 241.

The duty of a newspaper to the public does not justify the publication of false and defamatory matter concerning a private citizen merely because he is active in promoting his own political views. A publication concerning such person, if libelous in its nature, cannot be excused on the ground that the occasion is privileged, and can be justified only by pleading and proving that it is true. And the fact that the matter published tends to cause merriment, or is a "facetious rejoinder" to adverse criticisms made by other persons, does not justify the wrong. It is libelous per se to falsely charge that a person is a hypocrite.

[6-8] The answer does not allege that the imputation of hypocrisy to Newby, or the imputation that he was in the habit of altering public records, alleged to be the purport of said cartoon, were true, but denied that it was susceptible of that meaning. The court below, at the request of the plaintiff, instructed the jury that it should determine whether or not said cartoon would fairly represent to the ordinary reader that the plaintiff was a hypocrite and was in the habit of changing public records, and that, if it was found to have that meaning, the plaintiff would be entitled to recover on the second count, unless it was proved to be true that plaintiff was a hypocrite and was in the habit of changing public records. The verdict in favor of the defendant necessarily implies that the jury either found that the cartoon was not susceptible of the meaning imputed to it, or found that plaintiff was a hypocrite and was in the habit of changing public records. The plaintiff insists that the evidence does not support either of these findings, and this insufficiency is assigned as cause for a new trial.

The instruction that the jury might find for the defendant if the imputation to Newby

of hypocrisy and the habit of altering public records were proven was not properly within the issues, inasmuch as the answer does not aver the truth of these charges. As the plaintiff requested the instruction, he cannot complain that it was given, but he may make the point that the implied findings are not supported by the evidence.

[8, 18] There was no evidence whatever to the effect that Newby was a hypocrite, or that he was in the habit of altering public records. The act of altering the entry in the case of *Blumer v. Mayhew*, when considered in the light of circumstances under which it was done, does not tend to show hypocrisy, or any sort of depravity in the character of Newby. It only shows that he was in error as to the lawful method of correcting the wrong attempted by Mayhew. Any finding that the charge of hypocrisy was true would be contrary to the evidence. It is therefore to be presumed that the jury did not find that charge to be true. The verdict can only be supported, so far as this count is concerned, on the theory that the jury concluded that the cartoon would not, to an ordinary reader, bear the meaning that the plaintiff was a hypocrite or was in the habit of changing public records. The evidence does not justify such conclusion. The heading to the cartoon, consisting of the phrase, "And These are Our Leading 'Reformers,'" in itself implied that the persons pictured were not worthy to be called reformers and were claiming a virtue they did not possess. The statement below, "All hypocrites are sinners, but, thank God, all sinners are not hypocrites," taken in connection with the admitted fact that these persons were generally known as "Reformers" in the pending political campaign, was nothing less than an indirect assertion that the persons whose pictures appeared above were both sinners and hypocrites, while their opponents might be sinners, but were not hypocrites. This meaning was also indicated by the fact that the four persons, other than Newby, shown in the cartoon, were each portrayed as engaged in transactions either disreputable, dishonest, or ridiculous, and, further, by the sinister expression on the face of Newby as given in the cartoon. All these circumstances may be considered. *Bettner v. Holt*, 70 Cal. 274, 11 Pac. 718. Newby was not named in the cartoon, but it is practically conceded that the picture was sufficiently like him to be readily recognized by all who knew him. No person of ordinary intelligence could fail to perceive that the cartoon was intended to suggest that the plaintiff was a hypocrite posing as a reformer. The verdict on this point is therefore contrary to the evidence. The plaintiff was entitled to recover on this count, regardless of the weakness of his case on other counts.

We do not mean to intimate that the other

publications set forth in the complaint do not, in effect, assert that the plaintiff was addicted to the changing of public records and impute to him a moral obliquity or depravity which was not established by his conduct in the case of *Blumer v. Mayhew*, and which was no part of his character, or that they do not also impute to him hypocrisy and insincerity. These are, for the most part, questions of fact as to which, upon another trial, the result may be different. Our conclusion with regard to the second count makes it unnecessary to consider them further upon this appeal.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

In re FRIEDMAN'S ESTATE.
HEBREW HOME FOR THE AGED DIS-
ABLED v. FRIEDMAN et al.
(S. F. 7838.)

(Supreme Court of California. Sept. 27, 1916.)
APPEAL AND ERROR ~~§~~796—MOTION TO DIS-
MISS APPEAL — PARTY IN INTEREST — PRO-
CEEDING TO DETERMINE HEIRSHIP.

Each of the defendants in a proceeding under Code Civ. Proc. § 1664, to determine heirship to and succession to the estate of deceased, claiming by heirship wholly distinct from, independent of, and antagonistic to the claims of the other defendants, has an interest in defeating the claim of each of the other defendants, and so on separate appeals being taken by defendants from the decree for plaintiff, declaring that deceased died without heirs, one of them may move for dismissal of the appeals of the others.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3146-3148; Dec. Dig. ~~§~~796.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Proceeding under Code Civ. Proc. § 1664, in the matter of the estate of Julius Friedman, deceased. There was judgment for the plaintiff, Hebrew Home for the Aged Disabled, and defendants Liebe Friedman and others took separate appeals. Certain of the defendants move to dismiss the appeals of the other defendants. Appeals dismissed. See, also, 171 Cal. 431, 153 Pac. 918.

Marcus Rosenthal, Rothchild, Golden & Rothchild and Edgar D. Peixotto, all of San Francisco, for appellants. Houghton & Houghton, of San Francisco (Sullivan & Sullivan and Theo J. Roche, all of San Francisco, of counsel), for respondents.

SHAW, J. This is a proceeding under section 1664 of the Code of Civil Procedure to determine the heirship and succession to the estate of Julius Friedman, deceased. Upon the filing of the petition the Hebrew

Home for Aged Disabled filed a complaint claiming the entire residue of the estate, in the absence of legal heirs, under a charitable bequest contained in the will of the decedent. Answers were filed by several groups of persons, each group claiming to be heirs and next of kin of the decedent. These groups may be designated as the Kagan claimants, the Grunwaldt claimants, the Bernstein claimants, and the Liebe Friedman claimants. Issues were formed, the cause was tried by the court, and a decree given declaring that the decedent died without heirs, and that none of the claimants is or ever was an heir or next of kin of the deceased, and that the Hebrew Home for Aged Disabled was entitled to the entire estate. Each group of claimants above named separately moved for a new trial, and the motions were denied. Separate appeals were taken by each of these groups from the decree, and also from the order denying their respective motions for new trial. Each of these groups claims by an asserted kinship to the decedent, wholly distinct from, independent of, and antagonistic to the claims of each and all of the other groups. The Kagan claimants have filed in this court a transcript of the record as required by the rules of this court. None of the other claimants has filed such transcript, and the time for filing the same allowed by the rules has expired. The Kagan claimants move to dismiss the several appeals of the other groups on the ground of the failure to file transcripts in support of their separate appeals.

The Grunwaldt claimants oppose the motion on various grounds, the only one necessary to mention here being their claim that the Kagan claimants have no right to prosecute a motion to dismiss the appeals of the other claimants. If they have that right their case is complete, for the failure of the other groups of appellants to file transcripts within the time prescribed is sufficient ground for the dismissal of the appeal under our rules.

Each person filing a complaint or answer in the proceeding and setting up title to the whole estate by a distinct line of kinship is necessarily an actor for himself and against all other persons who also claim the entire estate. His claim is antagonistic to that of all the others and the claim of each of the others is antagonistic to him. With respect to every other claimant so alleging an interest, the case stands precisely the same as if the contest was between him and that person alone. "His hand will be against every man, and every man's hand against him." If any claimant does not appeal from a judgment against him, that judgment, at the end of 60 days, becomes final and forever thereafter remains final. Such claimant cannot revive it and no other claimant is further interested in it. If any claimant takes an appeal, such appeal continues the litigation until it is determined, so far as he is

concerned and so far as the successful claimant is concerned, but it does not and cannot continue the litigation, nor the cause, with respect to the defeated parties who do not appeal. They are put out of the case by the judgment and must remain out. It must follow from these propositions that if two or more claimants, who are in hostility to each other, each appeal, the litigation between all of them and the successful claimant continues while such appeals are pending. Each appellant is interested primarily in defeating the claims of the successful party and in establishing his own claim, and secondarily in defeating the claim of every other unsuccessful claimant who has kept himself in the litigation by an appeal. As the one thing in controversy, the succession to the estate, is sought by all and is the only thing sought by all or either, it must be that each is the opponent of every other. As was said in *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522, section 1684 was "intended to provide the means by which, where there are hostile claimants to an estate, all the conflicting rights thereto may be summarily and finally determined in one proceeding," and "the alleged right of each party, whether nominally a plaintiff or defendant, is as much before the court for determination as is the alleged right of either of the other parties." It is not correct to say that the judgment declaring that the deceased, Friedman, died without heirs, does not purport to determine the relative rights of the Kagan claimants on the one hand and of the other claimants on the other. Such judgment determines that each unsuccessful claimant is without right. As the claims are wholly separate, this is equivalent to a determination against each appellant, and in favor of every other appellant, in the controversy as between them. The fact that all are alike put out of the case by the single judgment does not alter the logical result of the judgment. It must follow that each appellant may dispute the right of any other person to take an appeal, and may attack the proceedings by which such person has appealed and obtain the dismissal thereof if cause therefor exists.

If these views are correct, and we can see no escape from them, it must follow that the Kagan claimants who have taken an appeal from the decree have the right, and a sufficient interest, to move to dismiss any appeal from that decree taken by any other claimant to the estate. They are interested in having each one of the other parties defeated, including the successful party. A dismissal of another appeal is equivalent to an affirmation of the judgment against that appellant. If the Kagan claimants succeed in their appeal and the decree is affirmed with respect to the other claimants taking separate appeals, either by a decision on the merits on such separate appeals or by a dismissal thereof, the result would be that the case would go back

to the superior court for a trial de novo between the Kagan claimants and the successful claimants only, and all the other parties will be eliminated. The Kagans would thus secure to themselves exemption from further attack upon or attack by the other unsuccessful claimants. The case does not stand precisely in the same position as an ordinary case where the defeat of one necessarily results in a victory for the other. In cases of the kind here presented the defeat of one claimant merely eliminates him from the contest, leaving the others to fight it out to the finish, but none the less, each is an adverse party to the other and is entitled to attack the appeal of the other.

The appeals of the so-called Grunwaldt claimants, the Bernstein claimants, and Liebe Friedman claimants are each dismissed.

We concur: HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

CONNOLLY v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(S. F. 7645.)

(Supreme Court of California. Sept. 22, 1916.)

1. MASTER AND SERVANT §405(2)—WORKMEN'S COMPENSATION—RELATION OF PARTIES.

There is no force, as determining whether deceased was an employé or an independent contractor, in the mere fact that the work was such that the alleged contract price was inadequate.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §405(2).]

2. MASTER AND SERVANT §404—RELATION OF PARTIES—EVIDENCE.

Hearsay testimony is not admissible to prove the relation of master and servant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §404.]

3. MASTER AND SERVANT §405(2)—RELATION OF PARTIES—EVIDENCE.

The mere fact that defendant was to furnish lumber for a building to be erected by deceased is not conclusive that his relation with deceased was not that of owner and independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §405(2).]

4. MASTER AND SERVANT §405(2)—RELATION OF PARTIES—EVIDENCE.

The mere fact that defendant requested a workman to construct a building in a certain way is not conclusive that his relation with deceased was not that of owner and independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §405(2).]

5. EVIDENCE §67(1)—WORKMEN'S COMPENSATION—RELATION OF PARTIES—PRESUMPTIONS.

Although Code Civ. Proc. § 1963, subd. 32, states the rebuttable presumption that a thing once proved to exist continues, the fact that deceased worked for defendant as a day laborer at other places and times for over a year, would not raise the presumption that he was so working when injured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. §67(1).]

6. MASTER AND SERVANT §403 — WORKMEN'S COMPENSATION—JURISDICTION—BURDEN OF PROOF.

The burden of showing jurisdiction of the Industrial Accident Commission rests on the claimant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §403.]

7. MASTER AND SERVANT §405(1)—WORKMEN'S COMPENSATION—JURISDICTION—EVIDENCE.

Where the only evidence of jurisdiction of the Industrial Accident Commission admitted is hearsay, it has no jurisdiction to make an award.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §405(1).]

In Bank. Proceedings by Louise Connolly for workmen's compensation for the death of her husband, Edward H. Connolly, opposed by Patrick Connolly. Certiorari to review action of the Industrial Accident Commission awarding compensation. Award annulled.

St. Sure, Callaghan & Rose, of Oakland, for petitioner. Christopher M. Bradley, of San Francisco, for respondents. Harry F. Davis, of San Francisco, for applicant.

MELVIN, J. Certiorari to review the action of the Industrial Accident Commission in awarding to Louise Connolly compensation for the death of her husband, Edward H. Connolly.

The deceased was very remotely, if at all, related to Patrick Connolly. Edward H. Connolly was doing work as a carpenter on the ranch of said Patrick Connolly when he stepped on a nail and injured his foot. As a result he died of lockjaw. The findings of the Industrial Accident Commission were to the effect that Edward H. Connolly died as the result of an injury which arose out of and happened in the course of his employment; and that at the time of the accident both Edward and Patrick Connolly were subject, as employé and employer, respectively, to the provisions of the Workmen's Compensation Insurance and Safety Act. St. 1913, p. 279.

Petitioner makes the point that all of the competent evidence is to the effect that Edward H. Connolly was an independent contractor, and that petitioner was therefore not liable for his injury and death. *Carstens v. Pillsbury*, 158 Pac. 218; *Western Indemnity Co. v. State Industrial Accident Commission*, 158 Pac. 1033. Patrick Connolly testified that Edward H. Connolly "took a job to move a granary and put up a wagon shed and do the porch on the house and a few other things"; that he agreed to do all of this for \$42 and to furnish his own board. This testimony was corroborated by that of Patrick J. Connolly, a son of petitioner, who recited the terms of the alleged verbal contract in substantial agreement with the testimony of his father. Mrs. Moy testified to statements

made by Edward H. Connolly that he was working on "a contract job," that he was his "own boss," and that he would have to pay board for himself and his helper. A man named Lee was hired to assist Edward Connolly on the work, but left the employment before the structures were completed. The latter borrowed money to pay Lee from John Sweeny, and according to the testimony of Sweeny a statement was made by Edward Connolly at that time that he wanted the money "to pay a man off that he hired to do this job." Dan Moy told of a conversation with Edward Connolly in which the latter said he had a contract to do the work for an agreed price of either \$42 or \$42.50. Witness could not remember which sum was named.

Opposed to this testimony was that of Mrs. Louise Connolly, who said that her husband had told her of figuring on a contract with Patrick Connolly, but failing to make the latter understand and accept his figures, of agreeing to work by the day. Lee, who had been selected by Edward Connolly as his helper, also testified that said Connolly had told him of an unsuccessful attempt to get a contract from Patrick Connolly and his final arrangement to work by the day. Lee also said that Edward Connolly had told him, when hiring him, that he (Lee) was to work for Patrick Connolly, and he was corroborated in this statement by another witness named Madsen. There was also some testimony tending to impeach Mrs. Moy's statements, but it is true, as petitioner contends, that all of the testimony offered by Mrs. Connolly before the Industrial Accident Commission relating to the terms upon which her husband went to work for Patrick Connolly was hearsay.

In the opinion of the Industrial Accident Commission the following comment is made regarding the evidence:

"The evidence in this case is conflicting and difficult. A considerable portion of that admitted into the record on behalf of applicant was hearsay and not in relation to the happening of the injury. Some of the evidence on the part of the defendant was direct but self-serving and questionable. For these reasons the commission is turned back upon inferences to be drawn from collateral facts and some direct evidence, not from the parties in interest."

The learned commissioners then concluded that there was no contract because the work was "indefinite in quantity and not readily subject to specific contract," and not of such nature as to "warrant a contractor undertaking it for a lump sum"; yet the petitioner before the commission had herself testified that her husband had endeavored to get a contract for the work.

[1] Another ground for the determination of the commissioners was that the work was so extensive that it would not pay a contractor for performing it at \$42.50. There is no force in this reason, as it is a matter of common knowledge that contractors are fre-

quently disappointed in the financial return from work done for a stipulated sum.

[2] It was found that Edward H. Connolly had been paid before his death \$45, a sum greater than the alleged contract price, but admittedly \$10 of this amount was paid by the wife of Patrick Connolly after the accident, and she swore that she gave it to Mrs. Louise Connolly to enable the latter to take her injured husband to the hospital and not as a payment for work done. Of the evidence regarding the payment of \$45 we may say that if there had been any competent testimony that Edward H. Connolly was working by the day, the proof of the payment of so large a sum would have had some corroborative force, but we are here confronted with a condition involving a total lack of competent evidence regarding the status of the claimant's decedent. His status as an employé is sought to be proven by hearsay testimony which may not be considered. *Englebreton v. Industrial Accident Commission*, 170 Cal. 793, 151 Pac. 421; *Employers' Assurance Corporation v. Industrial Accident Commission*, 170 Cal. 800, 151 Pac. 423.

[3, 4] Attention is also called to the circumstance that Patrick Connolly gave directions to Lee with special reference to the construction of the implement shed—such directions (to quote from the opinion) "as one could properly give to an employé but not such as could be given to a contractor who had undertaken to perform a specified task for a specified sum of money." Examining Lee's testimony we find that he said he never saw Patrick Connolly but once. He was asked if Patrick Connolly ever gave him any instructions. He replied:

"Not a great deal, only a little about the overhang. He said he would like to have it eight feet if he could, but that would make the front too low to drive in, so he said, 'Do the best you can.' Six feet was all I could get the overhang to come right, and he said that would do."

We fail to see how this one incident proves that Edward Connolly was not an independent contractor, particularly in view of the fact that the lumber was furnished by Patrick Connolly. It does not appear that the "overhang" which Mr. Connolly wanted on the implement house involved more labor on the part of the carpenters than a shorter one. Nor is there any force in the suggestion that because the owner of the real property was to furnish the lumber, there was probably no contract except that for labor by the day. Contracts are often made for sufficient labor to accomplish specific results with materials furnished by the person on whose property those results are to be produced.

[5] Finally, it is argued by learned counsel for the Industrial Accident Commission that a presumption of law (disputable but not successfully overcome) fixes the status of Edward Connolly as that of a day laborer because both Patrick Connolly and his son tes-

tified that Edward H. Connolly had worked "on and off" for Patrick Connolly, as a day laborer for more than a year prior to the time when he went to work on the ranch where the accident occurred, and that he was employed at a daily wage during the week immediately preceding the one in which he went to work on the ranch. It is insisted that under the authority of subdivision 32 of section 1963 of the Code of Civil Procedure and such decisions as *Kidder v. Stevens*, 60 Cal. 414, *Elitzroth v. Ryan*, 89 Cal. 135, 28 Pac. 647, and *Metteer v. Smith*, 156 Cal. 572, 105 Pac. 735, the status thus proved to exist continues until overturned by proof of a different arrangement. But a proven status is only presumed to exist "as long as is usual with things of that nature" and employment by the day, in the nature of things, may be presumed to exist only so many days as the services of the workman are desired by his employer. The former employment of Edward Connolly by Patrick Connolly at other places and other times by the day raises no presumption that when he went to work at the ranch he was similarly hired. Moreover the testimony regarding the admissions against interest made by Edward Connolly all shows that at least he had attempted to secure an independent contract for the work upon which he was employed when he met with the accident which caused his death.

[8, 7] It will be seen from the foregoing that the jurisdiction of the Industrial Accident Commission to hear and determine the claim of Louise Connolly was not established. The burden rested upon her to prove the jurisdictional facts as well as the circumstances of her husband's death. *Western Grain & Sugar Products Co. v. Pillsbury*, 159 Pac. 423; *Rideout v. Pillsbury*, 159 Pac. 435. This she sought to do by hearsay evidence which was then inadmissible and which, although admitted, was not considered by the Industrial Accident Commission and by proof of certain negative circumstances which standing by themselves or taken together were by no means sufficient to fix the asserted relations between Patrick and Edward Connolly. The award was therefore erroneously made.

Petitioner also contends that Edward Connolly was not under the provisions and protection of the statute, even if he were an employé, because the very nature of the work upon which he was engaged at the time of the accident would, in that case, make him one whose employment was both "casual and not in the usual course of the business of his employer," who was a farmer. There is much force in this contention (see *Maryland Casualty Co. v. Pillsbury*, 158 Pac. 1031), but in view of the conclusion which we have reached on the other branch of the case

we need not enter into an extended discussion of this point.

The award is annulled.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.

LUPTON v. DOMESTIC UTILITIES MFG. CO. et al. (Sac. 2214.)

(Supreme Court of California. Sept. 28, 1916.)

SALES ~~6~~124—RESCISSIION—ACTION TO ENFORCE—RETURN OF ARTICLES.

For the buyer of an agent's contract and articles of merchandise to maintain an action to enforce a rescission for fraud, and recover the note she had given in payment, and the security therefor, instead of affirming the contract, and suing for damages, she must have returned, tendered, or given notice of abandonment of such articles; she, though never having received actual possession of them, having at the time of the sale been given credit therefor on the seller's books, and they having been crated and set aside in its warehouse subject to her disposal; and she having transferred all her rights therein and thereto to her husband, and the same being retained by him; and the note received by her from him therefor being retained by her; and this though the seller induced her to make the transfer, its reason given her therefor being true, though its motives may have been evil, they alone not constituting fraud; and the buyer's husband not having acted as the seller's agent, so that his possession cannot be regarded as its possession; all this at least where the husband is not made a party to the action, so that it is impossible to adjust the equities between all the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303-312; Dec. Dig. ~~6~~124.]

Department 1. Appeal from Superior Court, San Joaquin County; G. W. Nicol, Judge.

Action by Mary S. Lupton against the Domestic Utilities Manufacturing Company and others. From an adverse judgment and order, defendants appeal. Reversed.

G. M. Steele, of Lodi, and R. W. Kemp, of Los Angeles, for appellants. L. S. Channell, of Lodi, and H. R. McNoble and Ben Berry, both of Stockton (Warren H. Atherton and Lawrence Edwards, both of Stockton, and M. E. Haggerty, of Los Angeles, of counsel) for respondent.

LAWLOR, J. This is an action for the rescission of a contract for the purchase of a certain agent's contract and a quantity of washing machines, to cancel a promissory note given in payment thereof, and to obtain the reconveyance of certain real property given as security for the note. The relief is sought principally upon the ground of false and fraudulent representations by which the plaintiff was induced to enter into the contract. The defendants, excepting the Domestic Utilities Manufacturing Company, which was not served with summons, answered, denying the fraud and the other material allegations of the complaint, and at the trial, after the close of the plaintiff's case, moved

for a nonsuit, which was denied. Judgment was rendered for the plaintiff as prayed. The defendants appeal from the judgment, alleging as error, among other things, the refusal of the court to order a nonsuit. An appeal is also taken from the order denying the motion for a new trial.

The alleged false and fraudulent representations, and the general operations of the defendant company and its agents in their efforts to dispose of the "tin vacuum clothes washers or clothes pounders" and certain "so-called 'valuable' agent's contracts," which the plaintiff was induced to buy, are substantially similar and in many respects identical with the frauds shown in the case of *Brown v. Domestic Utilities Manufacturing Company*, 159 Pac. 163. In considering that case this court declared the frauds established by the evidence to be "so gross that equity would lend all of its legitimate powers to relieve plaintiff from the effects of them." We must be no less vigilant here. It appears from the record that there was an exhaustive inquiry into the merits of the case. The evidence is full and complete, and convinces us that the entire scheme of the company is founded in fraud. The tenor of the circulars distributed at its instance, the spurious methods employed in the demonstrations, and the studiously drawn form of contract, all reveal a plan of the company for the alleged disposal of its wares which involved fraud in its every aspect—contemplating an endless chain of victims, each one in turn to recoup his own loss and make a profit by victimizing others. This is the meaning which must be attached to what is termed in the company's form of contract "the line of succession," especially when studied in the light of the evidence. For instance, William Lupton, one of the plaintiff's witnesses, testified:

"Mr. Enslinger told me like this: I said, 'It looks like a kind of a skin game,' he said, 'You skin this man, he skins the other one, and he has then to skin the other one;' there would be nobody hurt only the last man; he says, 'What is that to us?' he says, 'We may be under the ground at that time.'"

But it will not be necessary to enumerate in detail the particulars wherein it appears that the plaintiff was defrauded. It is sufficient to state that the court found that plaintiff, who "is a woman ignorant of business and its methods," became interested in the sale of the "tin vacuum clothes washers or clothes pounders" and the "so-called 'valuable' agent's contracts," issued and sold by the Domestic Utilities Manufacturing Company; that she had various conversations with the defendants Enslingers, who represented the company as its agents, in regard to the efficiency and value of the washers, and the advisability of investing her money in the venture; that she was also encouraged by the Enslingers to attend certain public demonstrations, held under the auspices of the company, as to "the manner in which it

was claimed said tin vacuum clothes washers or clothes pounders would wash all articles generally found in a general family wash as thoroughly and as quickly as the articles the said demonstrators, so called, used for their demonstrations"; that, as a matter of fact, such demonstrations were "false and fake demonstrations, and were not in good faith"; that at these demonstrations large wall charts were used in order to explain the manner in which an investment in the washers and an agent's contract would realize large and profitable returns; that these representations, made "as to the ability of the plaintiff to make large sums of money greatly to exceed her original investment, were highly colored and distorted by reference to 'prospects,' 'lines of succession,' 'deals to be turned,' 'new territory to be opened,' 'transfers of bills of goods,'" all of which "were designed to prey upon the ignorance of the plaintiff, were false, and were made in a manner fitted to deceive plaintiff"; that plaintiff, believing and relying upon what was told her, purchased of defendants Enslingers, as agents of the company, one of the agent's contracts and 1,687 washers, with the privilege of appointing other agents, transferring to them the washers she had purchased, and receiving certain commissions therefor; that in payment for these alleged privileges the plaintiff gave her promissory note in the sum of \$5,000, and executed a deed of trust to a certain house and lot to the defendants Sam H. Zimmerman and William Siegalkoff, as trustees, which property was of the value of about \$8,000. As above stated, it is to cancel this note and to regain the property given as security that plaintiff brings this action.

The court also found that the agent's contract, in fact, "is and was valueless and worth nothing to the plaintiff or to any one else," while the "tin vacuum clothes washers or clothes pounders are of no value for the doing of general family washing, or for any other purpose." These findings are attacked upon the ground that the evidence is insufficient to sustain them. It is also contended that the judgment is erroneous because the representations made were merely matters of opinion; that, in any event, plaintiff was not entitled to relief, for the reason that she had failed to investigate the truth of the representations; and that she had no right to rely upon the statements made by the defendants, as they did not occupy confidential relations with her, were interested parties, and had only recently invested in the business themselves. We have carefully examined all these contentions, and the evidence appertaining thereto, and find they have no merit. The representations, for the most part, were more than mere matters of opinion, and were made in such positive terms that the plaintiff was justified in relying upon them without making an independent investigation.

We must, however, reverse the judgment

on the ground that the plaintiff had failed to effect a rescission of the contract prior to the commencement of the action. This was one of the grounds of the motion for a nonsuit. The other grounds were that the testimony of the plaintiff showed that she had waived the fraud after discovering the facts which entitled her to rescind, and that she was guilty of laches in not having used reasonable diligence in rescinding promptly upon becoming aware of her right of rescission. In our opinion, there is no force to either of these contentions. The sole question to be determined, therefore, is whether the "notice, tender and demand," which the plaintiff served upon the defendants, was sufficient to constitute a proper rescission of the contract and entitle her to the relief she seeks. The defendants contend that it was not, for the reason that she did not tender or offer to return the 1,667 washers, but, on the contrary, had conveyed the title thereto to her husband. As regards the other portions of the contract, it is not questioned that her notice of rescission and demand was sufficient.

It was found by the court:

"That upon the discovery by plaintiff of the falseness of said representations and of her right of rescission, and prior to the commencement of this action, said plaintiff elected to rescind her contract for the purchase of said so-called 'valuable' agent's contract, and the 1,667 tin vacuum clothes washers or clothes pounders therewith, and served a notice of her election to rescind upon said defendants Ensmingers, and offered to return to said Domestic Utilities Manufacturing Company, a corporation, and Josie A. Ensminger and John W. Ensminger, said so-called agent's contract and all rights that plaintiff herein had in and to the same, or the territory mentioned in the same, or the rights to create agencies or any other right conferred by said so-called agent's contract; that she did not tender a return of the 1,667 vacuum clothes washers above mentioned, because she never received the same; that said notice of election to rescind and tender of return also contained a demand upon said defendants, Ensmingers that they surrender to plaintiff said promissory note, and reconvey, or cause said defendants' trustees to reconvey, to plaintiff the said real property so conveyed by deed of trust, but they, and each of them, refused so to do."

This finding corresponds with the language used in the notice of rescission:

"With this notice, tender and demand there is no delivery to you or any of you of any vacuum clothes washers as none have been received by the undersigned."

It cannot be disputed that plaintiff never received actual possession of the 1,667 washers, or any of them. The evidence shows, however, that upon the close of her deal with the Ensmingers she was given credit upon the company's books for the washers, and the entire quantity was crated and set aside in its warehouse at Los Angeles subject to her disposal. It is admitted by plaintiff's counsel, as indeed it must be, that the defendants actually sold to her the 1,667 washers which became her property, and that she had the right to the possession thereof. In the absence of other circumstances, it would there-

fore have been necessary for the plaintiff, in order to accomplish a rescission of the contract of sale, to have abandoned or offered to restore to the defendants everything of value which she had received under the contract. Civ. Code, § 1691. This is a familiar principle of equity. When one has a right of rescission and exercises that right he must restore the other party to the same condition that he would have been in if no contract had been made. As is said in *Collins v. Townsend*, 58 Cal. 606, 615:

"If the vendor has retained possession of the property sold, as security or otherwise, the purchaser may indicate his intention to rescind and notify the seller that he abandons all right or claim to the property. If he fails to do this under such circumstances he is equally at fault as if, having received the property, he should refuse or neglect to return or tender it." Approved in *Kelley v. Owens*, 120 Cal. 500, 47 Pac. 369, 52 Pac. 797.

But at the trial plaintiff attempted to justify her action in having failed to abandon all claim or right to the washers by introducing evidence to show that the Ensmingers had induced her to transfer all the washers to her husband, William Lupton, and that he still retained title and right of possession, and for that reason the plaintiff had no power to restore the washers or the title thereof to the defendants. The findings of the court on this point are as follows:

"That on or about the 15th day of April, 1912, plaintiff transferred all her right, title, and interest in and to said 1,667 washers, which she was entitled to receive with said agent's contract purchased from Josie A. Ensminger, to William Lupton without any consideration whatever, and at the special instance and request of defendants Ensmingers, and upon their representations to plaintiff that that was the proper course to pursue in order to make the most money from said so-called valuable agent's contract. That defendants Ensmingers induced plaintiff to make said transfer to William Lupton, and defendants Ensmingers made said representations, and induced said transfer as a part of the scheme to injure and destroy plaintiff's right to rescission and to prevent plaintiff from escaping from the fraud which they, defendants Ensmingers, had perpetrated against plaintiff."

The rule is well established that, in passing upon a motion for a nonsuit, the evidence must be interpreted most strongly against the defendant, and every favorable inference of fact that can be legitimately drawn in support of the action should be made. *O'Connor v. Menzie*, 169 Cal. 217, 146 Pac. 674; *Boyle v. Coast Improvement Co.*, 27 Cal. App. 714, 151 Pac. 25. But we are unable to find in the evidence any indication that defendants induced the transfer of the washers to Lupton through misrepresentations or other fraudulent means. There is testimony to the effect that, during the negotiations with the plaintiff, John W. Ensminger suggested to her that such a transfer should be made, giving as a reason therefor that, because of her husband's personality and wide, worldly experience, he would make a better agent in the field. Neither of the Luptons was very well fitted for the business, but it does not

appear that the reasons advanced by Ensminger were false. Notwithstanding the sinister motives which may be imputed to the Ensmingers in advising such an arrangement, it can scarcely be said that plaintiff was induced to make the transfer on account of any frauds practiced upon her. Evil motives alone do not constitute fraud. Her husband's conduct in the premises, it is true, is not above question. The evidence tends to show that while she was contemplating the purchase of the contract and washers, he was apparently acting in conjunction with the Ensmingers to induce her to enter into the contract so that he would be appointed agent. He admittedly knew of the fraudulent character of the operations which were then being carried on by the company and the Ensmingers. His testimony, in this behalf, is significant:

"Well, my wife didn't know anything about it. All I knew about it was from what Mr. Ensminger and several of the others had told me, that there was really no harm in it, because the very first time the next man you had skinned got a chance to skin another man he played even, and then if he got another opportunity he made a percentage."

Regarding the promissory note he had given his wife in exchange for the contract and the washers, he testified:

"I did not expect to pay that note; just gave it to fulfill the contract and make the company believe that I had paid value."

But there is no suggestion in the evidence, nor is it contended, that Lupton acted as agent for the Ensmingers, or that he resorted to fraudulent methods, or exerted any undue influence upon the plaintiff, to induce his appointment as agent and the transfer of the washers which was incidental to such appointment. As testified by plaintiff:

"He said he thought it was a good thing. If he couldn't get one, he would go in with somebody else. He said when I concluded to buy it that I could use my own pleasure about it. He didn't say not to buy it, because whenever I talk of doing anything that way, he doesn't tell me not to do anything."

It cannot be held under such circumstances that the husband's possession must, in the eyes of the law, be regarded as the possession of the Ensmingers. Nor can it be said that the washers were valueless and worth nothing to the extent that it was not necessary to return them in order to accomplish a rescission. While the evidence as to the actual value is conflicting, and shows conclusively that they were not as valuable as represented, it cannot be questioned that they were of substantial value.

Conceding that the evidence amply supports the finding that it was upon the advice of Ensminger, and at his special instance, that the transfer was made, we are unable to see how this circumstance, alone, excuses the failure of the plaintiff to make a complete rescission. None of the cases relied upon by plaintiff is opposed to this conclusion. While certain language, in several of the authorities referred to, is to the effect

that a rescission by the buyer of an executed contract of sale induced by fraud cannot be defeated by the seller upon the ground that the buyer has parted with the possession of the property sold, when he parts with it upon the advice of the seller, in none of them, nor in any others that we have found, was a situation presented in which it was impossible to adjust the equities between all the parties. It is a general rule that a buyer cannot rescind if he has sold the goods or any part thereof. 35 Cyc. 147. In such a case he must affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud.

"The rule is well settled, that where the party complaining has parted with the thing purchased, he cannot rescind, but must resort to an action for damages." *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868.

This principle rests upon the doctrine that equity will not relieve where it is utterly impossible to place all the parties in statu quo. That is precisely the situation presented in this case. William Lupton, who it cannot be questioned holds the title to the washers, is not a party to the action. If the plaintiff should be granted judgment as prayed, her note to the defendants would be canceled, and she would be entitled to recover from them the realty which she gave as security. But Lupton, her husband, would still retain the property in the 1,667 washers, and the right to demand immediate possession at any time. Moreover, the plaintiff would retain the note which the evidence shows she received from Lupton as the price of the agent's contract and washers. In this aspect it matters not that Lupton had neither the ability nor the intention to pay the note, or that under the circumstances of the transaction it was apparent to the court that it amounted to no consideration whatever. As long as it remained uncanceled and in the hands of the plaintiff it constituted a chose in action against William Lupton. Potentially, at least, it represented a sum of \$5,000, the face value of the note. It requires no extended argument to show that a judgment in plaintiff's favor would be inequitable, and fall short of restoring the parties to the statu quo. Were Lupton a party to the suit, or were the situation of the parties such that he could be regarded merely as an agent for the plaintiff, having no interest in himself, the trial court might have been enabled to adjust the equities between the parties, and, if it had not done so, this court might have afforded relief. But as the case was presented to the lower court there was no showing by the plaintiff of a complete restitution of the property, or any means by which the court could relieve her of the omission. Accordingly, the motion for nonsuit should have been granted.

Judgment and order reversed.

We concur: SHAW, J.; SLOSS, J.

NARVER v. JORDAN, Secretary of State.
(L. A. 4739.)

(Supreme Court of California. Sept. 29, 1916.)

1. ELECTIONS \S 126(4)—NOMINATION—STATUTE.

Primary Act (St. 1913, p. 1390) \S 5, subd. 8, provides that nothing therein shall prohibit the independent nomination of candidates as provided by Pol. Code, \S 1188, enacted at the 1913 session of the Legislature, except that a candidate who has filed nomination papers as a candidate for any office on the ballots of any political party at a primary election held under the act, and who is defeated for such nomination, shall be ineligible for nomination to the same office at the ensuing general election, either as an independent candidate or as the candidate of any other party, held not to render ineligible to the Progressive party's nomination for the office of Representative to Congress, made by writing the person's name in the blank space left for the purpose in the ticket of the Progressive party, a person who was a candidate at the same election for the Republican nomination, having been proposed under Primary Act, \S 5, subd. 2, but being defeated for such nomination.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 118; Dec. Dig. \S 126(4).]

2. ELECTIONS \S 141 — NOMINATIONS — STATUTE.

Primary Act, \S 5, subd. 8, providing that nothing therein shall be construed as prohibiting the independent nomination of candidates, with an exception, has reference, in the exception, only to attempted nominations under Pol. Code, \S 1188, providing how and when a candidate may be nominated subsequent to a primary election or in lieu of any primary election, meaning that a candidate for a party nomination, who was defeated at the primary, may not have his name placed on the general election ballot as a candidate for the office under the provisions of section 1188.

[Ed. Note.—For other cases, see Elections, Cent. Dig. \S 121; Dec. Dig. \S 141.]

In Bank.

Application for writ of mandate by David C. Narver, petitioner, against Frank C. Jordan, Secretary of State. Alternative writ discharged, and proceeding dismissed.

Samuel M. Shortridge and John O. Catlin, both of San Francisco, and W. M. Bowen and Frank P. Doherty, both of Los Angeles, for petitioner. U. S. Webb, Atty. Gen., for respondent.

ANGELLOTTI, C. J. This proceeding is one to obtain a writ compelling the secretary of state, in sending to the county clerks and registrars in the Tenth congressional district his certificate of candidates to be placed on the ballot for the general election, to omit the name of Henry Stanley Benedict as the Progressive party candidate for the office of Representative in Congress from the Tenth congressional district.

At the August primary neither the name of Mr. Benedict nor any other person was printed upon the ballot as a candidate for the Progressive party nomination. The ticket of that party had as to that office simply

the blank space in which any elector was authorized to write in the name of any person for such nomination. His name was so written in for such nomination by many electors, and he received in this way a sufficient number of votes to make him the Progressive nominee for the office, if he was eligible to be such.

It is claimed that by virtue of certain provisions of the Primary Act of 1913, the law in force at this time, he is ineligible to be such Progressive party nominee. The material facts upon which this claim is based may be stated in a very few words. Mr. Benedict was a candidate at such primary for the Republican party nomination for such office, having been proposed as such candidate by a committee in accord with the provisions of subdivision 2b of section 5 of the Primary Act, and his nomination papers, prepared in accord with such provisions and accompanied by his own affidavit consenting to be such a candidate, having been duly filed in the office of the secretary of state. He was defeated for such Republican party nomination.

Under the Primary Act any person is entitled to be a candidate for all the party nominations for an office, and the act expressly provides that nothing therein contained "shall be construed to limit the rights of any person to become the candidate of more than one political party for the same office upon complying with" its requirements. Subdivision 4 of section 5. Section 25 provides that if as a result of any primary election a person receives a nomination without first having filed nomination papers and having his name printed on the primary election ballot, he may cause his name to be withdrawn from nomination. It then provides:

"The vacancy created by the withdrawal of such person as aforesaid, or on account of the ineligibility of such person to qualify as a candidate because of the inhibitions of subdivision 8 of section 5 of this act, shall not be filled."

Subdivision 8 of section 5, so far as material, provides:

"Nothing herein shall be construed as prohibiting the independent nomination of candidates as provided by section 1188 of the Political Code, as said section was enacted at the fortieth session (the session of 1913) of the Legislature of the state of California, except that a candidate who has filed nomination papers as one of the candidates for nomination to any office on the ballots of any political party at a primary election held under the provisions of this act, and who is defeated for such party nomination at such primary election, shall be ineligible for nomination to the same office at the ensuing general election, either as an independent candidate or as the candidate of any other party."

Section 1188 of the Political Code, as enacted at the fortieth session of the Legislature, provides simply how and when a candidate "may be nominated subsequent to" a primary election, "or in lieu of any primary election." Its language is such as to preclude the idea

that a nomination by any party can be made under its provisions.

[1] The claim is that by reason of the language of subdivision 8, section 5, which we have quoted, Mr. Benedict is ineligible to the Progressive party nomination that he received at the primary election. It must be held that he filed nomination papers as a candidate for the Republican party nomination, and he was defeated for such party nomination at the primary election, which, it is claimed, brings him squarely within the language of the subdivision. It must be confessed that there is much force in this contention if the words of the provision commencing with the word "except" be construed as an independent provision, and not merely as an exception to and a limitation of the preceding language guaranteeing the right, notwithstanding any other provision of the act, of independent nomination of candidates as provided in section 1188 of the Political Code. The effect of the construction contended for would be somewhat anomalous, we may here say, in view of the other provisions of the act. Although a person might properly be, so far as the law is concerned, a candidate for nomination at the hands of each of the four parties participating in the primary, if he was defeated for any one of the nominations, he would be rendered ineligible for the nomination he had received at the hands of the other three parties. Of course, in the present state of the law no plausible reason can be given for any such provision.

[2] It seems clear to us that the only reasonable construction that can be given to this provision is that it has reference only to attempted nominations under section 1188 of the Political Code "subsequent to" or "in lieu of any primary election." It simply means that a candidate for a party nomination who was defeated at the primary may not have his name placed on the general election ballot as a candidate for the office under the provisions of said section 1188. In other words, the provision as a whole is simply a declaration that nothing in the act shall be construed as prohibiting the independent nomination of candidates subsequent to or in lieu of any primary election, as provided in said section 1188, except that no candidate defeated for a party nomination for such office at the primary may be so nominated. The only reasonable argument against this conclusion is the apparent consequent lack of necessity for the words "or as the candidate of any other party" in the exception, in the light of the fact that the exception is applicable only to candidates at the primary for nomination on the ballots of political parties, and that section 1188, as amended in 1913, apparently has no application to the matter of "party" nominations. The same is true as to the portion of section 25 that we have italicized in our quotation thereof. The provisions just referred to are apparently

the merest surplusage, without any possible force or application. But this consideration we do not deem sufficient to warrant us departing from what we believe to be the clear intent of the provision as a whole. It may properly be noted that these provisions which are apparently without meaning or application in the Primary Act of 1913 were contained in the earlier Primary Act of 1911, when section 1188 of the Political Code did permit "party" nominations, and when a candidate could file nomination papers only for nomination at the hands of the party with which he was affiliated. It is very probable that they were simply copied into the act of 1913 from the old law, without consideration of any question of their necessity in view of the changes otherwise made. But, however this may be, we are of the opinion that the provision as a whole may reasonably be construed only as we have indicated.

The alternative writ heretofore issued is discharged, and the proceeding dismissed.

We concur: LORIGAN, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

SLOSS, J., not having heard the argument in this case, does not participate in the decision.

PACIFIC MFG. CO. et al. v. PERRY et al. (Civ. 1501.)

(District Court of Appeal, Third District, California, Aug. 25, 1916. On Rehearing, Aug. 29, 1916. On Motion to Rescind Order, Sept. 18, 1916. Rehearing Denied by Supreme Court Oct. 23, 1916.)

1. MECHANICS' LIENS §111(1)—AMOUNT APPLICABLE—ABANDONMENT OF CONTRACT.

The amount applicable under Code Civ. Proc. § 1200, repealed by Act May 1, 1911 (St. 1911, p. 1319), to liens of materialmen and laborers, in case of a valid contract abandoned by the contractor, is the part of the contract price proportional to the part of the work done, less payments made thereon.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 144; Dec. Dig. §111(1).]

2. MECHANICS' LIENS §111(1) — RIGHT OF LIEN — VOID CONTRACT — CHANGES DURING CONSTRUCTION.

Relative to right of lien of materialmen and laborers, where the contractor abandoned the contract, the contract was not rendered void by alterations of plans during construction at direction of owner, as authorized by the contract, providing for addition to or deduction from contract price on account thereof, at a fair valuation.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 144; Dec. Dig. §111(1).]

3. APPEAL AND ERROR §1071(5) — REVIEW — FINDINGS—ADMISSIONS IN PLEADINGS.

Any finding on authority of husband to contract for wife is immaterial, where the answer admits the allegation of the complaint that he, on her behalf and with her knowledge and consent, entered into the contract.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4238; Dec. Dig. §1071(5).]

4. TRIAL \S 398—INCONSISTENT FINDINGS.

A finding that a wife never made or entered into a contract in writing is not inconsistent with the fact that her husband entered into it on her behalf and with her knowledge and consent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. \S 398.]

5. MECHANICS' LIENS \S 78—MATERIALMEN AND LABORERS—NOTICE OF NONRESPONSIBILITY.

To secure the protection given by Code Civ. Proc. § 1200, repealed by Act May 1, 1911 (St. 1911, p. 1319), limiting the amount for which materialmen and laborers could have lien where the contract was abandoned by the contractor, the contract being recorded as required by the statute, it was not necessary for the owner to give the notice of nonresponsibility provided for by section 1192, that being to defeat liability where the owner learns of work being done on his property without his authority.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. \S 78.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Pacific Manufacturing Company and others against R. A. Perry and others. From adverse judgment and order, defendants appeal. Modified and affirmed.

Snook & Church, of Oakland (C. Irving Wright, of San Francisco, of counsel), for appellants. W. B. Rinehart, C. L. Colvin, and Ezra W. Decoto, all of Oakland, and Robert B. Gaylord, of San Francisco, for respondents.

CHIPMAN, P. J. The action is to foreclose laborers' and materialmen's liens for work performed and materials furnished in the construction of a residence and garage in the city of Oakland. With the action by Pacific Manufacturing Company were consolidated ten other actions. The following findings of fact were found by the court:

That defendant R. A. Perry was the reputed owner, defendant Winifred A. Perry the real owner, of the premises; that on June 10, 1910, the said R. A. Perry and defendant Magneson entered into a written contract whereby the latter agreed "to construct and complete certain buildings, to wit, a certain brick veneered and frame residence and garage appurtenant thereto upon the above-described land and premises and to furnish the labor and materials" therefor, according to certain plans, drawings, and specifications, which said plans, drawings, and specifications were attached to and made part of said contract, and the same was duly recorded on June 13, 1910; that the agreed price for said work and materials was \$23,567, payable in progressive installments, the sum of \$6,000 to be paid 35 days after the date of acceptance by architect and owner. Among other provisions, the contract contained the following:

"Third. Should the owner at any time during the progress of said buildings request any alterations, deviations, additions, or omissions from said contract, specifications, or plans, he shall be at liberty to do so, and the same shall in no way

affect or make void the contract, but will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation.

"Fourth. Should the contractor at any time during the progress of said work refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the expenses shall be deducted from the amount of said contract price. * * *

"Ninth. No extras will be allowed except agreed on in writing at time of making same, and signed by both interested parties.

"Tenth. It is hereby agreed by both interested parties that the said party of the second part shall enter into contracts with the following subcontractors for their portion of the work at prices mentioned:

Pacific Mfg. Co. for millwork, sash, doors, and glass	\$3,385.00
Burtchael & Crowley, plumbing.	1,895.00
P. N. Kuss Co. (or acceptable to owner), painting	950.00
Century Electric Co., electric work and wiring	650.00
Inlaid Floor Co., hardened floors.	940.00
Schmitt & Co., hot-air heating	470.00"

It was further found: That the contractor, Magneson, commenced work about June 13, 1910, in the construction of said residence and garage and so continued said work until February 11, 1911, when he "abandoned the construction of said buildings and all work and labor ceased thereon," and no labor was performed nor any materials furnished to be used, nor was any used, in the construction thereof, for a period of 80 days next immediately thereafter; that on March 22, 1911, defendants R. A. and Winifred made and filed for record in the office of the county recorder of Alameda county, and there was recorded on that day, a notice of abandonment of said contract by said Magneson on February 11, 1911; that no notice in writing requiring said Magneson to finish said works was ever given to said Magneson nor any demand made upon him as required by said contract, "to wit, the fourth subdivision thereof hereinbefore specifically quoted and set forth."

It is further found: That the said defendant Winifred A. Perry never entered into any contract in writing with said defendants Magneson and R. A. Perry, or either of them, relating to the construction of said buildings; that said Winifred A. Perry never at any time gave notice pursuant to section 1192, Code of Civil Procedure, or otherwise that she would not be responsible for the labor performed or materials furnished in the construction of said buildings, but during all the time said Magneson was engaged in the construction of said buildings by the said R. A. Perry he was so engaged with the knowledge and consent of said Winifred, and all the materials furnished for said buildings were furnished with her knowledge and consent; that after said Magneson had abandoned said work, to wit, on March 22, 1911, said defendants R. A. and Winifred commenced to com-

plete said buildings, and completed the same on or about September 6, 1911, and on that day notice of completion was duly filed by the said Winifred and defendants R. A. and Winifred that they had expended the sum of \$18,359.59 in the said completion; that said buildings were not constructed nor were they completed according to the plans and specifications and original contract, but "were actually constructed in such a manner that the said buildings greatly exceeded in value the original contract price as agreed upon between the said parties defendant, to wit, the said R. A. and Winifred Perry and said Magneson"; that "no extras were ever agreed upon in writing nor any writing signed with relation to extras by any persons interested or by any of the parties, to wit, the said Perry and Magneson, in pursuance of subdivision 9 of the contract for said building, between the said defendant Magneson and said defendant R. A. Perry, hereinbefore specifically set forth"; "that during the course of the construction of said buildings and prior to the abandonment thereof by the defendant Magneson, said defendant R. A. Perry paid the said Magneson" certain stated sums at different stages of the work amounting in all to \$10,000, "paid on account of the contract price and no more"; that the said defendants Magneson and Perry never at any time, nor did the said defendant Winifred A. Perry ever at any time, fix or attempt to fix, according to the provisions of said contract, or otherwise, by a fair and reasonable valuation or at all, the amount or values of said alterations of, deviations from, additions to, or omissions from said contract, in writing, or otherwise"; that the reasonable value of said extra work amounts in the aggregate to \$3,868.28, "of which there had been paid, at the time of the abandonment aforesaid by said Magneson, the sum of \$1,300."

It was also found: "That the value of the work and materials done and furnished in the construction of said buildings, including materials then actually delivered, on the ground, estimated as near as may be by the standard of the whole contract price (exclusive of the extra labor performed and materials furnished as aforesaid), at the time of the abandonment of the said contract by said Magneson as aforesaid, was and is the sum of \$14,730"; that "all of the materials which were furnished by the plaintiffs herein were furnished to be used, and actually used, in the construction of said buildings, and all of the labor performed by these plaintiffs was actually performed upon and in the construction of said buildings, * * * all with the full knowledge and consent of the said Winifred A. Perry."

The foregoing are the general findings more or less applicable to all the claims involved.

The court then finds the facts as to the specific amounts of labor performed and materials furnished by the several plaintiffs,

the filing of their liens, and the amount remaining unpaid in each case, amounting in all to the sum of \$7,970.87.

The court found, among other conclusions of law, that the contract between Magneson and R. A. Perry, as recorded, was void, and "that no legal contract was ever made or entered into between the owner of said premises, to wit, Winifred A. Perry and O. M. Magneson, for or with relation to the construction of said buildings"; that the "liens hereinbefore declared in favor of said plaintiffs, and the said several sums hereinbefore stated and declared to be due, owing, and unpaid to the said plaintiffs respectively, are prior and superior to the rights, interests and claims of the defendants Winifred A. Perry and R. A. Perry, in and to said premises"; and that plaintiffs are entitled to have the "said described land, together with the buildings thereon and the premises thereof, sold * * * for the satisfaction of said respective liens," etc.

Judgment was accordingly entered.

Defendants appeal from the judgment and from the order denying their motion for a new trial.

The theories upon which respondents urge affirmance of the judgment are as follows:

(1) That a valid contract existed which was duly recorded; that it was abandoned, and hence the amount applicable to the liens of plaintiffs should be measured by section 1200 of the Code of Civil Procedure.

(2) That no contract existed, because in the construction of the buildings the plans and specifications of the recorded contract were so departed from and so increased the cost of the buildings as actually constructed as to "constitute a new and independent contract, and render void the recorded contract."

(3) That the entire interest of defendant Winifred A. Perry in the premises should be subjected to plaintiffs' liens because of her failure to give the notice of nonresponsibility required by section 1192, Code of Civil Procedure.

[1] The court found that there was a valid contract. If that finding is to stand, the payment of the liens must be determined by section 1200, Code of Civil Procedure, and the statutes in force prior to the act of 1911 (Stats. 1911, p. 1313). Section 1183, Code of Civil Procedure, gives a lien to mechanics and materialmen for labor done or materials furnished, "whether at the instance of the owner, or of any other person acting by his authority or under him" and "in case of a contract for the work between the reputed owner and his contractor, the liens shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price."

Section 1200 provides that, where the contract has been abandoned before completion,

"the portion of the contract price applicable to the liens of other persons than the contractor, shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens."

In the recent case of *Roystone v. Darling*, 171 Cal. 526, 154 Pac. 15, the history of our mechanic's lien law is very fully shown, and the various decisions of the Supreme Court are cited which have given construction to the statute as it has been amended from time to time. It was shown in that case that up to the passage of the act of 1911 the Supreme Court "has followed the rule established by the cases last cited and has uniformly declared, with respect to such liens, that if there is a valid contract, the contract price measures the limit of the amount of liens which can be required against the property by laborers and materialmen"; "that the contract, legally made, limits the liability of the owner to lien claimants." See, also, *Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025, where the meaning of section 1200, as affecting the liability of the owner in the case of an abandoned valid contract, was very clearly pointed out.

What, then, was the situation when the contract was abandoned and what were the lienors' rights? The court found that the contract price was \$23,567. It found that the value of the extra work performed and materials furnished at the time of abandonment was \$3,866.28, of which there had been paid the sum of \$1,300; and that the value of the work and materials, including materials then actually delivered at the ground, "estimated as near as may be by the standard of the whole contract price (exclusive of the extra labor performed and materials furnished as aforesaid), at the time of the abandonment of the said contract by said Magnuson as aforesaid, was and is the sum of \$14,730," of which the sum of \$10,000 had been paid.

Respondents state the account thus:

Labor performed and materials furnished	\$14,730.00
Value of alterations, etc.	3,866.28
Total	\$18,596.28
Upon which was paid	11,300.00
Leaving applicable to the liens.....	\$ 7,296.28
The court gave judgment for	7,970.87

—which is \$674.59 more than the fund, accepting respondents' method of computation.

But respondents make no allowance for the cost of completing the buildings which,

through no fault of appellants, were left in an unfinished condition. What the actual cost of completion was to appellants may be immaterial (*Ganahl Lumber Co. v. Weinsveig*, supra), but as was said in *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, 97 Pac. 152, 154:

"When he (owner) is, without any default on his part, burdened with the cost of completing the building, it is but fair and just that he should be relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. In no other way can he be protected in his constitutional right to have his liability limited to the amount which, by a valid contract, he has agreed to pay."

We have been unable to formulate any equation under the rule of section 1200 as approved by the Supreme and appellate courts which would support the findings of the court for the full amount found subject to the liens, on the theory of a valid contract abandoned by the contractor.

The finding that there was a valid contract and that it was abandoned by the contractor before completion is sustained by the evidence, and, unless the judgment can find support upon one or other of plaintiffs' remaining theories, it must be reversed.

[2] Plaintiffs' second theory was that the original contract was rendered void by reason of the alterations in the plans adding so materially to the cost of the buildings. The contract contained the provision quoted above by which the owner was given the right to make any alterations he might wish to make "from said contract, specifications, or plans" which, when made, "shall in no way affect or make void the contract, but will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation." Notice of the provision of the contract was given to all parties concerned by its recordation, and nearly all of them furnished some of the materials or labor constituting these alterations, and no objection was made to any claim because it was for extras. It would be difficult to express in language more explicit authority to deviate from the plans and specifications than is found in this contract. So far as lien claimants are concerned, alterations are immaterial, except where there is an abandonment, and in such case they may be considered in ascertaining the cost of completing the buildings according to the contract, for the contract so expressly provides. *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651. That the owner may provide in his contract for changes or alterations in the building during its construction without invalidating the contract we do not doubt.

Witness Quinn, manager of plaintiff Pacific Manufacturing Company, was asked by plaintiffs' attorney whether or not there were changes or alterations made in the construction of the buildings prior to abandonment, and, if so, to state what, if any, there were.

"A. One of the changes made was in the cornice of the building. The owner took exception to it for some reason or other, and caused the cornice to be torn down and a new cornice was put up in place of it. Another change was made in the pergola after that was in place. The owner * * * objected to the use of beams, and had that torn down and a new pergola put in place. And then the owner was dissatisfied with the quality of brick used in the construction of the building and had a special brick manufactured. There were other changes of a minor character. * * * Q. Were there any changes in the interior arrangement of the house, the rooms, to your knowledge? A. No material changes."

He testified as to some changes made after abandonment, but we cannot see that they would affect the question of the lienors' rights at the time of abandonment; for they would be taken into account in ascertaining the cost of completion under the contract.

Other witnesses pointed out some changes made in the course of the construction of the building. The contract called for a "brick veneered and frame residence and garage." The court found that the reasonable value of the changes made, in materials and labor, was \$3,866.28; that, while said changes did not materially alter the elevations and appearances of said buildings, the same consisted in the use of more expensive material, greater increase in labor, and necessitated the tearing out and replacing of certain work done and performed in the buildings, thereby changing the interior construction as to value and character of materials, and to a certain extent in general appearance. We do not think that the facts found justified the conclusion of the trial court that the contract was void.

[3-5] Plaintiffs' third theory calls for the application of section 1192. This claim is that this section of the Code of Civil Procedure makes the title and interest of defendant Winifred absolutely responsible irrespective of the contract, and that the findings and judgment may rest entirely on the fact that she did not give the notice contemplated by section 1192.

Plaintiffs allege in their complaints that:

"Said defendant R. A. Perry, acting for himself and on behalf of the said defendant Winifred A. Perry, and with her full knowledge and consent, entered into a contract in writing with the said defendant Magneson," etc.

In their answers, defendants admit these averments of the complaints.

The finding of the court was:

"That defendant R. A. Perry is, and was at all times herein mentioned, the reputed owner of the hereinafter described land, buildings, and premises, and that Winifred A. Perry is, and was at all times herein mentioned, the real owner, to wit, the owner in fee," etc.

The court also found that during all the time that labor was being performed or materials being furnished for said buildings said defendant Magneson was employed and engaged in the construction of said buildings by the said R. A. Perry, with the full knowledge and consent of the said defendant Winifred A. Perry, "and that all the materials

furnished or labor performed" was furnished and performed with the knowledge and consent of the said Winifred A. Perry.

There was no direct finding that R. A. Perry executed the contract as the agent of his wife, Winifred, nor was there any evidence that she personally contracted with Magneson. The admitted averments of the complaint that defendant R. A. Perry entered into the contract on her behalf and with her full knowledge and consent rendered any finding on the fact of his authority to act for her in the matter immaterial. And the finding that "the said Winifred A. Perry never made or entered into any contract in writing with the said defendant R. A. Perry and one Magneson, or either of them, relating to the construction of said buildings," is not inconsistent with the fact that her husband entered into the contract on her behalf and with her full knowledge and consent.

It was said in *Stimson Mill Co. v. Braun*, 136 Cal. 122, 125, 68 Pac. 481, 482 (57 L. R. A. 726, 89 Am. St. Rep. 118):

"The materialman and the laborers are protected in their right to a lien by the provision in section 1183 of the Code of Civil Procedure, requiring such contract to be in writing and made a matter of public record. They know that, in accordance with the decisions of this court, the Legislature cannot give a right of lien to an extent greater than the contract price. By being placed upon record the contract is open to their inspection and examination, and if they are not content with its provisions they may decline to furnish any materials for the building or perform any labor thereon. But if they do furnish any, their right to a lien must be limited by the terms of the contract."

And as was said in the *Roystone Case*, supra:

"The contract, legally made, limits the liability of the owner to lien claimants."

In the present case there was a valid contract made on behalf of the owner and with her knowledge and consent, and it seems to us that the owner was not obliged also to give notice under section 1192 of nonresponsibility in addition to the recorded contract in order to secure the protection given her by the statute. We have found no case where our Supreme Court has held that lien claimants may disregard the recorded contract of the owner and proceed against him under section 1192 unless he has also given the notice mentioned in that section. Where the contract is made on his behalf and with his knowledge and consent, and is recorded, and the lien claimants so state in their complaints, we can see no reason why the contract should not be the measure of his liability. In short, the owner's liability under section 1192 does not attach when there is a valid recorded contract made in his behalf.

Some other questions are presented in the briefs, but the view we have taken renders their consideration unnecessary.

The learned trial court seems to have found the amount due on the claims upon the theory that the contract was void because of the alterations in the plans and that the owner

was liable under section 1192. We think the contract was valid and the owner's liability should be measured by section 1200.

The judgment and order are reversed.

We concur: HART, J.; ELLISON, Judge pro tem.

On Rehearing.

PER CURIAM. The attention of the court having been called to the fact that the trial court in the above-entitled cause made full findings under section 1200 of the Code of Civil Procedure, and it appearing that judgment may be entered upon such findings in accordance with the opinion of this court now on file, thus avoiding the delay and expense of a new trial, the judgment heretofore entered reversing the judgment and order in said action is set aside, and the trial court is directed to enter judgment on the several claims in the consolidated action in accordance with and as provided by section 1200 of the Code of Civil Procedure as it existed prior to the amendment of 1911, and as thus modified, the judgment and order are affirmed.

On Motion to Rescind Order.

The motion in the above-entitled action for an order recalling, setting aside, and rescinding the order made and entered by this court on the 29th day of August, 1916, wherein the trial court is directed to enter judgment on the findings in accordance with the opinion rendered August 25, 1916, in said action, having this day come on to be heard:

It is ordered that the order of this court made and entered August 29, 1916, in said action, be and the same is set aside, and the judgment made and entered August 25, 1916, in said action, shall stand as hereinbefore made and entered.

BRESLAUER v. McCORMICK-SÆLTZER CO. (Civ. 1489.)

(District Court of Appeal, Third District, California. Aug. 25, 1916. Rehearing Denied by Supreme Court Oct. 23, 1916.)

1. MASTER AND SERVANT §271(18) — ACTION FOR SALARY—SUFFICIENCY OF EVIDENCE.

In an action to recover a balance alleged to be due on account of salary as chief clerk of a corporation at the rate of \$175 per month, where the defendant claimed that the salary was \$150 per month and had been fully paid, evidence held to sustain a judgment for the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 119; Dec. Dig. §271(18).]

2. PAYMENT §74(2) — ACTION FOR SALARY—RECEIPT—CONCLUSIVENESS.

In an action to recover from a corporation on account of salary at \$175 per month, the fact that plaintiff, who received \$150 a month and \$25 per month out of a secret fund, signed a receipt each month in full was not conclusive that he had been paid the full agreed compensation, where it appeared that defendant did not want the receipt to show the full salary paid.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 138, 139, 229; Dec. Dig. §74(2).]

3. EVIDENCE §271(18) — DECLARATIONS — SELF-SERVING DECLARATIONS.

In an action for the balance due on account of salary, the stubs of checks and resolutions of the defendant's board of directors, made long after the making of the contract with plaintiff, were self-serving declarations, and properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1096; Dec. Dig. §271(18).]

4. ACCORD AND SATISFACTION §25(2) — PLEADING—ISSUES—FINDING.

In an action for the balance of salary at the rate of \$175 per month, the answer denied that plaintiff had not been paid all his salary, and alleged that plaintiff had agreed to, and that defendant had promised to pay, a salary of \$150 per month, which amount was paid, and that plaintiff received and accepted payments of that salary amounting to \$2,250. The court found that the salary was \$175 per month; that plaintiff received \$150 per month, and the balance was due. Held, that the answer was no more than a statement that the agreed salary was \$150 per month and that the full amount at that rate had been paid and accepted, and was not an allegation that there was an accord and satisfaction by which the parties settled a disputed claim on the basis of \$150 per month, so as to require a finding on such issue.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 154, 155; Dec. Dig. §25(2).]

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Action by Louis Breslaue against the McCormick-Sæltzer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, for appellant. W. D. Tillotson, of Redding, for respondent.

ELLISON, Judge pro tem. This action is brought by the plaintiff to recover of the defendant the sum of \$375, balance alleged to be due on account of salary from February 28, 1914, to May 1, 1915. Plaintiff has judgment for the amount claimed, and the defendant appeals therefrom.

The complaint alleges that between the above dates plaintiff rendered services for defendant at its instance and request, each and every month, in the capacity of chief accountant and clerk; that for said services defendant promised to pay him at the rate of \$175 per month, which salary for said time amounted to \$2,625; that defendant had only paid him of said amount the sum of \$2,250, leaving a balance due him of \$375, which had not been paid, and for which judgment is asked. The answer denied that plaintiff's salary was fixed by agreement at \$175 per month, but alleged it was fixed at \$150 per month, and alleges that during said period of employment—

"the plaintiff received and accepted from defendant in payment of said salary the sum of \$150 for each and every month of said time, amounting for said period to the total sum of \$2,250, and alleges that said salary has been fully paid and satisfied."

The findings of the court followed closely the allegations and language of the complaint. The principal contention of the appellant

is that the finding of the court "that for plaintiff's services the defendant promised to pay him \$175 per month" is not sustained by the evidence, that the evidence shows he was only to receive \$150 per month, and that this amount has been fully paid to him. It appears from the record that the defendant is engaged in the general merchandise business in the city of Redding, Shasta county, Cal., and has in its employ many persons. The plaintiff entered the employ of the defendant in July, 1901, as chief clerk and accountant, and continued with it until May 1, 1915. In February, 1910, and for some time prior thereto, the salary of the plaintiff appeared upon the books of the defendant as \$125 per month, but for some time he had been receiving, in addition to his "book salary," \$25 per month which was paid to him at the end of the year in a check for \$300.

The plaintiff testifies that in the latter part of the year 1909, or the early part of 1910, he applied to the defendant for an increase in his compensation or salary. Quoting from his testimony:

"I applied to Mr. Saeltzer for an increase of salary. What was said to me: 'You were to receive a book salary of \$150 per month.' A salary on a separate fund known as the 'secret fund' of \$25 per month. It was said at the time I would get the \$25 per month at the end of the year."

He further testified that after this incident his salary was entered on the books of the defendant at \$150 per month, which was paid each month, and that \$300 was paid him each year out of the "secret fund," and that this arrangement was carried out from February 28, 1910, to February 28, 1914. There is no conflict in the testimony as to the fact that the corporation kept a fund or account known as the "secret fund," and no dispute that plaintiff and other employes of the defendant received money from this fund, both before and after February, 1910, and no dispute that from February, 1910, to February, 1914, plaintiff was paid by defendant out of the fund \$300 on four different occasions, making \$1,200 in all. This gave him a compensation for his work between those dates of \$175 per month. From February, 1914, to May 1, 1915, he only received \$150 per month, and received nothing out of the secret fund. The extra \$25 per month for the period between the last two dates is the basis of this action. The defendant denies that it ever agreed to pay the plaintiff at any time any salary in excess of the \$150 per month appearing on its books.

The conflict between the parties centers, largely, around the significance and meaning of this transfer of money from the "secret account" to the plaintiff, the position of the latter being that the \$25 per month was paid to him as a part of his agreed salary out of this fund; the defendant's position is that the \$300 per year paid was a pure gift for good services rendered, and not the result of

any contractual liability; that it could give it or not to the plaintiff in any years as it saw fit.

The plaintiff testified that Mr. Saeltzer gave as a reason for not having the books show he was getting \$175 per month that he did not want the other employes to know what salary any particular employe was getting. In this he is corroborated by the testimony of Mr. Saeltzer, from which it appears a "secret fund" was kept, and from it other employes besides the plaintiff received extra compensation. His testimony shows that the "secret fund" was a recognized part of the machinery for transacting the business of the corporation. As to its purpose and use, Mr. Saeltzer testified:

"The secret fund was kept to pay extra salaries. To explain salary—for instance, we have a person in our employ who is working for \$75 per month, and that being a good man. And he says: 'I want to leave; I can make more money.' I don't want to give him more on the books, for the next man would want more salary if I started this. So I would pay him the extra salary out of the secret fund, and the board would approve it."

[1] We think this testimony of Mr. Saeltzer clears up the whole situation and corroborates the plaintiff. It makes manifest that the defendant did not want the books to show, in all cases, the salary that was being paid to an employe, and that they did not; that the "secret fund" was kept for the purpose of paying "the extra salary" (to quote his testimony), extra salary meaning salary agreed upon in excess of that entered on the books, and that plaintiff was paid \$1,200 out of this "secret fund" after his salary was raised on the books from \$125 per month to \$150. That the plaintiff did have an arrangement with the defendant that he was to get \$25 per month in addition to his book salary of \$150 per month seems clear. And the evidence shows he did receive it for four years. His book salary was raised from \$125 per month to \$150 per month February, 1910. After this, according to the testimony of Mr. Saeltzer, he secured, in addition to his book salary, the following sums: January 1, 1911, \$300; May 23, 1912, \$300; December 22, 1913, \$300; December 24, 1914, \$300. The above testimony of the defendant's manager amply supports the plaintiff's contention that there was a "secret fund," that out of it he was paid \$300 per year extra compensation for several years, not as a gratuity, but as of right under the terms of his contract with the defendant, and that he is entitled to it as of right for the period embraced herein.

Appellant further contends that the plaintiff's testimony is inconsistent with the entries made in the books of the corporation by himself. It is true that for the period here involved, the plaintiff's salary was entered upon the books of the corporation as \$150 per month. But in view of the plaintiff's testimony that it was a part of his agreement with R. M. Saeltzer that the books

should show a salary only of \$150 per month, the discrepancy between his actual salary and the book entries stands explained. The entries on the books were in accordance with the contract.

There is other evidence in the record bearing upon the finding under discussion, both in favor of the plaintiff and the defendant. We have examined it all with care, but enough has been referred to to show that the finding of the learned trial judge that plaintiff was working under a contract for an agreed compensation of \$175 per month finds substantial support in the evidence.

[2] 2. It appears that during the later months of plaintiff's employment the system of paying employes was changed to a time card system, and employes receipted on the card. The plaintiff signed these receipts. The receipts were worded as follows:

"Received payment in full for period and amount stated, and time recorded on this card."

Counsel for appellant claims that this should be held conclusive on plaintiff that he had been paid his full agreed compensation. A receipt is never conclusive evidence. Is always open to explanation. The explanation contained in the record is sufficient to prevent this receipt from concluding plaintiff. If the defendant did not want the books of the corporation to show the salary plaintiff was receiving, and the evidence is ample for the drawing of such a conclusion, then it did not want, for same reason, the receipts to show it. It would have been an idle act to have the books show that he was getting only \$150 per month, and follow this with a receipt showing he was receiving \$175 per month.

[3] 3. The stubs of checks and resolutions of the board of directors, made months and years after the contract was made with plaintiff, were self-serving declarations, and properly excluded.

[4] 4. It is claimed the court erred in failing to find upon a material issue raised by the answer. In the brief of counsel the allegation of the answer upon which it is claimed no finding was made is quoted as follows:

"That during said time defendant paid to plaintiff, and plaintiff received and accepted in payment of said salary, the sum of \$150 for each and every month of said time, amounting for said period to the total sum of \$2,250."

To properly appreciate the significance of the above language, it must be considered in connection with its context. It is found in paragraph 4 of the answer. The first part of the paragraph denies that plaintiff has not been paid all of his salary and, proceeding, says:

"Defendant alleges that for said services so rendered by plaintiff to defendant during said time mentioned in the complaint, plaintiff agreed to accept and defendant promised to pay to plaintiff a salary at the rate of \$150 per month for each and every month during said time, and

amounting to the total sum of \$2,250" (and alleges that during said time defendant paid to plaintiff and plaintiff received and accepted from defendant in payment of his salary, the sum of \$150 for each and every month of said time, amounting in said period to the total sum of \$2,250, and alleges that said salary has been fully paid and satisfied).

The court has found that the agreed salary was \$175 per month, and that of it only \$150 per month has been paid, and that the balance is unpaid and due. The part of the answer above quoted and placed in parentheses, when considered with its context, is no more than a statement that the agreed salary was \$150 per month, and that the full amount computed at that rate has been paid and accepted by defendant. The statement in the answer that his salary was to be \$150 per month is the pleader's statement of what the contract of employment was as originally made, and is not, and was not intended as, a statement that after the services were performed, there was an accord and satisfaction in and by which plaintiff and defendant settled a disputed claim on the agreed basis of \$150 per month for the period.

Viewed in this light, the findings of the court fully cover the issue made.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

ASPINWALL v. ASPINWALL (No. 2235.)

(Supreme Court of Nevada. Oct. 9, 1916.)

DIVORCE \Leftrightarrow 91—JURISDICTION—COMPLAINT.

Under St. 1915, c. 28, § 1, providing that divorce may be obtained by complaint to the court of the county in which the cause therefor accrued, or in which defendant shall reside or be found, or in which plaintiff resides, if the parties last cohabited there, or in which plaintiff shall have resided for six months, the complaint of a husband, not alleging his residence in the county, but merely that he is now therein, does not bring his status within the jurisdiction of the court, the matrimonial domicile of the parties being in another state, and the marital offenses complained of being such as might have been determined by the courts of the matrimonial domicile, though the complaint alleges that defendant can be found in and is a resident of the county, the right of the wife to acquire another domicile separate from him, where their unity is dissolved, not availing him.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 287-289; Dec. Dig. \Leftrightarrow 91.]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by Lloyd Aspinwall against Elizabeth Roosa Aspinwall. From an order dismissing the action, plaintiff appeals. Affirmed.

George Springmeyer, of Reno, for appellant. Hoyt, Gibbons & French, of Reno, for respondent. Brown & Belford, of Reno, amici curiæ.

McCARRAN, J. This was an action in divorce. The complaint in the action set forth:

"That the defendant, Elizabeth Roosa Aspinwall, is now living in and can be found in and is a bona fide resident of Washoe county, state of Nevada, and that plaintiff is now in said county; that substantial parts of this cause of action accrued in said Washoe county, state of Nevada."

Two causes of action are set up in the complaint in furtherance of plaintiff's prayer for a decree of divorce. The first cause of action is that of extreme cruelty resulting in mental anguish to the plaintiff, and so forth. The second cause of action is that of adultery, and the complaint in that respect alleges, on information and belief, acts of adultery committed by defendant in the town of Chatham, Morris county, state of New Jersey, and in the city of New York, state of New York, and at 700 Wheeler avenue, in the city of Reno, state of Nevada, and elsewhere in the county of Washoe, state of Nevada.

A demurrer to the complaint was interposed by defendant, respondent herein, in which, among other things, the demurrant asserted the want of jurisdiction of the district court.

The matter being submitted on demurrer, the same was sustained by the court for want of jurisdiction. The plaintiff, appellant herein, declining to amend his complaint, an order was entered dismissing the action. From this order appeal is prosecuted to this court.

It will be observed that the complaint in this action makes no pretense at asserting either that the residence of the plaintiff was within this state, or that he was domiciled within the jurisdiction of the court. The plaintiff in the court below, appellant herein, sought to assert the jurisdictional prerequisite by alleging that the defendant, Elizabeth Roosa Aspinwall, "is now living in and can be found in and is a bona fide resident of Washoe county, state of Nevada."

Our statute applicable to the subject reads as follows:

"Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes. * * * Stat. 1915, p. 26.

The appellant in this case relies upon the decision of this court in the case of *Tiedemann v. Tiedemann*, 86 Nev. 494, 137 Pac. 824. In that case the wife, Gertrude Eleanor Tiedemann, alleged in her complaint:

"I. That plaintiff is a resident of Carson City, Ormsby county, state of Nevada.

"II. That plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that said defendant is now within, and can be found in said county of Ormsby, and within the jurisdiction of this court."

The distinction between the allegations of residence contained in the complaint in the *Tiedemann* Case and those found in the com-

plaint in the case at bar must not be lost sight of in arriving at a correct application of the law of the case. In the matter at bar the husband, Lloyd Aspinwall, files his complaint, making no allegation or even attempted allegation of residence within this state or within the jurisdiction of the district court. In this respect the only averment in the complaint is "that plaintiff is now in said county." In the *Tiedemann* Case the wife, as plaintiff, asserted her residence within the jurisdiction of the district court, and alleged grounds which would warrant the assumption of separate domicile.

We approach the consideration of the matters presented in this record in the light of legal doctrines quite well established. At common law it was a well-founded rule that a woman on her marriage loses her own domicile and acquires that of her husband. *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530, Ann. Cas. 1912D, 400, note.

While this general rule established at common law may prevail to-day, modern law and modern decisions have established at least one well-founded and well-sustained exception.

The Supreme Court of the United States, in the case of *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604, in answer to the proposition that the domicile of the husband is the wife's, and that she cannot have a different one from his, said:

"The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. 2 Bishop on Marriage and Divorce, 475. The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and the domicile of the husband are of no consequence. *Ditson v. Ditson*, 4 R. I. 87."

Eminent authority supports the proposition that under modern law the wife may acquire a domicile separate and distinct from that of her husband where the unity of the husband and wife is breached, as, for instance, where the husband has given cause for divorce (*Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; *Frary v. Frary*, 10 N. H. 61, 32 Am. Dec. 395; *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395, note; *Duxstad v. Duxstad*, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. Rep. 1138; 9 R. C. L. 545), or where by mutual agreement there is a separation (9 R. C. L. 545), or where by the institution of divorce proceedings the dissolution of the unity is made manifest (*Jenness v. Jenness*, supra; *McGrew v. Mutual Life Insurance Co.*, 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20).

It may, we think, be safely asserted as an

established proposition of law that, if the plaintiff is a bona fide resident of the state of the forum, the courts of that state may acquire jurisdiction to decree a divorce in his or her favor irrespective of the domicile or residence of the defendant. 9 R. O. L. 400.

In the case of Tiedemann v. Tiedemann, supra, this court held that an action for divorce may be instituted by a resident of the state in a court of the county, regardless of the residence of the defendant if it is alleged that the defendant can be found within the county where the suit is instituted and is actually served with process therein.

The residence of the wife, the defendant in the case at bar, even though the same might be within this state and within the alleged county, would, as we view it, avail nothing in the way of conferring jurisdiction where the plaintiff, the husband, was a resident of and domiciled in another state and made no pretense of asserting residence within this jurisdiction. The fixed domicile of the parties was the domicile of the husband, the plaintiff in this action. True, the wife might under conditions heretofore referred to, establish a separate domicile, and, when the same was established under the laws of the state, she might sue for divorce, and thereby confer jurisdiction upon the courts of the state in which her new domicile was fixed; but such is not the case presented in the record before us. The matrimonial domicile of the parties in the case at bar was in another jurisdiction, and, in so far as the plaintiff in this action was concerned, he, claiming no residence or domicile within this state, could not, as we view it, bring his status within the jurisdiction of our district court. Domicile in legal contemplation depends, not alone upon residence, but upon all the circumstances surrounding the act of residence. 9 R. O. L. 540.

The establishment of residence, like that of domicile, must depend largely upon the intention of the party, and no intention can be even assumed where in a matter of this kind the party seeking to confer jurisdiction on the courts for the purpose of having the latter determine his marital status declines to even assert his residence.

The rule recognizing the right of the wife to acquire another and separate domicile from her husband where their unity is dissolved will not avail in behalf of the husband to the extent that he may go into a jurisdiction foreign to the matrimonial domicile, and, without asserting his residence or domicile therein, invest the courts with jurisdiction to determine his marriage status. Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.

The right of the wife to establish a separate residence and domicile from that of the husband arises out of the necessity of the case, and, as we view the law, her right to assert a separate residence grows out of the

grounds or causes by reason of which the matrimonial unity no longer exists in fact. It is the averment of a residence separate and apart from that of the husband, together with the causes for such separate residence, that gives the wife the right to sue for divorce in the courts of a jurisdiction other than that of the matrimonial domicile.

This case is to be distinguished from the case of Tiedemann v. Tiedemann, supra, inasmuch as in that case the wife asserted in her verified complaint grounds which, if proven, were sufficient to establish a cause for her maintenance of a separate residence and domicile, and coupled with these averments was the allegation of her residence within this jurisdiction; while in this case no averment of residence on the part of the husband, the plaintiff, appears, and the marital offenses of which he complains were such as might properly have been determined by the courts of the matrimonial domicile.

We are cited to many authorities, some of which bear directly and others indirectly upon the question at bar. But in reviewing these authorities we must not lose sight of the fact that we are dealing with a matter of public concern, one in which the basic or underlying thing applicable to the conference of jurisdiction is that of the status of the parties to a marriage contract; and, while there is a lack of uniformity in the decisions, there is nevertheless a strong tendency appearing in those decisions which we deem best considered to hold that the question of domicile is vital in determining jurisdiction. In the case of Loker v. Gerald, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. Rep. 252, the very question which we deem the turning point in the matter at bar was touched upon. In that case the parties were married in Massachusetts and lived together until the wife deserted the husband, who afterwards moved to Colorado, and there prosecuted a divorce against the wife on grounds of desertion and adultery. There the court said:

"It is sufficient for the present case to say that by our decision, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that therefore, for the purpose of divorce, the court in Colorado had jurisdiction of both the parties, within the meaning of the statute."

In the case of Kell v. Kell, 80 Neb. 496, 114 N. W. 570, the Supreme Court, of Nebraska had under consideration a question quite similar to that at bar, in which Kell, a minister, having received a call from a church in Iowa, moved with his wife and family to the latter state. After living in Iowa for some months, the wife with her children returned to the state of Nebraska, their former residence, and within three days after arriving in the latter state she brought her action for divorce, alleging that the defendant was a nonresident. It was held that, the plaintiff and defendant having established

a home in Iowa with intention to make it their future residence, the plaintiff, the wife, could not regain her residence in Nebraska to entitle her to maintain an action for divorce until she had been there for a period of six months.

Many authorities may be found where, following the rule laid down by this court in the case of *Tiedemann v. Tiedemann*, supra, the wife, declaring her residence to be in a jurisdiction foreign to that of her husband, has successfully maintained an action for divorce even through constructive service. Indeed, many other cases have been cited to us where the husband, moving to another jurisdiction than that of the matrimonial domicile, has taken up his residence in the foreign domicile, and there successfully prosecuted his suit for dissolution of the marital relations. But the case at bar falls within a different class from either of these, inasmuch as the husband, the plaintiff here, fails to assert domicile or residence within this state, and the status of the parties is not by any allegation declared to be within the jurisdiction of our district court.

As we have already stated, the question of residence is one that may depend upon both the acts and the intention of the party seeking to establish the same. It is a question which involves both the law and the facts, and may be determined by the acts and conduct of the party and by other matters susceptible of proof. *Hulett v. Hulett*, 37 Vt. 586; *Reeder v. Holcomb*, 105 Mass. 94; *Gambrell v. Schooley*, 95 Md. 280, 52 Atl. 500, 63 L. R. A. 427; *Kennedy v. Ryall*, 67 N. Y. 379; *Hope v. Flentge*, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806; 9 R. C. L. 556.

Where under a statute such as ours residence is essential to the conference of jurisdiction, the allegation of residence must be made by the party who seeks in the first instance to have the court determine his marital status. The intention of the party may be established by proof as any other element going to the merits of the action and as any other fact in the case may be determined by the trial court.

The order of the trial court is affirmed.
It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

POFLATCH LUMBER CO. v. BOARD OF COUNTY COM'RS OF LATAH COUNTY.
(Supreme Court of Idaho. Sept. 26, 1916.)

1. HIGHWAYS \Leftrightarrow 127(1) — TAXES — DUTY OF COUNTY OFFICERS.

Under the provisions of section 882, Rev. Codes, it is the mandatory duty of the board of county commissioners to levy a property road tax to be paid into the county road fund, and under the provisions of section 99, Sess. Laws 1913, p. 203, boards of county commissioners in this state must levy annually upon all the tax-

able property in their respective counties a tax for general county purposes, and upon the same property and for the same year the board must also levy for general road purposes, to be collected and paid into the county treasury and apportioned to the county road fund, which levy shall not exceed 25 cents on each \$100 of such assessed valuation.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. \Leftrightarrow 127(1).]

2. HIGHWAYS \Leftrightarrow 130—MAINTENANCE—TAXES—DISTRIBUTION.

Subdivision 6 of section 882, Rev. Codes, provides that at least 25 per cent. of the fund collected in any road district must be expended within the district in which such fund was collected.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387; Dec. Dig. \Leftrightarrow 130.]

3. HIGHWAYS \Leftrightarrow 130—MAINTENANCE—TAXATION.

Under the provisions of section 900, Sess. Laws 1913, p. 524, the tax for general road purposes must be levied by the board of county commissioners at their session when the tax is by them levied for county purposes, and must be collected by the same officers and in the same manner as other state and county taxes are collected, and paid into the county treasury and apportioned to the county road fund, except that 25 per cent. of that portion of such tax which shall have been levied upon property within the limits of any incorporated city, town, or village must be apportioned to such city, town, or village for the road fund of such city, town, or village, and if there be within the county any taxing district organized under any law of this state providing for the apportionment of any portion of such tax to such taxing district, that portion of such tax which may have been levied upon property within the limits of such taxing district shall be paid and applied as provided in such law.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387; Dec. Dig. \Leftrightarrow 130.]

4. HIGHWAYS \Leftrightarrow 138—MAINTENANCE—TAXATION.

Where the resident taxpayers of any road district within a county desire a special road levy, in addition to the general levy made by the board of county commissioners for road purposes on the assessed valuation of all of the taxable property in the county, in order to provide for a greater degree of improvement than would be made possible by the general levy, said resident taxpayers may petition the board of county commissioners for such special levy. Under the provisions of section 901, Sess. Laws 1913, p. 522, the granting of said petition and the making of said special levy are discretionary with the board of county commissioners.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 392; Dec. Dig. \Leftrightarrow 138.]

5. HIGHWAYS \Leftrightarrow 127(1) — MAINTENANCE — TAXES—DISTRIBUTION.

Boards of county commissioners in making a general levy for road purposes are not authorized, neither is it their duty, to take into consideration petitions filed with them for special levies by a majority of the resident taxpayers of any road district in their respective counties, petitioning such board under the provisions of section 901, Sess. Laws 1913, p. 522. The proceeds of any such special levy for road purposes, when granted, are to be expended only within the district or for the benefit of the district from which they were collected, and should not be considered by boards of county commissioners in making a just and equitable distribution to the various road districts of the moneys paid into the county treasury under the general levy made upon the

assessed valuation of all of the taxable property in their respective counties for road purposes.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 384; Dec. Dig. § 127(1).]

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Application by the Potlatch Lumber Company for a writ of mandate to the Board of County Commissioners of Latah County. From a judgment denying a peremptory writ, the applicant appeals. Reversed.

A. L. Morgan and E. C. Boom, both of Moscow, for appellant. Frank L. Moore and C. J. Orland, both of Moscow, for respondent.

BUDGE, J. This proceeding was brought for the purpose of procuring a writ of mandate to compel the board of county commissioners of Latah county to levy a general property tax on the assessed valuation of all of the taxable property in Latah county for the maintenance and improvement of the established public roads and highways within the county.

From the record in this case, among other things the following facts appear: For many years past the board of county commissioners of Latah county has failed and refused to levy a general property tax for road purposes on the assessed valuation of all of the taxable property in said county, except for such an amount as they found necessary for the establishment and laying out of new roads, the purchase of road machinery, and the payment of the salary of road overseers. It also appears that the commissioners have taken the position that the cost of the maintenance and improvement of the public roads and highways within the county must be met by special assessment upon petition filed with the board by a majority of the resident taxpayers within each road district, provided the resident taxpayers in such road district shall deem it necessary in order to properly maintain and improve the public roads and highways within such districts; and unless the resident taxpayers so petition for the levy of a special property tax upon the taxable property within their district for the above purpose, it was not incumbent upon, nor the duty of, the board of county commissioners to provide funds for the maintenance or improvement of the public roads or highways within any of the road districts of said county, by the levying of a general property tax for that purpose. In other words, the commissioners took the position that if they, by a general levy for road purposes, provided sufficient funds to pay for the necessary machinery, the salary of road overseers, and the establishment and laying out of new roads, they thereby fully complied with the law fixing their duties in so far as the public roads and highways within the county were concerned.

Upon the complaint and affidavit of the appellant herein, setting forth in substance

the above matters, an alternative writ of mandate was issued by the district judge of the Second judicial district of Idaho, directed against the respondents, the board of county commissioners of Latah county, commanding them to levy on or before the third Monday in September, 1916, a sufficient tax upon all the taxable property in Latah county, to provide for all of the general road purposes in said county, including the necessary working, improvement, and maintenance of all of the roads and highways in said county, or to show cause on the 3d day of July, 1916, why they refuse so to do. To this writ the respondent board filed a demurrer. Upon hearing had, the trial court sustained the demurrer of respondents, quashed the alternative writ, and denied the peremptory writ prayed for. This appeal is prosecuted from said judgment. The appellants assign and rely upon three assignments of error: First, the court erred in sustaining respondent's demurrer; second, the court erred in rendering judgment quashing the alternative writ of mandate; and third, the court erred in denying and refusing to issue the peremptory writ of mandate as prayed for. All of the above assignments of error will be discussed together.

From the foregoing brief statement of facts it will appear that the main questions presented under the foregoing assignments of error for our consideration and determination are, must the board of county commissioners annually levy a general property tax on all taxable property of the county for the express purpose of meeting the expense necessarily incurred in the proper maintenance and improvement of all of the established public roads within the county? or is it compulsory upon each road district in the county to petition each year for the levy of such a special property road tax on the taxable property of the district as a majority of the resident taxpayers shall deem necessary for that purpose?

It is admitted in this case that Latah county has not availed itself of its option to come within the provision of Session Laws of 1909, p. 274, known as the county road system. That being true the provisions of the law as found in title 7 of the Revised Codes and the amendments thereto must be resorted to for the purpose of determining the validity of the action of the board of county commissioners in refusing to levy a general property tax on the assessed valuation of all of the taxable property in Latah county at a rate sufficient to cover the expense necessarily incurred in the maintenance and improvement of the established public roads and highways within the county.

Section 874a, Sess. Laws 1911, p. 167, provides:

"The improvement of highways is hereby declared to be the established and permanent policy of the state of Idaho; and the duty is hereby imposed upon the boards of county commis-

sioners in their respective counties of improving and maintaining the public highways within their jurisdiction and of securing as rapidly as the public revenues will permit and of maintaining permanent good roads of hard surface and properly graded and available for convenient travel thereon throughout the year."

[1, 2] In adopting and carrying out the policy expressed in the foregoing provisions of the statute, the Legislature has enacted from time to time the following provisions:

Section 882, Rev. Codes, *inter alia* provides:

"The board of county commissioners, by proper ordinances, must: * * * Levy a property road tax to be paid into the county road fund. * * *"

Sess. Laws 1913, p. 203, § 99, among other things provides:

"The board of county commissioners of each county in this state must levy annually, upon all the taxable property of said county, a tax for general county purposes, to be collected and paid into the county treasury and apportioned to the county current expense fund * * * and upon the same property and for the same year the said board must also levy a tax for general road purposes to be collected and paid into the county treasury and apportioned to the county road fund, except as otherwise provided by law, which levy shall not exceed twenty-five cents on each one hundred dollars of such assessed valuation."

The words "except as otherwise provided by law" refer to subdivision 6 of section 882, Rev. Codes, and to Sess. Laws 1913, p. 524, § 900, which provide that at least 25 per cent. should be set aside and appropriated to the road district fund where collected. *Genesee v. Latah County*, 4 Idaho, 149, 36 Pac. 701.

It is further provided by section 896, Sess. Laws 1911, p. 162, that:

"The board of commissioners must each year, at the meeting at which they are required to levy the property tax for county purposes, estimate the probable amount of property tax for road purposes and the probable amount of property tax for bridge purposes which may be necessary for the ensuing year over and above any road poll tax which may have been levied, and must regulate and fix the amount of property road tax and the amount of property bridge tax, and levy the same thereby."

[3] Section 900, Rev. Codes, as amended by Sess. Laws 1913, p. 524, provides:

"The tax for general road purposes must be levied by the board of county commissioners at their session when the tax is by them levied for county purposes and must be collected by the same officers and in the same manner as other state and county taxes are collected, and paid into the county treasury and apportioned to the county road fund, except that twenty-five per cent. of that portion of such tax which shall have been levied upon property within the limits of any incorporated city, town or village must be apportioned to such city, town or village [for the road fund of such city, town or village]; and if there be within the county any taxing district organized under any law of this state providing for the apportionment of any portion of such tax to such taxing district, that portion of such tax which may have been levied upon property within the limits of such taxing district shall be paid and applied as provided in such law."

The Legislature has conferred upon boards of county commissioners exclusive jurisdiction over the public roads and highways in their respective counties, for the purpose of the expenditure of the public revenue available each year for the improvement of the public roads and highways, the establishment and laying out of new roads, the purchase of necessary machinery in the construction of roads, and the payment of the salary of road overseers. To determine the amount necessary to be raised for these purposes, section 882a of the Revised Codes provides:

"It shall be the duty of each of the county commissioners of this state personally to visit and inspect all roads and highways in the commissioner's district from which he was elected, on or before the first Monday in February of each year, * * * and also on the first Monday in September of each year; and he shall give to the several road district overseers in the county specific instructions as to the work to be done therein. * * * Said commissioners shall require the said overseers to keep and maintain all the roads in their several districts in good repair, and shall exercise full and complete authority over all roads and overseers of his district; they shall submit a report in detail at each quarterly meeting of the board of county commissioners of the work done and materials used in their several districts, and an approximate estimate of the money needed for improvements upon the roads and highways therein for the ensuing quarter. Said commissioners shall meet in special session on the second Monday of May and September of each year, for the consideration of questions pertaining to the public roads of their respective districts, and each member of said board of county commissioners shall submit a report showing the conditions of the public roads and highways in his district, and the work needed, with an estimate of the cost to be incurred; and the board of county commissioners shall, at said special meetings, make provision for the necessary improvements on the public roads and highways of the county. * * * Any county commissioner who shall willfully or negligently fail to perform any of the duties or requirements herein contained, shall be subject to a fine of not less than fifty dollars nor more than two hundred dollars, to be recovered upon his official bond by action brought by the prosecuting attorney of the county wherein said commissioner resides."

It was no doubt the intention of the Legislature by the enactment of the foregoing provisions to enable the various boards of county commissioners intelligently to fix the rate of levy for road purposes within their respective counties, as well as to require boards of county commissioners to provide a sufficient fund by general levy, in order that all of the public roads and highways within their respective counties might be kept in good condition for public travel and substantially improved as rapidly as consistent with the financial prosperity of the people within the respective counties.

To further emphasize the power and duties of boards of county commissioners with reference to the public roads in their respective counties, the Legislature by express enactments has conferred upon them exclusive supervision and jurisdiction over all of the highways within their respective counties,

except such public roads and highways as are within the territorial limits of incorporated cities, towns, and villages, highway districts, and good road districts, with full power to construct, maintain, repair, and improve all highways within the county, whether directly by their agents and employes or by contract. Section 882b, Sess. Laws 1911, p. 167.

It is quite clear to our minds that the statutory provisions hereinbefore cited and referred to, touching the duties of boards of county commissioners over the public roads and highways of their respective counties, are mandatory, and that the commissioners are required to levy a general property tax annually on the assessed valuation of all the taxable property in their respective counties for the maintenance and improvement of the established public roads and highways therein, as well as for other purposes necessarily connected with, or incidental to, the maintenance of good roads; that the tax so levied is to be collected and paid into the county treasury and apportioned as provided by law to the county road fund, but which levy shall not exceed 25 cents on each \$100 of such assessed valuation, and that at least 25 per cent. of the fund collected in any road district must be expended within that district. *Genesee v. Latah County*, 4 Idaho, 141, 36 Pac. 701.

[4] It is contended on behalf of the board of county commissioners, respondents herein, that they are relieved from a compliance with the foregoing provisions of the statute heretofore cited, by reason of section 901, Rev. Codes, as amended by the Extraordinary Session of the Legislature (Sess. Laws 1912, p. 47), and as again amended by Sess. Laws 1913, p. 522, which provides:

"That when a majority of the resident taxpayers of any road district in such county, at, or before the time of making such levy, shall have petitioned such board of county commissioners for the levy of a special property road tax for their particular district, then the said board of county commissioners shall levy a special property road tax at such rate as in the petition set forth therefor, not exceeding twenty-five (25) cents on each one hundred dollars (\$100.00) of the assessed valuation on all of the taxable property in such district. The proceeds of such special property road tax shall be expended only within the district, or for the benefit of the district from which it was collected: Provided, that whenever a majority of the resident taxpayers of any district shall have petitioned the board of county commissioners for the levy of a special property road tax, and at the same time have embraced or included in said petition a request that said special tax when so levied may be paid by labor upon the highways in their district, the board of county commissioners shall spread upon their minutes an order directing that the special property road tax so petitioned for and levied may be paid by labor by the taxpayers in said district. * * * The imposition of the special property road tax authorized by this section is not an essential or integral part of the highway system provided for by this act, and the imposition of any such tax shall always be discretionary with the board of county commissioners."

The foregoing provisions of the statute do not require a majority of the resident taxpayers in any road district to petition the board of county commissioners for the levy of a special property road tax to be expended within their particular district, and to sustain the contention of the board, namely, that they are only required to make a general levy for road purposes in an amount sufficient to meet the probable cost and expenses necessary for the establishment and laying out of new roads, the purchasing of road machinery, and the payment of the salaries of road overseers, would result in a lack of uniformity in the levy for road purposes and in the amount of money raised and expended in the various road districts. We think it will be conceded that the property of a road district cannot be subject to a special tax for general county purposes, and that it must also be conceded that public roads and highways are constructed for and should be maintained by the county at large, and that the inhabitants of any road district should not be compelled to pay a special tax for the maintenance and improvement of the public roads and highways generally within the county. Should the contention of respondents be sustained, it would no doubt result in not only a lack of uniformity in levies for road purposes, but would also result in the public roads and highways not being kept in good condition throughout the entire county. In one district a majority of the resident taxpayers, prompted by civic pride, would petition the board of county commissioners to levy a special property road tax for road purposes to be expended within their district, while a majority of the resident taxpayers of an adjoining road district may reach the conclusion that no matter what the conditions of the roads might be in their district they would not petition the board of county commissioners to levy a special property road tax to be expended within their particular road district. Thus we would have good roads in one district and bad roads in another; a maximum levy in one district for road purposes and a minimum levy or no levy in another; while the public roads throughout the entire county would be used by all of the inhabitants of the county, as well as the traveling public generally, and the commissioners would be powerless to remedy this condition. It is therefore clear to our minds that it was the intention of the Legislature to permit a majority of the resident taxpayers of any road district to petition at their option in the manner provided by section 901, Rev. Codes, as amended by Sess. Laws 1913, *supra*, for a special levy for road purposes to be expended in their particular district in addition to any amount that they would be entitled to receive under an equitable distribution of the moneys paid into the county road fund as a result of a general levy made for road purposes, as provided by subdivision 7,

§ 882, Rev. Codes, as amended by section 90, Sess. Laws 1913, p. 203, and section 896 as amended by Sess. Laws 1911, p. 162, and section 900, as amended by Sess. Laws 1913, p. 524.

[5] It will be observed upon a reading of section 901, as amended by Sess. Laws 1913, p. 522, that a majority of the resident taxpayers of any road district may at their option petition the board of county commissioners to levy a special property road tax for that particular district, and that it is also expressly provided that:

"The imposition of the special property road tax authorized by this section is not an essential or integral part of the highway system provided for by this act, and the imposition of any such tax shall always be discretionary with the board of county commissioners."

It is clear, therefore, that a majority of the resident taxpayers may or may not petition the board of county commissioners to levy a special property road tax to be expended within their particular district, and it is further apparent that the levy of the tax or refusal to levy the same rests wholly within the discretion of the board of county commissioners, and that it was not the intention of the Legislature that these special levies should be considered by the commissioners in fixing the amount of the general levy or they would not have used the expression that "the imposition of such special levies is not an essential or integral part of the highway system." It was never intended that there should be such uncertainty attached to the raising of funds necessary for the construction, improvement, and maintenance of the public roads and highways within the various counties of this state, and it is also clear from the several sections of the statutes heretofore cited that the Legislature contemplated that the construction, maintenance, and improvement of all of the public roads throughout the county should be provided for primarily by a general levy made for that purpose, to be estimated and determined by the commissioners as provided by section 882a, Rev. Codes, and section 896, as amended by Sess. Laws 1911, p. 162.

It therefore follows from what has been said that the judgment of the trial court in sustaining the respondent's demurrer and entering judgment quashing the alternative writ of mandate, and in denying and refusing to issue the peremptory writ of mandate as prayed for by appellants, should be reversed and a peremptory writ of mandate issue in accordance with the order heretofore made, addressed to the respondents herein, commanding them to levy on or before the third Monday in September, 1916, a sufficient tax upon all the taxable property in said county, not exceeding 25 cents on each \$100 of assessed valuation, to provide for all general road purposes in said county, including the necessary working, improvement, and main-

tenance of all the roads and highways in said county, 25 per cent. of such amount so raised to be expended in the respective road districts where it is raised and to be exclusive of any amount raised upon petition for levy of a special property road tax in any particular road district.

The judgment of the trial court is reversed. Costs awarded to appellants.

SULLIVAN, C. J., concurs. MORGAN, J., did not sit at the hearing or take any part in the decision of this case.

POTLATCH LUMBER CO. v. BOARD OF COUNTY COM'RS OF LATAH COUNTY.

(Supreme Court of Idaho. Oct. 18, 1916.)

1. HIGHWAYS—127(2)—TAXES—LEVY—SCOPE OF PROCEEDINGS.

Under section 896, Rev. Codes, as amended by Session Laws of 1911, p. 162, it is the duty of the board of county commissioners to make an annual estimate of the probable amount of money necessary for general road purposes for the ensuing year, and when it appears that they honestly use their best judgment in making such estimate, their action is not subject to review upon citation to show cause why they should not be punished for contempt in disregarding the mandate of the court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. 127(2).]

2. HIGHWAYS—127(2)—TAXES—LEVY—EVIDENCE.

Held, that it appeared from the evidence adduced before the court upon contempt proceedings in this case that the board of county commissioners for Latah county used their best judgment in fixing the levy for general road purposes for the ensuing fiscal year, and that no evidence was submitted which would justify the court in concluding that said commissioners willfully disobeyed the mandate of the court with regard to said levy, and that they are guilty of neither a civil nor a criminal contempt of this court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. 127(2).]

Application by the Potlatch Lumber Company for writ of mandate to the Board of County Commissioners of Latah County. Proceeding on citation to show cause why respondent should not be punished for contempt for disregarding the mandate of the court. Order to show cause quashed.

A. L. Morgan and E. C. Boom, both of Moscow, for appellant. C. J. Orland, of Moscow, for respondent.

BUDGE, J. On the 12th day of September, 1916, a writ of mandate was issued by this court, directing the board of county commissioners of Latah county to levy on or before the third Monday in September, 1916, a sufficient tax upon all the taxable property in said county not exceeding 25 cents on each \$100 of assessed valuation, to provide for all general road purposes in said county, 25 per

cent. of such amount so raised to be expended in the respective road districts where it is raised, and said amount so raised to be exclusive of any amounts raised upon petition for levy of a special property road tax in any particular road district.

This writ of mandate was served on the chairman of the board of county commissioners on September 15, 1916, two legal days prior to the time fixed by statute within which the board is required to fix the levy for general road purposes.

Some time prior to the issuance of the writ of mandate a majority of the resident taxpayers of numerous road districts in Latah county had petitioned the board of county commissioners to levy a special property road tax on the taxable property within their respective districts, pursuant to the provisions of chapter 153, Sess. Laws 1913, p. 522. All of these petitions were on file with the board of county commissioners at the time that the writ of mandate was served upon them. The writ of mandate, however, did not prohibit the board from granting the petitions of the resident taxpayers of road districts, but did direct the board to levy a sufficient tax upon all the taxable property in said county for all general road purposes, exclusive of any amounts raised upon petition for levy of a special property road tax in any particular road district.

An application was made to this court, supported by affidavits, in which it was alleged among other things that the respondents, acting as a board of county commissioners, knowingly and willfully disobeyed and disregarded the said writ of mandate of this court, both in letter and in spirit, thereby defeating, nullifying, thwarting, and evading the intent, force, and effect of the judgment and mandate of this court. Whereupon said commissioners were cited to appear before this court on Monday, the 16th day of October, 1916, at 10 o'clock, to show cause why they, and each of them, should not be punished for contempt, as in said affidavits alleged.

[1] It is contended by appellant that the board of county commissioners did take into consideration in fixing the levy for general road purposes the petitions for a special levy upon all the taxable property, for road purposes, in the various road districts, in violation of the provisions of the writ of mandate. Under the evidence offered upon the hearing in this case, we do not think that the position taken by counsel is correct. The board of county commissioners, in order to comply with the letter and spirit of the writ of mandate, increased the general levy, after receiving the writ of mandate, to $1\frac{1}{2}$ mills, being one-half mill higher than they had theretofore concluded was necessary. It also appears that they were disposed and anxious to reduce the special levies petitioned for by the various road districts within Latah coun-

ty, although they were not directed so to do. Upon this latter matter they sought and received the advice of County Attorney Moore, who informed them that such special levies petitioned for by the taxpayers and residents of the various road districts could not, in his opinion, be reduced; that the board must either, under the law, grant the petitions for the amounts of the special levies petitioned for, or reject the petitions in their entirety.

The writ of mandate was served upon them on the 15th day of September. They were required under the law to make the levy on or before the third Monday in September, which was the 18th day of September. Owing to the fact that these petitions for special levies were received from practically all of the road districts throughout the county, it was impossible within the time allowed the commissioners to fix the general levy to communicate with the taxpayers of the respective road districts for the purpose of ascertaining their wishes with reference to the special levies, in view of the fact that the general levy had been increased one-half of one mill.

The writ made no reference to the special levies, except as herein indicated, and from the evidence the board did not take into consideration said special levies in fixing the levy for general road purposes in said county for the ensuing year, but raised enough by said levy, in their judgment, for general road purposes. This court advisedly refrained from stating just what amount in dollars and cents the levy should be, for the reason that the law makes the amount of the levy to be fixed discretionary with the board. The court, in other words, directed the board to act, but did not intend to tell them just how much it would be necessary for them to raise by a general levy for road purposes for any given year, or what the levy should be. It is the duty of the board of county commissioners to make an estimate of the amount of money necessary for general road purposes for any given year, exclusive of special levies, and when they honestly use their best judgment their action is not subject to review in a proceeding of this character.

Whatever moneys are not expended during this fiscal year which may be raised in the various road districts as a result of the petitions filed with the board, will remain in the road fund of such districts, and will necessarily reduce the amount of taxes to be raised by levies for the year following.

In our judgment one-half of one mill levied by the board of county commissioners will not work a very serious hardship upon the taxpayers of Latah county, or result as disastrously to the welfare of its citizens as would an order of this court (admitting for the purposes of this case that this court has the power to make such order), directing the board of county commissioners to eliminate all special levies and increase their general

levy in an amount sufficient to take care of the special levies made in the various road districts.

[2] We are satisfied that the commissioners used their best judgment in fixing the levy for general road purposes, and no evidence was offered that would justify this court in reaching the conclusion that the commissioners willfully and intentionally disobeyed the directions of this court, as set out in the writ of mandate, and that they are not guilty of a civil contempt of this court.

It was conceded by the attorneys for appellant during the course of the hearing that the commissioners were not guilty of a criminal contempt, and with this admission we are in full accord.

It therefore follows from what has been said that the order to show cause should be, and the same is hereby, quashed and vacated. Costs are awarded to respondents.

SULLIVAN, C. J., concurs. MORGAN, J., did not sit at the hearing or take any part in the decision of this case.

SEYSLER et al. v. MOWERY, Mayor, et al. (Supreme Court of Idaho. Oct. 3, 1916.)

1. MUNICIPAL CORPORATIONS \S 330(1)—PUBLIC IMPROVEMENTS—COMPETITIVE BIDDING—STATUTORY PROVISION.

It was the purpose of the Legislature, in enacting subdivisions 15 and 16, \S 2238f, Rev. Codes (Sess. Laws 1915, p. 231), relative to making contracts for certain improvements by cities and villages, to procure competitive bidding for such contracts, and thereby to safeguard public funds and prevent favoritism, fraud, and extravagance in their expenditure.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 854; Dec. Dig. \S 330(1).]

2. MUNICIPAL CORPORATIONS \S 336(1) — PUBLIC IMPROVEMENTS—COMPETITIVE BIDDING—STATUTORY PROVISION.

It was also the legislative intent that such a contract must not be let to any other than the lowest bidder unless some fact, or facts, exist by reason of which a bid, other than the lowest, has been made by one who is, even though higher in price, the best responsible bidder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 862; Dec. Dig. \S 336(1).]

3. MUNICIPAL CORPORATIONS \S 336(1)—PUBLIC IMPROVEMENTS—COMPETITIVE BIDDING—ENTRY IN MINUTES.

If such facts do exist, they must be weighed and considered by the mayor and council or board of trustees, while in session, and, if the contract is let to another than the lowest bidder, the ultimate facts upon which that action is based should be entered in the clerk's minutes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 862; Dec. Dig. \S 336(1).]

4. MUNICIPAL CORPORATIONS \S 314(1)—PUBLIC IMPROVEMENTS—SPECIFICATIONS—DEFINITENESS.

The specifications for a public improvement such as is contemplated by subdivisions 15 and

16, \S 2238f, supra, must be made sufficiently definite and certain that any bidder who secures the contract may be compelled to perform it in a way to produce the kind, character, and grade of improvement desired, and that liability upon his bond will result from his failure so to do.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 827; Dec. Dig. \S 314(1).]

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Suit by R. E. Seysler and others to enjoin Charles R. Mowery and others, as the Mayor and Council of the City of Wallace, from entering into a contract for the pavement of the streets and alleys of local improvement district No. 4 of that city. From an order dissolving a temporary restraining order, plaintiffs appeal. Reversed and remanded, with instructions.

Miller & Gundlach, Charles E. Miller, and S. S. Gundlach, all of Wallace (James F. Ailshie, of Coeur d'Alene, of counsel), for appellants. L. E. Worstell and James A. Wayne, both of Wallace, for respondents.

MORGAN, J. On June 1, 1916, respondents, as mayor and members of the city council of Wallace, having theretofore advertised for bids for paving the streets and alleys in local improvement district No. 4 of that city, met in special session for the purpose of considering such bids as had been submitted for making said improvement. For laying the kind of pavement respondents had agreed upon, being of asphaltic concrete with a four-inch base and a two-inch top, and for maintaining it for a period of five years, six bids were submitted which had been tabulated by the city engineer for the convenience of the mayor and council, as follows:

Name.	Price.	Maintenance.
Oregon Eng. & Con. Co.....	\$72,347 70	\$ 250 00
Clifton, Applegate & Toole	67,954 44	131 50
Independent Asphalt P. Co.	62,572 85	1,250 00
Spokane Bitu-Mass Pav. Co.	56,867 75	5 00
C. M. Payne.....	54,587 70	1,938 25
Washington Paving Co.....	54,784 26	300 00

It further appears that, without assigning any reason for so doing, and over the protest and objection of citizens of the city and taxpayers of the local improvement district, respondents rejected the bids of Clifton, Applegate & Toole, Independent Asphalt Paving Company, Spokane Bitu-Mass Paving Company, C. M. Payne, and Washington Paving Company, and accepted that of Oregon Engineering & Construction Company.

Thereafter appellants, who are citizens of Wallace, and who own property which is subject to taxation in and for the benefit of local improvement district No. 4, instituted a suit in the district court one of the purposes of which was to procure an injunction restraining respondents from entering into a contract with the Oregon Engineering & Construction Company for making the proposed improvement. Upon the filing of the complaint the district judge issued an order re-

quiring respondents to appear and show cause, if any they had, why an injunction pendente lite should not issue, and commanding them to desist from taking any further action in the premises until the further order of the court.

The matter came on to be heard in the district court upon the amended complaint, the order to show cause, and an answer filed by all the respondents, except the mayor. There were submitted for the court's consideration a certified copy of the council proceedings had at the special session of June 1, 1916, and certain affidavits filed by the respective parties, all of which appear in the record in this court. After considering the showing so made, the district judge, on June 24, 1916, made and entered an order vacating, setting aside, and dissolving the order to show cause and the temporary injunction or restraining order.

This appeal is from the order dissolving the injunction. Pending the hearing upon appeal appellants made application for and were granted an order in the nature of an injunction pendente lite, and application was made by respondents to dissolve that order. However, by agreement of counsel and with the consent of this court, the case was heard upon the appeal and upon the record made in the district court.

In advertising for bids and in awarding the contract respondents were attempting to proceed pursuant to the provisions of subdivisions 15 and 16 of section 2238f, Rev. Codes of Idaho (Sess. Laws 1915, p. 231), which are as follows:

"15. All contracts which are made by the city or village for any improvements authorized by this section or any subdivisions thereof, shall be made by the council in the name of the city or village upon such terms of payment as shall be fixed by the council, and shall be made with the lowest and best responsible bidder upon sealed proposals, after public notice of not less than three (3) weeks issue of the official weekly newspaper of said city or village, which notice shall contain a general description of the kind and amount of work to be done, the material to be furnished, as nearly accurate as practicable, and shall state that the plans and specifications for said improvement work are on file in the office of the city engineer or city clerk.

"16. Each contractor shall be required to give a good and sufficient bond to the city or village, to be approved by the city council or village board of trustees for the faithful performance of the contract."

[1, 2] It was manifestly the purpose of the Legislature, in enacting the foregoing provisions, to procure competitive bidding for contracts for making public improvements of the kind here under consideration, and thereby to safeguard public funds and prevent favoritism, fraud, and extravagance in their expenditure, and it is equally clear that it was the legislative intent that a contract of the kind here proposed to be entered into must not be let to any other than the lowest bidder, unless some fact, or facts, exist by reason of which a bid, other than the lowest, has

been made by one who is, even though higher in price, the best responsible bidder.

[3] If any such facts do exist, they must be weighed and considered by the mayor and council, or board of trustees, while in session, and if the contract is let to another than the lowest bidder, the ultimate facts upon which that action is based should be entered in the clerk's minutes for the information of taxpayers, the protection of the officers who let the contract from unjust criticism for the commission of an act which, in the absence of explanation, would appear to be an unjustified expenditure of public money, and to the end that the courts may, if called upon to do so, review the facts and reasons upon which the contract was awarded and pass upon their sufficiency.

Discussing the discretion of governing boards of municipalities in matters of this kind, McQuillin, in his work on Municipal Corporations (volume 3, § 1227), says:

"This discretion is not an arbitrary uncontrolled one, but one limited to the exercise of bona fide judgment, based upon facts tending reasonably to the support of their determination. Accordingly it has been held that an award to one who is not the lowest bidder will be set aside where no plausible reason for making it is given."

This court, in case of *Caldwell v. Village of Mountain Home*, 29 Idaho, —, 156 Pac. 909, quoted with approval from *Dillon on Municipal Corporations* (5th Ed.) § 811. Another part of that same section is:

"Even when the provision of the statute is that the contract shall be let to the 'lowest responsible bidder' or 'lowest and best bidder,' the body or officer awarding the contract cannot exercise the discretion intrusted arbitrarily, and without reason reject the lowest bid and accept a higher one."

The Supreme Court of the state of New Jersey, in case of *Faist v. Mayor, etc., of the City of Hoboken*, 72 N. J. Law, 361, 60 Atl. 1120, construing a statute which provided that a certain class of contracts should be entered into only with the responsible bidder or bidders who shall give satisfactory bonds or security for the faithful performance of the work, said:

"If a responsible bidder tenders himself ready to fulfill his bid by entering into the contract, and offers the bondsman or security required, he is entitled to be awarded the contract as against any person whose bid was higher than his. If there be an allegation that a bidder is not responsible, he has a right to be heard upon that question, and there must be a distinct finding against him, upon proper facts, to justify it. *McGovern v. Board of Works*, 57 N. J. Law, 580, 31 Atl. 613."

See, also, *Inge v. Board of Public Works*, 185 Ala. 187, 33 South. 678, 98 Am. St. Rep. 20; *Armitage v. Mayor, etc., of City of Newark*, 86 N. J. Law, 5, 90 Atl. 1035; *Attorney General v. City of Detroit*, 26 Mich. 263; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Fourny v. Town of Franklin*, 126 La. 151, 52 South. 249; *People v. City of Buffalo* (Sup.) 84 N. Y. Supp. 434; *Berry v. Tacoma*, 12 Wash. 3, 40 Pac. 414;

Times Pub. Co. v. Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865.

In the case last above cited the Supreme Court of Washington, construing a statute which required contracts made by cities of the third class for printing and advertising to be let to the lowest bidder, said:

"The responsibility of the bidder, his experience, and his facilities for carrying out a contract may be looked into, and an honest determination that on the whole his bid will not be, in the long run, the lowest, will be entitled to control. * * *

"But in every such case, in order to protect itself from interference, the contracting agent should judicially find the facts which in its judgment render the apparently lowest bid not the lowest in fact."

In this case all the prospective contractors were bidding upon the same improvement to be made of the same materials under the same plans and specifications, and the successful bidder was required, by law, to give a good and sufficient bond for the faithful performance of the contract. The bid which was accepted was not the lowest offer, but the highest. It was many thousand dollars higher than some of the others, and the council rejected all others and accepted it without, at the time, making any explanation or assigning any reason for so doing. After this case was commenced, and as a defense to the action, a number of affidavits were filed, among them being those of six of the respondents, whereby it is shown that certain of the members of the city council had, at various times prior to attempting to award this contract, examined asphaltic concrete pavements and samples of such pavements which had been laid by the various bidders, other than the one to which the contract was awarded, and had found the same to be of inferior quality, and not such as they desired to have laid in the city of Wallace.

It may be gravely doubted that affidavits showing the result of investigations prosecuted by individual members of a city council acting separately and when not in session should be accepted in lieu of findings of fact which should have been made by that body while in session when determining as to which was the lowest and best responsible bidder. However, we do not deem it necessary to decide that question in this case. We have examined the affidavits presented on behalf of respondents and find them to be insufficient to justify their action in awarding the contract to the highest, instead of the lowest, bidder.

While it appears from these affidavits that certain members of the council, after examining pavements and samples from pavements laid by the bidders, other than the Oregon Engineering & Construction Company, did not approve the same, it is not disclosed, nor contended, that the contractors offering these bids were not financially responsible and abundantly able to fulfill the contract to pave the streets and alleys in improvement dis-

trict No. 4 according to the plans and specifications, and it is further disclosed in the record that the highest bidder, to whom the contract was awarded, had never, during its existence, constructed a single square yard of asphaltic concrete pavement.

We gather from the affidavits that respondents base their action in accepting the highest bid upon information gathered by some of them that the Oregon Engineering & Construction Company had employed, or would employ, one Compton to superintend the work, and that Compton had superintended like work for another construction company which had proven to be very satisfactory. There is nothing before us to show that the successful bidder was in any way bound to employ Compton or to retain him in its employ, or that he would, if he superintended the work, render the same class of service he had theretofore rendered for another and different employer, or do anything else not required by the contract, plans, and specifications, which is exactly what any other contractor would have been bound to do.

[4] It was urged upon oral argument by counsel for respondents, as an explanation of the rejection of the lower bids and the acceptance of the highest one, that the specifications were loosely drawn, and, although conforming to the requirements thereof, a contractor might, by mixing the component parts in improper proportions, produce an inferior grade of pavement, while under the same specifications superior work would result by mixing the specified parts in proper proportions. If this be true, and if a prospective contractor was bidding upon a certain grade of pavement while others were bidding upon another, we do not hesitate to say that the contract was not let upon competitive bids as is contemplated by our statute, because all bidders were not given an opportunity to bid upon the kind of improvement to be made. Furthermore, when thousands of dollars of public funds, in excess of the amount of the lowest bid, are to be expended in procuring a public improvement, we must look, for a justification, to something more substantial than the empty hope cherished by the members of a city council that a contractor will do better work than he is required to do in order to collect the contract price.

In order to conform to the spirit and purpose of subdivisions 15 and 16, § 2238f, heretofore quoted, the specifications must be made sufficiently definite and certain that all may know what each is bidding upon, and that any bidder who secures the contract may be compelled to perform it in a way to produce the kind, character, and grade of improvement desired and that liability upon his bond will result from his failure so to do. *Hannan v. Board of Education*, 25 Okl. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214, and cases therein cited.

The order of the trial judge vacating and

dissolving the temporary injunction is reversed, and the cause is remanded, with instructions that the same be continued in full force and effect until the case is finally disposed of. Costs are awarded to appellants.

SULLIVAN, C. J., and BUDGE, J., concur.

BLACKWELL LUMBER CO. v. EMPIRE MILL CO.

(Supreme Court of Idaho. Oct. 3, 1916.)

1. EMINENT DOMAIN §262(4) — REVIEW — QUESTIONS OF FACT—FINDINGS OF COURT.

In an action wherein the condemnation of land is sought under the exercise of the right of eminent domain, the question of necessity is a question of fact, and where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 685; Dec. Dig. §262(4).]

2. RAILROADS §53 — RIGHT OF WAY — LOCATION—REQUISITES.

The power to locate a railroad right of way by a corporation is vested in its board of directors, and some official corporate action is necessary before such corporation can make a valid location. The act of an officer of the company in making a preliminary survey of such right of way does not by itself constitute a valid appropriation of such right of way to a public use.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 121, 122; Dec. Dig. §53.]

3. EMINENT DOMAIN §47(1)—PROPERTY SUBJECT—PRIOR APPROPRIATION.

Held, under the facts of this case as disclosed by the evidence, the lands of appellant were not devoted to a public use at the time they were sought to be condemned by respondent, and were subject to condemnation by respondent in proper proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107, 109, 110, 116-120; Dec. Dig. §47(1).]

4. EMINENT DOMAIN §47(1) — NATURE OF RIGHT—EFFECT OF CONVEYANCE.

Where it appears that no legal or valid appropriation of land for a public use has been made, a purported conveyance thereof for such use has no validity.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107, 109, 110, 116-120; Dec. Dig. §47(1).]

5. EMINENT DOMAIN §171, 266—NATURE OF RIGHT—EFFECT OF PRIOR OCCUPATION.

Prior occupation of land without authority of law by one seeking to exercise the right of eminent domain does not preclude the condemnor from taking subsequent measures authorized by law in order to condemn such land to a public use, but such illegal occupation renders the condemnor liable in trespass.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 468, 469, 694-696, 702, 703, 705; Dec. Dig. §171, 266.]

6. EMINENT DOMAIN §241 — PROCEEDINGS FOR CONDEMNATION—JUDGMENT.

Where in an action for condemnation for a logging railroad it appears from the findings of fact that the condemnor will not require the use of such road for more than one year, the court in its judgment of condemnation should limit the period of use accordingly.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 621-625; Dec. Dig. §241.]

Appeal from District Court, Shoshone County; John M. Flynn, Acting Judge.

Action by the Blackwell Lumber Company against the Empire Mill Company. From judgment for plaintiff, defendant appeals. Affirmed.

O. W. Beale, of Wallace, and Charles L. Heitman, of Rathdrum, for appellant. John P. Gray, C. H. Potts, and W. F. McNaughton, all of Coeur d'Alene, for respondent.

BUDGE, J. This case has been before this court on three prior occasions, and will be found reported in 27 Idaho, 400, 149 Pac. 505; 28 Idaho, 556, 155 Pac. 680; and 29 Idaho, —, 158 Pac. 792. In the interest of brevity we will limit ourselves so far as practicable to the questions involved upon this appeal. An investigation of the above authorities will elicit a history of the case from its inception. However, at this point it may be well to call attention to the fact that this court has heretofore held that the lumbering industry of this state is one of its material resources, which cannot be completely developed in the absence of the right to exercise the power of eminent domain, under the provisions of section 14, art. 1, of the Constitution, which provides that:

"The necessary use of lands * * * to the complete development of the material resources of the state, * * * is hereby declared to be a public use." Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 Pac. 426, 118 Am. St. Rep. 233; Washington Water Power Co. v. Waters, 19 Idaho, 595, 115 Pac. 682.

In construing the above constitutional provision, this court has held it to be broader in its terms, and consequently entitled to receive a more liberal construction, than constitutional provisions of a somewhat similar character, dealing with the subject of eminent domain, found in a majority of the various state Constitutions; which liberal construction has also been justified by this court in view of the varied industries of the state, coupled with their rapid and phenomenal development. Connolly v. Woods, 13 Idaho, 591, 598, 92 Pac. 573. In effect, under the above constitutional provision this court has held that private property may be taken under the power of eminent domain for any use necessary to the complete development of any of the material resources of the state, upon the payment of a just compensation therefor, to be ascertained in a manner prescribed by law.

Upon a former hearing (Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho, 556, 155 Pac. 680) this court held that the respondent company is vested with the power of eminent domain, and that the allegations of its complaint stated a cause of action. Just previous to the pronouncement of the opinion of this court, wherein it so held, the Shoshone Railway Company was organized by the officers of the Empire Mill Company,

the appellant herein, and the land sought to be condemned by the respondent company was by the Empire Mill Company conveyed to the Shoshone Railway Company. The Empire Mill Company immediately thereafter filed its answer to respondent's complaint in this action, denying the necessity for the construction of the proposed railroad and for the appropriation and condemnation of the land sought to be taken by the respondent, alleging an appropriation of the lands sought to be condemned by the Empire Mill Company for railroad use, and alleging in substance and effect that the respondent company surreptitiously, wrongfully, and unlawfully went upon the lands of appellant, and unlawfully constructed thereon a temporary logging railroad, without the consent and against the protest of the appellant, which acts constituted a bar to the proceedings brought by the respondent company in condemnation, and that said railroad so constructed thereby became the property of the Empire Mill Company, and was by it, together with the right of way, conveyed to the Shoshone Railway Company. It further appears that shortly after the respondent filed its complaint in the original action it also filed its notice of lis pendens. When the respondent company filed its original complaint, notice was given by it for the appointment of commissioners to assess and determine the damages accruing to the appellant by reason of the condemnation and appropriation of the lands sought to be taken.

On the issues made by the pleadings a hearing was had, pursuant to notice, on May 25, 1916, at Wallace, in the district court of the First judicial district in and for Shoshone county, Honorable John M. Flynn presiding, for the purpose of determining whether or not the Blackwell Lumber Company was entitled to the appointment of commissioners and to have entered a decree of condemnation for the purchase of the land sought to be taken. After hearing the testimony that is presented upon this appeal the district court made its findings of fact and conclusions of law and entered its judgment, wherein it was adjudged and decreed that the respondent company was entitled to condemn a strip of land across the lands of the appellant company for a right of way for a temporary logging railroad, as prayed for in its complaint, and thereupon the court appointed three commissioners pursuant to notice, as provided by law, to assess appellant's damages; from which judgment an appeal was immediately taken to this court, followed by an application on behalf of appellants for an order staying all further proceedings pending a final determination of this appeal, which order was by a majority of this court granted. *Blackwell Lumber Co. v. Empire Mill Co.*, 29 Idaho, —, 158 Pac. 793.

For a reversal of this case, counsel assigns and relies upon 39 separate assignments of error, and 19 subdivisions of assignments

of error, all of which we have carefully considered, but which we will not discuss serially. These assignments of error in the main are that the evidence was insufficient to support the findings of fact and conclusions of law made by the trial court; that the findings of fact and conclusions of law are insufficient to support the judgment; that the court erred in admitting certain evidence over the objection of counsel for appellant and in its refusal to admit certain evidence offered by appellant, in admitting certain evidence offered by respondent, in refusing to strike out and in striking out certain evidence during the course of the trial. In addition to these assignments of error, appellant makes the general assignment that the court erred in its failure to make findings of fact upon all of the material issues raised by the pleadings.

In our opinion there are but four controlling questions involved in this present appeal: First, whether there was sufficient legal evidence introduced at the trial to establish a necessity for the construction of the temporary logging railroad and for the condemnation of the lands sought to be taken by the respondent company for that purpose; second, whether the lands sought to be taken were already appropriated to a public use, prior to the commencement of the action to condemn by the respondent company; third, whether the transfer of the lands sought to be condemned and appropriated by the respondent company to the Shoshone Railway Company, a common carrier, by the appellant company, defeated or in any manner affected the right of respondent company to condemn said lands for right of way purposes, or affected the necessity for it to take and condemn said lands in order to remove and manufacture its timber from its lands described in its complaint; and, fourth, whether the logging railroad constructed by the Blackwell Lumber Company upon the lands of the Empire Mill Company became the property of the Empire Mill Company under the facts of this case.

[1] Directing our attention to the first proposition, which we do not deem necessary to discuss at length, the question of necessity is one of fact, and where there is a substantial conflict in the evidence the findings of the trial court will not be disturbed. In passing, however, we might say that the record conclusively shows that there is no other feasible way whereby either the appellant or respondent will be able to move the timber from their respective holdings, except over a railroad to be constructed along the route sought to be taken by the respondent herein, as was said by Mr. Blackwell, president of the respondent company, among other things in his testimony (and upon this point he is corroborated by witness Mr. Connolly), in answer to the following question propounded by counsel for respondent:

"Q. You may state to the court what is the feasible way of marketing that timber [referring to the timber upon the lands of the Blackwell Lumber Company], getting it out of there in the form of sawlogs and transporting it to market? A. Why, that is the natural and feasible route, and the only one. Q. Which? A. The way our road is built up the ravine."

Mr. Lawrence F. Connolly also testified that the right of way down through the three 40-acre tracts over which the respondent has in part constructed its railroad was the only feasible way for getting out the timber on the lands of the Empire Mill Company, and the court in its seventh finding of fact, in harmony with this evidence, finds:

"That there is but one feasible and practicable way to move and utilize said timber which is by use of such railroad. * * * That the only practicable and feasible route across said lands for said railroad is the route described in plaintiff's complaint. * * * and it is necessary in order to build and operate said railroad, and in order that said timber may be removed and manufactured, for plaintiff to acquire said right of way across said lands herein sought to be condemned."

[2, 3] Coming now to the second proposition, Lawrence F. Connolly, manager, secretary, and treasurer of the Empire Mill Company, among other things, testified that the lands sought to be condemned by the respondent company were appropriated for railroad use by the Empire Mill Company some time in 1913; that said appropriation was made by him as an officer of the Empire Mill Company for the purpose of constructing a railroad to transport the timber owned by the Empire Mill Company along practically the identical route over which the respondent company has constructed its railroad; that said appropriation was made by running out the lines, placing stakes along the right of way, and blazing out a part of the trails; that nothing further has been done by the appellant company or on its behalf looking to the construction of its proposed railroad. No right of way was procured over the lands of the respondent company or over the lands of one Magee, located between the lands of the appellant company and the Chicago, Milwaukee & St. Paul Railroad, and no contract or understanding was had with said latter company for junction connections with their line. It further appears that there is no evidence of any official action by the directors of the Empire Mill Company appropriating or adopting such right of way, which action would appear to us to be imperative in that the power to locate a railroad by a corporation is vested in its board of directors, and that some corporate action by the Empire Mill Company was absolutely necessary in order to constitute a valid appropriation for a public use of the lands sought to be taken in this action, so as to defeat the right of the Blackwell Lumber Company to make an appropriation of such land for a public use, and it further appears that said company for many years has not been engaged in the operation of sawmills, and is a holding company of tim-

ber lands only. The respondent company when it went upon the lands of the appellant company found it merely idle land, wholly unimproved, and devoted to no public use.

It may be contended that by reason of the ownership of the lands sought to be taken being vested in fee in the Empire Mill Company, it was not required to make an appropriation over its own lands for a public use, or adopt one made in its behalf by one of its officers. If as a matter of fact the lands sought to be taken had been actually and in good faith appropriated or devoted to a public use by the Empire Mill Company, prior to the commencement of this action to condemn by the Blackwell Lumber Company, and the proof established that fact, there is no question but what the contention would be correct; but the facts do not bear out this contention. The facts, as disclosed by the entire record, relating to the purported appropriation by the appellant company of the lands sought to be taken by the respondent company, support in our opinion the eleventh finding of fact made by the trial court, which is as follows:

"That the property sought to be condemned [by the Blackwell Lumber Company] is not already appropriated to a railroad use by the defendant [Empire Mill Company] or any other person or company, and is not appropriated to any public use. That the making of blazes and setting of stakes by Lawrence Connolly in 1913 as alleged and claimed did not constitute an appropriation of a right of way over said lands herein sought, or any lands in behalf of the Empire Mill Company, and no part of said land has been appropriated by the Empire Mill Company, or any other person or company prior to the commencement of this action."

Under the Constitution and laws of this state, as construed by the decisions of this court, the lands of appellant were subject to condemnation, and were not devoted to a public use (Portneuf Irrigation Co., Ltd., v. Budge, 16 Idaho, 116, 100 Pac. 1046, 18 Ann. Cas. 674; Postal Tel. Cable Co. v. Oregon Short Line R. R. [C. C.] 104 Fed. 623), and the principles of law announced in the foregoing decisions are in our opinion borne out by the following decisions:

As was held in the case of Williamsport, etc., Co. v. Phila., etc., R. Co., 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220, the making of a location so as to give title to one railroad company as against another involves some corporate action on the part of the company, establishing and adopting some definite route. An engineer alone by surveying and marking the line cannot make a location and effect a valid appropriation of the land. An engineer may make explorations in advance of the location, or he may re-mark the line or adjust the grades after the adoption of a location; but an engineer alone cannot locate a railroad so as to give title to the company that employs him. He is not the company. The right of eminent domain does not reside in him.

We think that the case reported in 41 Fed.

293-300, *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.* (C. C.) may, in many respects, on principle be applied to the case at bar. It appears that the Burlington & Missouri Valley Railroad Company was about to build into Denver and was seeking terminal facilities. The superintendent of the Colorado Eastern Railway Company was instructed to buy up such ground as was necessary in order to keep its competitor from getting into the Union Depot, which he did. The court in its opinion, among other things, said:

"Without imputing to the defendant company the selfish and indefensible motive of being actuated in the acquisition of this land by a desire to obstruct the Burlington Road's access to the Union Depot, the very utmost that can be conceded to the defendant is that it entertained the belief that this piece of ground might become necessary to the full accommodation of its business in the future, and that it expects to so apply it. This is but a prospective dedication, which may or may not ever be made. If the defendant were seeking to condemn this property upon a prospective increase of its business, 'it should be established beyond reasonable doubt that such increase will occur.' *Railroad Co. v. Davis*, 48 N. Y. 145. While not holding defendant to the same rigorous rule as if it were seeking to condemn this property, yet 'no one can blink so hard as not to see,' from the evidence as a whole, that the defendant has not for five years done any other act looking to the subjection of this piece of ground to its use; and, if it is held exempt from the exercise of the right of eminent domain, it rests for its foundation upon conjecture, or a contingency that no court can say with assurance will ever arise. * * * In view of its greater necessity to the petitioner, as already demonstrated, I feel constrained to hold, both on reason and authority, that this mere prospective use by defendant should yield to the more immediate necessities of the petitioner. * * * Mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches upon the greater necessities of the other franchise. *East St. L. O. Ry. Co. v. East St. L. U. Ry.*, 108 Ill. 265; *Lake S. & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506."

In the case of *Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508, the court says:

"One public corporation cannot take the lands or franchises of another public corporation in actual use by it unless expressly authorized to do so by the Legislature. But the lands of such a corporation not in actual use may be taken by another corporation, authorized to take lands for its use in invitum, whenever the lands of an individual may be taken, subject to the qualification that there is a necessity therefor. 2 Wood R. R. p. 856.

"We think this to be the true rule, and that opposing corporations may be limited to the enjoyment of that property in actual use by them, and that which is reasonably necessary for the safe, proper and convenient management of their business, and the accomplishment of the purposes of their creation. *Mobile & G. R. Co. v. Alabama M. R. Co.*, 87 Ala. 501 [6 South. 404]."

In the case of *Chicago & M. Electric R. Co. v. Chicago & N. W. Ry. Co.*, 211 Ill. 352, 71 N. E. 1017, where the electric company sought to condemn a part of the unused lands of the Northwestern Company, it was

claimed by the Northwestern Company that the lands were appropriated to a public use and condemnation would not lie, but the court said:

"It is possible, it is true, that the Northwestern Company may, at some remote time in the future, need for public use the 25-foot strip which petitioner seeks to condemn, or a like space elsewhere at that station. It is evident that it does not need it now, and will not need it in the immediate future. Petitioner needs it now for a present public purpose, for which it has the power to acquire a right of way by condemnation. The remote and uncertain needs of the Northwestern Company must yield to the present and certain right of appellant."

[4, 5] Involved in the third proposition is the transfer of the lands sought to be condemned to the Shoshone Railway Company, a common carrier, subsequent to the bringing of the action by the respondent and after the filing of its lis pendens. It also appears from the record that the respondent company had constructed its railroad from a point on the Chicago, Milwaukee & St. Paul Railroad, over lands lying between the lands of said railroad company and the lands of the appellant to and over lands of the appellant company to within a distance of approximately 200 feet of respondent's lands, when the Shoshone Railway Company was organized by the officers of the appellant company.

It is the contention of counsel for appellant that the incorporation of the Shoshone Railway Company, as a common carrier, although subsequent to the bringing of this action by the Blackwell Lumber Company, and a conveyance to it by the Empire Mill Company of its right of way for railroad use over the lands sought to be condemned by the Blackwell Lumber Company, defeated the right of the Blackwell Lumber Company to appropriate and condemn said land for a temporary logging railroad, upon the theory that the property sought to be condemned was already devoted to a more necessary and important public use. Under the facts in this case we cannot concede the correctness of this contention. The Empire Mill Company, prior to the bringing of this action by the Blackwell Lumber Company, had made no valid appropriation of the lands sought to be condemned for a public use, and the same was not by it devoted to a public use. The mere conveyance of the right of way selected by the Blackwell Lumber Company, over which it intended to construct its temporary logging railroad, by the Empire Mill Company to the Shoshone Railway Company, a common carrier incorporated by the officers of the Empire Mill Company, ostensibly for the purpose of defeating the right of the Blackwell Lumber Company to condemn, and thereby complete its railroad, would not operate in and of itself to defeat the right of the Blackwell Lumber Company to maintain this action, unless we adopt the theory advanced by counsel for appellant, which involves the fourth and last proposition, that

under the facts in this case the Blackwell Lumber Company when it went upon the lands of the Empire Mill Company and constructed a portion of its railroad became a naked trespasser, and as such could initiate no right to said land or to its use. This principle of law may be conceded, but it does not necessarily follow that it lost its right to condemn and that being such naked trespasser the logging railroad constructed by it upon the lands of the Empire Mill Company became the property of the latter company. While the authorities are not uniform upon this question, we think the correct rule is as announced in *Lewis on Eminent Domain*, vol. 2, § 759:

"Persons and corporations vested with the power of eminent domain have no more right than natural persons to enter upon private property before taking the steps prescribed by law to obtain possession. If they do, the owner may have his common-law remedies of trespass or ejectment, or he may resort to equity and enjoin the invasion or use of his land. But, in all such cases, the persons making the entry may, by proper proceedings, condemn the property entered upon, and so perfect their right to its possession and enjoyment."

In the case of *Secombe v. Milwaukee & St. Paul Railroad Co.*, 90 U. S. (23 Wall.) 108-118, 23 L. Ed. 67, in relation to the taking of private property by a railroad company under the power of eminent domain, the court says that:

"Prior occupation without authority of law would not preclude the company from taking subsequent measures authorized by law to condemn the land for their use. If the company occupied the land before condemnation without the consent of the owners * * * they are liable in trespass."

And again, in the case of *Stevens v. Connecticut Co.*, 86 Conn. 36, 84 Atl. 361, Ann. Cas. 1913D, 597, the court says:

"The fact that the defendant, without authority, entered upon the plaintiff's land in question, and made excavations as above stated, and that suits for damages for said acts are still pending, does not prevent the defendant from proceeding to condemn the land under the provisions of chapter 101 and section 3687. We have no occasion to decide what damages the plaintiff may recover in said pending actions, either before or after a condemnation of the land. The question before us is whether these facts constitute a bar to condemnation proceedings. The authorities are that they do not."

And in the notes to Ann. Cas. 1913D, 601, we find the following rule announced, supported by numerous cases:

"In harmony with the reported case it is generally held that where there has been an unlawful entry on land and a suit is pending to recover damages therefor, such suit is no bar to the right of the trespasser to institute condemnation proceedings to obtain title to the land in question."

In the case of *Jacksonville, etc., R. Co. v. Adams*, 28 Fla. 631, 10 South. 465, 14 L. R. A. 533, the court held, where a railroad company having the power of eminent domain entered on land unlawfully and constructed a railroad track thereon, on recovery of a judgment by the landowner for damages and

ejectment against the railroad company, that the appellate court could withhold its mandate of possession to allow a reasonable time for the institution and consummation of proper condemnation proceedings by the company, if there was no bad faith on the part of the company as to such proceedings.

The rule is again announced in 15 Cyc. 763, as follows:

"Where a corporation invested with the power of eminent domain enters upon land without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common-law rule that a structure erected by a tort-feasor becomes a part of the land does not apply and the owner is not entitled to the value of the improvements thus wrongfully erected."

[8] The Constitution and laws of this state in granting the power to appropriate private property to any particular public use restricts its grantee to take only such property, and for such length of time, as shall be actually necessary for such use, and inferentially requires the necessity to be proved as a fact. The respondent corporation seeks but a temporary use of the strip of land sought to be appropriated and condemned for the construction of its temporary logging railroad, and its complaint alleges that:

It "will be able to remove from its lands and transport across the said right of way sought to be acquired in this action all of the timber which it desires to remove at this time in a very few months, and that the use sought of the lands of the defendant is therefore but temporary; that the plaintiff will not materially affect or injure the lands of the defendant, or injure the same at all."

Upon this issue the trial court in its findings of fact found:

"That the plaintiff [the respondent here] will be able to remove from its said lands hereinbefore described and transport all said timber across said right of way to be acquired in this action, within one year after it acquires said right of way."

The court, however, in its judgment of condemnation fails to limit the time of the use of appellant's lands. In this respect we think the judgment should be amended, restricting the right to the use of the lands of appellant company to one year after it acquires the right to such use, and the trial court is hereby directed to amend its judgment in this respect.

Upon an examination of the entire transcript in this case, we are convinced that there is but one feasible way for the respondent company to remove its timber, cut and growing upon its lands described in its complaint, and that is by the construction of a temporary logging railroad over the right of way that it seeks to condemn over the lands of the appellant company. These lands are located in a mountainous section of this state, covered with growing timber of great value, which must either be transported to the mills of the respondent company, or other mills, to be manufactured into lumber, or left to lie upon the ground and decay or be

subject to destruction by fires. The lands were not, prior to the construction of the temporary logging railroad by the respondent company, devoted to a public use or any use. Upon the lands of these companies, which may be reached by this railroad and an extension thereof, there are about 10,000,000 feet of growing timber, matured and ready to be manufactured. All of this timber can be transported to mills and manufactured into lumber over the railroad constructed upon this right of way, by reason of its location, which by agreement might be utilized by both companies without in any way seriously discommoding the appellant company. To deprive the respondent company of the right of condemnation would mean in effect the destruction of the timber growing upon its lands. To sustain the judgment of the trial court means the development of one of the material resources of the state and making possible the transportation and manufacture into lumber of between 3,500,000 and 5,000,000 feet of valuable timber. The march of progress in the development of the material resources of this state would almost seem to justify the temporary use, upon just compensation being paid, of the lands of the appellant company, despite the owner's protest, in view of the great benefits, both direct and incidental, that will follow by reason of the construction of the temporary railroad, and we are of the opinion that under the facts of this case and under the provision of the Constitution of this state heretofore referred to, the power of eminent domain may be right-fully exercised.

In view of the conclusions reached by this court, it will be the duty of the commissioners heretofore appointed by the trial court to hear testimony, assess damages, and make their report as provided by section 5226, Rev. Codes, and upon the filing of said report showing the amount of damages that will be suffered by the owner of the property sought to be taken in this action, and the payment of the same to such owner or into court for the use and benefit of such owner, the respondent company will be authorized to enter into the possession and use of the lands sought to be condemned pending the final hearing (*Pyle v. Woods*, 18 Idaho, 874, 111 Pac. 746; *Portneuf Irrigation Co. v. Budge*, *supra*), or until the expiration of the time limited in the judgment to be corrected as herein indicated.

Finding no reversible error in the record, the judgment of the trial court upon amendment as herein indicated is sustained, and it is so ordered. Costs are awarded to appellant. *Portneuf-Marsh Valley Irrigation Co. v. Portneuf Irrigation Co.*, 19 Idaho, 492, 114 Pac. 19; *Rawson Lumber Co. v. Richardson et al.*, 26 Idaho, 37, 141 Pac. 74.

SULLIVAN, C. J., concurs.

MORGAN, J. (concurring). Accepting the decision of the majority of this court in the case of *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho, 558, 155 Pac. 680, as the law of this case, I concur in the foregoing opinion. My views upon the right to exercise the power of eminent domain in cases of this kind are fully expressed in the dissenting opinion appearing in 28 Idaho at page 582, 155 Pac. 680, and no useful purpose will be served by a reiteration of them at this time.

LUKICH v. UTAH CONST. CO. (No. 2904.)

(Supreme Court of Utah. Sept. 29, 1916.)

1. APPEAL AND ERROR — 494 — REVIEW — RECORD.

In case of appeal there must be record evidence showing that a final judgment was rendered and entered, or the appeal cannot prevail.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2285, 2286; Dec. Dig. ¶ 494.]

2. JUDGMENT — 272 — ENTRY — JURISDICTION OF COURT.

Where an appeal was taken after granting of a nonsuit in September, 1913, and no final judgment was attempted to be entered until August, 1915, the trial court did not lose jurisdiction to enter final judgment, merely because the judgment was not entered immediately after the motion was sustained, or because of a premature appeal which could not effectuate anything, but the case continued pending in the trial court for final disposition.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 512-523; Dec. Dig. ¶ 272.]

3. APPEAL AND ERROR — 347(1) — TIME FOR TAKING APPEAL — NUNC PRO TUNC ENTRY.

Under Comp. Laws 1907, § 3301, providing that an appeal may be taken within six months from the entry of judgment, where a final judgment was not entered and an appeal for that reason failed, a judgment could be entered, the time within which an appeal must be taken runs from the actual entry of the judgment, and such entry for purposes of appeal may not be considered a nunc pro tunc entry.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1897, 1899; Dec. Dig. ¶ 347(1).]

4. STATUTES — 226 — PREVIOUS DECISIONS AS CONTROLLING DECISIONS OF OTHER JURISDICTIONS — SAME STATUTE.

Where Comp. Laws 1907, § 3301, touching time for taking appeals, was taken from the California Code, a California case construing the section is decisive of the question involved.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 307; Dec. Dig. ¶ 226.]

5. APPEAL AND ERROR — 586(7) — REVIEW — ASSIGNMENTS OF ERROR — RECORD.

Where a record on appeal disclosed that the parties stipulated that the abstract used in a former appeal, dismissed as premature, might be used in instant appeal, the rule of the court was substantially complied with, and its purpose subserved when appellant obtained leave to refile the original abstract which contained the assignments of error, as respondent was apprised of errors relied on.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2605; Dec. Dig. ¶ 586(7).]

6. APPEAL AND ERROR ¶586(4) — REVIEW — ABSTRACT—JUDGMENT.

Where a judgment was in the judgment roll, but was not printed in the abstract, because a new abstract was not printed after judgment was entered, but abstract used in a premature appeal was refiled by consent, a rule requiring the judgment to be printed in the abstract, but not in terms, making failure to print it in the abstract a cause for dismissing an appeal, is directory, and in view of the stipulation, the rules of the court were substantially and sufficiently complied with to withstand a motion to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶586(4).]

7. MASTER AND SERVANT ¶222(2) — ACTION FOR INJURIES—ASSUMPTION OF RISK.

In an action for death of plaintiff's son, where it appeared that deceased was killed in the performance of a portion of his usual duties, in prying down a mass of rock and earth on a 45-degree incline, pursuant to the orders of defendant's foreman, although it be conceded that the foreman did not exercise ordinary care under the circumstances, the conditions and danger which were an ordinary incident of the work being such that a person of ordinary intelligence must be presumed to have appreciated them, the deceased willingly assumed the risk.¹

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. ¶222(2).]

8. MASTER AND SERVANT ¶288(11)—ACTION FOR INJURIES—ASSUMPTION OF RISK.

In an action for death of plaintiff's son, the fact that deceased, who was fully developed both physically and mentally and had been engaged in the work for a month before the accident, was only 19 years of age, standing alone, does not prevent a finding that as a matter of law he assumed the risk.²

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1079-1082; Dec. Dig. ¶288(11).]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Niko Lukich against the Utah Construction Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Weber & Olson, of Salt Lake City, for appellant. Howat, Macmillan & Nebeker, of Salt Lake City, for respondent.

FRICK, J. This is the second appeal in this case. Lukich v. Utah Const. Co., 150 Pac. 298.

The first appeal, upon respondent's motion, was dismissed upon the sole ground that it was premature; that is, it was brought before final judgment had been duly entered in the case. After the former appeal was dismissed a judgment was duly entered and a motion is now interposed by the respondent to dismiss this appeal: (1) Because the district court had lost jurisdiction to enter judgment; (2) that no final judgment appears in the printed abstract; and (3) that

the assignments of error do not appear in the printed abstract.

[1] As before stated, the former appeal was dismissed upon respondent's motion upon the sole ground that no final judgment of dismissal had been entered after its motion for nonsuit was sustained. It is a universal rule that in case of appeal there must be record evidence showing that a final judgment was rendered and entered, or the appeal cannot prevail. We need not now inquire whether the appellant could or could not have perfected his former appeal under our statute. It is sufficient for the purposes of this decision to know that the appeal was dismissed upon the sole ground that it was prematurely brought. After the remittitur from this court had reached the district court from which the former appeal was taken and in which the motion for nonsuit was granted in September, 1913, the appellant moved the district court that it direct that a final judgment of dismissal be entered, which was accordingly done. This appeal is from that judgment.

[2] It is now contended that inasmuch as the motion for nonsuit was made in September, 1913, and that an appeal was taken and dismissed, and that no final judgment was attempted to be entered until August, 1915, the district court had lost jurisdiction of the cause and was powerless to enter judgment therein. We cannot see any reason for so holding. If the former appeal was premature, as we held it was, then there was in fact no appeal that could effectuate anything. We are of the opinion that the court did not lose jurisdiction to enter final judgment merely because the judgment was not entered immediately after the motion for nonsuit was sustained. Until a final judgment was entered the cause was not disposed of, and in one sense, therefore, it continued to be pending in the district court for final disposition. Such disposition was not made until August, 1915, when the final judgment, which now is appealed from, was entered. We cannot see why the district court did not possess the same power to enter judgment in August, 1915, that it had in September, 1913, when the motion for nonsuit was interposed, but no judgment was entered thereon and to that effect are the authorities. In *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685, a judgment was not entered until about 4 months had elapsed after it should have been entered, and it was held that judgment was properly entered, and that the California statute, which is the same as ours respecting the time judgment should be entered, was directory merely. In *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218, judgment was not entered until 8 years had elapsed, yet the Supreme Court of California held the judgment was properly entered. See, also, *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52. In *Shepherd v. Brenton*, 20 Iowa, 41, a judgment entered

¹ *Toone v. O'Neill Const. Co.*, 40 Utah, 265, 125 Pac. 10.

² *Cook v. U. S. Smelting Co.*, 24 Utah, 190, 97 Pac. 28; *Richards v. Ogden Steam Laundry*, 32 Utah, 422, 91 Pac. 267; *Goleah v. Utah Apex Min. Co.*, 151 Pac. —.

more than 18 months after verdict was held proper and timely. To the same effect are *Mountain v. Rowland*, 30 Ga. 929, and *Burnett v. State*, 14 Tex. 455, 65 Am. Dec. 131. We are of the opinion, therefore, that the court had ample power to enter final judgment, and that in case it had refused it could have been compelled to do so.

[3] It is, however, further insisted that we are without jurisdiction because the motion for nonsuit was made and sustained in September, 1913, and that all that was left undone was merely to enter final judgment. It is therefore contended that the judgment entered in August, 1915, was a mere nunc pro tunc entry which related back to the time when the motion for nonsuit was sustained, and that for that reason the time for appeal commenced to run in September, 1913, when final judgment should have been entered. No doubt there are jurisdictions in which it is held that such an entry of judgment, as between the parties, constitutes a nunc pro tunc entry. 2 Cyc. 796, 797. There are other cases in which it is held that where the belated entry merely constitutes an amendment of a judgment originally entered, such entry is merely a nunc pro tunc entry which relates back to the time the original judgment was entered and does not enlarge the time within which to appeal. *Estate of Scott*, 124 Cal. 671, 57 Pac. 654. Such, however, is not the case when no judgment has been entered. Our statute (Comp. Laws 1907, § 3301), so far as material here, provides:

"An appeal may be taken within six months from the entry of the judgment."

That section was taken from the California Code of Civil Procedure, § 339, and was incorporated into the Revised Statutes of Utah of 1898 as section 3301. The Supreme Court of California, in 1888, in the case of *Coon v. United Order of Honor*, 76 Cal. 354, 18 Pac. 384, construed section 3301, supra, and it is expressly held that in case a final judgment has not been entered, and an appeal for that reason fails, a judgment may be entered and the time within which an appeal must be taken runs from the actual entry of the judgment, and that such entry, for the purposes of appeal, may not be considered as a nunc pro tunc entry. In passing upon that point the Supreme Court of California there said:

"The rights of the parties in respect to an appeal are determined by the date of the actual entry of the judgment, and they cannot be affected by the entry of the judgment nunc pro tunc as of a prior date. The time to appeal begins to run from the time of the actual entry."

[4] In view that our statute is taken from California that case is decisive of the question just discussed.

[5, 6] It is, however, also contended that the appeal should be dismissed because "the assignments of error do not appear in the abstract," and because the final judgment is not printed therein. The record discloses that the parties stipulated that the "ab-

stract of record used in the former appeal * * * may be used in the present appeal. Appellant, therefore, prepared no new nor additional abstract. It is now contended that under the rules of this court appellant should have prepared an additional abstract in which he should have printed the assignments of error and the final judgment. The assignments of error that are relied on here are a verbatim copy of the assignments on the former appeal, all of which were printed in the abstract. All that the appellant would have accomplished by printing the last assignments of error would have been to print a duplicate of the former assignments. Since appellant was given the right to use his original abstract we cannot see why it was necessary for him to again print what was already contained in the original abstract. As a matter of course he was required to file new assignments of error, or, at least, to obtain permission to refile his old ones. He did that. We think the rule of this court was substantially complied with when appellant obtained leave to refile his original abstract which contained the assignments of error as filed in this case. Surely, neither the court nor respondent could have been benefited by reprinting the assignments of error. The object or purpose of the rule was subserved, since respondent was apprised of the errors appellant relied on so that it could answer them and could assign and file cross-errors if it desired to do so. It is true that the judgment is not printed in the abstract. It is, however, in the judgment roll, and the only reason it is not in the printed abstract is because no new abstract was printed after the judgment was entered, as before stated. The rule, however, does not, at least not in terms, make the failure to print the judgment in the abstract a cause for dismissing an appeal. Admitting, however, that under the rule the judgment should have been printed in the abstract, yet the rule is directory merely and was promulgated as a means of promoting the ends of justice and to aid or advance judicial administration. Moreover, in view of the stipulation before referred to, if the respondent did not waive its right to interpose this objection, yet the rules have been substantially complied with, and this is sufficient to withstand a motion to dismiss an appeal. The motion to dismiss the appeal, therefore, cannot prevail.

[7] This brings us to the merits of the appeal. The plaintiff, who is a resident of Austria, brought this action to recover damages for the death of his son Mike Luckich who was employed by, and, it is alleged, was killed through the negligence of the defendant. At the conclusion of plaintiff's evidence the defendant moved for a nonsuit on various grounds, among others, that no negligence had been shown on the part of the defendant, that the deceased had assumed the risk of injury, and that he was guilty of

contributory negligence, which was the proximate cause of his death.

The controlling facts, briefly stated, are, that in July, 1910, the defendant was engaged in making a somewhat extensive excavation along the side of a mountain; that in making the excavation the material, including rocks, was blasted from the mountain side by means of explosives, and a steam shovel was used to take up the material after blasting and to load it upon cars which were operated along the foot of the mountain. After blasting down the material, and in loading it upon the cars with the steam shovel, what is called a one-to-one slope, that is, a 45-degree incline, was formed along the mountain side, which was quite high. In blasting, and perhaps in removing the material from the mountain side with the steam shovel, often some boulders or rocks, or other masses of material, were lodged on different parts of the slope or incline aforesaid. When that occurred it was the duty of the deceased to go along the slope, and, with an iron bar or some suitable instrument, pry loose the rocks and material aforesaid so that they would roll or slide down the slope or incline to the foot thereof. It was necessary to do that so as to protect the men, who were working at and about the steam shovel at the foot of the incline, from being injured by the rocks and material which would become loosened by the operation of the steam shovel, and thus would roll or slide down the incline aforesaid. In the forenoon of the 21st day of July, 1910, it appears that some rocks or a considerable mass of material lodged some distance up the incline which, in the condition it was in, constituted a menace and danger to the workmen at work at the steam shovel, and to those working at the foot of the incline as before stated. What was said and done just before the accident occurred is not made as clear by the record as it might be, yet we think the evidence clearly tends to show that when rocks or masses of material would lodge at different points of the incline and thus become dangerous to the men working below one of the employes would go, or be directed to go, up the incline to pry down such material or to start it down the slope; that Mike Lukich, the deceased, was one of the employes who went up the incline from time to time to pry down such material; that he had been so engaged for about a month before the accident; that on the morning aforesaid a mass of rocks or material had lodged near the top of the incline, and the foreman of defendant, a Mr. Brown, told Lukich to pry down the material. In the language of the witness this is what occurred:

"Brown told him (Lukich) * * * 'You go around the steam shovel and go to the bar and take this bar and knock that stuff down.' The boy (Lukich) said, 'It looks kind of dangerous.' Brown said, 'It looks pretty good; don't be scared; it is solid; you go ahead and do it.'"

The witness further said:

"Young Lukich went to the top of the slope to the bar and as soon as he put his hand on the bar all the stuff and him and the bar went down. It was rock the steam shovel couldn't reach, and men are sent to pry them down."

On cross-examination the witness further said:

"Before Mike went up where he was told to go I could see that the material and rock was loose, but it didn't look very dangerous because it was covered with sand and dirt. I did not pay much attention to it. After this coming down with Mike there was a few big rocks there. Where Mike went there were no projecting rocks in the slope."

Lukich was precipitated down with and among the mass of rocks and material, and was killed.

Appellant's counsel contend that Mr. Brown was negligent in ordering the deceased to go up the incline to pry down the material. They further contend that in any event if Brown's act did not constitute negligence as a matter of law the question of whether it was or was not negligence was, nevertheless, for the jury. In answer to respondent's contention that the deceased, under the circumstances of this case, assumed the risk of injury appellant's counsel further contend that the question of whether the deceased appreciated the danger, although he knew it, was also a question which should have been submitted to the jury. As abstract legal propositions counsel's contentions are correct. The question, however, is whether the contentions are applicable to the undisputed facts of this case. We have gone as far as any court emanating from a jurisdiction where the doctrine of assumption of risk is a defense in sustaining the contentions contended for by appellant's counsel. See *Toone v. O'Neill Const. Co.*, 40 Utah, 265, 125 Pac. 10, and cases there cited. It is made apparent from the *Toone Case*, however, and also from similar cases, that before the doctrine contended for by appellant's counsel applies the facts must be such that a jury of reasonable men would be authorized to say that in ordering the servant to do the thing complained of the master was negligent. Counsel concede that such is the law. Indeed, it is alleged in the complaint that the act of Brown in ordering the deceased to pry down the material constituted negligence. We can, however, not agree with counsel in their conclusions. In making the excavation, as we have seen, a more or less high and steep incline was necessarily formed. Along or on the side of this incline, in the ordinary and natural conduct of the work, loose rocks and masses of material would, from time to time, gather and lodge, which, if left in that condition, created a menace and a danger to all the men who worked at the foot of the incline. In order to protect those working there against such danger the rocks and masses of material which gathered and lodged as aforesaid had to be pried down from

time to time. This, it seems, was not an infrequent occurrence, and to pry down such rocks and masses of material was a part of the deceased's duty. That more or less danger would be encountered in prying down such rocks and masses of material must have been apparent to every person of the most ordinary intelligence. Indeed, the ordinary forces of nature, the law of gravitation, the effect of which every person of ordinary intelligence is presumed to know, would cause the rocks and material to slide down the incline whenever the force of gravitation overcame the inertia of the material lying loose on the incline. From the evidence it is clear that the actual condition of the mass of material the deceased went to pry down was seen and understood by him. He, it must be assumed, knew and appreciated what all other men of ordinary intelligence knew and appreciated, which was, that if he went on the mass of material, and that if it should go down as a mass, he, of necessity, must go down with it, and if he did, he might, and in all probability, would be seriously injured. Then again, how can it be said that in ordering a servant to perform a part of his duty constitutes negligence? If that were so no master could, without impunity, direct any servant to do anything without becoming liable in case injury should result. All that Mr. Brown did was to direct the deceased to take the iron bar and go up the incline to where the mass of material had lodged and to cause it to slide down the incline, and in that way to prevent it from endangering the lives of the other workmen. That was a necessary part of the work. In doing it the servant would necessarily incur more or less danger, but whatever the danger it was a mere incident to the work that had to be done. How can it be said, therefore, that Mr. Brown was negligent in ordering the work done?

Let it be conceded, however, that Mr. Brown, in directing the deceased to go upon the incline and pry down the mass of material that had lodged there, failed to exercise ordinary care under the circumstances and that the jury would be justified in so finding, yet that, standing alone, would not be controlling. The conditions and danger arising from going upon the incline were as open and apparent to the deceased as to Mr. Brown. Indeed, one cannot peruse the testimony of the witnesses who testified for the plaintiff (although all seemed to be foreigners and unfamiliar with the English language, and for that reason their statements in some respects are not as lucid as they might be) without becoming convinced that every one of them fully knew and appreciated the danger incident to the prying down of material that lodged on the incline as aforesaid. How could it be otherwise? Any person of ordinary prudence and intelligence must be assumed to have known that any attempt to

move any considerable mass of material, whether composed of rocks or of mixed rocks and earth, down the incline, which was 45 degrees, danger would be encountered, that such danger was unavoidable, and that it was a mere incident of doing the work. That being so, one attempting it must be held to have willingly assumed whatever risk there was.

[8] But it is contended that in prying down such loose masses of material a rope was sometimes used, one end of which was tied around the man who would pry down the material and the other end held by some one on the top of the incline or fastened to some object so as to prevent the man from going down with the mass, as did the deceased. There was, however, nothing said about using a rope at this time. By merely viewing an occurrence in retrospect most any one can always discover or point to some thing that might have been done or omitted. That is not the test. The question is: Did the person charged with negligence fail to exercise ordinary care? That is, did he do or omit to do some act which men of ordinary prudence under the circumstances would have done or would have omitted? In view of all the circumstances, what is there that any one can say Mr. Brown did that he should not have done or that he omitted to do which he should have done in carrying on the work? He merely insisted that the usual precautions be taken to prevent injury to the men working below. But, as before pointed out, the risk or danger incident to effectuating that purpose was just as open, just as apparent, and must be assumed was appreciated by any one who was capable of doing the work as it was to Mr. Brown. In this connection it is asserted that the deceased was only 19 years of age. That fact, standing alone, does not affect the result. *Cook v. U. S. Smelting Co.*, 34 Utah, 190, 97 Pac. 28; *Richards v. Ogden Steam Laundry*, 32 Utah, 423, 91 Pac. 267. In the *Cook* Case the injured employé was only 16 years of age, and yet it was held that he assumed the risk. The evidence is that the deceased was fully developed, both physically and mentally, was strong and intelligent, and had been engaged in the work for a month or so before the accident occurred. If it should be held, therefore, that under the undisputed facts the deceased did not assume the risk as matter of law it would, in effect, amount to a holding that the doctrine of assumed risk no longer prevails in this jurisdiction. It may be that it would be more just and equitable to all employés that the business or enterprise be made to bear the loss incident thereto. Such, however, is not the law in this jurisdiction. *Cook v. Smelting Co.*, supra. If the doctrine of assumed risk shall be abrogated in this jurisdiction it should be done by the Legislature, and not by the judicial branch of the state government. The cases

and authorities that control in cases of assumption of risk have been cited and referred to in the case of *Golesh v. Utah Apex Min. Co.*, 161 Pac. —, and it is not necessary to refer to them again.

We are of the opinion that the judgment should be affirmed. Such is the order; respondent to recover costs.

McCARTY, J., concurs.

STRAUP, C. J. (concurring). From the nature of the work prosecuted, the case is not within the rule where the master was required to make or could make the place safe or guard the servant against dangers incident to the work or where the master was derelict in the discharge of any such duties, nor is it one where the master directed a servant to a place or to do something at or about which the servant could assume that the master was required to do or had done anything with respect to making the place safe or guarding the servant against dangers, nor one where the servant could absolve himself from the charge of assumption of risk by yielding his judgment respecting danger to that of his master's.

MARTINDALE v. OREGON SHORT LINE R. CO. (No. 2892.)

(Supreme Court of Utah. July 10, 1916. On Application for Rehearing, Oct. 16, 1916.)

1. APPEAL AND ERROR ⇨1001(1)—QUESTION OF FACT—VERDICT.

Where there is any substantial evidence in support of every element necessarily included in the general verdict, the Supreme Court is bound thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. ⇨1001(1).]

2. RAILROADS ⇨324(1)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Deceased, a comparative stranger in the neighborhood, who had been invited by some young people to attend a dance, and who accepted the invitation and rode in a covered spring wagon with them, drawn by a gentle team driven by a competent driver, and who while returning, and without the slightest opportunity to warn the others or to protect herself, was struck and killed at a crossing, was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020, 1022, 1023; Dec. Dig. ⇨324(1).]

3. NEGLIGENCE ⇨93(1) — IMPUTED NEGLIGENCE—DRIVER OF VEHICLE.

In such case, and even if the driver was guilty of negligence, his negligence could not be imputed to the deceased; the mere fact that she had accepted the invitation of the young people with whom she was riding to attend a dance being insufficient to charge her with being interested in a common or joint enterprise.¹

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148; Dec. Dig. ⇨93(1).]

¹ *Atwood v. Utah Light & R. Co.*, 44 Utah, 366, 140 Pac. 187; *Lockhead v. Jensen*, 43 Utah, 99, 129 Pac. 347.

4. NEGLIGENCE ⇨138(1) — PLEADING — INSTRUCTIONS.

A charge that plaintiff must by a preponderance of the evidence establish one or more of the particular acts of negligence set forth in a complaint, where more than one is pleaded, and that such act must be the proximate cause of the injury complained of, is proper; as it does no more than to limit the jury to the particular acts of negligence specified in the complaint.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354, 356-360; Dec. Dig. ⇨138(1).]

5. NEGLIGENCE ⇨119(7) — PLEADING — RECOVERY.

A plaintiff must recover if he recovers at all upon the acts of negligence pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 212-216; Dec. Dig. ⇨119(7).]

6. RAILROADS ⇨348(1)—ACCIDENT AT CROSSING—SUFFICIENCY OF EVIDENCE — FAILURE TO KEEP LOOKOUT.

In an action for the death of plaintiff's minor daughter killed when the wagon in which she was riding was struck by defendant's passenger train at a crossing, brought on the ground that the defendant negligently failed to keep a diligent lookout for persons on the crossing, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. ⇨348(1).]

On Application for Rehearing.

7. APPEAL AND ERROR ⇨930(1)—QUESTION OF FACT—WEIGHT OF EVIDENCE.

After judgment the statements of the witnesses against whom the jury has made findings must be taken most strongly against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755, 3756, 3758; Dec. Dig. ⇨930(1).]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by James Martindale against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

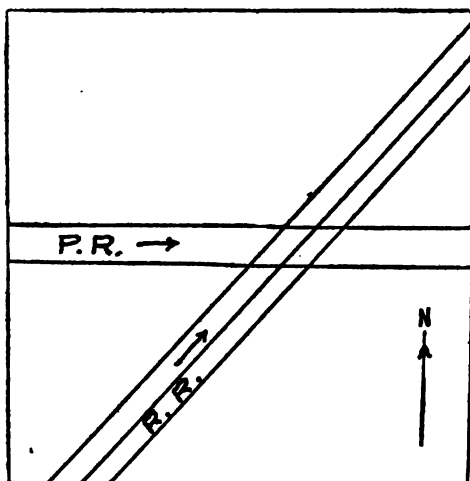
Geo. H. Smith, J. V. Lyle, and B. S. Crow, all of Salt Lake City, for appellant. B. N. O. Stott, of Salt Lake City, for respondent.

FRICK, J. The plaintiff recovered judgment against the defendant for damages caused by the death of plaintiff's daughter, a minor of the age of 19 years. The death of such daughter, plaintiff alleged, was caused through the negligence of the defendant in running a passenger train over a public road crossing in the state of Idaho, thereby causing said train to collide with a wagon in which said minor, with others, was riding at the time. After making the necessary allegations of inducement, plaintiff alleged the acts or causes of negligence on the part of the defendant as follows: (1) That the "defendant carelessly and negligently failed and omitted in approaching said crossing to have any headlight upon its engine"; (2) that the defendant "carelessly and negligently failed and omitted in approaching said crossing to blow the whistle * * * or ring the bell, or to in any wise give warning of the ap-

proach of said train"; (3) that the defendant "carelessly and negligently failed and omitted to keep a diligent lookout ahead for * * * persons traveling over the said road and across the railroad track"; (4) that the defendant "carelessly and negligently operated said train at a high and dangerous rate of speed"; and (5) that the defendant "carelessly and negligently failed and omitted to keep the said train under reasonable control in approaching the said crossing."

Briefly stated, the plaintiff's evidence shows:

A public highway running east and west crosses defendant's railroad track, which runs in a northeasterly and southwesterly direction. The following plat shows the precise angle at which the public road, marked P. R. on the plat, crosses the defendant railroad, marked R. R. on the plat:



Miss Martindale, the deceased, on the night of September 12, 1913, in company with three other young women and four young men, attended a dance some miles westerly from the crossing in question. In going to the dance in the evening, about 8:30, all rode in a covered, three-seated spring wagon. In going they did not drive over the crossing in question, but passed along a road running east and west, but some distance north of the crossing. In returning home, however, for some reason the young man who drove the team took the road in question. In approaching the crossing three of the young people sat on the rear seat, three on the middle seat, and the deceased sat on one knee of one of the young women and on one knee of one of the young men, both of whom were riding on the middle seat, making four altogether on that seat, while the driver was in the front of the wagon. Whether he was sitting on the seat or down on the bottom of the wagon bed is not made very clear by the evidence. The deceased was so seated that she was facing north, or away from the railroad track and the direction from which the train was approaching the crossing. The team and wagon

approached the crossing from the west. The directions in which both the train and wagon were moving are indicated by arrows on the plat. The deceased was visiting with friends or relatives who lived in the neighborhood, but their homes were some miles away from the crossing in question. She had not before passed over the crossing, and, so far as disclosed, had no knowledge of and did not know that there was a crossing at the place in question, or that the team and wagon were approaching that or any other railroad crossing. It further appears that the team was approaching the crossing on a slow trot, and that all of those in the wagon did not know they were in fact approaching the railroad crossing, and did not know of the approach of the train, which was a fast passenger train running at a speed of about 35 miles an hour. Nor did the engineer know that he had collided with the wagon until he arrived at the next station, more than a mile distant from the crossing. The railroad crossing in daylight was visible for about 1,600 feet from the west, and the grade descended slightly towards the crossing, so that the engine at the time, in the language of the record, was "coasting" or running without exhausting steam in approaching the crossing. The engine and the team and wagon arrived at the crossing at the same moment of time, at about 3:40 o'clock a. m., and the occupants of the wagon were thrown therefrom, some of them receiving more or less serious injuries, while Miss Martindale was killed outright. There is much evidence pro and con the question whether there was a headlight burning, whether any signals were given by the engineer in approaching the crossing. It was shown that the young man who drove the team was a competent driver. There was also evidence upon other phases of the case shedding more or less light upon the accident.

[1] We could subserve no good purpose, however, in further detailing the facts in view of the peculiar circumstances, and in view that all of the questions of fact were for the jury, and for that reason, so long as there is any substantial evidence in support of every element necessarily included in the general verdict, we are bound by the verdict. We felt impelled, however, to set forth the foregoing facts so that the reader may have a better understanding of the law which we shall now proceed to consider.

The first question of law arises upon defendant's motion for a directed verdict in its favor, which the court denied. The defendant duly excepted to the ruling and now assigns the same as error. The motion, so far as material here, was substantially based upon the following grounds: (1) That the deceased was guilty of contributory negligence as a matter of law; and (2) that the driver of the team and wagon was guilty of negligence as a matter of law in attempting to cross the railroad track, which negli-

gence must be imputed to the deceased. In considering the grounds, we, as a matter of course, must apply the law to the facts and circumstances as they affected the deceased, and not as they may have affected some or all of the others who were in the wagon with her at the time.

[2] In view of the foregoing statement, was the deceased guilty of contributory negligence? We confess our entire inability to discover any evidence or facts in this record from which any negligence on her part can legitimately be inferred or deduced by any reasonable mind. The very authorities cited by counsel for defendant support the foregoing statement. Counsel cite section 503, 1 Thomp. Com. L. Neg., in which the author cites the duties of one who is injured at a railroad crossing while riding with another who owns and drives the vehicle which is injured in a collision. The author says that "if he [the person injured] is riding *by the side of the driver in an open carriage*, and the driver, on approaching a railway track, *fails to make any use of his faculties*," etc., then, it is said, the person so riding must act to protect himself if necessary and if he can do so. Counsel also cite 33 Cyc. 1017, where the rule is stated that one riding in a carriage with a driver must avoid injury to himself "*where he has an opportunity to do so*, * * * and if he is familiar with the crossing to look or look and listen for himself, he is guilty of contributory negligence * * * if he fails to use proper care," etc. In *Whitman v. Fisher*, 98 Me. 575, 57 Atl. 895, also quoted from by counsel, it is said that "a person who is accompanying another upon a drive, and *who has an opportunity to observe and give notice of dangers that may be avoided*," etc., must protect himself if he can. The italics in the foregoing excerpts are ours. We do not deem it necessary to quote further, since the foregoing excerpts are quite sufficient to show that the situation in which the deceased was placed at and immediately prior to the accident clearly exculpate her from the charge of contributory negligence. As before pointed out, the deceased was a comparative stranger in the neighborhood, and at the time of, and immediately prior to, the accident she was visiting with friends and relatives who lived some miles distant from the railroad crossing in question. On the day of the accident, or perhaps the day preceding, she was invited by one, or perhaps two, of the young women who were in the wagon with her at the time of the accident to attend a dance on the evening of the night of the accident some miles west of where she was visiting. She accepted the invitation, and rode in the covered spring wagon we have mentioned with the young men and young women to and from the dance. In returning the young people were riding in the position before stated, and the deceased, being a stranger, knew nothing about the railroad crossing;

nor had she the slightest opportunity either to warn others or protect herself against the impending calamity. It was shown that the team was gentle, and that the driver was a young man reared on a farm, and was a competent driver. If one riding in a vehicle in the nighttime with others can, under such circumstances, be found guilty of contributory negligence in case of a collision, then it would be utterly impossible to successfully avoid the plea of contributory negligence in any case. Such, however, is not the law, as clearly appears from the excerpts we have quoted from the authorities cited by defendant's counsel.

[3] What has been said also answers the contention that the driver of the team was negligent, and that his negligence must be imputed to the deceased. We need not now pass upon the driver's negligence. What we now decide is that, even though it were assumed that the driver was guilty of negligence, yet his negligence cannot be imputed to the deceased. The question of imputed negligence is fully discussed in the cases of *Atwood v. Utah Light & R. Co.*, 44 Utah, 366, 140 Pac. 137, and *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347. Counsel for defendant, however, insist that both of those cases are distinguishable from the case at bar. We cannot agree with counsel in that regard. As we view those cases, they are decisive of the question of imputed negligence as that question arises here. Counsel, however, pleaded and introduced in evidence a certain decision emanating from the Supreme Court of Idaho wherein it is contended that court had arrived at a different conclusion upon the question of imputed negligence. At the hearing however, counsel frankly conceded that the most that could be claimed for the Idaho decision was that it left the law upon the question of imputed negligence in Idaho somewhat in doubt. We are of the opinion, however, that there is nothing in the Idaho decision which in any way modifies the doctrine laid down in the two cases emanating from this court to which reference has been made, and we have discovered no reason why we should depart from the rule announced in those cases, and counsel have suggested none.

Nor can counsel's contention prevail that the result in this case should be different from the one reached in the *Atwood Case* because all of those in the wagon were engaged in a common or joint enterprise. We pointed out in the *Atwood Case* that when different parties are engaged in a common or joint enterprise, or where all have the power to direct or control the driver of the vehicle or the team, then, in case of a collision and consequent injury, the doctrine of imputed negligence has no application, and the parties may be guilty of contributory negligence as in other cases where negligence is involved. The mere fact that the deceased accepted the invitation of her girl friends to

attend the dance is, however, not sufficient to charge her with being interested in a common or joint enterprise with those who were with her in the wagon at the time. Nor did she have any control or direction over the driver or team. True, the evidence showed that she was permitted to drive the team for some distance in going to the dance. That, however, is not controlling here. We cannot see why a different rule should apply in this case, so far as the deceased is concerned, than was held to apply in the Atwood Case. It is also assigned as error that the court withdrew the question of the deceased's contributory negligence from the jury. Counsel insist that under the facts and circumstances that question should at least have been submitted to the jury for their determination. We have already discussed the facts relating to the young woman's acts and conduct. We can only repeat that we can discover nothing from which reasonable men might find that she was guilty of contributory negligence. Upon that question this case does not materially differ from the Atwood Case, where we held the court committed no error in withdrawing the question of contributory negligence upon the part of the young woman from the jury. We are of the opinion that the court's ruling in withdrawing that question from the jury under all the circumstances was proper.

[4-6] It also is insisted that the court erred in charging the jury as follows:

"You are further instructed that, where the operatives of a train approach and enter upon a public crossing carelessly, and a person driving over the crossing is killed as a consequence, no recovery of damages can be had from the company if he himself was guilty of negligently entering upon the crossing; for in such case he is guilty of contributory negligence.

"But you are further instructed that, where a train is negligently run across a public highway and collides with a vehicle attempting to use the crossing, if a person in the vehicle who is not driving the same and has no management or control over it is killed, and such person is an unmarried daughter, the father is not prevented from recovering damages because the driver of the vehicle was guilty of negligence in entering upon the crossing. Under such circumstances the father has the right to sue either the railroad company or the driver, or both, and if he brought suit against the driver, the driver could not escape responsibility by claiming that the railroad company was also negligent, and if he brought suit against the railroad company, it could not claim freedom from responsibility because the driver was also negligent; and in this case the plaintiff is entitled to recover if the defendant was guilty of negligence in some of the particulars alleged in plaintiff's complaint, and such negligence was the proximate cause of the accident resulting in the death of his daughter, and no negligence of any one else could defeat the plaintiff's right to recover except the negligence of the deceased; and in this case you are instructed that the deceased was not guilty of negligence."

We have given the instruction in full, although those portions relating to contributory and imputed negligence have been already discussed and passed on. Counsel, however, especially except to that part of the

instruction which we have italicized, and they in their brief contend, and in the oral argument vigorously insisted, that the court erred in so charging the jury. Much stress is laid upon the phrase that the jury were authorized to find for the plaintiff if they found that "the defendant was guilty of negligence in some of the particulars alleged in the complaint," etc. In that connection it is insisted that no fewer than five acts or causes of negligence are alleged in the complaint. In order to make counsel's contention clear we have set forth the five different acts or causes of negligence complained of at the beginning of this opinion. Counsel insist that under the charge the jury could have found against the defendant if they found any one of the five alleged causes or acts of negligence to exist, and found in connection therewith that such acts were the proximate cause of the injury. In that connection it is argued that there were several of the alleged acts or causes of negligence which were not supported by any evidence. It is not unusual—indeed, it is quite usual—to charge that the plaintiff must, by a preponderance of the evidence, establish one or more of the particular acts of negligence set forth in the complaint where more than one is pleaded, and that such act must be the proximate cause of the injury complained of. Such a charge is quite proper. In giving such a charge the court usually does no more than to limit the jury to the particular acts of negligence, whether of omission or commission, that are specified in the complaint. This is done to inform the jury of the rule, which to all lawyers is elementary, that the plaintiff must recover, if he recovers at all, upon the acts of negligence pleaded. Counsel, however, insist that, under all the circumstances, the instruction complained of means much more than that. They insist that the court in effect charged the jury that they could find for the plaintiff upon any one of the five causes or acts of negligence alleged in the complaint whether there was any evidence to support any particular act or cause of negligence or not. If that construction of the instruction were assumed to be the correct one, there would be much force to counsel's contention. It is, however, not necessary to determine whether counsel's contention shall prevail or not, for the reason that we have carefully examined into the evidence, and, after doing so, are convinced that counsel's contention that there is no evidence in support of several of the alleged acts or causes of negligence cannot prevail. At the hearing the writer was impressed with counsel's contention that no evidence was produced upon the question that a proper lookout had not been maintained by the fireman and engineer. It occurred to the writer, then, that inasmuch as the accident occurred in the darkness, at about 8:40 o'clock in the morning, at a country road

crossing with no habitation near, and which was not shown to have been frequented at that time of night, that at least some evidence was required other than the mere fact of the collision to show that no proper lookout was maintained by the train. After reading the evidence of both the fireman and engineer, however, there no longer remains any doubt in the mind of the writer regarding that question. They both testified that they not only did not look, but said that if they had looked they could and probably would have seen the team and wagon approaching the crossing. Indeed, the engineer testified that he could have seen the team approaching the crossing, and gave as a reason for not seeing it that it was not at the crossing at all; yet the evidence is clearly to the effect that there were marks in the very center of the roadway where it crosses the railroad track showing that the wagon had been struck and had been shoved along the rail in the direction the train was moving. Moreover, parts of the wagon and gearing, as well as several of the occupants thereof, were found on the pilot in front of the engine when the train arrived at the next station, which was about a mile northeast of the crossing. None of the trainmen, however, knew that any collision had occurred until they discovered the persons and things on the pilot of the engine as just stated. There is therefore positive evidence that the trainmen did not look, and that if they had done so they would have seen the team and wagon. From all the evidence the jury could also have inferred that they could have avoided the collision had they exercised that degree of care which is required of them at public crossings. If the evidence had been left as it was when the plaintiff rested his case, it would be extremely doubtful, to say the least, whether, in view of the time, place, and circumstances under which the accident occurred, there would be any evidence authorizing a finding that no proper lookout had been maintained, or that, even though such had been done, the accident could have been prevented by those in charge of the train. The defendant's evidence changed all that, not only with regard to the question of maintaining a lookout, but also inferentially with regard to several of the other acts or causes of negligence. While it is true that under all the circumstances it seems quite possible that the driver, as matter of law, may have been guilty of contributory negligence barring recovery, yet, as we have pointed out, that question, in view of the deceased's position and conduct, is not controlling.

We are of the opinion, therefore, that there is substantial evidence upon every essential element which it was necessary for the plaintiff to establish in order to recover. In view of that fact, we cannot interfere with the verdict. From what has already been said it also follows that the court committed no

error either in charging the jury or in refusing certain requests of the defendant which were framed upon the theory of imputed and contributory negligence on the part of the deceased. The case was submitted to the jury upon the theory of the law as we have already held it to be, and hence no prejudicial error was committed.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

On Application for Rehearing.

Counsel for appellant have filed a petition for a rehearing in which they vigorously insist that the writer stated the evidence of the engineer too strongly against him. The statement respecting the lookout of the engineer and fireman in approaching the crossing in question in the opinion which is objected to is as follows:

"After reading the evidence of both the fireman and engineer, however, there no longer remains any doubt that if they had looked they could and probably would have seen the team and wagon approaching the crossing. Indeed, the engineer testified that he could have seen the team approaching the crossing, and gave as a reason for not seeing it that it was not at the crossing at all."

There were two firemen on the engine at the time of the collision. One of them, in answer to the question whether he kept a lookout, testified: "I kept no constant lookout; no, sir." In answer to the question whether he was in the fireman's seat as the train approached the crossing in question he said: "I have answered that question a number of times, and I have told you no to that." Further, in answer to whether any one else was in the fireman's seat keeping a lookout at that time, he said: "I don't remember any one; no." The other fireman, after testifying that he was in the cab of the engine at the time the train approached the road crossing where the collision occurred, answered the following questions as indicated:

"Q. That is, you were sitting on the fireman's seat on the fireman's side of the cab? A. Sitting on the side of the seat. Q. And you were not looking out? A. No, sir. Q. The windows—you were not looking forward through the front window of the cab were you? A. No, sir. Q. You were not looking out of the side window of the cab? A. No, sir."

The engineer repeatedly said that he could have seen a team if one had been at or near the crossing in question.

"Q. You could see a team in that position that night without any trouble couldn't you? A. Yes, sir."

He further said that he did not see the "rig," that is, the wagon the plaintiff and her companions were riding in; that he did not know any team or wagon was either approaching the track or crossing it; that the reason he did not see the team and wagon was because they were not at the crossing,

that is, "there was no team there to see." He said that he did not look out of the side window of the cab, but said he looked ahead out of the front window on his side of the cab, which was the opposite side from which the team and wagon were approaching, and that he did not know that a collision had taken place until after the train had stopped at the next station, a mile or so distant from the crossing in question. The evidence is conclusive that the collision did occur; that at least some of the occupants of the wagon with which the train collided and certain parts of the wagon and harness were on the pilot when the train reached the station aforesaid. The testimony is clear and convincing that the collision occurred at the crossing to which both of the firemen and the engineer referred in their testimony, and to which testimony we have referred. If, therefore, we have stated the evidence too strongly against the engineer, it is because we have misinterpreted the real purport of what he testified to. We think no one can successfully maintain that the jury were not authorized to find from his testimony that he did not keep a proper lookout. He admits that he could have seen a team and wagon approaching the crossing, and that he would have seen them had they been there. The real reason he gives why he did not see them is that "there was no team there to see." In the very teeth of that statement he carried conclusive evidence of the collision on the pilot of the engine. That evidence he still had on the pilot when the train reached the next station, a mile distant from the crossing where the collision occurred. There can be no doubt, therefore, that the engine collided with the wagon, and that some of those riding in it were injured, while some were killed outright. Nor is there any room to doubt the fact that the collision occurred at the crossing in question. True, the engineer does not concede the latter fact. When all of his testimony is considered together, however, it merely amounts to this: That he could have seen a team and wagon approaching the crossing on the night in question; that he did not see any, and the reason he did not see it was because "there was no team there to see." From all this he and appellant's counsel maintain that he kept a lookout. How, they say, can it be otherwise? The engineer, in effect says:

"I not only could, but would, have seen a wagon and horses had any approached the crossing; I did not see any there, because there were none. I looked out of the front window on the opposite side of the engine from whence the team and wagon approached, and did not see them; hence they were not there."

[7] From all the engineer said, therefore, the conclusion is inevitable that, had he maintained a proper lookout, he, in all probability, would have seen the team approaching; and such a conclusion comes from the

firemen's and engineer's statements. Counsel are too prone to overlook the fact that, after judgment, the statements of the witnesses against whom the jury has made findings must be taken most strongly against them. We cannot see how the jury could escape the conclusion that no proper lookout was maintained in the face of the firemen's and engineer's statements.

The other matters referred to in the petition relate to the court's instructions, and to the contributory negligence of the deceased. Those subjects are fully considered in the opinion, and nothing new is presented in respect to either of them.

The petition therefore should be, and it accordingly is denied.

STRAUP, C. J., and McCARTY, J., concur.

STINSON et al. v. GODBE, City Treasurer.
(No. 2887.)

(Supreme Court of Utah. Sept. 29, 1916.)

1. MANDAMUS \Leftrightarrow 119—SPECIAL ASSESSMENTS—COLLECTION—ORDINANCES AND STATUTES.

Under ordinances of Salt Lake City, providing that on any installment or the interest not being paid on due date the whole amount of the special tax unpaid at the time the installment and interest are due shall become due and payable, and providing for the sale of all property upon which the special tax is delinquent, the city treasurer could be compelled to collect the whole tax for a sewer, to discharge coupon warrants issued to the contractor, when but one installment was delinquent, in view of the provision of the ordinances and Comp. Laws 1907, § 282x7, as amended by Laws 1909, c. 41, providing that the whole warrant may be paid on the day any installment becomes due by paying the amount and interest to date of payment, so that the collection would not be of money which the city could not use and upon which interest would accumulate.¹

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 251-253; Dec. Dig. \Leftrightarrow 119.]

2. MUNICIPAL CORPORATIONS \Leftrightarrow 485(1)—SPECIAL ASSESSMENTS—INTEREST-BEARING WARRANTS—NEGOTIABLE CHARACTER.

While interest-bearing warrants of a city issued to a sewer contractor partake of negotiability, they do not in law have the same protection as negotiable instruments.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1140; Dec. Dig. \Leftrightarrow 485(1).]

3. MUNICIPAL CORPORATIONS \Leftrightarrow 525—SPECIAL ASSESSMENTS—ENFORCEMENT—INCREASED INTEREST UPON DELINQUENCY.

Though the interest upon delinquent installments of a special tax for a sewer improvement is increased from 6 to 8 per cent., nevertheless payment of delinquent installments should be enforced by sale of the property to pay interest-bearing coupon warrants issued the contractor for the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1240, 1241; Dec. Dig. \Leftrightarrow 525.]

\Leftrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

¹ Stinson v. Godbe, 150 Pac. 967.

4. MANDAMUS \Leftrightarrow 119—PROPRIETY OF REM-EDY.

The holder of an interest-bearing coupon warrant drawn upon a special fund to be raised through assessment made for a sewer improvement, may, by mandamus, compel the city treasurer to proceed with the collection of the warrant by sale of delinquent property.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 251-253; Dec. Dig. \Leftrightarrow 119.]

Appeal from District Court, Salt Lake County; F. C. Loofbouroow, Judge.

Petition for mandamus by R. M. Stinson and Thomas Stockhausen, copartners doing business as R. M. Stinson & Company, against Frank Godbe, as City Treasurer of Salt Lake City. From judgment dismissing the complaint, plaintiffs appeal. Judgment reversed, and cause remanded, with directions to issue a peremptory writ of mandate as prayed.

Pierce, Critchlow & Barrette and Van Cott, Allison & Biter, both of Salt Lake City, for appellants. H. J. Dininny, of Salt Lake City, for respondent.

FRICK, J. Plaintiffs commenced this proceeding in the district court of Salt Lake county to require the defendant, as treasurer of Salt Lake City, to proceed to sell certain real estate which is subject to a special tax and by that means to collect said tax.

The complaint covers 25 pages of the printed abstract. After stating the matters of inducement it is in substance alleged that Salt Lake City entered into a contract with one P. J. Moran, contractor, to make certain public improvements consisting of a sewer for said city; that under said contract it was agreed that said contractor, for making said improvement, should be paid in "coupon warrants" issued by said city. The said contract contained the following provision:

"It is understood and agreed that said contractor shall accept such coupon warrants in full payment for work done and material furnished under the contract to the amount of the sum named in each of said warrants and interest as therein provided, and that the city shall not be held liable for the payment of the cost of the improvements mentioned in said warrants, or for the payment of any warrants issued, as aforesaid, or for the payment of any of the coupons attached thereto, except to the extent of the funds received by it under the levy and assessment for said improvements; but the city shall be responsible for faithful accounting, collection, and settlement, and paying the money of said funds, and when such accounting, collection, settlement, and paying is faithfully performed all further liability on the part of the city shall cease, and it is hereby understood that the city will exercise the authority conferred upon it by law to collect said assessments."

It was further alleged that said city by ordinance had duly levied a special tax to pay said coupon warrants; that in said ordinance it was also provided:

"Said tax shall become and be delinquent in five equal yearly installments, with interest on the whole sum unpaid at the rate of 6 per

cent. per annum, payable at the time each installment is due, to wit: One-fifth thereof one year after the ordinance confirming the levy of the tax for the payment for such improvement becomes effective; one-fifth thereof in two years after said ordinance becomes effective; one-fifth thereof in three years after said ordinance becomes effective; one-fifth thereof in four years after said ordinance becomes effective; and one-fifth thereof in five years after said ordinance becomes effective. One or more installments, in the order in which they are payable, or the whole special tax, may be paid at any time within thirty days after the ordinance confirming the levy of the tax becomes effective, without interest. In the event of any installment or the interest aforesaid not being paid on the date the same becomes due, the whole amount of the special tax unpaid at the time said installment and interest are due, shall become due and payable, and shall draw interest at the rate of 8 per cent. per annum until the sale of the property assessed: Provided, one or more installments, in the order in which they are payable, or the whole special tax unpaid, may be paid on the day any installment becomes due, by paying the amount thereof and interest to said date."

It was also alleged that said coupon warrants were duly issued and delivered to said contractor and were by him sold to the plaintiffs herein who are the holders thereof; that said special tax is payable in annual installments, some of which, with accrued interest, amounting in the aggregate to \$1,600, were past due and unpaid. Plaintiffs also pleaded the ordinances of said city whereby the levying of special assessments and the collection thereof is provided for, practically as set forth in the contract aforesaid. It is alleged that in said ordinances it is further provided as follows:

"Within ten days after the date of delinquency, as fixed in the levy and notice of tax, the city treasurer shall make up a list of all property upon which the special tax remains due and unpaid, and cause the same to be published in some newspaper having general circulation in the city, daily thereafter for a full period of ten days. Said delinquent list shall contain a description of the property delinquent according to lots, blocks or parcels, together with the owner's name or names, if known, and if not known, in lieu thereof, the words 'Unknown Owner,' with the amount of taxes due, on each separate parcel, exclusive of costs, and shall be accompanied by a notice of sale substantially in the following form."

It is also set forth in said complaint that said ordinances provide that on the day fixed for the sale of delinquent property the city treasurer shall offer such property for sale for the amount of the special tax, etc.; that plaintiffs have requested the city treasurer to collect the delinquent installments of said coupons and for that purpose to advertise and sell the delinquent property as provided in said ordinances, and that he has refused, and still refuses, to do so; that they have no "plain, speedy, or adequate remedy in the ordinary course of law."

The defendant appeared and demurred to the complaint, and upon a hearing the district court sustained the demurrer. The plaintiffs elected to stand upon their com-

plaint, and hence the court entered judgment dismissing the same. The plaintiffs appeal and contend that the district court erred in sustaining the demurrer, and in entering judgment as aforesaid.

We passed on a similar proceeding where-in the same plaintiffs and the same defendant were parties, entitled *Stinson v. Godbe*, 150 Pac. 967. We there affirmed a judgment denying a writ of mandate and dismissing the complaint. In the course of the opinion in that case Mr. Chief Justice Straup said:

"It is not claimed that there is any authority upon delinquency of an installment to declare the whole of the tax due and delinquent."

It is further said:

"The tax is a special lien on the property. The holder of the warrant can only through the intervention of the city foreclose the lien, sell the property, and collect the tax. There is a clear power and duty conferred and imposed on the city and its treasurer at some time to do that. The serious question is: Is the power conferred and the duty imposed to sell upon delinquency of an installment and before the whole tax is due and delinquent?"

[1] The Chief Justice then proceeds to demonstrate that there is nothing in the statute, nor in the ordinances, that imposes a duty upon the city treasurer to proceed to collect the installments due by selling the property upon which the tax is delinquent, and that no such duty exists until all the installments are due: that is, until the whole tax is delinquent. The very questions propounded and answered in the negative in that case are, however, now answered in the affirmative by the ordinance under which the tax in question here was levied and under which the coupon warrants involved in this proceeding were issued by Salt Lake City. The ordinances that control here in express terms provide:

"In the event of any installment or the interest aforesaid not being paid on the date the same becomes due, the whole amount of the special tax unpaid at the time said installment and interest are due shall become due and payable."

Then follows the ordinance providing for the sale of all property upon which the special tax is delinquent. Counsel for the city, however, contend that if the city treasurer is compelled to collect the whole tax when but one installment is delinquent, then he is collecting money which the city cannot use and upon which interest accumulates. In making that contention counsel overlook the fact that both the ordinances and the statute (Comp. Laws 1907, § 282x7, as amended by chapter 41, Laws Utah, 1909) provide:

"The whole warrant may be paid on the day any installment becomes due by paying the amount thereof and interest to date of payment."

That provision affords ample protection to the city, and it no doubt was adopted so that in case the city is compelled to declare the whole tax due upon any considerable amount of property because of delinquent installments, it may also protect itself by pay-

ing off any warrant on the date any installment falls due.

[2, 3] Counsel for the city further contend that since the interest upon delinquent installments is increased from 6 to 8 per cent. for that reason payment of delinquent installments should not be enforced by a sale of the property. Counsel, in their brief, upon that subject make the following observation:

"The ordinance which provides that on the failure of a property owner to pay an installment the whole unpaid tax shall become due and payable and draw interest at 8 per cent. is harsh enough, and while there is an ordinance which also requires that within ten days after delinquency the city treasurer must proceed to sell the property, to do so under all circumstances would be unjust. It seems to us that the treasurer should be allowed to use reasonable discretion in proceeding to make the sale, taking into consideration the person owing the tax and his circumstances and availability of money."

Why declare the "whole tax due and payable" if it was not intended to enforce payment thereof? Of what practical use is it to enter into a contract with a contractor that the debt entered into by the contract shall become due in installments and that in case one installment shall become delinquent and so remain for a specified time "the whole debt shall become due and payable" if the contractor may not enforce payment as stipulated in the contract? As was well said by Mr. Justice Swayne, Justice of the Supreme Court of the United States, in *City of Galena v. Amy* (U. S.) 5 Wall. 710, 18 L. Ed. 560:

"We can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them."

The city issues these warrants and pays them to the contractor for the contract price for making the improvement. While the city is not individually liable, yet it has promised the contractor that it will insist upon the prompt payment of the warrants, and if not paid when due, that it will invoke the aid of the law to enforce their payment. Every one knows that while such warrants partake of negotiability they, nevertheless, do not, in law, have the same protection as negotiable instruments. For that reason the contractor must sell or dispose of them to obtain currency to pay for the labor and material required in making the improvement for the city. It is well known also that the price that the contractor may obtain for the warrants depends largely upon the city's credit and the law by which their payment may be enforced. Many persons of small means may invest in those warrants relying upon their prompt payment for a meager income. But whether small or large investments are made the investor, whoever he may be, has a right to rely upon the terms and conditions of the contract and the ordinances when authorized by statute, under which such warrants are issued and made

payable. The property owner and taxpayer who pays his taxes promptly is likewise interested. He is interested in obtaining public improvements at the least possible cost. He can do that only if assurances are given to those who advance the money to make such improvements that the warrants which they receive for the money advanced will be repaid promptly, and in accordance with the ordinances and contract. After the laws and ordinances are passed and contracts are entered into it is too late to seek to modify some of their provisions by appealing to the courts. Courts are created to enforce contracts that are not tainted with fraud or coercion and not to modify them. The city may easily protect the property owners and taxpayers affected by any special tax which the city is required to collect by giving the taxpayer ample time in which to redeem any property that may be sold for the purpose of enforcing payment of delinquent taxes and to make the expenses incident to such sales and redemptions as small as consistent with due and proper service. In doing that the city will maintain its credit, the warrant purchaser obtain his money promptly, and the taxpayer obtain all the relief that under just laws he is entitled to. It is therefore not a question of enforcing harsh remedies as counsel for the city seem to think. The right to enforce collection upon overdue obligations in accordance with the terms and conditions thereof in the eye of the law cannot be considered a harsh remedy. That is especially true where, as here, the city may amply protect the taxpayer by also affording him a proper remedy to redeem his property in case he is unable or unwilling to pay promptly when his taxes fall due.

[4] Nor do the decisions leave any room for doubt that under contracts, ordinances, and laws which must control this case, mandamus is the proper remedy. The following cases are decisive of that question: *German-American Svgs. Bk. v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259; *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, 1080; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920; *Himmelman v. Cofran*, 36 Cal. 411; *City of Galena v. Amy*, supra; *Rock Island County v. State Bank*, 4 Wall. 435, 18 L. Ed. 419; *People v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006. In *German-American Svgs. Bk. v. Spokane*, supra, the rule is stated in the headnote thus:

"The holder of a warrant drawn upon a special fund to be raised through assessments made for a street improvement may by mandamus compel the city officers to proceed with the collection of the assessments."

To the same effect are the other cases cited. Why should not that be done, and especially where, as here, the city has obligated itself to promptly collect the tax which it has levied to pay for the improvement? No other method of enforcing payment under the

contract and ordinances, except to have recourse to a court of equity, seems available. But even in a proceeding in equity all that could be accomplished would be to require the city to comply with the terms and conditions of the contractual obligations it assumed in ordering the improvement, in levying the special tax, in issuing the warrants, and in enforcing their payment. We confess our utter inability to see any escape from, or to arrive at, any other conclusion than to grant the prayer of plaintiff's complaint.

The judgment of the district court of Salt Lake county is therefore reversed, and the cause is remanded to that court, with directions to issue a peremptory writ of mandate as prayed for in the complaint. Costs to appellants.

MCCARTY, J., concurs.

STRAUP, C. J. (concurring). Where the tax or assessment is made payable in installments I had somewhat doubted whether the statute confers power on the city by ordinance or otherwise to declare the whole tax or assessment due on the delinquency of an installment. Unless it is conferred by statute it has no such power. While the statute (Comp. Laws 1907, § 258) is not as explicit in such respect as it might be, still I think the fair and reasonable construction of it leads to the conclusion that such power was intended to be conferred. On that ground I concur.

HIRSH et al. v. OGDEN FURNITURE & CARPET CO. (No. 2916.)

(Supreme Court of Utah. Sept. 28, 1916.)

1. SALES §365—ACTION FOR PRICE—FINDINGS—JUDGMENT.

In an action upon an account for the price of goods, findings that on a date named the defendant was indebted to plaintiffs on an open account in a certain sum with legal interest, entitled plaintiff to judgment for both interest and costs.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1077; Dec. Dig. §365.]

2. APPEAL AND ERROR §1122(2)—FINDINGS—POWER OF SUPREME COURT.

In a law case, the Supreme Court is powerless to make findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4420; Dec. Dig. §1122(2).]

3. APPEAL AND ERROR §837(12)—REVIEW—ADMISSIBILITY OF EVIDENCE.

In a law case, the Supreme Court, where evidence was excluded, has no power to pass upon its sufficiency, but can do no more than to determine whether there was error in its exclusion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8276; Dec. Dig. §837(12).]

4. TENDER §28—ACTION FOR PRICE OF GOODS—ADMISSIBILITY OF EVIDENCE—TENDER OF PAYMENT.

In an action on an account for goods sold, evidence that defendant had mailed a check to plaintiff's address for the amount, that the check was returned to it, that plaintiff's attorney pre-

sented a draft upon it and was informed that the account had been paid, that defendant was always able and willing to pay the account, that plaintiffs had requested defendant to honor a draft for such amount, and that plaintiff had never demanded more than the amount of the check, and a telegram to plaintiff from its counsel after he had been informed by defendant that the account had been paid, and the check itself, were admissible, and their exclusion was reversible error.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 96-98; Dec. Dig. ¶28.]

5. TENDER ¶15(3)—OBJECTION—WAIVER.

Under Comp. Laws 1907, § 3487, providing that one to whom a tender is made must then specify any objection to the money or instrument or must be deemed to have waived it, the plaintiff who received defendant's check by mail in payment of an account for goods sold, and whose attorney before the check was received demanded payment and was told that the check for the amount had been mailed, and who returned the check without objection and without advising defendant of any objection to the tender before bringing an action, thereby waived any objections to the tender.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 44; Dec. Dig. ¶15(3); Payment, Cent. Dig. § 62.]

6. TENDER ¶22 — TENDER — SUFFICIENCY — CHECK.

Such tender by check on a bank in which there was always a sufficient fund to meet it, in the absence of timely objection, was good.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 87, 88; Dec. Dig. ¶22.]

7. TENDER ¶7—PARTIES TO WHOM MADE—ATTORNEY.

A tender to an attorney who has authority to collect an account is the same as though made to the creditor himself.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 9, 10, 22; Dec. Dig. ¶7.]

8. INTEREST ¶50—TENDER—EFFECT—INTEREST.

A tender of the amount due on an account for goods sold, made by check without objection thereto, was sufficient to prevent the creditor from recovering interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. ¶50.]

9. TENDER ¶24 — REQUISITES — KEEPING GOOD.

Where a tender is made, which, if accepted, is intended to operate as a payment of the debt, and is rejected, it must nevertheless be kept good by bringing or depositing the money into court, since in case the tender is by check the creditor is not obliged to take the risk of bank failures, etc.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 79-81, 94; Dec. Dig. ¶24.]

10. TENDER ¶15(6)—PAYMENT INTO COURT—WAIVER.

Where defendant tendered its check in payment of an account for goods sold, and showed that the money to meet the check was in the bank when it was tendered, and had constantly remained there subject to check, and was there at the time of the trial, so that it could probably be produced in court, plaintiff's failure to object, and its conduct in permitting defendant to assume that the production of the money into court was waived, the objection that the tender was not kept good, was waived.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 46; Dec. Dig. ¶15(6).]

11. TENDER ¶12(4) — EFFECT — INTEREST — STATUTE.

Under Comp. Laws 1907, § 3347, providing that when the defendant in an action for the recovery of money alleges that before the commencement thereof he tendered the full amount and deposits in court the amount so tendered, the plaintiff cannot recover costs; the tender of the amount due on an account for goods sold, not including interest, was sufficient, where no demand for interest was then made, as under such circumstances interest was waived.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 26-28; Dec. Dig. ¶12(4).]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Ralph Hirsh and Solomon Dryfoos, copartners doing business under the firm name and style of Hirsh & Dryfoos, against the Ogden Furniture & Carpet Company. Judgment for plaintiffs, and defendant appeals. Reversed.

R. S. Farnsworth, of Ogden, for appellant.
C. R. Hollingsworth, of Ogden, for respondents.

FRICK, J. On September 3, 1915, the plaintiffs, Ralph Hirsh and Solomon Dryfoos, copartners doing business in Philadelphia, Pa., commenced an action in the district court of Weber county by serving summons on the defendant, a corporation doing business at Ogden, Utah, to recover upon an account for goods sold and delivered by the plaintiffs to the defendant "between July 1, 1914, and June 21, 1915," amounting to \$326.40, for which sum, with legal interest from June 21, 1915, plaintiffs demand judgment. The defendant appeared in the action and answered as follows:

"Admits the allegations of paragraphs numbered 1 and 2, and that portion of paragraph 3, alleging the sale and delivery of said goods, but denies that said sum of \$326.40 has not been paid, but alleges that before the commencement of this action it tendered to the plaintiffs the full amount to which they were entitled and all that the plaintiffs asked at said time, and the said defendant now deposits in court the amount so tendered. That said tender was made in writing in check in the words and figures following, to wit: 'Ogden Furniture & Carpet Company. No. 593. Ogden, Utah, 8-26, 1915. Pay to the order of Hirsh & Dryfoos, \$326.40, three hundred twenty-six dollars, forty cents. To First National Bank, Ogden, Utah. Ogden Furniture & Carpet Co., B. F. Hundley, Manager.' That at said time there was and ever since has been and now is sufficient funds in said bank to pay said check."

Upon the issues a trial to the court, without a jury, resulted in the following findings of fact:

"That at Ogden City, Utah, between July 1, 1914, and June 21, 1915, the plaintiffs, at the special instance and request of the defendant, sold and delivered to the defendant which were then and there received and accepted by the defendant from the plaintiffs certain goods, wares and merchandise of the fair and reasonable value of \$326.40, which said amount last aforesaid became due and payable on June 21, 1915, that no part of said sum has been paid and the whole thereof is now due and owing from the defendant

to the plaintiffs. That the defendant at Ogden City, Utah, at 11 o'clock p. m., on August 31, 1915, deposited in the United States mail addressed to the plaintiffs at Philadelphia in the state of Pennsylvania, the defendant's check No. 593, drawn on the First National Bank of Ogden, Utah, dated Ogden, Utah, August 26, 1915, payable to the plaintiffs for the sum of \$326.40. That said check aforesaid was delivered in due course of mail to the plaintiffs at Philadelphia in the state of Pennsylvania on September 7, 1915. That plaintiffs thereupon returned said check to the defendant at Ogden, Utah, on September 8, 1915. That said check aforesaid is the same check pleaded in defendant's answer and with said answer deposited with the clerk of this court and offered in evidence upon the trial heretofore. That on August 26, 1915, and ever since said date the defendant had sufficient funds in said First National Bank of Ogden wherewith to pay said check. That this action was commenced by the service of summons herein upon the defendant at Ogden City, Utah, on September 3, 1915."

Judgment was entered accordingly in favor of plaintiffs for \$340.50, which included legal interest from June 21, 1915, to the date of judgment, January 7, 1916, and for \$16.90 costs. The defendant appeals.

[1] Numerous errors are assigned. Most of those that are relied on, however, relate to the exclusion of evidence which was proffered by the defendant at the trial. Defendant's counsel, however, also insists that the court erred in rendering judgment for plaintiffs for interest and costs, and further contends that upon the undisputed evidence and findings the defendant was entitled to judgment for costs. The contention is based upon the court's findings respecting the tender pleaded by the defendant. In our judgment the findings are, however, not sufficient to sustain the contention. From the findings as they now stand it appears that the defendant, on the 21st day of June, 1915, was indebted on open account to the plaintiffs in the sum of \$326.40, and legal interest from that date. In the absence of any finding other than those contained in the record the plaintiffs were entitled to judgment for both interest and costs. It, no doubt, is true that if the proffered evidence hereinafter referred to had been admitted and it had not been disputed the court should have found in accordance therewith, and if it had done so, then, under the law, as hereinafter indicated, counsel's contentions should prevail. As the findings now stand, however, and in view that the court excluded all of defendant's proffered evidence, counsel's contention must fail.

[2, 3] This is a law case and we are powerless either to make findings or, in view that the evidence was excluded, to pass upon its sufficiency. We can do no more than to determine whether the court erred or not in excluding the evidence.

[4] All that the defendant was permitted to prove at the trial was that on August 31st a check had been mailed by the defendant's manager to plaintiffs' address at Philadelphia for the sum of \$326.40, and that the

check was returned to the defendant by plaintiffs on September 16 or 17, 1915; that plaintiffs' attorney came to the defendant's place of business on September 2, 1915, and presented a draft to defendant's manager and demanded the money due plaintiff on the account sued on, and that the manager then informed the attorney that the account "has been paid." When defendant's counsel undertook to prove, however, the conversation between plaintiffs' attorney and defendant's manager concerning the check, and the payment of the account, the court, upon plaintiffs' objection, excluded all the evidence. The court also excluded the check and likewise excluded defendant's proffered evidence that he always was able, ready, and willing to pay the account, and also excluded a letter written by plaintiffs to the defendant in August, 1915, wherein defendant was informed that the plaintiffs had drawn upon it for the sum of \$326.40, "to pay your account with us as per statement inclosed. Please honor the draft on presentation and oblige," which letter was signed by Hirsh & Dryfoos. The court also excluded a telegram sent by plaintiffs' attorney to his clients after he was informed by defendant's manager that the account had been paid. The court also excluded defendant's proffered evidence that the plaintiffs at no time had demanded more from the defendant than the \$326.40, the face of the account, until this action was commenced. In fact, the court excluded every fact defendant's counsel offered to prove concerning the making and sending of the check and the conduct of plaintiffs and their attorney with respect thereto, and further excluded all evidence tending to show waiver on the part of the plaintiffs so far as the tender is concerned. We think that under the law all the evidence offered by defendant's counsel was proper, and its exclusion constitutes reversible error.

[5-8] Comp. Laws 1907, § 8487, reads as follows:

That "the person to whom the tender is made must at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and, if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward."

Under a similar statute the Supreme Court of California has repeatedly held that where a tender is made by check the person to whom it is tendered must specify his objections or he will be deemed to have waived all objections except such as he insists upon when the tender is made. *Lowe v. Yolo*, etc., County, 8 Cal. App. 167, 96 Pac. 379, and cases there cited; *Wright v. John A. Robinson Co.*, 84 Hun, 172, 32 N. Y. Supp. 463; *Nidever v. Hall*, 67 Cal. 79, 7 Pac. 136; *Cleveland v. Toby*, 36 Misc. Rep. 319, 73 N. Y. Supp. 544. In *Wright v. John A. Robinson*

Co., supra, the question of tender by check by mailing the same, as in this case, was involved, and it was there held that in the absence of special objections such a tender is good. In the case of *Cleveland v. Toby*, supra, tender was made by mailing a check as here, and in view that it was kept good it was held sufficient.

Under the findings as made by the court, supplemented by the evidence offered by the defendant, the situation of the parties to this action in effect is this: In August, 1915, the defendant was indebted to plaintiffs on account for goods sold and delivered by them in the sum of \$326.40; that some time during that month plaintiffs wrote the defendant that they would draw upon it for said amount and expressed the hope that defendant would honor the draft; that on August 26th defendant's manager made a check for the amount aforesaid in favor of plaintiffs drawn upon a bank at Ogden, Utah, in which the defendant had sufficient funds to pay the check when presented, and on the 31st day of August inclosed and mailed the check in a letter addressed to plaintiffs at their place of business in Philadelphia. The check was made and mailed pursuant to the plaintiffs' letter informing defendant that they had drawn on it for the amount due from it upon the account. On September 2d, and before the letter and check had reached plaintiffs, their attorney, who was authorized to collect the account, went to the defendant's place of business and presented the draft referred to by the plaintiffs and demanded payment thereof. The attorney was then informed that the defendant's manager had paid the account by having mailed to plaintiffs a check covering the amount of the draft. No further demand was made on the defendant, nor was any claim made for interest, and nothing was said regarding the sufficiency or insufficiency of the check. Indeed, no objection of any kind was ever interposed. Now, let us assume that when the attorney for plaintiffs called on the defendant's manager on September 2d and demanded payment of the draft which was drawn for \$326.40, the precise amount of the account, the manager had tendered the attorney a check drawn on a local bank in which were ample funds to pay it for the amount of the draft and the attorney had made no objections to the check whatever, but had thereafter commenced an action upon the account, would not defendant's plea of tender have been good? Surely if a tender by check is ever good the tender just referred to would have been. But counsel for plaintiffs insists that they had the right to refuse the tender when the check reached them at Philadelphia, which was not until after the action was commenced. Let that be granted, and the question still remains: What are the defendant's rights under the proffered evidence? We have seen that a tender by check

is good if no objection is made thereto. Now, in this case, the fact that plaintiffs' attorney presented the draft for payment at which time he was informed that a check had been mailed to plaintiffs, that in effect amounted to a tender of the check to him. A tender to an attorney who has the authority to collect is the same as though made to the creditor himself. 38 Cyc. 156, 157. At all events, in case plaintiffs or the attorney desired to avoid the tender by check they should have advised the defendant of that fact and should have given it an opportunity to meet the objection before bringing an action. The plaintiffs, however, never offered any objection to the check. Neither did their counsel. But they returned it without objection. Such were, in substance, the facts in *Cleveland v. Toby*, supra, and the tender was held sufficient. We are of the opinion, therefore, that under the facts which the defendant offered to prove, if not disputed, the tender in question was sufficient to prevent the plaintiffs from recovering either interest or costs.

[8, 10] Counsel for plaintiffs, however, contends that even though the foregoing conclusion be sound, yet it has no application here, since the defendant did not keep the tender good by bringing the money into court. Counsel cites and relies upon Comp. Laws 1907, § 8347, which reads:

"When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant."

The general rule no doubt is, that where a tender is made in a law case which, if accepted, is intended to operate as payment of the debt, the tender, if rejected, must, nevertheless, be kept good. Ordinarily that is done by bringing or depositing the money into court. The rule is based upon the reason that in case the tender is by check the check is not payment unless expressly accepted as such. Moreover the creditor is not obliged to take the risk of bank failures or matters of that kind. *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Hunt on Tender*, § 356. Indeed it should be conceded that such is the law. A plaintiff may, however, waive his right of having the money paid into or produced in court, and ordinarily, in case he fails to challenge the trial court's attention to the fact that the money is not produced in court, he waives his right in that regard. That is especially true where, as in this case, the defendant shows that the money was in the bank when the check was tendered and has constantly remained there to be paid on presentation of the check, and that it is in the bank at the time of trial. Under such circumstances the money would, in all probability, be produced in court just as soon as

plaintiff insisted upon his right to have it there. The case at bar was tried at Ogden, where the bank in which the money was deposited by the defendant is located, and no doubt if plaintiff's counsel had indicated that he insisted upon his right to have the money produced in court the defendant instantly would have produced it, and if it had not done so then counsel was entitled to a ruling from the court that the tender was not kept good, and was therefore insufficient for any purpose. Plaintiffs' counsel, however, made no objections of any kind and permitted defendant's counsel to assume that the production of the money in court was waived. Indeed, plaintiffs' counsel made the objection for the first time in this court. We make the foregoing statement upon the record which does not disclose any objection by plaintiffs' counsel, and none appears except in his printed brief which is filed in this court. Under such circumstances the authorities are numerous that the objection that the tender was not kept good is waived and cannot prevail in the appellate court. *Hunt on Tender*, § 488; *Connell v. Mulligan*, 13 *Smedes & M. (Miss.)* 888; *Hull v. Peters*, 7 *Barb. (N. Y.)* 331; *Storer v. McGaw*, 11 *Allen. (Mass.)* 527; *Steckel v. Standley*, 107 *Iowa*, 699, 700, 77 *N. W.* 489; 21 *Ency. Pl. & Pr.* 580.

[11] It is also contended that the tender in this case was insufficient because it did not include interest. Defendant's counsel offered to prove that the full face of the account, as well as all that was demanded by the draft, was tendered, that no demand for interest had ever been made, and that defendant's manager had no knowledge that interest was demanded until the action was commenced. The authorities last above cited, as well as others, go to the extent of holding that under such circumstances interest, for the purpose, at least, of a tender, is waived, and that a plaintiff cannot have a tender of the amount demanded by him, avoid the effect of the tender by claiming interest in an action commenced subsequent thereto. This is but justice as well as common sense. Indeed, our statute (section 3487) provides that unless the person to whom the tender is made objects to the amount of the tender and specifies the amount he is "precluded from objecting afterward." By this we do not mean to be understood as holding that a tender of a nominal sum in payment of a debt of a larger amount would be good, and especially not where the person making the tender knew what the amount due was. That such is not the intention of the statute is clearly pointed out by Mr. Chief Justice Beatty in the case of *Colton v. Oakland Bank*, 137 *Cal.* 376, 70 *Pac.* 225. That the statute, however, applies with full force in a case like the one at bar is as clearly held in the cases we have hereinbefore cited.

We need only add in conclusion that the evidence offered by defendant's counsel was all proper to show the real transaction between the parties, and was proper upon the question of waiver. The court, therefore, erred in excluding it.

It follows that the judgment should be, and it accordingly is, reversed, at respondent's costs.

STRAUP, C. J., and McCARTY, J., concur.

HELPER STATE BANK v. JACKSON et al. (No. 2825.)

(Supreme Court of Utah. Sept. 27, 1916.)

1. BILLS AND NOTES §359 — HOLDER FOR VALUE—ASSIGNEE.

An assignee before maturity of a note signed by one as maker, and by another to enable the first maker to borrow money to apply on his indebtedness to the assignee, and who was given credit by the assignee for the full amount of the note immediately upon its delivery, was a holder for value.¹

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 924-936; Dec. Dig. § 359.]

2. BILLS AND NOTES §525 — ACTION — EVIDENCE—AGREEMENT OF MAKER.

In a bank's action on a note signed by its cashier and another, evidence held to sustain a finding when the bank received the note and credited the cashier with the amount thereof upon his indebtedness, it had no notice of the alleged fact that it was signed by the comaker and by him delivered to the cashier on condition that it should not be delivered or become effective unless two other persons signed it.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.]

3. BANKS AND BANKING §116(4) — ACTS OF OFFICERS—AGREEMENT—NOTICE.

A bank, taking a note for value before maturity, signed by its cashier and another as joint makers, was not chargeable with knowledge of an agreement between the cashier, representing himself, and not the bank, and his comaker that the note was not to be delivered until signed by the president of the bank, since by reason of his individual interest adverse to that of the bank, the cashier was not its agent.²

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 285; Dec. Dig. § 116(4).]

Appeal from District Court, Carbon County; A. H. Christensen, Judge.

Action by the Helper State Bank against Clyde Jackson and Shekrey Sheya. Judgment for plaintiff, and defendant Sheya appeals. Affirmed.

M. P. Braffet, Ferdinand Erickson, and Saml. A. King, all of Salt Lake City, for appellant. L. O. Hoffmann, of Price, and Thurman, Wedgwood & Irvine, of Salt Lake City, for respondent.

FRICK, J. The plaintiff bank brought this action to recover upon a promissory

¹ *Felt v. Bush*, 41 *Utah*, 462, 126 *Pac.* 688.

² *First Nat. Bank v. Foote*, 13 *Utah*, 157, 42 *Pac.* 205.

note for \$1,050, which was signed by both defendants, Jackson and Sheya, as makers. The complaint is in the usual form in such actions. The defendant Sheya filed a separate answer in which, after making certain admissions and denials, he, in substance, averred the following facts, namely: That on the date the note in question bears, to wit, May 11, 1912, the defendant Jackson was the cashier of the plaintiff bank; that on said date said Jackson was indebted to said bank in the sum of \$1,000; that at said time said Jackson as such cashier—

“requested this defendant to sign a note with him for \$1,050 in favor of said bank, the plaintiff herein, payable six months after date, in order to aid him, the said Jackson, to borrow from said bank the amount of said note to apply on his indebtedness to said bank.”

The defendant Sheya further averred that said note was signed by him upon the express condition that two other persons, naming them, should also sign the same before it should be delivered to said bank, and that, unless and until so signed, it should not be delivered to said bank; that defendant signed said note without receiving any consideration, and for the purpose and upon the understanding aforesaid; that, notwithstanding said agreement, said Jackson, without the knowledge or consent of the defendant Sheya, delivered said note to said bank without first obtaining said signatures, but that said bank received the same with full knowledge of the agreement between Sheya and said Jackson; that upon being informed that said Jackson had delivered said note as aforesaid, the defendant Sheya notified the plaintiff that the acts of said Jackson were unauthorized, and that the defendant repudiated the same. The defendant Jackson also filed an answer, but he did not appear at the trial and his answer, therefore, is immaterial here. The case proceeded to trial, upon substantially the foregoing issues, to the court without a jury. The court found all the issues in favor of the plaintiff and against the defendant Sheya, and entered judgment in favor of the plaintiff and against both Jackson and Sheya for the full amount of the note, with interest, including an attorney's fee, and Sheya alone appeals.

Counsel for the defendant Sheya complain of the court's findings, and insist that they are contrary to the evidence. Counsel further insist that no consideration for the note has been shown. In view of the averments of Sheya's answer, which we have set forth, that he signed the note for the purpose of aiding Jackson in borrowing said \$1,050 “to apply on his (Jackson's) indebtedness to said bank,” and in view that the evidence is without conflict that Jackson was given credit by the bank upon his indebtedness for the full amount of the note immediately upon its delivery to it, the contention that the note was without consideration is without basis, either in law or in fact. We shall therefore not devote

further attention to that phase of the case.

[1] The further contention in that connection is that the plaintiff is not a holder for value. In view of what has just been stated that contention must likewise fail. We held in *Felt v. Bush*, 41 Utah, 462, 126 Pac. 688, that an indorsee who takes a note before maturity as collateral security for a pre-existing debt, under our negotiable instruments act, is a holder for value. It has frequently been held by the courts that where a note is given in payment or discharge of a pre-existing debt, the payee is a holder for value. *Brannan's Negotiable Instruments Law*, § 25, and cases cited in the notes to that section. No further comment seems necessary.

[2] The only remaining question, and the only one of merit in this case is whether the note in question was in fact signed by the defendant Sheya and was by him delivered to Jackson upon the condition that it should not be delivered to the bank or become effective until, and unless, the two others referred to had also signed the note, and whether the bank was informed, or had notice or knowledge, of that arrangement at the time, or before, it received the note and had credited Jackson with the amount thereof upon his indebtedness. Upon that question there is a conflict in the evidence. While the defendant and his brother in effect testified that the president of the bank was informed of the conditional signing and delivery of the note to Jackson before it was received by the bank, and Jackson had been given credit therefor, yet, the president denied those statements, and in substance testified that the statements testified to by both witnesses did not come to his knowledge until after the note had been received and Jackson had been credited with the amount thereof. The circumstances disclosed by the evidence are such that the court could well have found the president's statements in that regard to be true, and in view that this is a law case, we are therefore, concluded by the court's finding.

[3] The contention, that inasmuch as Jackson was the cashier of the plaintiff bank at the time of the transaction and for that reason the bank was charged with notice of the agreement entered into between him and the defendant Sheya, is answered by this court against the contention in the case of *First National Bank v. Foote*, 12 Utah, 157, 42 Pac. 205, where the law upon this question is stated in the third headnote thus:

“A bank that takes a note for value before maturity, signed by its cashier and others as joint makers, is not chargeable with knowledge of an agreement between the cashier and his comakers that the note was not to be delivered until it was signed by the president of the bank, since, in this particular transaction, on account of his individual interest adverse to that of the bank, the cashier is not the agent of the bank, but stands on the opposite side with his comakers.”

It is not a matter of any moment now to inquire whether the case just referred to

was correctly determined upon the facts there involved or not. It is sufficient to know that the principle stated in the head-note is applicable to the facts of this case, since the defendant Jackson, the cashier, was not representing the plaintiff bank in the transaction here involved, but was merely representing himself. Neither his knowledge nor acts in the premises can therefore be given any legal effect as against the bank.

There is nothing presented in this record which would authorize us to interfere with the judgment, and it is therefore affirmed, with costs to respondent.

STRAUP, C. J., and MORSE, District Judge, concur.

TETZNER v. WULF. (No. 13399.)

(Supreme Court of Washington. Oct. 9, 1916.)

VENDOR AND PURCHASER \Leftrightarrow 181—TRANSFER OF MORTGAGED PROPERTY—ASSUMPTION OF MORTGAGE AS PART OF PURCHASE MONEY.

Where a vendor sold real property for a price named, to be paid by the purchaser by assumption of local improvement assessments, and of certain mortgages, the transfer of other real property, and the balance in cash, the purchaser not having agreed to pay the full purchase price in any event, and therefore not being the agent of the vendor as vendor testified in disbursing his funds, is not responsible to the vendor for that portion of the mortgage indebtedness which he was not required to pay.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 367, 368; Dec. Dig. \Leftrightarrow 181.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by F. J. Tetzner against Henry C. Wulf. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss.

William E. Froude and Higgins & Hughes, all of Seattle, for appellant. Jas. Kiefer, of Seattle, for respondent.

MAIN, J. This action arises out of a real estate transaction in which the plaintiff sold to the defendant Wulf a certain lot in the city of Seattle. Recovery is sought for money claimed to be due to the plaintiff. In response to the complaint the defendant Wulf filed an answer and cross-complaint. In the cross-complaint he claimed that there had been misrepresentation as to the amount of excavation which had previously been done upon the lot, and sought to recover in damages. The other defendant, Grant Smith & Co., took no part in the trial of the case in the superior court, and is not now interested in the controversy. The trial of the action resulted in a judgment for the plaintiff in the sum of \$1,376, and interest, and a denial of the relief prayed for in the cross-complaint. From this judgment Wulf appeals.

As to the controlling facts there is no substantial dispute, and they may be stated as

follows: On August 14, 1912, the respondent was the owner of a lot in the city of Seattle located in what is generally known as the Denny Hill regrade district. On this date, through his agent H. E. Orr Company, a corporation, he contracted in writing to sell the property to the appellant. This contract recites that H. E. Orr Company, as agent of the owner, "has this day sold to the purchaser for the sum of twenty thousand dollars" the lot mentioned. The contract further recites that the purchaser assumes and agrees to pay the incumbrances against the property, which included local improvement assessments, and two mortgages. The contract also provided that in case the amount of any of the local improvements could not be ascertained at the time the transaction was closed, that the cost thereof should be estimated, and such amount retained by Wulf out of the purchase price. As a part of the purchase price Wulf was to convey to the respondent a lot which he then owned, and upon which there was a mortgage of \$1,000, as part payment in the sum of \$3,000.

One of the mortgages was held by the contractor who had done the excavating upon the lot in connection with the excavation of the streets in the vicinity. Under the contract as originally made the contractor was to excavate the street, and a one to one slope upon the adjacent property. Thereafter the contract was sought to be modified so that the city would be charged with the excavation of the street and a slope of only three-fourths to one upon the adjacent property, and that the balance should be charged to the owner of the property. The mortgage to the contractor included the wedge-shaped excavation between the slope of one to one and three-fourths to one.

After the present transaction had been closed, in *Atwood v. Grant Smith*, 64 Wash. 470, 117 Pac. 393, it was held that the property owner could only be charged upon the basis of a slope of one to one. In this case the mortgage having previously been given to Grant Smith, covered the wedge of earth mentioned, and was for an amount which was not properly chargeable to the property owner. This excess amounted to the sum of approximately \$1,100.

When the case was called for trial in the superior court, Grant Smith & Co. appeared and consented to a credit on the mortgage in the sum mentioned. This was agreed to by all parties, and the action then proceeded to determine whether the vendor or the vendee was entitled to the benefit of the credit.

When the transaction was closed, the amount of the local improvement assessments could not be definitely ascertained, and they were estimated at \$4,149.17, the two mortgages were assumed, amounting to \$5,974.85, the lot owned by appellant was conveyed to the respondent, and the balance was paid in cash.

The question is whether a vendor who sells property for a price named, which price is to be paid by the vendee by the assumption of local improvement assessments, the amount of which must be estimated, by the assumption of certain mortgages, and by the transfer of other property, and the balance in cash, can recover from the vendee that portion of the mortgage indebtedness which he was not required to pay.

The vendee cannot be held to respond to the suit of the vendor in such case unless he had agreed to pay the full purchase price of the property in any event, and, in liquidating the liens which were against the property, he was acting as the agent of the vendor in disbursing his funds. This question seems not to have been often before the courts. In two cases in which the question has been considered it was held that the question was one of agency. In other words, if the vendee, in paying the obligations assumed, acted as the agent of the vendor, then the vendor would be entitled to any deduction. On the other hand, if as between the vendor and vendee the latter became primarily liable to pay the obligations assumed, and the vendor secondarily liable, any deduction from the incumbrances assumed would inure to the benefit of the vendee. *Miller v. Barler*, 89 Tex. 264, 34 S. W. 601; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 817.

In the case first cited it was held that under the facts in that case there was no relation of principal and agent, and therefore the vendee was entitled to the benefit of a reduction from a contract which he assumed as a part of the purchase money, but was not required to pay in full.

In the second case, owing to the particular facts there presented, it was held that the vendees were the agents of the vendor for the purpose of paying certain claims out of the purchase price of the property and that having compromised the claims for less than their face value, the vendor was entitled to the benefit of such compromise.

In the present case there was no agreement that appellant should pay \$20,000 for the property in any event. The price was fixed at \$20,000, and was to be paid, as already stated, by the assumption of local improvement liens, the assumption of mortgages, the conveyance of a lot, and the balance in cash. There is nothing in the contract of sale, or in the evidence, which would indicate that appellant, in meeting the incumbrances, was acting as the agent of his vendor. In addition to this it may be noted that the respondent, while upon the witness stand, expressly testified that appellant was not his agent.

Upon the issue raised by the cross-complaint it need only be stated that after a careful consideration of the evidence we are of the opinion that the appellant was not entitled to prevail upon that issue.

The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss the action.

MORRIS, C. J., and HOLOOMB, PARKER, and BAUSMAN, JJ., concur.

MacDERMID v. CITY OF SEATTLE (No. 13442.)

(Supreme Court of Washington. Oct. 9, 1916.)

1. MUNICIPAL CORPORATIONS — INJURY ON SIDEWALK — DEFECT — ACTUAL NOTICE — EVIDENCE.

In an action for injury from stepping upon a loose plank in a sidewalk near a municipal bathing beach under the supervision of the park commissioners, their actual notice of the defect was not notice to the board of public works having charge of the streets generally.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1645, 1646; Dec. Dig. § 790.]

2. TRIAL — 251(8) — INSTRUCTION — CONTRIBUTORY NEGLIGENCE.

Where the city pleaded contributory negligence as a defense, it was an issue of fact for the jury, so that an instruction on such issue was properly given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 598; Dec. Dig. § 251(8).]

3. TRIAL — 191(7) — INSTRUCTION — ASSUMPTION OF FACT.

An instruction that, if the jury from any evidence in the case thought that the plaintiff was negligent, and that her negligence contributed to the injury, she could not recover, was not objectionable as an assumption of contributory negligence, as it was a submission of the fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 430; Dec. Dig. § 191(7); *Negligence*, Cent. Dig. §§ 356-360.]

4. MUNICIPAL CORPORATIONS — 822(2) — STREETS — DEFECT — NEGLIGENCE — INSTRUCTION.

An instruction that in a remote locality or suburb where the highway is seldom used the same degree of care is not required as in a locality where the use is greater, part of an instruction that the degree of care imposed by law on a city in maintaining its streets was in proportion to the danger to be apprehended from their use, and that in determining such question the circumstances with regard to the place of the accident should be considered, read as a whole, was not erroneous.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1759; Dec. Dig. § 822(2).]

5. APPEAL AND ERROR — 1033(1) — REVIEW — HARMLESS ERROR — RECEPTION OF EVIDENCE — PRESENCE OF JURY.

The refusal to exclude the jury when the plaintiff was making her offer of proof as to actual notice to the defendant city favorable to herself, followed by an admonition to disregard such proof, was not prejudicial to the plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4052; Dec. Dig. § 1033(1); *Trial*, Cent. Dig. § 587.]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge. Action by Catherine MacDermid against the City of Seattle. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. Kiefer, of Seattle, for appellant.
Hugh M. Caldwell and Frank S. Griffith,
both of Seattle, for respondent.

MORRIS, C. J. Appellant, claiming to have received an injury caused by a defective sidewalk, sued the city. The cause was submitted to a jury and verdict returned for the city, upon which judgment was entered, and this appeal taken.

The place of the injury was on Alki avenue near the municipal bathing beach. At this point Alki avenue is about 15 feet above the beach, and is reached by a flight of stairs. Appellant, coming upon the stairs from the beach to the avenue, claims that as she reached the sidewalk on the avenue she stepped upon a loose plank which flew up, catching her foot, and resulting in a sprained ankle.

[1] The first error alleged is in the exclusion of evidence. Appellant sought to show both actual and constructive notice. In order to show actual notice, appellant offered to prove that four days before her accident a lady, in stepping from the sidewalk to the head of the stairs at the same point, noticed the loose plank, and telephoned a person in charge of the municipal bathhouse of the condition of the walk. The offer was rejected. The ruling was correct. The streets of Seattle are in charge of the board of public works. The bathing beach and bathhouse are under the supervision of the board of park commissioners. Actual notice to the board of park commissioners is not notice to the board of public works. In order to charge a city with actual notice, such notice must be brought home to some officer or person who is in some way charged with the duty of maintaining the streets in proper condition. No complaint is made but that the case was properly submitted to the jury upon the question of constructive notice.

[2] The next contention is that the court erred in instructing the jury that:

"Under the law nobody can come into court pleading carelessness of the opposite party, if the carelessness of the complaining party is the contributory cause of the injury, and if you think from any evidence in this case that the plaintiff was negligent herself, and her own carelessness in walking in stepping on this sidewalk was the contributory cause of the accident, without which it could not have occurred, of course, she could not recover."

It is argued there was no evidence upon which to submit the question of contributory negligence to the jury. The city pleaded contributory negligence as a defense, and, being so pleaded, it was an issue in the case to be determined by the jury as they believed the fact, either from affirmative proof on the part of the city or from the evidence of appellant herself in detailing the circumstances which she claimed resulted in her injury. Being an issue of fact, it was for

the jury to determine under proper instructions. The question was fairly submitted to the jury in this and other parts of the charge not quoted.

[3] The instruction is further criticized because it is said it assumes contributory negligence. We do not so read it. The language of the instruction is:

"If you think from any evidence in this case that the plaintiff was negligent herself," etc.

This was a submission of the fact to the jury, and not an assumption by the court.

[4] The third claim of error is that the court erred in using this language in an instruction:

"In a remote locality, a suburb of the city, where the highway is seldom or infrequently used, the same degree of care would not be expected as in a locality where crowds assemble and where travel is frequent."

This is only part of an instruction in which the court charged the jury that the degree of care imposed by law on the city in maintaining its streets was in proportion to the danger to be apprehended from the use of the streets, and that in determining such question the circumstances and surroundings with regard to the place of accident should be taken into consideration. Reading this instruction as a whole, we see no fault in it.

[5] The last error charged is that the court refused to exclude the jury when appellant was making her offer of proof outlined in the first claim of error. We see no error here. It could not be prejudicial to appellant to have the jury hear an offer of testimony she regarded as valuable to her recovery, even though such testimony was excluded. The ruling thereon was one of law, and not one of fact, and it is difficult to see how an offer of testimony upon a favorable fact getting before the jury, even though followed by an admonition to disregard it, could prejudice the party offering to prove it.

The judgment is affirmed.

HOLCOMB, MAIN, PARKER, and BAUSMAN, JJ., concur.

BREAKS v. SPOKANE AUTO CO. (No. 13328.)

(Supreme Court of Washington. Oct. 9, 1916.)

SALES \Leftrightarrow 477(1) — CONDITIONAL SALE — ENFORCEMENT OF FORFEITURE.

Plaintiff purchased an automobile, paying \$1,000 cash, and gave his note for \$220. A conditional bill of sale reserved title in defendant. Thereafter, there being due on plaintiff's note, principal and interest, \$242, defendant reclaimed and repossessed the car, repaired and repainted it, and resold it for \$1,000, without any declaration of forfeiture. Defendant's manager had expressly offered to plaintiff to find some plan of disposing of the car, so that plaintiff would get his money out of it, a declaration on which plaintiff relied. *Held*, that it was unconscionable to enforce against plain-

tiff a forfeiture under the conditional bill of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1411; Dec. Dig. ¶477(1).]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by L. S. Breaks against the Spokane Auto Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

J. D. Campbell, of Spokane, for appellant.

HOLCOMB, J. [1] Respondent in November, 1912, purchased a Buick automobile from appellant for \$1,220.70, paid \$1,000.70 cash, and gave appellant a note for \$220 on which \$1 was indorsed. A conditional bill of sale was executed by the parties and duly filed, reserving title to the automobile in the appellant. The note was due March 1, 1913, and was not paid. Respondent took an agency at North Yakima, and put in some time there attempting to sell Buick cars. Failing in that enterprise, he returned with the car to Spokane. Thereafter he frequently put the car in appellant's garage for sale, for greater or less periods of time, and at intervals used the car for his own purposes. In November, 1913, appellant reclaimed and repossessed the car, repaired, overhauled, and repainted it, and in March, 1914, resold it for \$1,000. The repairs and repainting cost \$196.62. There was due on respondent's note at the time of the resale, in principal and interest, \$242.36. Another note for \$85, given by respondent on May 13, 1913, to E. C. Finley, with 8 per cent. interest per annum, had been assigned and transferred by Finley to appellant, and was set up as a counterclaim against respondent.

The trial court found the facts in favor of respondent, and found, among other things, that it was "against the conscience of the court to declare a forfeiture under the conditional bill of sale," and that "there was no express declaration of forfeiture by appellant."

The record discloses that Finley, manager for appellant, out of friendliness for respondent and his mother, had undertaken to protect respondent. He expressly offered, both to respondent and to his mother, by letter, "to find some plan for disposing of the car so that he [respondent] would get his money out of it." Unusual and unbusinesslike as such generosity may be, it so stood, and respondent relied upon it; and when appellant repossessed itself of the car without any declaration of forfeiture, and resold it for a sum amply sufficient to recompense itself for its unpaid debt and for all its outlays and respondent's outlay, we think the court justified in holding it unconscionable to enforce a forfeiture of the conditional bill of sale. By its judgment the court undertook to make

both parties whole upon the entire transaction of the parties, and we think it did so.

[2] There is a trifle of \$11.80 interest appellant claims should, in any case, have been allowed by the court upon the repair bill of \$196.62, at the legal rate. The court allowed the full amount claimed for repairs, which was doubtless large enough; and possibly offset this small item against other items involved. "*De minimis non curat lex.*"

Judgment affirmed.

MORRIS, C. J., and PARKER, J., concur.

MAIN and BAUSMAN, JJ., concur in the result.

REED et al. v. FIRESTACK et al. (No. 13356.)

(Supreme Court of Washington. Oct. 9, 1916.)

1. BOUNDARIES ¶87(3) — LOCATION — EVIDENCE—PRESUMPTION.

Evidence to fix a section corner at a point on the ground materially different from that called for by the field notes, in view of the presumption of law as to its true location being proximately where the law requires it to be, must be clear and certain.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186-191; Dec. Dig. ¶37(3).]

2. BOUNDARIES ¶33 — LOCATION — SURVEY — CORNERS—EVIDENCE.

While the corners of a survey as actually established by the United States government surveyors control the designation of such corners in the field notes, the presumption is that they have been established at the places indicated by such field notes.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 146-152; Dec. Dig. ¶33.]

3. BOUNDARIES ¶37(3) — ACTION TO ESTABLISH—RELIANCE ON LOCATION—EFFECT.

In an action to establish north and south boundary lines of section 13 and to restore the lost corners of a United States survey, the fact that the location of the southwest corner of section 14 had probably been relied upon by a number of owners in the vicinity as the true location was not a determining factor, where none of such owners ever became entitled to place any reliance upon that location as determinative of the true location of the south boundary of section 13.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186-191; Dec. Dig. ¶37(3).]

Department 2. Appeal from Superior Court, Douglas County; R. S. Steiner, Judge.

Action by C. W. Reed and others against Fred Firestack and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Cade & Barrows, of Wenatchee, for appellants. C. B. Hughes and Hughes & Adams, all of Wenatchee, for respondents.

PARKER, J. This action was commenced in the superior court for Douglas county under sections 947-949, Rem. & Bal. Code, to establish the uncertain north and south boundary lines of section 13, township 23 north, range 20 east, in Douglas county, and

to restore the lost corners of the United States survey thereof. Trial in the superior court resulted in findings and judgment in accordance with the contentions of plaintiffs, the owners of section 13, from which the defendants Firestack and Cox, owners of the land in section 24, adjoining section 13 upon the south, have appealed to this court, so that the only boundary line directly in controversy upon this appeal is that between sections 13 and 24.

[1] The Columbia river runs southerly, bearing slightly to the west, through this township, leaving approximately two tiers of sections thereof east of the river. There is no evidence in the record before us as to the location upon the ground of any of the government corners in that portion of the township lying to the west of the river. The case manifestly proceeded to trial, both upon the part of counsel and the trial court upon the theory that the true location of the lines and corners drawn in question are determinable from the known location upon the ground of the section and quarter section corners of that portion of the township lying to the east of the river. The locations upon the ground of the section corners in the south boundary of the township, including the southeast corner of the township east of the river, are conceded to be known locations and marked by monuments. The township was originally surveyed by Deputy United States Surveyor Holcomb in the year 1884. This survey appears to have been very imperfectly made in so far as marking the corners is concerned, so much so that there remains no reliable evidence of the markings upon the ground by Holcomb of the corners east of the river other than the two corners in the south boundary and at the southeast corner of the township, above mentioned. In 1887 Deputy States Surveyor Navarre, under contract with the United States, surveyed the township lying immediately to the east. When he came to closing the section lines of his survey on the east line of this township previously surveyed by Holcomb, he was unable to find any monuments marking the section or quarter section corners of the Holcomb survey on the township line other than at the southeast corner of the township. He was thereupon directed by the United States surveyor general of Washington Territory to resurvey this township line and mark the section and quarter section corners thereon, which he accordingly did and placed proper monuments marking all the corners common to both townships. Whether the survey and markings on this township line by Navarre be regarded as a new independent survey, or simply as a survey for restoring the lost section and quarter section corners established by Holcomb in the original survey thereof, we think is of no consequence here, because, as we view the evidence, the result would be the same; that is, Navarre's survey resulted in placing the monuments, marking the section

and quarter section corners on the township line, in the same location that they would be placed in restoring them by following Holcomb's survey, as evidenced by his field notes. The monuments at section and quarter section corners thus re-established by Navarre were found in place by the commissioners appointed by the court in this action, except at the southeast corner of section 13 (being the southeast corner of respondents' land), which corner had become lost. This corner, however, was readily re-established from the known corners next north and south thereof. The only monument or location upon the ground seriously claimed by appellants as the known location of any of the interior section or quarter section corners as established by the Holcomb survey is a stone, claimed by them to mark the southwest corner of section 14, which stone is 2 miles west, and about one-half mile north, of the southeast corner of section 13, as determined by the Navarre survey, which, as we have seen was in effect a restoration of that corner as originally established by the Holcomb survey. This stone is about $3\frac{1}{4}$ miles north of the south boundary of the township, and hence about one-half mile north of the place where the southwest corner of section 14 should be found if still existing upon the ground. The trial court was of the opinion that the evidence was wholly insufficient to prove that this stone in fact marked the original location of the southwest corner of section 14 as established by Holcomb. A careful review of the evidence leads us to agree with the conclusion of the trial court upon this question of fact. The rule that evidence of a section or quarter section corner, existing at a point upon the ground materially different from that called for by the field notes, and the presumption of law as to its true location being approximately where the law requires it to be, must be clear and certain in order to so fix such corner at such a location is peculiarly applicable to this situation, where we find the claimed corner approximately one-half mile from where it is in law presumed to be and where the field notes of the survey place it. We deem it sufficient to say that we regard the evidence as falling far short of so establishing this corner as claimed by appellants. Some two or three locations on or near the north line of the township east of the river are also claimed by appellants as being the true locations of original corner monuments on that line as established by the original Holcomb survey. We regard the evidence of these locations being the original locations established by Holcomb equally uncertain and unsatisfactory, as the trial court evidently did. These locations, however, being on the claimed north line of the township, we think would have but little influence in this case in any event, since they would tend to show little else than a surplus in the sections along the north line of the township.

[2] The trial court appointed three commissioners to make a survey of the north and south boundaries of section 13, erect monuments marking the same, and report their doings in that behalf to the court in pursuance of section 948, Rem. & Bal. Code. Having completed their work, the commissioners reported to the court, in substance, that they had adopted the northeast and southeast corners of section 13 as re-established by the Navarre survey on the east line of the township; that they then established the southwest and northwest corners of section 13 at points 3 and 4 miles, respectively, north of the south boundary and 1 mile west of the east boundary of the township following the field notes of the original Holcomb survey of the township in so doing. They reported that no corner in the interior of the township could be found by them except the corner claimed by appellants as the southwest corner of section 14, which, while they seem to have regarded that as the true southwest corner of section 14, they ignored it in their conclusion in establishing the southwest and northwest corners of section 13 as they did. They were also manifestly uninfluenced by the corners on the north line of the township claimed by appellants to be corners established by the Holcomb survey, whatever their views may have been as to the correctness of such locations as claimed by appellants. That the commissioners correctly determined the location of the southwest and northwest corners of section 13 from the field notes of the Holcomb survey and the field notes and existing monuments on the township line of the Navarre survey is quite plain. Indeed counsel for appellants do not seem to contend that this was an erroneous establishing of those corners of section 13 if there were no other known corners than those upon the east and south line of the township. So in its finality the whole controversy really becomes one of fact as to whether or not there were any known corners from which the southwest and northwest corners of section 13 could be re-established other than the known corners upon the east and south lines of the township. The following remarks of Chief Justice Dunbar, speaking for the court in the early case of *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916, are peculiarly applicable to the situation we find here:

"There are really no questions of law to be decided in this case, for the proposition contended for by appellants, viz. that the true corner is where the United States surveyor established it, notwithstanding its location may not be such as designated in the plat or field notes, is elementary, and in fact is conceded by the respondents; and it is also undoubtedly true that though neither course, distance, or computed contents agree with the monument, yet the monument must prevail. But this presumes the fact that the monument, or actually established corner, is definitely ascertained. If any credit at all is to be given the plats and field notes, the presumption must attach that the corners have been established at the places indicated by such field notes, so that the burden is upon him who dis-

putes their correctness. But where, as in this case, the establishment of the corner as claimed by the appellants does not accord with the field notes of the government surveyor, and does not accord with the section lines in adjoining sections, and will establish the claim in an irregular shape, the proof of such actual establishment must be clear and convincing."

See, also, *Stangair v. Roads*, 41 Wash. 588, 84 Pac. 405.

It seems to us there is no escape from the conclusion that the adoption by the commissioners of the northeast and southeast corners of section 13 as established by the Navarre survey and the restoration by them of the southwest and northwest corners of section 13 in conformity with the Holcomb survey and field notes, ignoring the claim of appellants as to the location of the southwest corner of section 14, and the decree of the court in accordance with this establishing of the boundary lines of section 13 by the commissioners, was a correct determination of the rights of the parties to this action.

Some contention is made in appellants' behalf that the trial court erred in ignoring the conclusion of the commissioners that the monument marking the southwest corner of section 14 correctly marked that corner as established by the Holcomb survey, in view of the fact that no exception was taken thereto, prior to the trial, by counsel for respondents. We do not think this fact renders that conclusion of the commissioners binding upon the trial court, since by the express provisions of section 948, the report is only advisory to the court, and besides in this particular case it would seem that counsel for respondents had no occasion to take exception to the commissioners' report in view of the fact that their conclusion as to the location of the southwest and northwest corners of section 13 was, as at all times, claimed by respondents. The trial of the case proceeded after the report of the commissioners upon the theory, recognized by all concerned, that counsel for respondents were contending that the conclusion of the commissioners as to the proper location of the southwest corner of section 14 was erroneous; much evidence being introduced upon both sides touching this question. The trial court was of the opinion that the evidence showed that the commissioners' conclusion on this question was erroneous, though it agreed with the commissioners in their conclusion as to the location of the southwest and northwest corners of section 13, which was the real matter for ultimate decision.

Some contention is made in appellants' behalf touching the question of taxation of costs. This we think is clearly without merit. Indeed it seems plain to us that if any of the parties had reason to complain of the taxation of costs, it was respondents.

We are of the opinion that the judgment of the trial court must be affirmed. It is so ordered.

[3] It incidentally appears in this record

that the location of the southwest corner of section 14 as claimed by appellants has probably been relied upon by a number of owners in its vicinity as the true location of that corner, and that a number of owners have claimed and recognized boundary lines between different ownerships accordingly. This has been suggested by counsel for appellants as one of the reasons for recognizing that location as the true southwest corner of section 14, and that it should control the location of the south line of sections 13 and 14. From what we have already seen, however, we think it plain that the true line between sections 13 and 14, the properties of these respondents and appellants, respectively, cannot be determined by that claimed location of the southwest corner of section 14, in the absence of evidence that it was in fact that corner of that section as established by the Holcomb survey. The manner and extent to which that corner has been recognized by those owning land in the neighborhood may have some influence upon their rights, but it is in no sense a determining factor in this controversy, since we think it is plain from the evidence that neither of these parties ever became entitled to place any reliance upon that location as the true southwest corner of section 14, as determinative of the question of the true location of the south boundary of section 13. We are not here concerned with the rights of other parties than those to this action, and, of course, our decision in this case can affect only the rights of the parties to this action.

MORRIS, C. J., and MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

JIM v. CHICAGO, M. & ST. P. RY. CO. (No. 13500.)

(Supreme Court of Washington. Oct. 13, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 286(1)—PERSONAL INJURIES—QUESTIONS OF FACT.

In a servant's action for injury, tried without a jury, the question whether the master's alleged negligence constituted negligence entitling the servant to judgment became a question of fact for ultimate determination by the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1001; Dec. Dig. \Leftrightarrow 286 (1).]

2. APPEAL AND ERROR \Leftrightarrow 895(2)—REVIEW—TRIAL DE NOVO.

Cases tried in the superior court are in a sense triable de novo in the Supreme Court, and it is not bound by the findings of the trial court to the same extent that it is by the findings of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3647; Dec. Dig. \Leftrightarrow 895(2).]

3. MASTER AND SERVANT \Leftrightarrow 278(20)—ACTION FOR INJURY—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In a servant's action for injury from the explosion of a dynamite cap in the use of which he was inexperienced, evidence held to sustain a finding of the court, trying the case without a

jury, that his foreman was not negligent in failing to instruct him as to the dangers incident to handling dynamite caps and in failing to see that he returned the unused cap instead of letting it remain in his pocket.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. \Leftrightarrow 278 (20).]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Andy Jim against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant dismissing the action, and plaintiff appeals. Affirmed.

Glen V. Farnham and C. H. White, both of Spokane, for appellant. Geo. W. Korte, of Seattle, and Cullen, Lee & Matthews, of Spokane, for respondent.

PARKER, J. This is an action to recover damages for personal injuries resulting from the explosion of a dynamite cap, the proximate cause of which plaintiff claims was the negligence of one of defendant's section foremen under whom he was at the time working. The case proceeded to trial in the superior court for Spokane county without a jury. At the close of the evidence introduced in behalf of the plaintiff, counsel for the defendant, challenging the sufficiency of the evidence to entitle the plaintiff to recover, moved for judgment, which motion was by the court granted, rendering judgment of dismissal with prejudice. From this disposition of the case, the plaintiff has appealed to this court.

Appellant is a Bulgarian unable to speak the English language, but evidently fairly well educated, having attended school for many years in Bulgaria before coming to this country. At the time of receiving the injury here in question he was 21 years old. He had then been working for respondent upon its railway line for about two months as a section hand. On October 31, 1914, it became necessary to remove a large boulder from near appellant's track upon its right of way. The boulder was too large to move without breaking it, which had to be done by an explosion of dynamite. The respondent's section foreman in charge of the work directed appellant to go with him some little distance along the track to get some dynamite and a dynamite cap. The foreman took some dynamite directing appellant to bring a cap. They returned to the rock, the foreman carrying the dynamite and appellant the cap. They then attempted to set off the charge of dynamite with the view of breaking the rock, but for some reason it failed to go off. They then brought more dynamite and another cap, the foreman carrying the dynamite and the appellant the cap, as before. Their efforts to set off the charge of dynamite upon their return at this time also failed. It was raining at the time, and appellant's story seems

to indicate that their failures were because of the caps getting wet while he was carrying them to the rock. He was then directed by the foreman to bring more caps from the hand car, and to bring them in his pocket in order that they could be kept dry. Complying with this direction, he brought two caps in his pocket. One of these was successfully used in exploding the dynamite and in breaking the rock. The other cap evidently remained in appellant's pocket, though there is no direct evidence to that effect. He had never seen dynamite or dynamite caps until that time. His story furnishes us practically no information as to whether or not he had any appreciation of the dangers of dynamite or dynamite caps. The foreman did not caution him or give him any instructions as to the care he should exercise in handling the caps. Two days later, while performing his usual duties as section hand under the same foreman, appellant put his hand into the same pocket of his coat in which he had carried the two caps to the boulder, for the purpose of getting his gloves out, and while his hand was in his pocket in the act of withdrawing his gloves there was an explosion in the same pocket, resulting in serious injury to his hand, for which he claims damages. There was found there, as evidently having dropped out of his pocket, a piece of a dynamite cap, and some small pieces of copper from such a cap were also found in the wound inflicted upon his hand by the explosion. The evidence seems to warrant the conclusion that this explosion was from the cap which appellant had put in his pocket, and not used two days previous, though this is to be arrived at by inference rather than by direct evidence of such fact. We shall assume, as his counsel does, that it was the same cap, and that he had forgotten to put it back after the breaking of the rock by exploding the dynamite with the other cap.

There are no remarks of the trial judge or recitals in the judgment in the record before us showing the ground upon which the trial court granted the motion for nonsuit. We assume, therefore, that it was granted upon the ground stated by counsel for respondent in making the motion, which was that there was "no showing as to any acts upon the part of the defendant, or any of its agents or servants, which caused the injury complained of, or contributed thereto." There is nothing in the record indicating that the question of assumption of risk or contributory negligence on the part of appellant entered into the question of respondent being entitled to judgment. We have to do then with the correctness of the trial court's decision in holding that respondent was not negligent.

We are to be reminded that this is not a

question of nonsuit at the close of plaintiff's evidence upon a jury trial; hence our problem is not whether the evidence was sufficient to carry the case to the jury, had it been tried before a jury, but whether or not the trial court correctly decided the case upon the merits as a question of fact; for the court's decision was, in effect, a decision upon the merits of appellant's entire case, though made in response to a motion for judgment against appellant made at the close of the evidence introduced in his behalf.

[1-3] The only negligence which it would be at all possible to charge respondent with in this case was that of the failure of its section foreman to instruct appellant as to the dangers incident to handling the dynamite caps and see that he returned the unused cap instead of letting it remain in his pocket. Now it might well be argued that it would have been error in the trial court to take this question of negligence from the jury had the case been tried before a jury. But whether it constitutes negligence such as to entitle appellant to judgment upon a trial before the court is quite a different question, and, being so tried, became a question of fact for ultimate determination by the court the same as it would have been determinable by a jury had the case been tried before a jury. Clearly, under all the circumstances here shown, we would not be warranted in disturbing the verdict of a jury rendered against appellant upon these facts. While cases tried in the superior court are in a sense triable de novo in this court, and we are not bound by the findings of the trial court to the same extent that we are by the findings of a jury, we cannot see our way clear to disturb the findings of the trial court made against appellant in this case. Considering the age, education, and apparent intelligence and experience of appellant, as the trial court had opportunity to judge, we cannot say that it erroneously determined, as it manifestly did, that respondent's section foreman was not guilty of negligence in his failure to instruct appellant as to the danger of handling dynamite caps, and in the foreman's failure to see that appellant returned the unused cap immediately following the breaking of the rock when the other cap was used. The question is in its last analysis one of fact, the same as if the case had been tried before a jury, though the trial court's conclusions on questions of fact are not as binding on us as the finding of a jury. We cannot say that the evidence does not preponderate in support of the trial court's conclusion.

The judgment is affirmed.

MORRIS, C. J., and HOLCOMB and MAIN, JJ., concur.

VILLA v. KEYLOR et al.

(Supreme Court of Washington. Oct. 9, 1916.)

WATERS AND WATER COURSES §143—APPROPRIATION—RIGHTS ACQUIRED.

Where for a period of 20 years prior to the commencement of an action to determine riparian rights in the water of a creek each of the parties diverted from a creek and used upon their respective tracts of land certain proportionate amounts of water, their continued use of the water by mutual consent ripened into a binding agreement determinative of the rights of the parties.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. §143.]

Department 2. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Marie Villa against Howard B. Keylor and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank B. Sharpstein, of Walla Walla, for appellant. Everett J. Smith and Marvin Evans, both of Walla Walla, and Francis A. Garrecht, of Spokane, and John F. Watson and Thomas H. Brents, both of Walla Walla, for respondents.

PARKER, J. The plaintiff, Marie Villa, the owner of land riparian to Ritz creek, a small stream with a limited quantity of water in Walla Walla county, seeks to have defendants enjoined from diverting the water of that creek above her land, which she claims they are unlawfully doing to her damage, and also prays that the amount of the water of the creek which she and each of the defendants is lawfully entitled to be finally adjudicated in this action. Trial in the superior court resulted in a decree determining the proportionate amount of the water of the creek each of the parties is entitled to, which in effect awards the water to each of them in substantially the same proportion that it has for many years past been diverted and used by them. From this disposition of the case, the plaintiff has appealed to this court.

Appellant claims that she is entitled to one-half of the water of the creek, while the decree awards to her a less proportion thereof. Her claim to one-half of the water is rested upon a deed executed by Alexander Blackhall in 1878, conveying her land here involved to her deceased husband, to whose interest she has succeeded by his will. This deed describes the easterly boundary of her land as running northerly "to the center of the south channel of Ritz creek," and describes the northerly boundary thereof as running "thence westerly following the said south channel of Ritz creek." The north channel of the creek does not touch the land conveyed by this deed. The concluding words of the deed grant to Villa "the privilege of diverting one-half of the water of said creek for irrigation." When this deed

was executed by Blackhall he was the owner of the entire quarter section in which the land and water right conveyed to Villa lay. This quarter section, viewed as a whole, is riparian to both channels of the creek both above and below the land conveyed to Villa, though the land conveyed to Villa, viewed as a separate tract, is riparian only to the south channel of the creek. At that time defendant Catherine J. Ritz owned 40 acres of land riparian to the creek in the adjoining quarter section below, in connection with which she had acquired by appropriation the right to a considerable portion of the water of the creek as against the owner of the Blackhall quarter section, such appropriation right apparently having been acquired while that quarter section was government land. We notice these quoted words of the Blackhall deed to Villa, the fact that the north branch of the creek does not touch the land conveyed by Blackhall to Villa, and the then acquired appropriation right of Catherine J. Ritz in connection with her 40 acres below, not with a view of determining what the appropriation rights of Catherine J. Ritz and the granted rights of Villa might be under these rights alone, but for the purpose of showing that there is room for difference of opinion as to the extent of the water right thus granted by Blackhall to Villa; that is, as to whether Villa acquired by that conveyance only half the water of the south channel or half the water of both channels of the creek. These facts would seem to furnish a reason for the subsequent actions of the parties which the trial court regarded as controlling their present water rights.

The evidence, we think, warrants the conclusion that for a period of some 20 years prior to the commencement of this action each of the parties diverted from the creek and used upon their respective tracts of land substantially the same proportionate amount of the water of the creek as is awarded to them by the decree in this action. The theory upon which the trial court so apportioned the water was that this continued use of the water by mutual consent ripened into a binding agreement between them as to the apportionment of the water, though there may not have been an express agreement between them to that effect. That such a continued mutual diversion and use of all the water for such a period of time would become determinative of the rights of the parties touching the apportionment of the water seems plain as a matter of law, especially when such apportionment seems equitable, as it does in this case. Therefore, as we view the controversy, there is involved only the question of fact as to such continued mutual diversion and use of the water. The evidence is somewhat voluminous touching this question, and is also somewhat conflicting. We have read it all with care

as presented to us in the abstracts prepared by counsel, and are led to the view that it warrants the conclusion reached by the trial court. Upon the whole record we are of the opinion that we would not be warranted in disturbing the apportionment of the water as decreed by the trial court, who heard and saw the numerous witnesses upon the trial. We think that it would result to no useful purpose to analyze the evidence in detail in this opinion.

The judgment is affirmed.

MORRIS, O. J., and HOLCOMB, MAIN, and BAUSMAN, JJ., concur.

MARSHALL v. DUNN et al. (No. 13359.)
(Supreme Court of Washington. Oct. 9, 1916.)

1. WITNESSES \S 837(8)—CREDIBILITY—CONVICTION OF CRIME—"CRIME."

Under Rem. & Bal. Code, \S 2290, providing that a person convicted of crime shall be a competent witness, but that his conviction may be proved to affect his credibility, the fact of the defendant's conviction in a police court of an assault punishable under a city ordinance as a misdemeanor was admissible in a civil action for such assault only as affecting the weight of his testimony, as such offense is a "crime" within the statute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1132, 1140-1142, 1146-1148; Dec. Dig. \S 837(8).]

For other definitions, see Words and Phrases, First and Second Series, Crime.]

2. APPEAL AND ERROR \S 762—BRIEF AND REPLY BRIEFS.

Under the express provision of Rem. & Bal. Code, \S 1730, the court does not feel itself called upon to notice contentions made in appellant's reply brief which were not made in his opening brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3097; Dec. Dig. \S 762.]

3. NEW TRIAL \S 151—NEWLY DISCOVERED EVIDENCE.

In an action for damages for an assault, where the affidavits were presented to the trial court in support of a motion for a new trial upon the ground of newly discovered evidence, were met by counter affidavits challenging the truth of the alleged newly discovered evidence and the appellant's diligence in discovering it, the denial of the motion was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 311; Dec. Dig. \S 151.]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Margaret M. Marshall against Frank Dunn and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Mulligan & Bardsley and O. C. Moore, all of Spokane, for appellants. Corkery & Corkery, for respondent.

PARKER, J. The plaintiff seeks recovery of damages for personal injuries which she claims as the result of an assault made upon her by the defendants. Trial in the superior

court for Spokane county resulted in verdict and judgment against the defendants, from which they have appealed to this court.

It is first contended in appellants' behalf that the trial court erred to their prejudice in admitting evidence of the conviction and fining of appellant Dunn in the police court of the city of Spokane for the commission of an assault made upon respondent which it may be inferred, though not clearly shown, was the same assault involved in this action. Counsel for respondent offered in evidence the record of this conviction of appellant Dunn in the police court. The court ruled admitting the offered record, but immediately changed its ruling rejecting the record. This occurred in the presence of the jury, but evidently the jury did not then see the record, nor was it then read to them. It does not appear in the record of this case that this offer was renewed by counsel for respondent, though the record of appellant Dunn's conviction in the police court appears as an exhibit in this case. We may assume for the purpose of argument that it went into the jury room with the other exhibits, but it appears from the record before us that appellant Dunn admitted upon his cross-examination that he had been convicted in the police court and fined \$20 for assaulting respondent. This fact was sought to be proven by counsel for respondent both by his offer of the police court record and by his cross-examination of appellant Dunn for the sole purpose of affecting Dunn's credibility as a witness. The fact that he had not testified when the police court record was first offered is the apparent reason for the court's rejection of it at that time. The court plainly told the jury that the fact of Dunn's conviction was to be considered by them only as affecting his credibility as a witness. We note that the offer of the proof of Dunn's conviction in the police court by the record thereof and by cross-examination of appellant was only generally objected to by counsel for appellant in that it was "incompetent, irrelevant, and immaterial." Nor does the record before us indicate any more specific statement of their objection in argument to the court. In their opening brief counsel for appellant make only the general claim of error touching the proof of Dunn's conviction in the police court that "the court erred in permitting the respondent to introduce any testimony in reference to the alleged conviction in the Spokane police court." This contention is presented to us in the opening brief with citation of a number of authorities, but with little argument, indicating that counsel in their opening brief were only relying upon the general rule that a judgment in a criminal action is not admissible in evidence in a civil action against the same defendant to show that he is liable in damages, though the question of the defendant's guilt in the criminal action

may be, in substance, the same as the question of his liability for damage in the civil action, citing 2 Black on Judgments, § 529; 1 Greenleaf on Evidence (16th Ed.) 537; 3 Cyc. 1098; and other authorities.

[1] We have seen, however, that the fact of Dunn's conviction in the police court of the crime of assault was offered in evidence, not for the purpose of showing his liability for damages in this action, but only for the purpose of affecting the weight of his testimony, which it is expressly provided by section 2290, Rem. & Bal. Code, may be done, which section has been given full force and effect by our decisions in *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *State v. Stone*, 66 Wash. 625, 120 Pac. 76; *State v. Overland*, 68 Wash. 566, 123 Pac. 1011.

It would seem plain then that, unless we find in appellants' opening brief some other assigned reason for the rejection of this evidence, we must hold that no error was committed by the trial court in its admission of which we can here take notice. There seems to be no other reason suggested in appellants' opening brief.

One contention, however, is made in appellants' reply brief, which might be considered as included in the contentions made in their opening brief, which possibly merits some attention. It is argued that, since it appears that the conviction and fining of appellant Dunn was in the police court of the city of Spokane, we must proceed upon the assumption that it was a conviction of a violation of a city ordinance, and not of a state law, and that therefore the offense of which he was so convicted was not a crime within the meaning of section 2290, Rem. & Bal. Code, and our decisions above noticed. It seems to be conceded by counsel for appellants that that section and our decisions thereunder make the rule applicable to misdemeanors as well as felonies, classing both as crimes within the meaning of the rule. Indeed, our decision in *State v. Overland*, supra, seems to expressly so hold. The authorities are not in harmony upon the question whether or not offenses defined by and punishable under city ordinances are "crimes," using that word as including also misdemeanors. We are of the opinion, however, that when a valid city ordinance makes punishable an act which is mala in se, wrong within itself, as of course an assault is, such act is a crime within the meaning of section 2290 and our decisions above noticed. The decision of this court in *Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125, where it was held that a prosecution under a city ordinance for an act not mala in se was a criminal prosecution, would seem to argue that even such an act is a crime, though the question of it being a crime within the meaning of section 2290 may not be free from doubt.

[2] Some other contentions are made in the

reply brief of counsel for appellants touching the claimed error of the court in admitting proof of the conviction of appellant Dunn in the police court. These contentions, however, were not made in the opening brief, so we do not feel called upon to further notice them. Rem. & Bal. Code, § 1730. We are of the opinion that the court did not err to the prejudice of appellants by the admission of evidence of appellant Dunn's conviction in the police court, in so far as we are here called upon to take notice of counsel's claim of error in the admission of that evidence.

[3] One of the grounds of new trial relied upon by counsel for appellants is newly discovered evidence. Several affidavits were presented to the trial court in support of this ground for a new trial. There were also presented to the trial court counter affidavits which challenged the truth of a considerable portion of the statements made as to the alleged new evidence being in fact newly discovered, and also as to the truth of a considerable portion of the alleged new evidence. We deem it sufficient to say that this contention presents only the question of abuse of discretion of the trial court in the denial of the motion for new trial, and we are quite clear such discretion was not abused in the disposition of the motion adverse to appellants.

The judgment is affirmed.

MORRIS, C. J., and MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

JACOBS et ux. v. CITY OF SEATTLE. (No. 12993.)

(Supreme Court of Washington. Oct. 11, 1916.)

1. APPEAL AND ERROR \S 516—DISMISSAL OF APPEAL—GROUNDS.

Where defendant withdrew his answer and demurred to the complaint, and demurrer being sustained, plaintiff refused to amend, and appealed from the judgment of dismissal, the appeal stood on the demurrer, and the question was the sufficiency of the complaint, so that the record need not include opening statement of counsel, prior to the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2332-2340; Dec. Dig. \S 516.]

2. EMINENT DOMAIN \S 2(1)—TAKING PROPERTY—NECESSITY OF COMPENSATION.

That the city in erecting and operating a garbage disposal plant was exercising a lawful governmental function, did not warrant its exercise in violation of any constitutional guaranty to the citizen; and if such plant operated as a taking of private property, the city should, under Const. art. 1, § 16, have compensated therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 8-8; Dec. Dig. \S 2(1).]

3. EMINENT DOMAIN \S 293(1)—TAKING PROPERTY—NECESSITY OF COMPENSATION.

Complaint alleging erection and maintenance of municipal garbage disposal plant, with resultant damage to plaintiffs' property, but not charg-

ing or relying on negligent operation, is sufficient, as against general demurrer, on which to base recovery of compensation for the damage on the ground that it was a taking of the property.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 797-799; Dec. Dig. § 293(1).]

4. EMINENT DOMAIN §271.—TORTS OF CITY.—
— MAINTENANCE OF GARBAGE DISPOSAL PLANT—RECOVERY.

One whose property is damaged by construction and maintenance of a municipal garbage disposal plant should seek recovery as for taking of property without just compensation, and not by way of damages for negligent operation; and, having sought recovery on the first ground, is precluded from recovering on the second.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 725-736, 741; Dec. Dig. § 271.]

5. EMINENT DOMAIN §2(1) — MAINTENANCE OF GARBAGE PLANT—TAKING OF PROPERTY.

Although Rem. & Bal. Code, § 8006, authorizes construction of municipal garbage disposal plants, and section 8311 provides that nothing done by express authority of statute can be deemed a nuisance, they do not prevent recovery for damage to property by erection of such plants, on the ground that it is a taking of property without just compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-8; Dec. Dig. § 2(1).]

Department 1. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by George Jacobs and wife against the City of Seattle. From judgment dismissing the action after plaintiffs' refusal to amend the complaint when demurrer thereto was sustained, plaintiffs' appeal. Reversed in part, and remanded, with leave to answer.

Jay C. Allen, of Seattle, for appellants. Jas. E. Bradford and William B. Allison, both of Seattle, for respondent.

FULLERTON, J. This is an action by George Jacobs and Theresa Jacobs, his wife, against the city of Seattle for damages to their residence property by reason of the construction and operation on an adjoining lot of an incinerator for the purpose of burning and destroying city garbage. The appeal is based upon the alleged error of the court in sustaining a demurrer to the complaint, and in entering judgment dismissing the action on plaintiffs' refusal to amend.

[1] The respondent interposes a motion to dismiss the appeal because the record does not disclose the opening statement made by counsel for appellants. This is thought to be material because of the admissions therein contained on which the respondent moved for judgment. It appears, however, that the respondent had answered to the complaint, and on the court's intimation that a demurrer to the complaint would be the better method of attack, the respondent obtained leave to withdraw the answer and file a demurrer to the complaint. It is sufficient answer to the motion to dismiss to say that the preliminary proceedings were merged in

the final attack presented by way of demurrer, and that the appeal is from the order of the court on the demurrer. The record is ample for the presentation of the sufficiency of the complaint, which is the sole question before us. The motion is denied.

The complaint for a first cause of action alleged that appellants are the owners of lot 8, block 4, McNaught's third addition to the city of Seattle, Wash.; that respondent, prior to the 5th day of May, 1913, installed upon property abutting and adjoining appellants' lot on the south an incinerator for the purpose of burning up and disposing of the garbage and refuse of the respondent city, which are brought to said incinerator from different portions of the city in open wagons; that the wagons pass alongside of appellants' property and frequently stand along its east line; that such wagons give forth noxious odors and are disgusting and sickening to the sight and senses; that said refuse and garbage are burned in said incinerator, by reason of which smoke, steam, and vapors arise and permeate the air, noxious to the smell and other senses, which said odors are sickening, disgusting, and unbearable, and tend to, and will, cause sickness and disease to those forced to smell and inhale the same; that from such incinerated garbage and refuse, ashes, and unburnt portions are carried out and dumped in close proximity to appellants' home; that the said refuse is composed mainly of decomposed and partly burned matter, which emits strong, disagreeable, and noxious odors, detrimental to the health, peace, and comfort of appellants and of any one living or being upon appellants' property; that during the process of incineration a large amount of cinders and ashes is carried up into the air and precipitated upon the property of appellants, covering appellants' home and yard and surrounding property; that by reason of the operation of said incinerator flies congregate in great numbers upon and about appellants' home and in and about their house and other houses which they have upon said property, thereby breeding disease and rendering the occupancy of appellants' property disagreeable to the senses and dangerous to health; that respondent maintains an inclined roadway leading from said incinerator and alongside of appellants' property, which is unsightly and unseemly, and which lessens the value of their property; that at no time has respondent ever condemned the property of appellants, nor brought suit to fix the damage thereto, because of the erection, maintenance, and operation of said incinerator, but has installed same without paying, or having first fixed and ascertained by a jury, the damages to appellants; that by reason of the facts and conduct and uses aforesaid, appellants have been greatly damaged, and the value of their property has been and is

constantly being lessened and will permanently continue to be lessened, to their damage in the sum of \$7,000.

For a second cause of action, it is alleged that the incinerator is negligently and carelessly maintained; that it constitutes a nuisance; that by reason of its maintenance large quantities of garbage, rubbish, refuse, and trash are carried to, and burned in, said incinerator, causing a large amount of cinders, ashes, and dust, disagreeable and noxious odors, stench, and gases to arise therefrom and permeate the atmosphere in the vicinity of appellants' premises to such an extent as to be a menace and danger to the health of appellants and to persons occupying their property; that respondent carelessly causes and permits a large amount of ashes, cinders, and debris and partially burned animal matter to accumulate around said incinerator, and to be blown and carried over appellants' property, causing it to be covered with cinders, ashes and dust; that respondent has built an inclined roadway alongside appellants' property, leading from the ground up into said incinerator, over which is being hauled garbage, refuse, ashes, and debris, from which noxious and vexatious odors arise, and which is unsightly and detrimental to the property of appellants; that appellants have upon their property three houses for rental purposes, from which they might derive an income, but that they are untenanted and uninhabitable, and appellants are and will be unable to derive any income therefrom; that said damage is a continuing one, and the value of their property has been greatly injured, lessened, and destroyed. They further alleged that on May 5, 1913, within 30 days after said damages first accrued, they presented their claims in writing to the respondent city, and again on April 2, 1914, presented a further and additional claim, both of which the city disallowed. Appellants demanded judgment for \$7,000.

[2, 3] The first cause of action is based upon the guaranty of article 1, § 16, of the state Constitution, which provides that no property shall be taken or damaged for public or private use without just compensation. The second cause of action is based upon the negligent operation of the incinerator plant in a manner which causes it to be a nuisance. Respondent's attack on the sufficiency of the complaint is founded on its contention that the city in the disposal of garbage is discharging a governmental as distinguished from a corporate duty, and hence would not be liable for resulting damages of any character. The only question for determination is: Does the complaint state a cause of action on either count? It may be conceded that the construction and operation of an incinerator by the city of Seattle for the disposal of garbage was a lawful exercise of municipal power under the delegation of authority granted by virtue of state legisla-

tion. But the lawfulness of the power would not warrant its exercise in such a way as to breach any constitutional guaranty for the protection of the citizen. The disposal of garbage may be a proper governmental function, granted by legislative enactment; but, conceding it to be so, the function must be exercised with due regard to constitutional limitations. Our Constitution (article 1, § 16) explicitly provides that private property shall not be damaged for public use "without just compensation having been first made, or paid into court for the owner." The complaint in this case sets forth the injury to the property of appellants arising from the erection, maintenance, and operation of respondent's plant for the disposal of garbage on land adjoining that of the appellants, and "that at no time has said city ever condemned plaintiffs' property nor has it ever brought any suit to establish or fix the damage to plaintiffs' property because of the erection, maintenance, and operation of said incinerator, but said city has, without paying to plaintiffs, or having first fixed and ascertained by a jury, plaintiffs' damage," so installed and operated said incinerator as to menace and depreciate the value of their property. The complaint does not seek to charge negligence of the respondent or its employees in the performance of governmental duties, in which case the municipality might be absolved from liability. The first cause of action is founded on the higher ground of the taking or injury to property without just compensation. The authorities sustain the right of recovery in such cases.

The case of *Hines v. Rocky Mount*, 162 N. C. 409, 78 S. E. 510, L. R. A. 1915C, 751, Ann. Cas. 1915A, 132, which was an action involving the disposal of garbage, after conceding the rule of nonliability of municipalities for negligence in the performance of governmental duties, said:

"This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to the property of a private owner, without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land."

In *Louisville v. Hehemann*, 161 Ky. 523, 171 S. W. 165, L. R. A. 1915C, 747, another garbage case, which concedes the nonliability for the negligence of city employees, it is said:

"But there is an element of wrong complained of in this case which goes beyond that. Conceding that a city dump is necessary for the public good, and that Cabel street was the proper place for it, still the city had no right to take or injure adjacent private property or the occupants in the use thereof without making compensation."

In *Kobbe v. New Brighton*, 20 Misc. Rep. 477, 45 N. Y. Supp. 777, a garbage incinerator case, it is said:

"The constitutional prohibitions against depriving any person of his property without due process of law, or without just compensation, may be violated without the physical taking of property. They extend to every act which injuriously affects property rights. * * * If, therefore, it be true that such a cremator as this statute authorizes is, like a pesthouse, necessarily offensive, and a direct injury to neighboring real property, though conducted in the most careful and scientific manner, the authorization of it by the Legislature without providing for compensation for such injury, could not legalize it as against individuals thus damaged in their property."

See, also, *Thurston v. City of St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *McLaughlin v. City of Hope*, 107 Ark. 442, 155 S. W. 910, 47 L. R. A. (N. S.) 137.

The federal Constitution and many of the state Constitutions are without provision respecting the necessity of compensation for the "damaging" of private property by means of a public use; the constitutional inhibition extending only to the "taking" of private property without compensation. But the courts in the most of those states, however, hold that such an injury as in the case at bar is a "taking" of private property, and apply the same principle of necessity of compensation. We cite a number of them, most of them involving an injury to property arising from the disposal of sewage by municipalities. See *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U. S.) 177, 20 L. Ed. 557; *Selfert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; *Sammons v. City of Gloversville*, 175 N. Y. 326, 67 N. E. 622; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; *Attorney General v. City of Grand Rapids*, 175 Mich. 508, 141 N. W. 890, 50 L. R. A. (N. S.) 473, Ann. Cas. 1915A, 968; *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 877; *Parish v. Town of Yorkville*, 96 S. C. 24, 79 S. E. 635, L. R. A. 1915A, 282.

From the foregoing authorities it is clear that the erection and maintenance by a city of an incinerator for the burning of garbage on land adjacent to that of a private owner, and its operation so as to depreciate the value of his land and render it a menace to the health of himself and family, constitutes a damaging of private property for a public use for which he would be entitled to compensation under the terms of Const. art. 1, § 16. The allegations in the first count of appellants' complaint sets forth facts sufficient to bring it within the operation of this principle, and therefore states a cause of action as against a general demurrer.

[4] Respecting appellants' second cause of action, we are of the opinion that the demurrer thereto was properly sustained. This cause is based on the theory of the negligent operation of the garbage plant in such a man-

ner as to create a nuisance. There is a respectable line of authorities permitting the right of recovery in such cases. See *Ft. Worth v. Crawford*, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840; *Stephenville v. Bower*, 29 Tex. Civ. App. 384, 68 S. W. 833; *City of Haskell v. Webb* (Tex. Civ. App.) 140 S. W. 127; *New Albany v. Shider*, 21 Ind. App. 392, 52 N. E. 626; *City of Newcastle v. Harvey*, 54 Ind. App. 243, 102 N. E. 878; *Hines v. Nevada*, 150 Iowa, 620, 130 N. W. 181, 82 L. R. A. (N. S.) 797; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470.

We think, however, under the statutes of this state, the proper theory of recovery is set forth in appellants' first cause of action. The two causes of action in reality seek the same damages for the same injury, and to uphold one cause necessarily excludes the other.

[5] The installation of plants for the disposal of garbage is authorized by 3 Rem. & Bal. Code, § 8005. The Code also provides (section 8311):

"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

The construction of a garbage incinerator being authorized by law, its maintenance in a proper manner and place would not constitute a nuisance in a legal sense. But such a conclusion does not defeat appellants' right of recovery for the damaging of his property without just compensation. The denial of the right to recover damages for an injury on the theory of its constituting a tort, such as is the basis of the second cause of action, does not militate against the right of recovery for a taking or damaging of property for a public use without compensation. The principle upon which we rest appellants' right of recovery is well expressed in *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335, as follows:

"But if, for the purpose of this case, we concede the defendant's claim that the use is a governmental use, it is nevertheless liable to the plaintiff. The injury described by the complaint is not a mere consequential damage, like that resulting wholly from the lawful use of one's own property, or the lawful exercise of governmental powers; it is a direct appropriation of well-recognized property rights within the guaranty of the Constitution. * * * Public necessity may justify the taking, but cannot justify the taking without compensation. * * * The mandate of the Constitution is intended to express a universally accepted principle of justice, and should receive a construction in accordance with that principle, broad enough to enable the court to protect every person in the rights of property thus secured by fundamental law."

The judgment sustaining the demurrer is reversed as to the first cause of action, and the cause remanded, with leave to the defendant to answer.

MORRIS, C. J., and MOUNT, ELLIS, and CHADWICK, JJ., concur.

IMPERIAL CANDY CO. et al. v. CITY OF SEATTLE. (No. 13342.)

(Supreme Court of Washington. Oct. 9, 1916.)

1. WATERS AND WATER COURSES ⇐208—WATERWORKS—NEGLIGENCE.

Where the defective condition of a foundation under a city water meter at a point where a water pipe was reduced to a smaller pipe could readily have been ascertained by an inspection, the failure to inspect and replace the foundation was negligence on the part of the city.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 300; Dec. Dig. ⇐208.]

2. WATERS AND WATER COURSES ⇐208 — NEGLIGENCE — WATERWORKS — PROXIMATE CAUSE.

Such negligence was the proximate cause of damage to plaintiff's property in a basement from water from the pipe when the bushing broke, as the damage was the natural and probable consequence and such as would reasonably be anticipated by the breaking of the pipe.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 300; Dec. Dig. ⇐208.]

3. WATERS AND WATER COURSES ⇐208—WATERWORKS—BREAKING OF PIPE—DAMAGE TO PROPERTY—RECOVERY.

Under an ordinance forbidding the use of the basement of a building without a drain, but not forbidding a tenant's use of such basement, a tenant in storing his property in a basement without a drain was not guilty of negligence preventing his recovery for damages from flooding by the breaking of a city water pipe.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 300; Dec. Dig. ⇐208.]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the Imperial Candy Company and others against the City of Seattle. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jas. E. Bradford, Melvin S. Good, Hugh M. Caldwell, and Walter F. Meier, all of Seattle, for appellant. John W. Roberts and George L. Spirk, both of Seattle, for respondents.

MAIN, J. The purpose of this action was to recover damages to personal property caused by the breaking of a water main owned by the city of Seattle. The defendant, the J. M. Colman Company, was the owner of the building in which the property was at the time the damage occurred. The trial resulted in a judgment of dismissal as to the Colman Company, and a judgment in favor of the plaintiff and against the city in the sum of \$1,051.93, together with interest.

The facts are these: On March 3, 1913, the respondent was, and for about 9 years previous had occupied rooms in the basement of the building owned by the Colman Company, the west front of which was on Western avenue. One of the city water mains extended along this avenue. Under the side-

walk on the east side of the street a pit had been constructed in which the water meter was placed. The service pipe leading from the street main to the pit was approximately 4 inches in diameter. After the pipe entered the pit it was reduced to a 3-inch pipe. For this purpose it was necessary to use an elbow and bushing. The bushing used in making the connection was cast iron. The 3-inch pipe extended from the place where the connection was made to the meter and into the building. About 10 years previous to the date mentioned, the first meter had been installed in the pit upon a foundation consisting of boards placed upon the earth. At the time the main broke the boards had become decayed, and the only inference from the evidence is that the foundation of the meter had become so defective as not longer to furnish it support. The meter not being supported by the foundation, its weight was carried by the pipe to which it was attached, and the strain caused by this weight was borne by the cast-iron bushing. The meter when filled with water would weigh 300 or 400 pounds.

There was more or less hammering in the pipes due to the large amount of water which was used for operating elevators. When the pipe broke, a stream of water from the 4-inch opening extended upwards approximately 30 feet. Some of this water found its way into the room in the basement in which the respondent's property was stored. This property consisted of crackers, sugar, candy, and other like articles. The water upon the floor of this basement became 6 or 8 inches deep.

[1] The theory of the action was that the cast-iron bushing which broke was improper construction, and that the city had not exercised reasonable care in inspecting and replacing the foundation under the meter. The evidence sustains the position that the use of the cast-iron bushing was improper construction. The evidence also shows that the condition of the foundation under the meter could readily have been ascertained by an inspection. Access to the pit in which the meter was placed could be made through an opening in the sidewalk through which the meter reader entered the pit.

It is claimed that the city was negligent in one or two other particulars, which need not be referred to, as, in our opinion, the condition of the foundation under the meter was readily ascertainable by a reasonable inspection. The failure to inspect and replace the foundation was not the exercise of the proper degree of care on the part of the city. The lack of a foundation, together with the use of the cast-iron bushing instead of a metal of greater strength, was what caused the break, and permitted the water to escape.

[2] In this connection some claim is made that even though the city were negligent in the particulars mentioned, such negligence

was not the proximate cause of the damage to the respondent's property. But this contention cannot be sustained. The damage to the property was plainly the natural and probable consequence of the breaking of the main. The damage which occurred was such as would reasonably be anticipated by the breaking of a water main and releasing a stream of water the size of that mentioned. The case of *Ottevaere v. Spokane*, 89 Wash. 681, 155 Pac. 146, was based upon a different state of facts, and is not controlling.

[3] Another contention of the city is that the respondent was negligent in using the basement of the building because there was no drain therein as required by the city ordinance. The respondent was not the owner of the building, but a tenant of the owner. The evidence shows that the floor of the basement was below the level of the sewers in the adjacent streets. It is not claimed that the concrete floor in the basement was constructed without first having obtained a permit from the city as required by the building ordinance. The ordinance referred to did not forbid the use by a tenant of a basement in which no drain had been constructed. We think the respondent in storing his property in this basement was not guilty of negligence.

The judgment will be affirmed.

MORRIS, C. J., and HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

SEATTLE SEED CO. et al. v. CITY OF SEATTLE. (No. 18390.)

(Supreme Court of Washington. Oct. 9, 1916.)

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by the Seattle Seed Company and others against the City of Seattle. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jas. E. Bradford, Melvin S. Good, Hugh M. Caldwell, and Walter F. Meier, all of Seattle, for appellant. Byers & Byers, of Seattle, for respondents.

PER CURIAM. The facts in this case are substantially the same as those in the case of *Imperial Candy Co. v. Seattle*, 160 Pac. 303, just decided. The two cases were argued together, and are not distinguishable. Upon the authority of that case, the judgment will be affirmed.

UNION SECURITIES CO. v. SMITH et al. (No. 13119.)

(Supreme Court of Washington. Oct. 9, 1916.)

1. HUSBAND AND WIFE \S 133(1), 264—**POSTNUPTIAL AGREEMENTS—EVIDENCE—SUFFICIENCY.**

In an action to set aside as fraudulent certain deeds and a mortgage of real estate, and to subject the property to the lien of a judgment, evidence held to establish a valid oral postnuptial agreement between husband and wife that property inherited by the wife from her father and whatever she acquired should

be hers, and upon her death go to her children, and that whatever the husband acquired and his personal earnings should be his, and upon his death go to his two children by a former marriage, which was continuously acted upon by the parties transacting their business separately.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 487, 493, 916; Dec. Dig. \S 133(1), 264.]

2. HUSBAND AND WIFE \S 268(6)—**COMMUNITY PROPERTY—STOCK PURCHASED WITH HUSBAND'S MONEY.**

Where a husband purchased stock with money earned by himself, and his wife was not concerned in the purchase, and signed a bond as stockholder, guaranteeing the indebtedness of the company to a bank, there being a valid agreement between husband and wife that his earnings should be his separate property, his act in signing the bond did not create a community obligation.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 962; Dec. Dig. \S 268(6).]

3. HUSBAND AND WIFE \S 264—**COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY.**

Evidence held sufficient to support a finding that an undivided one-half of land purchased by the defendants father and son, title to which was taken in the name of defendant father's wife, was the community property of defendant father and his wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 916; Dec. Dig. \S 264.]

4. HUSBAND AND WIFE \S 268(6) — **JUDGMENT—PROPERTY SUBJECT—COMMUNITY PROPERTY.**

A judgment against the maker of a bond, guaranteeing a debt to plaintiff, binds the community property of the maker and his wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 962; Dec. Dig. \S 268(6).]

5. HUSBAND AND WIFE \S 133(7)—**COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY.**

Where defendant father made a valid agreement with his wife that property inherited by her and which she acquired should remain her separate property, evidence held sufficient to justify a finding that property purchased for her by son with her money and with money which the son owed her for rent, etc., was her separate property, and that part of the purchase price paid by the son with his own money should be credited upon his debt to her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. \S 491; Dec. Dig. \S 133(7).]

6. FRAUDULENT CONVEYANCES \S 27 — **PREFERENCES—VALIDITY.**

A mortgage executed by defendant held fraudulent and void as to his creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. \S 66-71; Dec. Dig. \S 27.]

Department 1. Appeal from Superior Court, Adams County; Bert Linn, Judge.

Action by the Union Securities Company against R. P. Smith and others. Judgment for plaintiff, and both parties appeal. Remanded for modification.

Wm. O. Lewis, of Ritzville, and V. T. Tustin, of Spokane, for plaintiff. G. E. Lovell, of Ritzville, for defendants.

ELLIS, J. Action to set aside as fraudulent certain deeds and a mortgage of real estate, and to subject all of the property to

the lien of a judgment held by plaintiff as assignee of the Bank of Lind.

Prior to 1907 R. P. Smith and his son Warren Smith, with a number of other farmers of Adams county, had become stockholders in the Farmers' Warehouse Company of Lind, a co-operative company organized to facilitate the marketing of their grain. In 1907 these two and a number of other stockholders signed a bond guaranteeing the indebtedness of the warehouse company to the bank. On July 23, 1913, the bank brought suit on this bond. Summons was served on that day, and on June 10, 1914, it recovered a joint and several judgment in the sum of \$5,474.74 against all of the signers of the bond.

On August 7, 1913, Warren Smith and wife conveyed to his mother, Janette P. Smith, wife of R. P. Smith, the north half of section 6, in township 16 north, range 35, E. W. M., which is called in the record the "Peasley land." Warren Smith had acquired title to this land in the spring of 1912. On the same day Warren Smith and wife executed to Janette P. Smith a mortgage covering the north half of section 26, in township 17 north, range 34, E. W. M., and the northeast quarter of section 32, in township 17 north, range 35, E. W. M., purporting to secure a debt of \$15,000. This land is known as the "Warren Smith land." The deed was filed for record on June 6, 1914; the mortgage on June 9, 1914. One purpose of this suit was to declare this deed and mortgage fraudulent as to the plaintiff's judgment, and to subject the land as belonging to Warren Smith to the judgment against him.

About August 7, 1913, Warren Smith and wife also executed to Janette P. Smith a chattel mortgage on all of their stock, teams, and farming implements, purporting to secure a debt of \$5,000. This was satisfied by a bill of sale of this property from Warren Smith and wife to Janette P. Smith executed June 8, 1914, and recorded June 9, 1914. This transaction is not assailed.

In 1907, R. P. Smith and Warren Smith negotiated the purchase of the northeast quarter of section 4 in township 16 north, range 35, E. W. M., and the southeast quarter of section 32, in township 17 north, range 35, E. W. M., known as the "Cartwright land." Title was taken in the name of Janette P. Smith. The consideration paid was about \$12,000. The money was raised, \$8,000 at a bank on joint notes of Warren Smith and wife, Janette P. Smith and R. P. Smith, \$1,750 by a mortgage given by Warren Smith and wife on their homestead, and \$1,750 by a mortgage given by R. P. Smith and Janette P. Smith on their homestead. All of these obligations were paid in 1908. Plaintiff seeks to have this tract declared community property of R. P. and Janette P. Smith, and subjected to the lien of its judgment.

In 1897, and prior thereto, Janette P. Smith acquired title to a half section of land

known as the "Railroad land," and another tract of 400 acres, known as the "Boyles land." Plaintiff sought to subject these, as community property of R. P. and Janette Smith, to the lien of its judgment. But the only evidence on the subject shows, and it now seems to be conceded, that these two tracts, though acquired after her marriage with R. P. Smith some 40 years ago, were paid for with money she inherited from her father before her marriage and are therefore Janette P. Smith's separate property.

The court adjudged: (1) That plaintiff's judgment as against R. P. Smith is a lien on the community property of R. P. and Janette Smith; (2) that an undivided one-half of the "Cartwright land" is community property of R. P. and Janette P. Smith and as such subject to execution to satisfy the judgment; (3) that the mortgage covering the "Warren Smith land" is a valid mortgage; (4) that the "Peasley land" is the separate property of Janette P. Smith and is not subject to the lien of plaintiff's judgment.

Both parties having appealed, we shall designate them throughout as plaintiff and defendants. We shall consider each branch of the judgment separately.

[1] 1. Both R. P. and Janette P. Smith testified that during all of their married life they have conducted their business separately; that at the time of the marriage she had a considerable amount of property inherited from her father; that at or about that time it was agreed between them that whatever she acquired should be hers, and upon her death should go to her children, and that whatever he acquired and his personal earnings should be his, and upon his death should go to his two children by a former marriage. Three disinterested witnesses who had known the Smiths for many years and had transacted business with both of them testified that they had always conducted their business separately. Their sons, Warren Smith and Newell Smith, the former 38 years old, the latter 29, testified that such had been the case as long as they could remember. This evidence fairly establishes the agreement and shows that in the main it had been continuously acted upon. Though this was an oral agreement, it does not appear that it was made before the marriage. It is not assailed as a contract made upon consideration of marriage, hence void because verbal, as we held in *Koontz v. Koontz*, 83 Wash. 180, 145 Pac. 201. The statute of frauds is neither pleaded nor discussed. Such agreements made after marriage and mutually observed are valid. *Gage v. Gage*, 78 Wash. 262, 138 Pac. 886; *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088; *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17.

[2] R. P. Smith testified that he purchased the stock of the warehouse company, ten

shares of \$10 each par value, with money earned by himself, that his wife was in no manner concerned in the purchase, and that he signed the bond as a stockholder. We are clear that his signing the bond did not create a community obligation. *Way v. Lyric Theater Co.*, 79 Wash. 275, 140 Pac. 320. The court erred in holding the judgment a lien on the community property of R. P. and Janette P. Smith.

[3, 4] 2. The giving of the joint notes of the two communities and the two mortgages to raise the original purchase price of the Cartwright land strongly supports the view that an undivided one-half of this land belonged to each of the communities composed of R. P. Smith and Janette P. Smith and Warren Smith and wife. All of these parties, however, testified that the title was taken in the name of Janette P. Smith, because the land was purchased for her, and that she paid off all of these obligations from her own funds. But it fairly appears that the money came partly from the crops growing upon the land when it was purchased, partly from money in bank in Warren Smith's name, and about \$2,500 from money inherited from her father by Janette P. Smith. It also appears that Warren Smith for many years had rented his mother's lands for half the crops after deducting seed and feed, and that when from time to time these crops were disposed of, the proceeds, both of his part and hers, were deposited in the bank to his credit. There was no evidence that R. P. Smith contributed anything toward discharging the obligations created on the purchase of this land. On the whole we are satisfied that an undivided one-half of this land is the property of the community composed of Warren Smith and wife, and the other half the separate property of Janette P. Smith, and we so hold. There can be no question that plaintiff's judgment as against Warren Smith binds the community property of Warren Smith and wife. It is therefore a lien on their undivided one-half of this land.

[5] 3. For convenience in consecutive discussion we shall next consider the "Peasley land." This land was purchased for \$12,000 at an administrator's sale in the spring of 1912. We are satisfied that it was purchased by Warren Smith for Janette P. Smith, that through mistake the return of sale was made in his name, and that soon afterwards he attempted to have the mistake corrected, but was told that the easiest way to correct it was to deed the land to her, his wife joining. Both he and Janette P. Smith so testified, as did also two attorneys whose advice they took at the time. There is no evidence to the contrary. Warren Smith had been farming Janette P. Smith's lands during the years 1908 to 1911, inclusive, but had paid her no rent since 1907. He borrowed money at a bank and paid for this land, giving his own check for something over \$8,000 of the

purchase price, and turning over two certificates of deposit, aggregating about \$1,700, belonging to his mother. So far as can be gathered from the evidence the balance of the purchase price, consisting of a mortgage assumed on the purchase, was paid partly by crops then growing on the land and partly by Warren from rent money owing by him to her. While the evidence is much confused we are convinced that Warren paid at least \$9,000 of the purchase price of this land in part payment of his debt to his mother. True she testified to the effect that at about this time, she does not remember whether before or after the Peasley purchase, she received a draft for \$10,000 from a niece in Michigan who has since died; that she cashed this draft at some bank in Spokane, but could not remember what bank or where in the city it was located; that she was identified by a "Dutch" woman named "Ella" or "Lena," she is not certain which, who at one time worked for her; that this woman now lives on "some avenue" in Spokane, but she cannot remember where; that she received the money in bills, spent some of it, and brought \$9,500 home with her in her pocket and gave it to Warren Smith, with which to pay for the Peasley land; that this money she inherited from her mother and had been owing to her from her niece 32 or 33 years. But this is all too vague and indefinite to carry conviction. It must be remembered that all this is supposed to have happened less than 3 years prior to the time when she testified, and is of such nature as to be remembered with certainty and exactness, and that since then she had a settlement with Warren Smith in which it must have been discussed. Moreover, every item of this testimony is of such nature as to be easily corroborated and rendered certain in many ways which at once suggest themselves. On the other hand certain it is that Warren Smith did not pay for the Peasley land with this money, and certain it is that his bank account shows no such deposit, or any unusual deposit at or near this time. Though he testified that she gave him cash from time to time, he could not remember when nor the amount, and "supposed" he kept some of it around the ranch and put some in the bank. When asked if she gave him \$9,500 in cash at any time he said: "I don't remember. Those things pass on in the common ways of daily life, and I don't remember." Clear and convincing proof of these things lay easily within their power. The evidence adduced seems to us too vague and doubtful to furnish the basis for a legal right. We find that she owns the Peasley land as her separate property, but that at least \$9,000 of the purchase price was paid by Warren Smith and should be credited upon his debt to her.

[6] 4. The evidence as to the settlement between Janette P. and Warren Smith as the basis of the mortgages is also lamentably

vague and indefinite. Both of them testified in substance that they discussed their business matters and concluded that he owed her, for rents and borrowed money, over \$20,000. When the loans were made and what their amount neither could tell. What the amount of grain raised by him on her lands during the 5 years, for which it is claimed she had received nothing, neither could tell. He could not remember whether he had been served with summons in the Bank of Lind suit when the mortgages were given or not, but the evidence shows that he had in fact been served just 14 days before. She could not remember whether at that time she knew of that suit, but admitted that she knew "a storm was brewing." The attorney in whose office the settlement was made and who witnessed the mortgage and the deed to her of the Peasley land, though he testified as to other matters, did not testify as to this settlement. Two things, however, are reasonably certain. Of this \$20,000 debt, \$5,000 was paid by the bill of sale of the stock and implements covered by the chattel mortgage, and the \$9,500 which Mrs. Smith claims to have given to Warren Smith about the time of the Peasley purchase was included in the \$15,000 secured by the real estate mortgage. But the proof, as we have seen, was wholly insufficient to show that she ever turned over to him this \$9,500.

Defendants assert that this mortgage was a valid preference. It is settled law in this state that a debtor, though insolvent, may prefer one or more of his bona fide creditors, even if it exhaust his whole property to do so. *McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297.

Mere knowledge on the preferred creditor's part that his preference will hinder or defeat other creditors will not alone render his preference fraudulent. *Holt Mfg. Co. v. Bennington*, 73 Wash. 467, 132 Pac. 30. But the preferred debt must be real. It must not be used as a colorable consideration to shield the debtor's property from other claims. *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 847; *Bump, Fraudulent Conveyances* (4th Ed.) § 172.

"The law looks with great jealousy upon the manner of giving preferences, and denounces all departures from good faith, and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors." *Bump, Fraudulent Conveyances* (4th Ed.) § 174.

Though it is usually held that the property transferred must bear a reasonable proportion to the preferred debt, *Bump, Fraudulent Conveyances*, § 174, excessive security by mortgage raises no conclusive presumption of fraud. It is evidence to be considered with other circumstances in determining fraud. *Grand Island Banking Co. v. Costello*, 45 Neb. 119, 63 N. W. 376.

But there is an obvious and marked dis-

inction between an excessive security and an exaggerated debt. Any security for a sum known to be in excess of what is actually due is presumptively fraudulent. *Kellogg v. Clyne*, 54 Fed. 696, 4 C. C. A. 554; *State ex rel. Redmon v. Durant*, 53 Mo. App. 493. This results as a corollary from the universal rule that the preferred debt must be real to furnish the essential element of good faith.

There are some authorities which hold that such a mortgage is only void as to the fictitious part of the ostensible debt, but the better rule is the other way. If a creditor knowingly takes a mortgage for more than his due, the fraud corrupts the whole. *Bump, Fraudulent Conveyances* (4th Ed.) §§ 485, 486, 487; *Holt v. Creamer*, 34 N. J. Eq. 181; *Heintze v. Bentley*, 34 N. J. Eq. 502; *Whiting v. Johnson*, 11 Serg. & R. (Pa.) 328, 14 Am. Dec. 633; *Hall, Moses & Roberts v. Heydon*, 41 Ala. 242; *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755.

When plaintiff showed by the parties to this mortgage that it must have included this \$9,500, and brought out circumstances casting the gravest doubt on the existence of so much of the ostensible debt secured, which doubt, if unfounded, in the very nature of the case, defendants easily could have dispelled, but did not, they made their case as against this mortgage. We have no option but to hold it void in toto as to plaintiff's judgment. The Warren Smith land is subject to the lien of that judgment.

But the trial court overlooked the fact that plaintiff's assignor had released the lien of this judgment on certain lands of one Offut, another of the judgment debtors, in consideration of an acknowledged payment of \$1,250. We can conceive of no reason why this sum, however it was paid, should not be credited on the judgment, and no reason has been suggested.

Cause remanded for modification of the judgment in accordance herewith. Plaintiff may recover its costs on this appeal.

MORRIS, C. J., and MOUNT and BAUSMAN, JJ., concur.

STATE v. HANKINS. (No. 13282.)

(Supreme Court of Washington. Oct. 9, 1916.)

1. CRIMINAL LAW §1102—APPEAL AND ERROR—MATTERS NOT IN RECORD.

Where defendant's statement of facts on appeal was incomplete in that it did not contain either "all the material facts" or "all the facts agreed to be material by the parties," as required by Rem. & Bal. Code, § 391, and was certified by the trial judge to omit the entire testimony of a number of witnesses and cross-examination of those witnesses who did testify, including that of defendant, whose direct testimony was incorporated, a motion to strike the entire statement and affirm will be granted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §1102.]

2. HOMICIDE \Leftrightarrow 297—"HOMICIDE BY MISADVENTURE"—TRIAL—INSTRUCTIONS.

An instruction that homicide is excusable when committed by accident or misfortune in doing a lawful act by lawful means, with ordinary caution and without unlawful intent, that homicide by misadventure is the incidental killing of another when the slayer is doing a lawful act, unaccompanied by any criminal carelessness or reckless conduct, and that if accused would justify the act or excuse it, the burden was on him, unless the proof of the state sufficiently manifests that accused was justified or excused in committing it, was abstractly correct.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611; Dec. Dig. \Leftrightarrow 297.

For other definitions, see Words and Phrases, First and Second Series, Homicide By Misadventure.]

3. CRIMINAL LAW \Leftrightarrow 777½ — TRIAL — INSTRUCTIONS.

Instructions should clearly state the law, and not recite facts or evidence, although recitals of evidence are not necessarily erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1807; Dec. Dig. \Leftrightarrow 777½.]

Department 2. Appeal from Superior Court, Ferry County; E. K. Pendergast, Judge.

A. E. Hankins was convicted of manslaughter and denied a new trial, and he appeals. Affirmed.

G. V. Alexander and Charles P. Bennett, both of Republic, for appellant. Leroy McCann and James T. Johnson, both of Republic, for the State.

HOLCOMB, J. Appellant, prosecuted for murder, was convicted of manslaughter, denied a new trial, and sentenced. He urges as grounds of reversal the refusal of two prayers for instructions, and the consequent alleged error in denying a new trial.

[1] The statement of facts is incomplete, does not contain "all the material facts" nor "all the facts agreed to be material by the parties," and is certified by the trial judge to omit the entire testimony of a number of witnesses who testified, and the cross-examination of those witnesses who did testify, including that of the defendant himself, whose direct testimony is incorporated therein.

No amendments were proposed by respondent, but timely motion was made to require appellant to correct his proposed statement by including the omitted cross-examination of the witnesses who testified and the testimony of the other witnesses, which was omitted, and an alternative motion to strike the proposed statement for such omissions. No attention was paid to these motions by appellant, and, so far as the record discloses, no action was taken thereon by the trial court. Upon this state of the record respondent makes several motions, to strike from the statement and the transcript, to strike the certificate, and to strike the entire statement and affirm the judgment. We feel that the last motion, to strike the entire statement

and affirm, is well taken. We have said that:

"The burden is on the appellant to furnish a statement of the testimony sufficient to show this court the facts upon which the assignments of error are predicated and to give this court a full understanding of the case. The burden cannot be shifted to the respondent by filing an incomplete narrative." State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859.

Also State ex rel. Fowler v. Steiner, 51 Wash. 239, 98 Pac. 609; State ex rel. Roberts v. Clifford, 55 Wash. 440, 104 Pac. 631; Taylor v. Andres, 83 Wash. 684, 145 Pac. 991. There may be two forms of certificate to a statement of facts: (1) It may certify that the record contains "all the material facts, matters, and proceedings heretofore occurring in the cause and not already a part of the record." (2) It may be certified as containing all the facts, matters, and proceedings occurring upon the trial which "the parties have agreed, to be all that are material" to the hearing on appeal. Rem. & Bal. Code, § 391. The certificate before us does neither, and there was no agreement of the parties that the statement contained all the facts, matters, and proceedings occurring upon the trial which were material. No attempt was made by appellant to furnish a complete statement containing all the material facts, matters, and proceedings occurring upon the trial, or to compel one.

We have consistently held, from Kirby v. Collins, 6 Wash. 297, 32 Pac. 1060, to State ex rel. Miller v. Seattle, 45 Wash. 691, 89 Pac. 152, that upon such condition of the record the statement should be stricken. As in the last-cited case, by the certificate in this case, "we are * * * advised that all the material facts which were before the trial court and which controlled its action are not before us."

[2] Assuming, however, that the statement contains all the facts which appellant supposed were and are material to the question of the propriety and correctness of the requested instructions, and because of the gravity of the case and its importance to appellant, an aged man, we have carefully looked into the record. We are first confronted with the fact that the testimony of the appellant himself upon cross-examination is not produced. We are unable to ascertain what admissions upon cross-examination he may have made which nullified his testimony on direct examination on the basis of which requested instruction No. 4 was asked. The court did, however, without setting forth specifically the theory of appellant upon which that requested instruction—summarizing his contention—was based, instruct the jury as to the abstract principle of law, that "homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, with ordinary caution and without any unlawful intent," and that "homicide by misadventure is the accidental

killing of another when the slayer is doing a lawful act unaccompanied by any criminal carelessness or reckless conduct," etc., and that, if "defendant would justify the act or excuse it, the burden was upon the accused, unless the proof on the part of the state sufficiently manifests that the accused was justified or excused in committing it." The jury were very fully, comprehensively, fairly, and lucidly instructed upon each and every issue and phase of the case usually necessary in such a prosecution or made appropriate by the particular issues and contention in the case.

[3] The seventh instruction was given so far as the legal principles submitted were concerned, omitting only the recital of evidence on behalf of appellant prefacing the same. Recitals of evidence in instructions are generally unnecessary and seldom proper, although not necessarily erroneous because thereof. Instructions should clearly state the law as this one did, and not ordinarily recite facts or evidence.

We have thus discussed the matters complained of by appellant to demonstrate not only our solicitude for the assurance of a fair trial to the appellant in a prosecution of such grave consequence to him, but to show that, in our opinion, it would probably be our duty to affirm the verdict and judgment upon the complete record; but certainly, in any event, upon the imperfect record brought to us, we cannot do otherwise.

As the record stands, the statement must be stricken, and the judgment affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and PARKER, JJ., concur.

BARNARD MFG. CO. v. RALSTON MILLING CO. et al. (No. 12990.)

(Supreme Court of Washington. Oct. 9, 1916.)

1. CORPORATIONS — § 861—LIABILITY OF TRUSTEES—PRESUMPTIONS.

Where corporation trustees were, in accordance with Rem. & Bal. Code, § 3679, required to manage corporate affairs for a certain period, that they were so acting when the corporation contracted the debts in suit does not appear in the absence of a showing of when business was begun; there being, in view of the express limitation of their terms, no presumption that they thereafter continued in office.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1506; Dec. Dig. § 861.]

2. CORPORATIONS — § 342—LIABILITY OF TRUSTEES—HOLDING OVER AFTER TERM.

If trustees, mentioned in articles of incorporation to hold for a limited term, hold over, their acts are binding on the corporation, and they are subject to the liabilities of trustees, in view of Rem. & Bal. Code, § 3687, making acts of trustees binding on the corporation until election and qualification of their successors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1486-1488; Dec. Dig. § 842.]

Department 2. Appeal from Superior Court, Adams County; Bert Linn, Judge.

Suit by the Barnard Manufacturing Company against the Ralston Milling Company and others. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Losey & Newton, of Spokane, for appellant. Adams & Naef, of Ritzville, for respondents.

MAIN, J. The purpose of this action was to recover a judgment for merchandise sold and delivered, and also for the appointment of a receiver. The defendants, so far as necessary here to refer to them, were Ralston Milling Company, a corporation, and certain individuals who had been named in the articles of incorporation of that company as trustees. The corporation was insolvent, and judgment went against it by default. As to the other defendants a nonsuit was entered. From the judgment of nonsuit the plaintiff appeals.

The facts are these: In the articles of incorporation of the Ralston Milling Company, E. H. Herring, V. T. Donnell, and one other were named as the trustees to manage the affairs of the company "up to and including the first day of July, A. D. 1908." This was in accordance with the statute (Rem. & Bal. Code, § 3679), which requires that in the articles of incorporation the number of trustees and names thereof who shall manage the concerns of the company for a period of time not less than two nor more than six months shall be stated. The merchandise for which the action was brought was sold and delivered subsequent to January 6, 1909. The capital stock of the corporation named in the articles was \$25,000, divided into 250 shares of the par value of \$100 per share. The corporation began doing business, and continued to do business with only about one-half of its capital stock subscribed for. The merchandise was sold by the appellant upon credit in reliance upon the assurance of the manager of the corporation that the capital stock had been fully subscribed. On what date the corporation began to do business does not appear from the evidence. Neither does the proof show that Donnell and Herring were trustees of the corporation at the time the merchandise for which the action was brought was sold and delivered. The theory of the action was that trustees of a corporation who launch it upon the business world prior to the time when its entire capital stock is subscribed for, as required by the statute, or who permit it to transact business when the capital stock is not fully subscribed for, are estopped at the suit of a creditor when the corporation is insolvent to deny that the entire capital stock has been subscribed, and are liable to the extent that the stock was not subscribed.

[1] In this case it cannot be found that Herring and Donnell were trustees, either at the time the corporation began business,

or when the merchandise in question was sold, unless there is a presumption that they continued as trustees after the expiration of their term as specified in the articles. In the articles, as already indicated, it is stated that the trustees named shall serve up to and including the 1st day of July, 1908. The articles having specified a definite term, it does not seem that there could be a presumption that the trustees named continued after the time mentioned. The express limitation of the term leaves no room for presumption. This was the holding in *Philadelphia & R. C. & I. Co. v. Hotchkiss*, 82 N. Y. 471. In that case the original certificate of incorporation named the trustees who should serve "for the first year." And the question was whether the trustees so named would be presumed to have continued after the expiration of the time mentioned. It was there said: "The express limitation of the term leaves no room for presumption."

[2] If the trustees mentioned in the articles continued to act as such after the time for which they were named, it is doubtless true that their acts would be binding upon the corporation, and that they would be subject to all the burdens and liabilities of trustees. Rem. & Bal. Code, § 3687, provides that "All acts of the trustees shall be valid and binding upon the company until their successors are elected and qualified." Construing a statute identical in meaning and almost identical in terms in *Van Amburgh v. Baker*, 81 N. Y. 46, it was held that the trustees of a corporation may act as such until their successors are elected and qualified, and that their acts would be binding upon the company, but that they did not hold over as a matter of law.

Since it is not shown in this case that the corporation began to do business prior to the expiration of the term of the trustees stated in the articles, or that they were acting as trustees either at the time the corporation began to do business, or at the time the transaction giving rise to this suit occurred, the question of their liability is not properly here for determination, and, consequently, no opinion will be expressed thereon.

The judgment will be affirmed.

MORRIS, C. J., and HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

PUGET MILL CO. et al. v. STATE et al.
(No. 13287.)

(Supreme Court of Washington. Oct. 9, 1916.)

1. NAVIGABLE WATERS § 37(4) — SHORE LANDS—ABSOLUTE CONVEYANCE.

Where the state authorities convey second-class tide and shore lands to private parties by deeds absolute in form, they vest in the grantees an absolute fee-simple title to such lands.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. § 37(4).]

2. NAVIGABLE WATERS § 37(4)—CONVEYANCE OF SHORE LANDS—OUTER BOUNDARY.

Though by Const. art. 15, state authorities are prohibited from disposing of and vesting in absolute private ownership lands of the state lying under navigable waters which shall be established as harbor areas, the state's grantees of second-class tide and shore lands on Lake Washington, the outer boundary of which remained undefined by the descriptions in the deeds, except as the law defined the outer boundary as the line of navigability, acquired title out to that line as it then existed or as it might be moved further out by act of the state, as by lowering the waters of the lake through the construction of a canal.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. § 37(4).]

3. CONSTITUTIONAL LAW § 123—OBLIGATION OF CONTRACTS—STATE ACTION.

Absolute fee-simple titles of the state's grantees to second-class shore lands cannot be impaired by any act of the state after making the deeds upon which they rest.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 293-297; Dec. Dig. § 123.]

4. NAVIGABLE WATERS § 37(4) — LANDS OF STATE—CONVEYANCE TO HARBOR LINES.

Where the state established harbor lines in front of second-class shore lands before conveying to private parties, the grantees of such conveyances acquired title only to the lands above the harbor lines.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. § 37(4).]

5. NAVIGABLE WATERS § 37(4) — LANDS OF STATE—GRANT—ESTABLISHMENT OF HARBOR LINES.

The conveyance of second-class shore lands on Lake Washington by the state before the establishment of harbor lines in front thereof does not prevent the state, after lowering of the lake through construction of a canal, from establishing harbor lines in front of such lands, dividing the lands which the state has power to vest in private ownership and harbor areas and other lands in navigable water, which cannot be so disposed of; the grantees taking subject to the state's power to establish such lines.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. § 37(4).]

6. NAVIGABLE WATERS § 14(1) — LANDS OF STATE—ESTABLISHMENT OF HARBOR LINES—STATUTE.

Under Rem. & Bal. Code, § 6769, conferring power upon the Harbor Line Commission to lengthen or extend any harbor areas existing in front of any city or town, and Acts 1913, p. 667, authorizing the Commissioner of Public Lands to select and plat harbor areas in front of the second-class shore lands on Lake Washington, the joint action of the Commissioner of Public Lands and the Harbor Line Commission, in making plats and entering a formal order establishing the harbor lines designated thereon before second-class shore lands on Lake Washington, constituted a lawful establishment thereof, though Const. art. 15, read in connection with Rem. & Bal. Code, § 6744, seems to make it the duty of the Legislature to cause harbor lines on first-class shore lands within two miles beyond city corporate limits to be established by "a commission."

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 31, 37-39, 42; Dec. Dig. § 14(1).]

7. NAVIGABLE WATERS \Leftrightarrow 87(4) — LANDS OF STATE — CONVEYANCE — OUTER BOUNDARY — STREETS.

Where the state conveyed to private parties second-class shore lands on Lake Washington, leaving the outer boundaries undefined, so that when the lake was lowered by the construction of a canal the grantees' title extended over the added shore lands, the state and municipalities, as public representatives, were entitled to claim the added shore land in front of and abutting upon the end of existing streets running transversely to the shore line.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 211, 218-222; Dec. Dig. \Leftrightarrow 87(4).]

8. NAVIGABLE WATERS \Leftrightarrow 14(1) — LANDS OF STATE — SHORE LANDS — ESTABLISHMENT OF "HARBOR LINES" — "HARBOR AREAS" — "PIERHEAD LINES."

The designation of a "pierhead line" alone upon the state's plats of second-class shore lands on Lake Washington is not the establishing of "harbor lines" and "harbor areas."

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 31, 37-39, 42; Dec. Dig. \Leftrightarrow 14(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Harbor Lines*.]

En Banc. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the Puget Mill Company and others against the State of Washington and others. From a decree for plaintiffs, defendants appeal. Decree directed to be modified.

France & Helsell, Jas. E. Bradford, Howard Hanson, Alfred H. Lundin, Robert H. Evans, and Hugh M. Caldwell, all of Seattle, for appellants. Oldham & Goodale, of Seattle, W. V. Tanner, Atty. Gen., R. E. Campbell, Asst. Atty. Gen., and Farrell, Kane & Stratton, Walter B. Beals, and Hughes, McMicken, Dovell & Ramsey, all of Seattle, for respondents.

PARKER, J. This controversy originated in the commencement of four separate actions in the superior court for King county, which, because of the common interest of the numerous parties in the controlling questions presented, were consolidated, tried, and disposed of together in the superior court. The plaintiffs seek a decree quieting their titles to certain lands which they claim as second-class shore lands bordering upon the waters of Lake Washington as against the claims of the defendants, the state of Washington, city of Seattle, Port district of Seattle, and King county. The superior court granted relief by rendering its decree quieting title in the plaintiffs as prayed for by them, except as to harbor areas established by the State Commissioner of Public Lands and the State Harbor Line Commission and the extensions of streets and roads over the shore land running transversely to the shore line, all as designated upon the state's plats made after the plaintiffs acquired their titles from the state as here claimed by them. The defendants have appealed from the de-

creed in so far as it denies their claims for public use to sites for slips and wharves and roads, streets, boulevards, and parkways running longitudinally to the shore line, as designated upon the state's plats. The plaintiffs have also appealed from the decree in so far as it denies their claims to the areas within streets and roads running transversely to the shore line as extensions of existing streets and to the harbor areas, as designated upon the state's plats.

The plaintiffs' claims of title are rested upon deeds of the state made to them or their predecessors in interest, describing the land conveyed as "all shore lands of the second class owned by the state of Washington situated in front of, adjacent to or abutting upon those portions of the United States government meander line lying in front of the following described upland, to wit, * * * to have and to hold said premises with their appurtenances unto the said, * * * successors and assigns forever," leaving the outer boundaries of the lands so conveyed undefined in so far as specific terms of the deeds are concerned; this being the form of description used by the state in conveying shore lands of the second class, and as authorized by law. These deeds were made by the state in the year 1904. They were all made for a money consideration in pursuance of lawful sale of the lands to the plaintiffs or their predecessors in interest and, as will be noticed, are absolute in form in so far as the nature of the titles conveyed is concerned. At the time of their execution, the state had not platted any of the shore lands so conveyed, nor had it established any harbor lines or harbor areas in front thereof. In the year 1914, after the state and national governments had by their action rendered it certain that the Lake Washington canal project would be consummated, resulting in the lowering of the waters of the lake, the State Commissioner of Public Lands caused to be platted the shore lands of the lake, including the lands here involved, designating upon the plats inner and outer harbor lines with harbor areas between in front of portions of the shore lands, and pierhead lines only in front of other portions of the shore lands; and also designating upon the plats above the harbor areas and pierhead lines certain areas or tracts purporting to be reserved and dedicated to public use as sites for slips and wharves and also streets, roads, boulevards, and parkways running both longitudinally and transversely to the shore line, some of which transverse roads and streets appear as extensions of roads and streets already established over the original shore lands to the added shore lands. This platting was acquiesced in by the State Harbor Line Commission, which commission, by an order duly made of record, adopted and established the harbor lines and

harbor areas as designated upon the plats. In the platting of these shore lands and the establishing of the harbor lines, harbor areas, and pierhead lines, the Commissioner of Public Lands and the Harbor Line Commission did so with reference to the shore line and the line of navigability as changed by the lowering of the waters of the lake in the consummation of the Lake Washington canal project, so that the harbor lines and pierhead lines are located farther out than they would have been had there been no lowering of the waters of the lake. We shall assume, as we proceed, that all of the reservations to public use of tracts and areas as designated upon the plats made by the Commissioner of Public Lands and the Harbor Line Commission, here involved, are from lands which are outside of the shore lands as they existed at the time of the execution of the state's deeds upon which the plaintiffs' rights are rested, before the lowering of the waters of the lake in the prosecution of the Lake Washington canal project.

The problem here presented, so far as the nature of plaintiffs' titles is concerned, is in substance the same as that involved in the case of *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650, in the decision of which case we held that the outer boundaries of the granted shore lands had been extended by the lowering of the lake to include the added shore lands, and that the grantees acquired title thereto as if such added shore lands had been then in existence and included in the original grant. This was held to be the law of the state's grantees' shore lands rights in the absence of statute touching the question at the time of the grant, though the state did by statute thereafter so recognize the shore land grantees' titles, attempting, however, to reserve to itself the right to make reservations from the added shore lands for public use in addition to the exercise of its power to establish harbor lines. This was done by the Laws of 1913, c. 183, p. 667, as follows:

"Section 1. In every case where the state of Washington has heretofore sold to any purchaser from the state any second-class shore lands bordering upon navigable waters of this state by description wherein the water boundary of the land so purchased is not defined, such water boundary shall be held and is hereby declared to be the line of ordinary navigation in such water; and whenever such waters have heretofore been or shall hereafter be lowered by any action done or authorized either by the state of Washington or the United States such water boundary shall thereafter be held and is hereby declared to be the line of ordinary navigation as the same shall be found in such waters after such lowering, and there is hereby granted and confirmed to every such purchaser, his heirs and assigns, all such lands: Provided, however, that this act shall not apply to such portions of such second-class shore lands which shall as hereinafter provided be selected by the Commissioner of Public Lands of the state of Washington for harbor areas, slips, docks, wharves, warehouses, streets, avenues, parkways and boulevards, alleys, or other public purposes: * * *

"Sec. 2. That within twelve months after the taking effect of this act it shall be the duty of the Commissioner of Public Lands to survey such second-class shore lands and in platting such survey to designate thereon as selected for public use all of such shore lands as in the opinion of said Commissioner of Public Lands is available, convenient or necessary to be selected for the use of the public as harbor areas and sites for slips, docks, wharves, warehouses, streets, avenues, parkways and boulevards, alleys and other public purposes. Upon the filing of such plat in the office of the Commissioner of Public Lands, the title to all harbor area so selected shall remain in the state, the title to all selections for streets, avenues and alleys shall vest in any city or town within the corporate limits of which they may be then situate, otherwise in the county in which situate, the title to and control of any lands so selected and designated upon such plat for parkway and boulevard purposes shall, if the same lie outside of the corporate limits of any city or town and if the same form a part of the general parkway and boulevard system of a city of the first class, be in such city, the title to all selections for commercial waterway district purposes shall vest in the commercial waterway district in which situate, or for which selected, and the title to all selections for slips, docks, wharves, warehouses and other public purposes shall vest in the port district if they be situate in a port district, otherwise in the county in which situate."

[1, 2] Counsel for the defendants contend that since the lands here involved were not shore lands at the time of the execution of the state's deeds to the plaintiffs and their predecessors in interest, but were then lands under navigable waters of the state, such lands were held by the state, not in its proprietary capacity, but in its governmental capacity in trust for the people of the state for the use of navigation and commerce, and for that reason they are not subject to disposition so as to vest absolute title thereto in private parties. While it is not urged that the plaintiffs have acquired no interest in these added shore lands, it is argued that their title thereto is subject to the power of the state to reserve therefrom for public use all reserved areas shown upon the plats above mentioned made by the Commissioner of Public Lands and the Harbor Line Commission above the designated harbor areas and pierhead lines, as well as subject to the power of the state to establish harbor areas and extensions across such added shore lands of existing roads and streets running transversely to the shore line. It seems to us that this contention cannot be sustained in the light of the history of the state's policy since admission to the Union and the decisions of this court. It is true that, by the limitations prescribed by article 15 of our Constitution, the state authorities are prohibited from disposing of and vesting in absolute private ownership the lands of the state lying under navigable waters which shall be established as harbor areas; but it is also true that the same article of our Constitution provides that the location of such harbor areas along the shores of navigable waters shall be determined and established by a commission appointed for that purpose, thus

rendering certain the line dividing shore lands which may be disposed of and vested in absolute private ownership from the lands within harbor areas which cannot be lawfully so disposed of. Now it is no longer an open question in this state as to the nature of the title vested in the grantees of second-class tide and shore lands by deeds from the state absolute in form, as these deeds are upon which are rested the titles of the plaintiffs. The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an absolute fee-simple title to such lands. *Eisenbach v. Hatfield*, 2 Wash. 236, 28 Pac. 539, 12 L. R. A. 632; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179; *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650; *Anderson Steamboat Co. v. King County*, 84 Wash. 375, 146 Pac. 855.

It has also become the settled law of the state by our decision in *State v. Sturtevant*, supra, as we have already noticed, that the grantees of these second-class shore lands, the outer boundary of which remained undefined by the descriptions in the state's deeds except as the law defined such outer boundary as the line of navigability, acquired title out to that line as it then existed or as it might be moved farther out by any act of the state. Concluding an exhaustive review of this question involving one of the same deeds from the state upon which some of the plaintiffs' titles are rested, Justice Chadwick, speaking for the court at page 173 of 76 Wash., at page 1040 of 135 Pac., said:

"We conclude, therefore, on the principal issue, that the Rainier Beach Improvement Company acquired the title to the shore lands conveyed by the state, and that it and its grantees are entitled to follow the line of navigability as it may be finally fixed by or through or in consequence of the act of its grantor, the state."

We conclude then that the plaintiffs acquired absolute fee-simple title to these added shore lands as they did to the shore lands existing at the time of the execution of the deeds therefor by the state.

[3] Now, this being the nature of the plaintiffs' titles, it is elementary constitutional law that such titles cannot be impaired by any act of the state after making the deeds upon which they rest. This brings us to the question of the outer boundary of the shore lands to which plaintiffs have thus acquired title, which we regard as the controlling question in this controversy and as quite a different question from that of the nature of the plaintiffs' titles. That is, the fact that the titles so acquired are absolute in fee simple does not determine the question of where, upon the ground, are the outer boundaries of the shore lands so acquired by the plaintiffs. When that question is determined, it will follow that all of the reservations to public use designated upon the state's plats

above the harbor lines established by the Commissioner of Public Lands and the Harbor Line Commission, except extensions of existing streets running transversely to the shore line, presently to be noticed, are attempted reservations and dedications to public use of portions of the plaintiffs' shore lands to which they have absolute fee-simple title, and are therefore void as against the rights of the plaintiffs.

[4, 5] Had the state established harbor lines in front of these shore lands before they were conveyed by the state to plaintiffs and their predecessors in interest, it is plain that the grantees of such conveyances would have acquired title only to the lands above the harbor lines so established. It seems equally plain to us that the conveyance of shore lands by the state before the establishing of harbor lines in front thereof does not prevent the state from thereafter establishing harbor lines in front of such shore lands, and that the grantees of such shore lands take subject to the power of the state to thereafter establish harbor lines in front thereof. This is foreign to the question of whether a grantee's title to shore lands so acquired is absolute or qualified. It has to do only with the question of the outer boundaries of the granted shore lands, and that boundary being by the terms of the grants made before the harbor lines were established, undefined except as the law may define them, we conclude leaves the matter of the outer boundaries of the shore land subject to the establishment of harbor lines by the proper state authorities. Our decision in *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650, leads to this conclusion. What the remedy of the owner of the shore lands might be in case of the establishment of harbor areas in front of such shore lands in arbitrary and fraudulent disregard of the line of navigability is not involved in this controversy. We do not want to be understood as holding that there would be no remedy in such a case.

[6] Some contention is made in the plaintiffs' behalf that there is no power in the Commissioner of Public Lands or the Harbor Line Commission to establish the harbor lines here involved. The argument seems to be that the Commissioner of Public Lands has no such power because article 15 of the Constitution contemplates the establishment of such lines by "a commission," and that the Harbor Line Commission has no power to establish these harbor lines because they are not within or in front of the corporate limits of any city or within two miles thereof. It is true that article 15 of the Constitution, read in connection with section 6744, Rem. & Bal. Code, extending first-class shore lands two miles beyond city corporate limits, seems to make it the duty of the Legislature to cause harbor lines within such limits to be established by "a commission." However,

whatever may be the duty and power of the Legislature touching the establishment of harbor lines in front of cities in the light of article 15 of our Constitution, we are of the opinion that the duty and power therein prescribed does not constitute a limitation of power upon the Legislature touching the establishing of harbor lines in front of second-class shore lands; that is, lands beyond the limits mentioned in article 15 of the Constitution, as these lands are. Section 6769, Rem. & Bal. Code, confers power upon the Harbor Line Commission "to lengthen or to extend any such [harbor] areas now existing or which may hereafter be existing in front of any city or town," and section 2 of the act of 1913, above quoted, authorizes the Commissioner of Public Lands to select and plat harbor areas in front of the second-class shore lands of Lake Washington, including the very lands here involved. That section further provides that "the title to all harbor area so selected shall remain in the state." It might well be argued that the action of the Commissioner of Public Lands alone, in pursuance of this power, would constitute a lawful establishing of these harbor areas. We are, however, quite convinced that, when the Harbor Line Commission joined with the Commissioner of Public Lands in the making of these plats and entered its formal order establishing the harbor lines designated thereon, such joint action of the Commissioner of Public Lands and the Harbor Line Commission constituted a lawful establishing thereof. It seems to us quite clear that this was within the power of the Legislature to provide for, even though the Constitution has made special provision for the establishing of harbor lines in front of cities. We conclude therefore that these harbor lines and harbor areas were lawfully established. It is true that the Constitution does not in terms prohibit the sale into absolute private ownership of harbor areas other than such areas as are to be established "within or in front of the corporate limits of any city or within one mile thereof"; but plainly a grant of second-class shore lands was never intended to convey land beyond the line of navigability, which line we must assume in this case was properly determined in so far as the harbor lines here involved are concerned.

[7] It is contended in plaintiffs' behalf that the reservations made upon the state's plats of the extensions of existing transverse streets over the added shore lands is as much an invasion of their rights as the reservations upon the state's plats of streets, boulevards, and parkways running longitudinally over the added shore lands above the harbor and pierhead lines. As we read the decree of the superior court, it only quiets title to the defendants state and municipal corporations as representatives of the public in those extensions of existing roads and

streets running transversely to the shore lines which have been dedicated as such by the owners across their shore lands to the added shore lands, limiting such extensions to the width of the dedicated roads and streets where they abut upon the added shore lands. It seems to us that the principle which entitles the plaintiffs as owners of the shore lands to claim the added shore lands because they became a part of the original shore lands also entitles the defendants, as representing the public, to claim the added shore land which is in front of and abutting upon the end of the existing streets running transversely to the shore line. In other words, the public's right to extend its ownership over the added shore lands is at least as great as that of the private owners of the original shore lands. Since apparently the roads and streets which are here involved and extended transversely across the added shore lands are substantially at right angles to comparatively straight shore lines, we are not here concerned with the question of converging or diverging side lines of shore lands as might be involved when such lands abut upon a curved shore line.

[8] We note that upon the state's plats, copies of which are here in evidence, there is designated sites for slips and wharves, some of which appear above the established harbor areas and above the designated pierhead lines where there are no designated harbor areas, and some of which appear to be within the established harbor areas. We construe the decree as meaning that the titles of the plaintiffs are quieted as against the claims of the defendants only in those sites for slips and wharves and portions thereof designated upon the state's plats above the designated harbor areas and pierhead lines, and not those designated sites for slips and wharves and portions thereof which are within the designated harbor areas. The decree being in general terms, rather than by specific descriptions of each tract as to which title is adjudged to be in plaintiffs or defendants, induces us to here note our construction of its meaning touching the title of the respective parties in these designated sites for slips and wharves, to the end that our decision and the decree may not be construed as awarding to the plaintiffs any title to the harbor areas.

The decree seems by its terms to quiet title in the plaintiffs to all sites for slips, wharves, etc., designated upon the state's plats, unqualifiedly, except such as are designated within harbor areas. This would seem to include such designated sites and tracts as abut upon designated "pierhead lines" where there are no harbor lines or harbor areas and be an adjudication against the state touching its power to establish inner harbor lines which might fix the outer boundary of the shore land inside the designated pierhead lines. It seems to us that these, as well as

other shore lands in front of which no harbor lines are established, are held subject to the power of the state to establish harbor lines in front thereof, and that the decree should be modified accordingly. The designation of a "pierhead line" alone, upon the state's plats, is not, as we view the law, the establishing of harbor lines or harbor areas. These words may suggest the outer limits of piers, but we think they should in no event be construed as fixing the inner harbor line, which when established becomes the outer shore land boundary.

Counsel for the defendants have learnedly discussed at great length and reviewed many authorities touching the doctrine of *jus publicum* as applied to the state's ownership and dominion over shore lands and lands under navigable waters bordering thereon, with a view of demonstrating want of power in the state, or rather its constituted authorities, to vest in absolute private ownership these added shore lands. As we view the problem here presented, however, it is not so much a question of the power of the state to vest in private ownership the lands or harbor areas here involved, but it is a question of where upon the ground is the line between shore lands which the state has the power to vest in private ownership and harbor areas and other lands under navigable water which cannot be so disposed of. Our holding here is, and we need go no farther, that the state has the power to determine where the line dividing these two classes of lands shall be located upon the ground and has lawfully done so in so far as it has established the harbor areas designated upon the state's plats made by its Commissioner of Public Lands and Harbor Line Commission.

We have proceeded upon the assumption, as already stated, that all of the attempted reservations to public use of tracts and areas designated upon the state's plats are from lands outside the shore lands as they existed at the time of the execution of the state's deeds upon which the plaintiffs' rights are rested. If we are wrong in this assumption of fact, it is of no material consequence in this controversy, since, from what we have said, we think it is rendered plain that the rights of the plaintiffs in the shore lands as those lands existed at the time of the execution of the state's deeds are no less than their rights to the added shore lands, and that both the original and added shore lands are held by the state's grantees subject to the power of the state to establish harbor lines and thereby define the outer boundaries of the shore lands.

We conclude that the decree of the superior court should be modified in its terms only so far as to render certain that it will not constitute an adjudication estopping the

state from exercising its power to establish harbor lines and harbor areas in front of the plaintiffs' shore lands where no harbor lines or harbor areas are now established, and thus define the outer boundaries of such shore lands; and that in all other respects the decree should be affirmed. It is so ordered, and the superior court is directed to modify and make certain the decree accordingly. None of the parties will recover costs in this court.

MORRIS, O. J., and HOLCOMB, ELLIS, FULLERTON, MOUNT, and MAIN, JJ., concur.

CHADWICK, J. (concurring). The use of the words "pierhead line" on the plat prepared by the state, and in the decree, is an unfortunate misuse of terms. The words mean nothing under our Constitution and statutes. In some of the eastern states, we understand that pierhead lines are defined; but the Constitution makers in this state were careful to avoid the confusion that may result from the drawing of an arbitrary line beyond which piers and docks should not be erected, by providing for an inner and an outer harbor line with an intervening area subject to state ownership and control.

It may be that the Commissioner of Public Lands and the Harbor Line Commission intended the line so designated to be the outer harbor line, subject, of course, to the approval of the War Department, for, under our law, piers or wharves could be built in the harbor area between the inner and the outer harbor line, and in that sense, if there be no further limitation, the outer harbor line is a pierhead line. But I agree that we should not assume anything against the future right of the state to define, in terms, that which it has reserved—the right to fix an inner and an outer harbor line. Treating the words "pierhead line" as without legal meaning under our statutes, the conclusion follows as indicated by Judge PARKER.

I deem it my duty to suggest that the Commissioner of Public Lands should, without delay, file an amended plat, fixing the harbor lines in Lake Washington in front of the city of Seattle. Until this is done, there will be a confusion of interests, with no way of determining legal rights.

I do not want to be understood as holding that the Legislature could not provide for the drawing of a pierhead line between the inner harbor line and the outer harbor line, either through the instrumentality of the Harbor Line Commission, the Commissioner of Public Lands, a harbor commissioner or port warden, or by an independent board.

What I do hold is that it cannot be done, in any event, until the harbor lines are established.

CITY OF SCAMMON v. AMERICAN GAS CO. et al. (No. 20978.)

(Supreme Court of Kansas. Oct. 19, 1916.)

(Syllabus by the Court.)

MANDAMUS \Rightarrow 3(8)—NATURE OF REMEDY—EXISTENCE OF OTHER REMEDY.

A gas company supplying several cities had for years, under a franchise with the city of Scammon, supplied gas to a street lighting company; the latter paying for all the service pipes leading from the gas company's mains to the lighting company's posts in excess of 50 feet from such mains. Such service pipes becoming leaky and dangerous the gas company turned off the supply from 13 of the 65 posts. The city, by ordinance, directed the gas company to repair and maintain such service pipes and to restore the supply of gas, and upon refusal sought by mandamus to compel obedience. *Held*, that such controversy should be submitted to the Public Utilities Commission under section 20 of chapter 238 of Laws 1911, and is not a proper one to be controlled by mandamus in the first instance.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 20, 23, 27; Dec. Dig. \Rightarrow 3(8).]

Appeal from District Court, Cherokee County.

Application by the City of Scammon for mandamus to the American Gas Company and another. From a judgment granting the writ, the American Gas Company appeals. Reversed.

Edward E. Sapp, of Galena, for appellant.
L. M. Resler, of Scammon, for appellees.

WEST, J. The American Gas Company appeals from a judgment in mandamus requiring it to furnish gas for the street lights in the city of Scammon, and to lay and maintain in good condition and repair service pipes to such lamps. From the pleadings, evidence, and admissions, it appears that in 1905 the city enacted an ordinance giving to certain persons and their successors authority to—

"construct, acquire, operate and maintain gas works in the city of Scammon, Kansas, and to manufacture, sell and supply natural gas to said city and the inhabitants thereof, * * * and to enter upon and dig and excavate in the streets, * * * and to lay, maintain and operate in the said streets, * * * gas mains and gas pipes, with all necessary and proper attachments, connections, fixtures and appurtenances, * * * with the right at all times hereafter during said period to dig and excavate for the purpose of relaying, repairing, replacing and removing the said gas mains or pipes or any portion thereof, and for the same purpose to make connections for consumers and such pipes and mains. * * *"

Section 3 provided that:

"No person, company or corporation shall be permitted to make any connections with any of the distributing or service pipes of the said grantees, unless duly authorized by said grantees, their successors or assigns. * * *"

By another ordinance passed in 1906 the Welsbach Company was granted a franchise—

"to lay in the streets of the city of Scammon gas pipes and connections, erect therein lamp posts and lamps and maintain in said streets and other public places all such fixtures and other equipment as shall be necessary for the furnishing of gaslight to the city under the contract herein made: Provided that all sidewalks and streets shall be fully restored to their former condition by said lighting company."

The lights were to be fixed at such points as should be designated by the city, provided that none should be required to be placed at a point more than 175 feet distant from any domestic gas main of the American Gas Company.

It was admitted that in pursuance of this ordinance the Welsbach Company did lay or cause to be laid mains to its posts; also that under a contract made in 1906 between the two companies the Welsbach Company paid for all the service pipes extending more than 50 feet from the mains of the American Gas Company for lamps installed by the former company, and that up until the passage of ordinance No. 89 the Welsbach Company paid the cost of repairs upon these service pipes. The contract referred to bound the gas company to furnish natural gas for the street lights erected or to be erected by the Welsbach Company, and provided, among other things, that all the lamp posts, fixtures, lanterns, and lamps furnished by the lighting company should remain its property, and that the gas company should—

"make the necessary taps in the gas mains for the said service connections, and to furnish and lay at its own expense the necessary 50 feet for each service, it being understood and agreed that any service pipe in excess of 50 feet for any one service is to be provided for by said second party" (the Welsbach Company).

It was alleged in the answer of the lighting company that the gas company failed to keep its mains and service pipes in repair, and that the lighting company refused to renew the contract of 1906 except upon condition that the city furnish and deliver the gas to the lamps, which was agreed to by the lighting company and the city, and the Welsbach Company prayed that the gas company be required to lay, maintain in good order, all necessary service pipes from its mains to the lamps, and to furnish the necessary gas.

In September, 1915, the city enacted Ordinance No. 89, declaring it necessary and ordering that the gas company furnish and deliver natural gas to 65 street lamps and such additional ones as might thereafter be ordered; also directing the company to lay and maintain in good condition and repair the service pipes to such lamps. The gas company, which supplies several cities, challenging the jurisdiction of the court and invoking that of the Public Utilities Commission, answered that it was under no contract with the city to furnish gas to light its streets, and that it was the duty of the lighting company to keep the service pipes in safe

condition and repair, and as this was not done and the pipes became leaky and dangerous the supply from 13 of the lamps was shut off. Complaint was made that by Ordinance No. 89 the city cut in two the price formerly received for the gas furnished for the street lights, but the abstract contains the following:

"Admitted: At that time and in this case the question was not before the court as to the price to be paid by the city of Scammon for gas. That the subject is a matter either of contract or under the control of the Board of Public Utilities."

This matter being eliminated, the only question for consideration is whether or not the judgment requiring the gas company to furnish gas and to repair and maintain the service pipes was proper.

While section 40 of the Public Utilities Act (chapter 238, Laws of 1911) makes the remedies provided in the act cumulative and not exclusive, still section 20 fits the situation so precisely that upon the authority of *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544, we hold that the commission and not the court should determine the controversy. That section expressly prohibits a public utility from making any change in any "rule [or] regulation or practice pertaining to the service or rates," without the consent of the commission. For many years the gas company supplied gas for the lamps, and to turn off this supply from 13 of the 65 is clearly to make a change in its practice pertaining to the service. The repair and maintenance of service pipes, especially those portions thereof from points 50 feet from the gas company's mains to the Welsbach Company's posts, while involving certain legal questions, are practically administrative matters very proper for determination by the commission, and the furnishing of the gas is still more clearly of such administrative character.

In the *Postal Telegraph Company Case*, 96 Kan. 307, 150 Pac. 548, mandamus was sought by the attorney for the commission to compel a restoration of service which had been discontinued without permission of that body, and this court declined to act until the defendant company should have an opportunity to file its application with the commission for formal leave to discontinue its station. It was said:

"But we insist that the first official tribunal to have consideration of such matters is the Public Utilities Commission."

In this case the city instead of invoking the judicial process of mandamus should have applied for relief to the tribunal expressly provided by law for the settlement of such controversies, and it was error under the circumstances to grant the writ.

The judgment is therefore reversed. All the Justices concurring.

BRADEN v. PANTHER CREEK OIL CO.
(No. 7496.)

(Supreme Court of Oklahoma. Oct. 8, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 773(5)—**BRIEFS—EFFECT OF FAILURE TO FILE—REVERSAL.**

Where the brief of the plaintiff in error, served and filed conformably to the rules of this court, appears reasonably to sustain the assignments of error, and the defendant in error has not filed a brief or offered excuse for failure so to do, it is not the duty of this court to search the record in order to find some theory upon which the judgment may be sustained, but such judgment may be reversed in accordance with the prayer of the petition in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110; Dec. Dig. \Leftrightarrow 773(5).]

Commissioners' Opinion, Division No. 3. Error from Superior Court, Tulsa County; M. A. Breckinridge, Judge.

Action by the Panther Creek Oil Company against G. T. Braden. Judgment for plaintiff, and defendant brings error. Reversed, with directions to dismiss case.

Haskell B. Talley, of Tulsa, for plaintiff in error. Rice & Lyons, of Tulsa, for defendant in error.

BLEAKMORE, C. This is an appeal from the superior court of Tulsa county. Plaintiff in error has served and filed his brief conformably to the rules of this court; but defendant in error has not filed its brief or offered excuse for failure so to do.

In a case where, as here, the brief of the plaintiff in error appears reasonably to sustain the assignments of error it is not the duty of this court to search the record in order to find some theory upon which the judgment of the trial court may be sustained; but it may reverse the same in accordance with the prayer of the petition in error. The defendant in error has also ignored the order of this court of April 11, 1916, requiring it to execute an increased or additional bond.

The brief of the plaintiff in error herein appears reasonably to sustain the assignments of error. The judgment should therefore be reversed, with directions to the trial court to dismiss the cause.

PER CURIAM. Adopted in whole.

FARMERS' STATE BANK OF GLENCOE v. HARRIS. (No. 7340.)

(Supreme Court of Oklahoma. Oct. 8, 1916.)

(Syllabus by the Court.)

CHATTEL MORTGAGES \Leftrightarrow 245—**RELEASE—STATUTORY PROVISION.**

Section 4408, Comp. Laws 1909, providing a forfeiture of \$100 for the failure to release a mortgage which has been satisfied, deals exclusively with recorded mortgages, and does not ap-

ply to chattel mortgages which are by law merely required to be filed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 510; Dec. Dig. ¶245.]

Commissioners' Opinion, Division No. 2. Appeal from County Court, Payne County; W. H. Wilcox, Judge.

Action by the Farmers' State Bank of Glencoe against A. D. Harris. Judgment for the defendant, and plaintiff appeals. Reversed and remanded, with directions to grant new trial.

J. W. Reece, of Stillwater, for plaintiff in error.

BURFORD, C. This was a suit instituted by the plaintiff against the defendant in the county court of Payne county in January, 1913. Answer was filed on the 25th day of February, 1913. The plaintiff declared upon a promissory note executed by the defendant in its favor on March 1, 1912. Defendant answered, setting up that there was a total failure of consideration of the note, and seeking to have it canceled, and further alleging that the mortgage ought, under the statutes and laws of this state, to have been released prior to the institution of the suit; that he had made demand therefor upon plaintiff bank, which had been refused; that by reason thereof he was entitled to a penalty of \$100 and damages in the further sum of \$900. There was a trial to a jury, resulting in a verdict canceling the note, and a judgment over against the plaintiff in the sum of \$200 and costs. From this judgment, after motion for new trial was filed and overruled, the plaintiff appeals to this court. The plaintiff has filed its brief in compliance with the rules. Although this brief has been on file since July 1, 1916, the defendant in error has failed to file any brief in this court.

It appears from the plaintiff's brief that the money judgment against it and the instructions of the trial court authorizing it were based upon section 4408, Comp. Laws 1909. This statute had no application to chattel mortgages, and a recovery under it of a penalty for failure to release a chattel mortgage was erroneous. *Bombeck v. Hamblett*, 152 Pac. 813, not yet officially reported. The Revised Laws of 1910, not having been put in force at the time of the institution of this action, have no applicability thereto.

Numerous errors are assigned relative to the sufficiency of the defendant's pleading and of his evidence to sustain a judgment in his favor. Had the defendant complied with the rules of this court by filing a brief, we should have investigated and passed upon the questions so raised to determine whether or not in our judgment we should award a new trial or merely require a remittitur of the money judgment.

Inasmuch as no brief for defendant has been filed, without expressing any opinion

upon the remaining questions raised, for the error pointed out in the instructions of the trial court, the cause is remanded, with directions to grant a new trial.

PER CURIAM. Adopted in whole.

MARKS et al. v. STEIN. (No. 6340).
(Supreme Court of Oklahoma. Oct. 8, 1916.)

(Syllabus by the Court.)

SALES ¶288(6)—FRAUD—WAIVER.

It appears that the defendant is an experienced merchant; that he bought goods for the fall and winter trade; that they were received on or about the 1st of September, and at the time he received them he discovered that they were not of the kind, character, or quality of goods purchased; that he exposed them for sale, and they faded, and with full knowledge of these facts he paid a part of the purchase price and kept the goods, and in the following February he executed a note for the balance of the purchase price, and on the 15th day of June, when the note was past due, and just nine days before the filing of this suit, he paid \$25 on it. *Held*, that such acts constitute a waiver of whatever damages he may have suffered because of any fraud practiced on him, and he is estopped from setting up or pleading such damages as a defense against a recovery on the note.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 823; Dec. Dig. ¶288(6).]

Commissioners' Opinion, Division No. 2. Error from County Court, Pontotoc County; I. M. King, Judge.

Action by Aaron M. Marks and another, against Ike Stein, doing business as the Meriman Manufacturing Company. Judgment for defendant, and plaintiffs bring error. Reversed and remanded, with instructions.

Epperson & Roddle, of Ada, for plaintiffs in error. Crawford & Bolen, of Ada, for defendant in error.

BRUNSON, C. The parties to this suit are designated here as they were in the trial court. The plaintiffs sued the defendant upon a promissory note that had been executed for the balance of the purchase price of certain goods bought by sample. The defendant answered that the clothing, when delivered, did not correspond to the sample and the representations made by the seller; that they were cotton, and faded easily. The plaintiff in his reply pleaded an estoppel by reason of the fact that the note in question was given some four or five months after the goods were received, and for the purpose of obtaining an extension of time in which to pay, and that after the note had become due the defendant made payment on it without objections. The defendant testified in part as follows:

"Q. When did you get the goods? A. About the last of August and the first of September (meaning 1911). When the goods came I did not want them. Pure cotton. Nobody wouldn't buy them."

It is further shown from the testimony that the defendant, with full knowledge of the facts that the goods were not of the kind, character, and quality purchased, kept and exposed them for sale and paid a part of the purchase price, and that in February of the following year he executed a note for the balance of the purchase price of the goods; that the goods faded while being exposed for sale; that the defendant is an experienced merchant, but that he did not know that the goods had faded at the time he executed the note, but on the 15th day of June, when the note was long past due, and just nine days before the filing of this suit, when he must have known the condition of the goods as to fading, he paid \$25 on it and made no objections to the kind, character, or quality of the goods, or that they had faded.

There was a time when he might have obtained relief from the fraud he claimed was practiced on him, and for the damages he claims were caused him by such fraud, but the right to obtain such relief can be waived, and we think, under the record in this case, the defendant has sinned away his day of grace. It is clear to our minds that such acts constitute a waiver of whatever damages he may have sustained because of such fraud practiced on him, and that he is thereby estopped from setting up or pleading such damage as a defense against the recovery on the note. When the defendant discovered that the goods were not of the kind, character, or quality purchased, it was his duty to assert that fact, and either refuse to accept the goods and return them, or keep the goods and assert his right for damages against the seller. In the case of *Burne v. Lee*, 156 Cal. 221, 104 Pac. 438, in the second paragraph of the syllabus, it is said:

"One who, after a discovery of the fraud which induced him to make a contract, assents to a new agreement concerning the subject-matter of the contract, thereby waives his claim for damages caused by the fraud."

In the case of *Minnesota Thresher Manufacturing Co. v. Gruben et al.*, 6 Kan. App. 665, 50 Pac. 67, in the first paragraph of the syllabus, it is said:

"Where a threshing machine, sold and bought as new, was in fact an old one, repaired and repainted, and where the purchasers knew this to be true within three days after they obtained the machine, but thereafter paid, without objection on this ground, one of the notes given for its purchase, held, that they waived the fraud in the sale, and the same did not furnish ground for the recovery of damages."

In the case of *Spaulding Manufacturing Co. v. Holiday*, 32 Okl. 823, 124 Pac. 85, in the third paragraph of the syllabus, it is said:

"Where a purchaser kept and used a buggy continually for nearly, or quite, a year, and then offered to return it because it was not as represented, the offer to return was too late, and the delay in offering to return was unreasonable as a matter of law."

The evidence of the defendant as to the fraud practiced on him and the damage caused him by such fraud was admitted over objections and exceptions, and at the close of his testimony the plaintiffs moved the court to withdraw the same from the consideration of the jury. This the court refused to do, and in this we think the court committed prejudicial error.

This case is reversed and remanded to the trial court, with instructions to him to set aside the judgment heretofore entered, and to enter a judgment for the plaintiffs on the note, for the principal, interest, costs, and attorney's fees.

The former opinion filed herein is withdrawn.

PER CURIAM. Adopted in whole.

CARTER v. PRAIRIE OIL & GAS CO. et al (No. 6386.)

(Supreme Court of Oklahoma. Oct. 12, 1915.
Rehearing Denied Oct. 10, 1916. Dis-
senting Opinion Oct. 10, 1916.)

(Syllabus by the Court.)

1. JURY \Leftrightarrow 14(9)—SUITS IN EQUITY—QUIETING TITLE.

A suit to clear title to 120 acres of land, part of her allotment, by a citizen of the Creek Nation, on the ground that her deed thereto was procured by fraud and was also executed in violation of section 19 of an act of Congress approved April 28, 1906 (chapter 1876, 34 Stat. 144) which provides: "And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void"—is, pursuant to Rev. Laws 1910, § 4994, properly triable by the court, subject to its power to order any issue or issues of fact tried by a jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 43, 75; Dec. Dig. \Leftrightarrow 14(9).]

2. APPEAL AND ERROR \Leftrightarrow 201(1)—PRESENTING QUESTIONS IN TRIAL COURT—MODE OF TRIAL.

Where, without objection, such cause is tried to a jury and a general verdict returned upon which a judgment was rendered and entered by the court as in a suit at law, held, that such was error; but, being uncomplained of in the trial court, it is too late to complain of it here for the first time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1251-1256; Dec. Dig. \Leftrightarrow 201(1).]

3. APPEAL AND ERROR \Leftrightarrow 1000—DISPOSITION OF CAUSE—RENDITION OF JUDGMENT.

Where such is the state of the record, this court on appeal will consider the whole record and weigh the evidence, and, where the same is uncontroverted, render, or cause to be rendered, such judgment as the trial court should have rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3925-3927; Dec. Dig. \Leftrightarrow 1000.]

4. INDIANS \Leftrightarrow 15(1)—LANDS—CONVEYANCES—VALIDITY.

A citizen of the Creek Nation received \$300 of the recited consideration of \$3,600, and on July 2, 1907, prior to the removal of her re-

strictions made, executed and delivered a deed to a part of her allotment, void under section 19 of an act of Congress approved April 28, 1906. At the same time she took back from the grantees therein their two promissory notes, one for \$1,700, payable August 9, 1907, the other for \$1,600, payable August 9, 1908, and agreed to meet them at the same place on August 9, 1907, which she did. There on that day, her restrictions in the meantime being removed by operation of law, they took up both notes, paid her the note for \$1,700, and took from her another deed for the same land, which recited the same consideration, and that \$2,000 of it was that day cash in hand paid, and executed and delivered to her their note for \$1,600, payable one year thereafter. *Held*, that, although executed at different times, both deeds were evidence, or part of one and the same transaction, and should be construed together; that, the first deed being void as in fraud of the statute, not only in that for the making of which an agreement was entered into before the removal of restrictions, but in that a part of the consideration of the first entered into the consideration for the second deed, the taint of illegality in that deed tainted the second, and that both are void. *Held*, further, that, being void, the subsequent purchaser of the land took no title.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37, 38, 40-44; Dec. Dig. ¶15(1).]

5. CONTRACTS ¶1—"AGREEMENT."

An "agreement" is a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1; Dec. Dig. ¶1.

For other definitions, see *Words and Phrases*, First and Second Series, *Agreement*.]

6. INDIANS ¶27(6) — LANDS—RESTRICTIONS ON ALIENATION—"TRANSACTION."

As "transaction" is derived from the Latin words "trans," meaning across, and "agere," to drive, evidence examined, and *held* that the transaction here involved was putting, or driving, across the title to the land from plaintiff to the defendant grantees, and that the two deeds executed for that purpose were evidence or part of that transaction, and should be construed together, not only to determine what the contract or agreement evidenced thereby was, but with what intent it was made.

[Ed. Note.—For other cases, see *Indians*, Dec. Dig. ¶27(6).]

For other definitions, see *Words and Phrases*, First and Second Series, *Transaction*.]

Kane, C. J., and Thacker, J., dissenting.

Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by Annie Carter against the Prairie Oil & Gas Company and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Fred M. Carter, of Okmulgee, Frank P. Smith, of Sapulpa, and Samuel W. Hayes, of Oklahoma City, for plaintiff in error. McDougal & Lytle, of Sapulpa, for defendants in error.

TURNER, J. On January 4, 1914, in the district court of Creek county, Annie Carter, plaintiff in error, sued Seres W. Anthony, Charles H. Anthony, and Prairie Oil &

Gas Company, defendants in error, to clear her title to 120 acres of land, her surplus allotment as a citizen of the Creek Nation, on the ground that a warranty deed, purporting to convey the same, made, executed, and delivered by her to the defendants Anthony, dated August 9, 1907, was: (1) Procured by fraud; and (2) was executed in violation of section 19 of an act of Congress, approved April 28, 1906, c. 1876 (34 Stat. at L. 144), which reads:

"And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void."

Aside from the allegations of fraud in procuring the deed, the petition substantially states that, before the removal of her restrictions, she made, executed, and delivered to the defendants Anthony a warranty deed to the land in controversy, dated July 2, 1907, which, she says, was void and not susceptible of ratification, and that on August 9, 1907, she made, executed, and delivered to them another like deed, purporting to convey the same land, in violation of said statute; that said second deed was an attempted ratification of the prior deed, and was also void, although executed after the removal of her restrictions, by reason of the sixteenth section of the Supplemental Agreement (Act June 30, 1902, c. 1323, 32 Stat. 500). It was further alleged that the Prairie Oil & Gas Company claimed some interest in the land adverse to that of plaintiff. After the Anthonys had answered in effect a general denial, they admitted the execution and delivery of both deeds, but denied that the deed of August 9th was executed in fraud of the statute, and set up the same as an independent transaction for a valuable consideration, and not in ratification of the former deed, as charged. They alleged themselves to be the owner of the land, and for cross-relief prayed that their title thereto be quieted.

Prairie Oil & Gas Company for separate answer set up that they were purchasers of 40 acres of the land in good faith and for a valuable consideration, and deaigned title by meane conveyances from the Anthonys, and, further, that since acquiring title thereto it had erected valuable and lasting improvements on the land, and taken therefrom vast quantities of oil, to the amount of more than \$84,000, and for cross-relief prayed that its title to the 40 acres be quieted.

[1] After issue joined by reply there was trial to a jury and a general verdict for defendants, upon which the court, without reviewing the evidence and reaching the same conclusion as the jury or making any findings of fact, rendered and entered judgment, and plaintiff brings the case here.

This being an action of purely equitable cognizance, the court erred in sending it to the jury and in entering judgment upon the verdict as in a common-law action. Apache

State Bank v. Daniels, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520; Watson v. Borah et al., 37 Okl. 357, 132 Pac. 347. Rev. Laws 1910, § 4993, provides:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided"

—and section 4994:

"All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury. * * *"

This, not being an action for the recovery of money or of specific personal property, was properly triable to the court, who had a right to send or not to send issues of fact arising therein to a jury for specific findings. The proper practice is stated in the syllabus in Success Realty Co. v. Trowbridge, 150 Pac. 898, recently decided, but not yet officially reported. There we said:

"In a case purely of equitable cognizance, neither of the litigants is entitled, as a matter of right, to a trial by jury. In the trial of equity cases the court may call in a jury for the purpose of advising the court upon questions of fact, and the court may either adopt or reject their conclusions as to the same as he sees fit."

[2] But as this error was uncomplained of in the trial court, and it is too late to complain of it here (Newland v. Melvin, 147 Pac. 307), we will not reverse the case on that account, but will dismiss the subject in the language of Dunphy v. Kleinschmidt et al., 11 Wall. 615, 20 L. Ed. 223:

"Now, it is perfectly obvious that, with the exception of the verdict being rendered by nine jurors, the trial was altogether conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at common law. This was clearly an error. The case, being a chancery case, and being instituted as such, should have been tried as a chancery case by the modes of proceedings known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as a result of his own judgment, aided, it is true, by the finding of the jury. Here the judgment is pronounced as the mere conclusion of law upon the facts found by the jury."

See, also, Lake Erie, etc., v. Griffin et al., 92 Ind. 487; Hall v. Doran et al., 6 Iowa, 433; Milk et al. v. Moore, 39 Ill. 584. Or as stated in Ayers v. Scott, Ky. Dec. (2 Ky.) 162:

"The chancellor, in order to inform his conscience as to any point arising in a cause, may direct an issue to be tried as to that point; but it is error to submit the whole case arising upon bill and answer to the jury."

[3] Such being the state of the record, our duty is clear. In Success Realty Co. v. Trowbridge, supra, we also said:

"4. In all cases which were cognizable only in a court of chancery, this court on appeal has the power to consider the whole record, to weigh the evidence, and, when the judgment of the trial court is clearly against the weight of the evidence, render, or cause to be rendered,

such judgment as the trial court should have rendered."

See, also, Schock et al. v. Fish, 45 Okl. 12, 144 Pac. 534.

[4] The judgment is contrary to both the law and the evidence. Aside from the question of fraud in the procurement of the deeds, which was laid out of the case by the trial court, and correctly, there is no dispute as to the essential facts. The evidence discloses that on July 2, 1907, the land in controversy was a part of plaintiff's allotment in the Creek Nation upon which restrictions had not been removed, and would not be removed by operation of law until August 8, 1907; that defendants were her lessees in possession under an oil and gas mining lease theretofore duly recorded; that they wanted to buy the land; that plaintiff's husband, co-operating with defendant Senes W., to induce her to sell it, on July 1st took her to his house, where they stayed all night, and with Senes next day they drove to Sapulpa; that there, at a certain law office, she, on that day, made, executed, and delivered to the defendants Anthony a warranty deed to the land, which was duly recorded. The pertinent part of the deed reads:

"For and in consideration of the sum of (\$3,600) thirty-six hundred dollars, of which amount three hundred (\$300) dollars is this day paid in cash, the receipt of which is hereby acknowledged, and the remainder to be due in two installments; one evidenced by a promissory note of this date, due August 9, 1907, for the sum of seventeen hundred (\$1,700) dollars, and one note dated this date, due August 9, 1908, for the sum of sixteen hundred (\$1,600) dollars, said last note to draw interest from August 9th, 1907, at the rate of seven (7) per cent. per annum, etc."

At the time the deed was delivered the \$300 part consideration recited therein was paid, the deferred payments were evidenced by two promissory notes as therein stated, and both were delivered to her, and she was requested by the Anthonys, the grantees therein, to return to the same place on August 9th, which she did. There on that date, present both plaintiff and the defendants Anthony, they prepared a like warranty deed, purporting to convey to them the same land for the same consideration, which she then and there made, executed, and delivered to them, at the same time surrendering to them their two notes recited in the deed of July 2d, the former of which they paid, and at the same time delivered to her their note for \$1,600, as evidence of the deferred payment mentioned in the second deed. The pertinent part of said deed reads:

"In consideration of the sum of thirty-six hundred (\$3,600) dollars, of which amount two thousand (\$2,000) dollars in cash paid, the receipt of which is hereby acknowledged and sixteen hundred (\$1,600) dollars to be paid one year from this date, for which a note has this day been executed, dated the 9th day of August, 1907, and due the 9th day of August, 1908, bearing interest at the rate of seven (7) per cent. from date, have this day granted," etc.

Prairie Oil & Gas Company deraigned their title to 40 acres of this land by mesne conveyances from the grantees in said deed, which was duly recorded. Both sides concede that the deed of July 2d was void. And such it was, as a fraud upon the statute participated in by both parties thereto. But defendants contend and the court, in effect, found, that the two deeds were not evidence, or part, of one and the same transaction, and hence the intent to evade the statute by the taking of the first could not be said to taint the second, and hence the second deed was good and passed the title. The court was wrong. The deed of July 2d was not only void as executed before the removal of the restrictions, but, as it is impossible to conceive of the execution of that deed without a prior contract or agreement to make it, and which, when made, would enter into and form a part of the transaction evidenced thereby, it is apparent that said deed was made pursuant to a contract or agreement entered into prior to the removal of restrictions, which entered into that transaction, and hence, if that deed and the deed of August 9th were evidence or part of one and the same transaction, that intent to violate the statute was carried into and tainted the second deed.

[5] And since an agreement is nothing more than "a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing" (Bouvier)—we repeat it is impossible to conceive a thing done, as here, without at least a prior tacit agreement to do that thing. And these two deeds were evidence, or part, of one and the same transaction. This for the reason they evidenced a contract between the same parties concerning the same subject-matter and were intended to accomplish the same object. In *Brake v. Blain*, 153 Pac. 158, recently decided by this court, but not yet officially reported, speaking of two instruments to convey land there in question, we said:

"The two agreements in writing, supra, constitute one contract, * * * and should be construed together. We say this for the reason that, although not executed at the same time, they refer to the same subject-matter, and on their face show that each was executed as a means of carrying out the * * * other. *Canadian Coal Co. v. Lynch*, 28 Okl. 585 [115 Pac. 466]."

[6] As the word, "transaction," is, according to Webster (International Dict. 1915 Ed.), derived from two Latin words, "trans," across and "agere", to drive, and, as it is apparent that what these parties attempted to accomplish thereby was to drive across, or, in other words, "put over," from one to the other the title to this land, it follows that they were part of that transaction, and, as such, evidence thereof, and not only must be construed together, but as having been made with a common intent, so that the taint in the one will taint the other. This thing

of carrying taint from one instrument to another is not new. In *Treadwell, Adm'x, etc., v. Archer*, 78 N. Y. 196, in the syllabus it is said:

"Where, upon the maturity of a promissory note given for a usurious loan, for the purpose of an extension, the borrower delivers to the lender a new note, by its terms made payable to a third person, which note is transferred by the lender to said third person, it is tainted with the usury, and is void in the hands of the payee, although he received the same in good faith and without knowledge of the usury."

And this thing of a determination by a court of the intent with which two deeds were made is nothing new. In *Pulliam v. Bennett*, 55 Cal. 368, G., being owner of the B. ranch, agreed to convey to F. and W. 5,000 acres on the lower end of it, 500 acres to F. and 4,500 acres to W., and pursuant thereto on the same day executed deeds to F. and W., but as to which was delivered first the evidence was conflicting. In an action of ejectment brought by grantees of F. against subsequent grantees of G., it was held that the deeds, being executed at the same time, were part of the same transaction, and that, construing them together, it must have been understood and agreed, among other things, that the W. deed should be first located. If the court could there take those two deeds and determine what must have been the understanding between the parties thereto at the time they were executed, and if the court can take one or more deeds by their corners and say, in the light of the evidence before him, whether they are made in fraud of creditors, which, of course, is frequently done, we can and will so take these deeds and say, as a conclusion of law from the undisputed facts before us, whether they were executed in fraud of the statute. What, then, is the prohibitive force of the undisputed evidence surrounding these two deeds and which characterizes their execution? As we have seen, the logical inference to be drawn from the making of the deed of July 2d is that it was executed pursuant to an agreement to convey, entered into between the parties thereto before the removal of restrictions; in fact a deed is defined to be "a contract under seal signed and delivered by the parties thereto." It was ineffectual to accomplish the purpose for which it was made, and no doubt placed of record so as to cloud the title and keep others from buying until such time as the restrictions were removed and the grantees therein left free to effect a transfer of the title to the property by securing the execution of another. The act of April 26, 1906, was leveled at this very practice. In *Simmons v. Whittington*, 27 Okl. 366, 112 Pac. 1018, we said:

"Prior to the enactment of April 26, 1906, contracts and agreements for the sale and purchase of allotments made before the removal of restrictions were void; but there existed no statute which specifically made deeds, procured after the removal of restrictions, in pur-

suance of contracts made before, void. Congress, no doubt, recognized that while such contracts to purchase and sell, made before the removal of restrictions, were void and could not be made the basis of an action for specific performance, designing persons, by procuring such contracts, could use them as a moral force to induce the Indian allottee, after the removal of his restrictions, to execute a deed which, when obtained, would be valid, and by such practice defeat the policy of Congress to protect the allottee from liability under any contract made before Congress deemed such allottee competent to transact his business and handle his property as other persons. Such contracts, although void, would constitute such a cloud upon an allottee's title as to render it, after the restrictions had been removed, unmarketable, without first obtaining a decree of court canceling such instruments. An opportunity was therefore afforded designing persons to obtain such contracts, thereby clouding the title of the allottee and forcing him to sell his land, when it became alienable, to the owner of such illegal contracts, or be to the expense of litigation to clear his title. But when any deed, procured in pursuance of such a contract, is struck down by the statute, all fruits of such contracts are destroyed, and there can be no inducement to obtain them. It was to accomplish this that this act was passed."

As evidence of the fact that the transaction of passing the title to the land did not end with the execution and delivery of the deed of July 2d, plaintiff was paid \$300 only of the \$3,600 consideration recited therein at that time, and was requested to return to the same place on the day after her restrictions were removed. Why return if the transaction was at an end? And why return on a day when she could make a valid deed to the land, unless it was for the purpose of renewing the transaction? and why make the deferred payment of \$1,700, due and payable to her on that day, if not as an inducement to secure her return to that end? Accordingly with intent to consummate the transaction of putting over the title from the plaintiff to the defendants Anthony, they accordingly met on August 9th at the same place, and proceeded to consummate the deal. And to that end the second deed was made, executed, and delivered, whereupon the parties grantee therein paid off the \$1,700 note made payable that day to plaintiff, which made up, with the \$800 already paid her, the \$2,000 cash payment recited in the second deed, and executed their note, payable to her for \$1,600 as therein recited, which was afterwards paid. From all of which it appears that, being evidence or part of one and the same transaction, the taint of illegality in the first was carried over and entered into the making of the second deed, and that both must fall for the reason that for their making a contract or agreement was entered into before the removal of the plaintiff's restrictions. This is in keeping with *Alfrey v. Colbert*, 7 Ind. T. 338, 104 S. W. 638, which was quoted approvingly on another point in *International Land Co. v. Marshall*, 22 Okl. at page 709, 98 Pac. 951, 19 L. R. A. (N. S.) 1056. In the

Alfrey Case, for a consideration of \$550, a minor executed a deed to 120 acres of his land which was void on account of his minority. After he became of age and could convey, for and in consideration of the payment of the money for the first deed and the additional sum of \$5 he executed another deed of the same land to the same party, and in that action both deeds were sought to be set aside. In setting them aside the court, in effect, held that as the consideration of the first deed entered into the consideration of the second, and both were evidence of one and the same transaction, both were void. In passing the court said:

"The last contention of appellant is: 'That if the first deed could not be ratified, or affirmed, the second deed conveyed title as an original conveyance; that the \$550 paid when the first deed was executed, together with the \$5 paid when the second deed was executed, made a good and sufficient consideration for the execution of the second deed.' But if the \$550 was the consideration of the first deed, which the master and the court found to be void, then how can that be a consideration in the second deed, except it be to ratify the void deed? The only consideration moving between the parties at the time of the execution of the second deed was \$5 and the including of the \$550 in the consideration of the second deed makes conclusive the fact that the second deed was an attempt to ratify the first deed, which has been declared to be void."

And in the syllabus:

"A minor Indian, who, receiving \$550, makes a deed of allotted land, void by Act June 30, 1902, c. 1323, § 16, 32 Stat. 508, modified by Act April 21, 1904, c. 1402, 33 Stat. 204, and after he becomes of age, without further consideration except \$5, make another deed to the same person of the same land, does not give an original conveyance, but merely attempts to ratify the first deed, which is not susceptible of ratification."

On appeal the decree in this case was affirmed. *Alfrey et al. v. Colbert*, 168 Fed. 231, 93 O. C. A. 517, and that, too, on the ground, among others, that the second deed was intended to be confirmatory of the first.

We said that \$300 was paid in part consideration for the land at the time of the execution and delivery of the first deed, and such is the undisputed evidence. Not only does plaintiff so state, but she is borne out by the face of the deed wherein she acknowledged the receipt of said amount from the grantees therein. Neither of them deny that they paid her that amount at that time. In fact they introduced no evidence concerning the execution and delivery of the deed of July 2d, or the consideration therefor. Senes W., however, testified that the recited consideration of \$2,000 cash in the second deed was not all paid plaintiff in cash, as therein stated, but that \$300 of it was withheld at that time and paid by him to extinguish a prior outstanding lease on the property made by plaintiff to one Kennedy in 1904. By this he would have us believe that no part of the consideration for the first deed entered into the second, which we decline to do, and, since it is not claimed he withheld and paid

out the \$300 to Kennedy pursuant to any understanding or agreement between plaintiff and himself, or with her knowledge or consent, we will take her statement concerning the entire matter, and hold, as we do, that the \$300 was paid her in cash at the time of the execution and delivery of the first deed, and that part of the consideration for that deed entered into the consideration for the deed of August 9th.

It will not do to say that, as these two deeds were not executed at the same time, they are not to be construed as one instrument. In 6 R. C. L. § 240, after the learned author states the rule to be:

"That in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance"

—he further says:

"In order to make the rule applicable it is not essential that the two instruments shall be executed simultaneously. When two written contracts are entered into between the same parties, concerning the same subject-matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract, and interpreted together."

In support of this rule he cites *Blagen v. Thompson*, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315. There it is said:

"When two written contracts are entered into between the same parties concerning the same subject-matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract, and be interpreted together. *Dean v. Lawham*, 7 Or. 422; *Kruse v. Prindle*, 8 Or. 158; *Bishop, Cont.*, § 165."

In *Chicago Trust & Savings Bank v. Chicago Title & Trust Co.*, 92 Ill. App. 366, in the syllabus it is said:

"Where two instruments are executed as a part of the same transaction and agreement, whether at the same or different times, they will be taken and construed together."

To the same effect is *Joy v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; *Knowles v. Toone*, 96 N. Y. 533; *St. Louis, I. M. & S. Ry. Co. v. Beidler*, 45 Ark. 17; *Wildman, Assignee, v. Taylor et al.*, 4 Benedict's Dist. Ct. Rep. 42; *Chicago Trust & Sav. Bank v. Chicago Title & T. Co.*, 190 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138; *Neill v. Chesson*, 15 Ill. App. 266; *Stacey v. Randall*, 17 Ill. 467; *Richardson v. Single*, 42 Wis. 40; *Gerdes v. Moddy*, 41 Cal. 335; *Leach v. Rains*, 149 Ind. 152, 48 N. E. 858.

We are therefore of opinion that, although executed at different times, as both deeds refer to the same subject-matter and each was executed as a means of carrying out the intent of the other, both are evidence, or parts, of one and the same transaction, and should be construed together as one instrument; that, the first deed being void as in fraud of the statute, not only in that for the making of which an agreement was entered

into before the removal of restrictions, but in that a part of the consideration of the first entered into the consideration of the second deed, the taint of illegality in that deed tainted the second, and that both were taken in fraud of the statute, and both are void, and, being void, that the subsequent purchaser takes no title.

Let the cause be reversed and remanded, not for a new trial, but to be proceeded with pursuant to the views herein expressed. All the Justices concur, except KANE, C. J., and THACKER, J., who dissent.

KANE, C. J. After hearing argument upon rehearing and a more thorough examination of the record and briefs filed by able counsel, I am unable to concur in the conclusion reached by my Brothers.

This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, to recover possession of plaintiff's surplus allotment, containing 120 acres of land situated in Creek county. The plaintiff was an adult citizen of the Creek Nation of one-eighth Indian blood. The allegations of her petition, in so far as it is necessary to notice them herein, were, in effect, that on the 3d day of January, 1906, she executed an oil and gas mining lease to the defendants, Senes W. and Charles H. Anthony, embracing said 120 acres of land; that on the 2d day of July, 1907, she executed a deed of warranty to one of said defendants, purporting to convey the same tract of land; that on the 9th day of August, 1907, she made, executed, and delivered to the same defendants another deed of warranty purporting to convey to the said defendants the same tract of land; that said plaintiff is an uneducated woman who can neither read nor write, and that the defendants, Senes W. and Charles H. Anthony, procured plaintiff to sign and deliver to them said deeds of July 2, 1907, and August 9, 1907, respectively, upon the false and fraudulent statements and representations made to her that said deeds were renewals of said oil and gas mining lease of January 3, 1906; that said deed of July 2d was executed before the removal of the restrictions upon her surplus allotment, and was therefore null and void; that said deed of August 9, 1907, was void because no consideration whatever was paid therefor, and that the same was obtained fraudulently, as aforesaid, and for the purpose of an attempted ratification of said deed of July 2, 1907. The answer of the Anthonys consisted: (1) Of a general denial of each and every allegation of the petition not specifically admitted; (2) an admission, to the effect that the plaintiff executed and delivered to them the deed of August 9, 1907, and a special denial that the execution of said deed was induced by any fraud or false representations, but that the full consideration stated therein was paid for the land described therein, and that the plaintiff under-

stood the full meaning, purport, and effect of said conveyance; and they specially denied that said deed of August 9, 1907, was taken in ratification of any former deed, but that said deed was taken as a separate and distinct conveyance for an adequate consideration, which has been fully paid.

The answer of the defendant Prairie Oil & Gas Company, which deraigned its title through the Anthonys, was, in effect, the same as the answer of the Anthonys, with the exception that it undertook to plead facts which, it contends, entitle it to the status of an innocent purchaser. Thereafter the plaintiff filed her reply to the answers of the defendants, in which she denied every statement and allegation contained in said answers, except such as admitted statements in plaintiff's petition. After various preliminary motions had been overruled, the cause was tried to a jury. The plaintiff in her own behalf testified, in substance, that by reason of certain false representations and statements made to her by her husband, she was led to believe that the instruments presented to her for signature at the time she executed the two deeds to her surplus allotment were renewals of the oil and gas lease formerly given to the Anthonys, as alleged in her petition. Other witnesses were offered for the purpose of corroborating this theory. Whereupon the plaintiff rested her case. Thereupon the Prairie Oil & Gas Company, Senes W. Anthony, and Charles H. Anthony separately demurred to the evidence offered by the plaintiff, for the reason that the evidence, if taken as true, and every legal presumption resolved in its favor, fails to constitute a cause of action against said defendants. Thereupon the following statement was made by the court:

"If the only question in this case at this time is the question of fraud, the court would, under the testimony in this case, sustain the motion, but an additional question enters into this case of the attempted ratification of a void deed. The facts as they appear at this time are that a deed was taken which was absolutely void, on that date, \$2,000 was paid, and a new deed is taken a few days later, which under the law a deed could be taken, and the consideration is the same as in the first deed, and recites a consideration of \$3,600. * * * If this first deed was void and the second was a ratification, then there could be no innocent purchasers, no matter how far removed, under the law in this state. The demurrer is overruled; exceptions allowed. I will instruct the jury there is not sufficient testimony to constitute fraud."

Thereupon Senes W. Anthony in his own behalf testified, in substance, that on the 9th day of August, 1907, he purchased the 120 acres of land involved herein from said plaintiff, for which the deed of that date was executed; that the consideration for said sale was \$3,600, which was fully paid on that date. That the consideration consisted of a promissory note for \$1,600 and \$1,700 in cash, and \$300, which was withheld, to pay for an agricultural lease held by Hackney & Kennedy, which did not expire until two

years from the date of the sale. In rebuttal the plaintiff testified as follows:

"Q. Mrs. Carter, you heard the testimony of Mr. Anthony just now, did you? A. Yes, sir. Q. I will ask you if, on August 9, 1907, when this second deed was signed by you, if there was anything said to you, or between you and Mr. Anthony, or any agreement entered into on that day whatever between you and Mr. Anthony with respect to him retaining \$300 of the purchase money that he was to pay you for that land, to pay on any lease? A. No, sir."

Thereupon the court instructed the jury as follows:

"(1) Gentlemen of the jury, you are instructed that the plaintiff has wholly failed to introduce sufficient testimony to prove fraud as alleged in her petition.

"(2) You are instructed that if you believe from a preponderance of the evidence in this case that the defendants Senes W. Anthony and Charles H. Anthony took a conveyance in the form of a deed from Annie Carter, the plaintiff, on the 2d day of July, 1907, purporting to convey the lands in controversy to the said Anthonys, and that thereafter, on August 9, 1907, they took another deed or conveyance from the said Annie Carter, for the same land, and that the said last deed was taken for the purpose of ratifying the said deed previously taken on July 2, 1907, as aforesaid, then in that case you are instructed that, owing to the restrictions on the plaintiff's land on July 2, 1907, her conveyance of that date was absolutely null and void, and not susceptible of ratification, and the said conveyance taken by the defendants from said Annie Carter on August 9, 1907, if taken for the purpose of ratification of the said former deed, would be absolutely null and void, and as to whether the said deed of August 9, 1907, was taken by the defendants Anthony for the purpose of ratifying the said former deed of July 2, 1907, you will look to the conduct of the plaintiff and the said Anthonys; that is to say, what was done and said by them at the time of the taking of the said first deed of July 2, 1907, and as to what they did and said at the taking of the second deed on August 9, 1907; and you will consider for this purpose all of the evidence surrounding the transactions, and look to the deeds themselves, which are in evidence; and if you believe from all of the evidence that the said second deed was taken for the purpose of ratifying the said first deed, then your verdict should be in favor of the plaintiff and against the defendant Anthony, and also against the defendant Prairie Oil & Gas Company, for the reason that the defendant Prairie Oil & Gas Company stands in the shoes of the said Anthonys as to its title in this land, and is bound and concluded by your finding that said last deed of August 9, 1907, was made for the purpose of the ratification of said first deed of July 2, 1907.

"(3) You are further instructed that the deed executed July 2, 1907, is void and conveyed no title, and that it is claimed by the plaintiff that the deed of August 9, 1907, is an attempted ratification of said deed. Upon this point, you are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the testimony that the deed of August 9, 1907, is a ratification of the deed of July 2, 1907; and, if you so find by such fair preponderance of the testimony, then your verdict should be for the plaintiff in this case.

"(4) You are further instructed that if all of the consideration for the deed of August 9, 1907, as expressed therein, was paid for the execution thereof, and that none of the consideration was a part of that which was paid as consideration of the deed of July 2, 1907, then the same would not be a ratification, but would be a new and independent transaction, and the burden is upon the plaintiff to prove by a fair

preponderance of the testimony that some of the consideration of the deed of July 2, 1907, formed a portion of the consideration, for the conveyance of August 9, 1907, and if the plaintiff has failed to establish this by a fair preponderance of the evidence, then your verdict should be for the defendant."

Thereupon the jury retired, and thereafter returned the following verdict:

"We, the jury, impealed and sworn in the above-entitled cause, do upon our oaths find for the defendants."

Thereupon the court entered judgment against the plaintiff and in favor of the defendants, quieting their title to the land in controversy, etc., to reverse which this proceeding in error was commenced.

The general assignments of error necessary to notice herein may be stated briefly as follows: (1) The court erred in holding that there was not sufficient evidence adduced at the trial to take the case to the jury on the question of actual fraud in the procurement of both deeds; (2) the court erred in submitting to the jury the question whether the deed of August 9, 1907, was given in ratification of the former deed, dated July 2, 1907.

In my opinion, the judgment of the court below should be affirmed. All the evidence offered by the plaintiff was in support of her charge of actual fraud, which, she alleged, consisted in certain false statements made to her by her husband, which induced her to believe that she was signing renewals of an oil and gas lease, when in truth and in fact she was executing deeds of conveyance. I agree with my Brothers that this evidence was so vague, uncertain, unsatisfactory, and altogether lacking in that weight and cogency necessary to set aside a deed on the ground of fraud as to warrant the court in instructing the jury that the plaintiff had wholly failed to introduce sufficient testimony to prove fraud, as alleged in her petition. *Moore v. Adams et al.*, 28 Okl. 43, 108 Pac. 392.

On the next proposition able counsel of record for the respective parties have filed voluminous briefs which are supplemented by many briefs prepared by counsel *amici curiæ*. These briefs are all filed upon the assumption that the case as made by the evidence requires a construction of section 16 of the act of Congress of June 30, 1902, and section 19 of the act of Congress of April 26, 1906. The trial court also seems to have taken this view of it, and it is upon this theory that the opinion of the majority of this court is based. After a very careful examination of the record upon petition for rehearing, I am unable to see the case in that light. It is true that the plaintiff set out allegations in her petition to the effect that both deeds were violative of the federal acts, but she offered no evidence tending to support these allegations, and nothing was developed at the trial which tended to cure this omission. Every particle of evidence introduced or offered by the plaintiff was directed toward establishing the charge of actual

fraud, which, according to her statement, consisted in being induced by false representations to sign the deeds, when in truth and in fact she intended to sign a renewal of an oil and gas lease, whilst every particle of evidence, introduced or offered by the defendants was for the purpose of rebutting this theory. The deed of July 2, 1907, which is admittedly void as violative of the statute, contains no contract or agreement for the execution of any subsequent deed, and there was no evidence offered or introduced which tended to show that the deed of August 9, 1907, which admittedly was executed after the removal of restrictions, was made pursuant to any contract or agreement entered into before the removal of restrictions, or that it was executed for the purpose of ratifying any previous deed made before the removal of restrictions. On the contrary, the evidence of the plaintiff is inconsistent with the theory that the last deed was an attempted ratification of any former deed, or that she intended to execute any instrument, either lease or deed, pursuant to any contract or agreement entered into either before the removal of the restrictions or at any other time.

Ordinarily ratification, like a contract, includes within it an intention to approve, by act, word, or conduct, that which was attempted, but which was improperly or unauthorizedly performed in the first instance. *Gallup v. Fox*, 64 Conn. 491, 30 Atl. 756; *Hartman v. Hornsby*, 142 Mo. 368, 44 S. W. 242.

In the face of the testimony of the plaintiff herself that, at the times she signed both deeds, she thought she was signing a renewal of an oil and gas lease, I cannot conceive how it could be held that the last deed, which was executed after the removal of restrictions, was in any sense intended by her to be a ratification of the former deed, executed before the removal of restrictions. And this testimony is also repugnant to the theory that the last deed was executed pursuant to any contract or agreement entered into between the parties before the removal of restrictions. In such circumstances, it is quite clear to me that at the close of the plaintiff's evidence, there being no sufficient proof of actual fraud, and no proof offered for the purpose of showing that the last deed was violative of any statute, the trial court should have directed a verdict for the defendants.

The only additional material evidence offered was the testimony of the defendant Senes W. Anthony, which we have hereinbefore set out in substance. This evidence of the defendant did not, in any way, tend to show that the last deed was intended as a ratification of any former act or deed, or that it was made pursuant to any contract or agreement entered into prior to the removal of restrictions. On the contrary, it

tended directly to disprove any such intention. I, therefore, conclude that there was no evidence introduced at the trial by either party which directly tended to prove that the last deed, which was given after the removal of restrictions, and based upon an adequate consideration, was an attempted ratification of the prior void deed, or that it was given pursuant to any contract or agreement between the parties entered into before the removal of restrictions. Moreover, it may be assumed that, notwithstanding the evidence was not sufficient to take the case to the jury on the question of actual fraud, or, taken literally, did not tend to establish that the last deed constituted a ratification of the void deed, or that it was given pursuant to a contract or agreement made prior to the removal of restrictions, there were some facts and circumstances developed at the trial from which an inference might reasonably be drawn by the jury that the parties entertained an ulterior motive that the last deed should constitute a ratification of the first, or that the first deed should constitute a contract or agreement for the execution of the second, and still the judgment of the court below should not be reversed. In such circumstances, the intention of the parties would be a question of fact for the jury, to be gathered, as the trial court instructed the jury in instruction No. 2—

"from the conduct of the plaintiff and the said Anthonys; that is to say, what was done and said by them at the time of the taking of the said first deed on July 2, 1907, and as to what they did and said at the time of the taking of the second deed on August 8, 1907; and you will consider for this purpose all of the evidence surrounding the transaction, and look to the deeds themselves, which are in evidence."

As the jury found in favor of the good faith of the defendants on evidence which seems to me sufficient, their verdict should not be disturbed.

From the instructions given, it is apparent that the trial court was of the opinion that there was evidence adduced at the trial from which a hidden purpose by the parties to violate the statute might be reasonably inferred, although such an inference would be inconsistent with the expressed purpose of the parties themselves, as disclosed by their evidence. This was the most favorable view for the plaintiff that could possibly have been taken of the case. In my judgment, however, what was said in the case of Rankin v. Blaine County Bank, 20 Okl. 68, 93 Pac. 536, 18 L. R. A. (N. S.) 512, wherein a somewhat similar situation arose, is applicable here:

"In the case at bar there really was no issue of fact joined by the evidence to be submitted to the jury. The court probably should have taken the case from the jury; but the mere fact that it presented a certain question to the jury, and the jury made a finding that was entirely consistent with the undisputed evidence, does not, to our mind, constitute prejudicial error, if error at all."

I am also convinced that the conclusion reached by my Brothers is inconsistent in

principle with the former opinions of this court, sustaining deeds executed by Indians under somewhat similar circumstances. *Henry v. Davis*, 156 Pac. 337; *McKeever v. Carter*, 157 Pac. 56; *Welch v. Ellis et al.* (No. 6806), handed down to-day, 161 Pac. —, and *Co-wok-o-chee v. Chapman* (No. 5979), 161 Pac. —, not yet officially reported. The latter case seems to me to be clearly in point, and what was said in *Welch v. Ellis et al.*, supra, in relation to the practical construction placed upon these restrictive statutes by the Secretary of the Interior and the Department of Justice, is peculiarly applicable to the facts and circumstances of the case at bar.

I am also of the opinion that the court is in error in holding that this is an action of purely equitable cognizance, and that the trial court erred in entering judgment upon the verdict as in a common-law action. The plaintiff alleged that she was the owner of the legal and equitable title to the land, and that the two deeds she executed were absolutely void and of no force or effect, wherefore she prayed that the defendants be ejected from the land, and that her title thereto be quieted. It is conceded that she had not been in possession of the land for several years prior to the time she filed her action, the defendants Anthony having been placed in possession by the plaintiff at the time she executed the deeds, and that they, or parties holding under them, have been in quiet possession ever since. Merely because the plaintiff may have denominated her action one to quiet title will not change the nature or character of her remedy. *Harlan v. Bankers M. T. Co.* (C. C.) 32 Fed. 305.

In such circumstances, the rule is well settled that, where the defendant is in possession of the land, there is nothing to hinder plaintiff from maintaining an action in ejectment, and, having an adequate remedy at law, he cannot maintain an action in equity to remove cloud from title. *United States v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 101; *Crane v. Randolph*, 30 Ark. 579; *Blackwood v. Van Vleet*, 11 Mich. 252. It has frequently been held that a grant or patent may be impeached in an action of ejectment when the issuance of such instrument is unauthorized or prohibited by statute. 9 R. C. L. 913; *Frazier v. Jenkins*, 64 Kan. 615, 68 Pac. 28, 57 L. R. A. 575; *Kirkpatrick v. Clark*, 132 Ill. 432, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531. But, as in my judgment there was ample evidence to support the verdict, whether the action be treated as one at law, as in the court below, or in equity, as by this court, I do not deem it necessary to discuss this question at any great length.

I am authorized to state that Mr. Justice THACKER concurs in this dissenting opinion.

**CHICAGO, R. I. & P. RY. CO. et al. v.
CLEVELAND et al. (No. 7653.)**

(Supreme Court of Oklahoma. Oct. 3, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §322—PARTIES—WHO ARE PARTIES.

Where one only of two defendants in a joint judgment files a motion for a new trial, but both join as plaintiffs in error in an appeal therefrom and the case-made for appeal and the notice for settling and signing same is served upon the defendant, who filed no motion for new trial, and such defendant in due time waived the issuance of summons in error and entered his voluntary appearance in this court, *held*, that such party is in this court, and the party who filed the motion for new trial and properly preserved the record is a proper plaintiff in error, and entitled to have his appeal reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795-1797; Dec. Dig. § 322.]

2. APPEAL AND ERROR §429—PROCEEDINGS FOR TRANSFER OF CAUSE—WAIVER.

A defendant in error or his attorney may waive in writing the issuance and service of a summons in error, and such waiver may be made at any time, prior to the expiration of the time allowed for appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2168-2172; Dec. Dig. § 429.]

3. CARRIERS §51, 55—CARRIAGE OF GOODS—DUTY OF CARRIER—"BILL OF LADING."

A "bill of lading" is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it; and it is the duty of a carrier or its agent, issuing a bill of lading, for those products for which it is the general custom for shippers to draw drafts upon the consignee or others, with bill of lading attached, to use ordinary care in issuing such bill of lading, in reference to the quantity and description of the product for which such bill of lading is issued.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 180, 148, 149, 168; Dec. Dig. § 51, 55.]

For other definitions, see Words and Phrases, First and Second Series, Bill of Lading.]

4. WORDS AND PHRASES—"BALE OF COTTON."

A "bale of cotton," as the term is used in the commercial and business world, means a standard package of merchantable lint cotton, separated from the seed by the first process of a cotton gin, weighing approximately 500 pounds, and classable under one of the recognized market grades.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bale.]

5. WORDS AND PHRASES—"GRABBOTS."

"Grabbots," or oilmill motes, are composed of small particles of refuse cotton, detached from, but left with, the seed in the first ginning process and generally separated and recovered by a process of reginning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grabbot Cotton.]

6. CARRIERS §57—CARRIAGE OF GOODS—BILLS OF LADING.

A bill of lading, issued by a carrier upon the receipt of 61 bales of "grabbots," describing the same as 61 bales of cotton, without any qualifying or modifying term, is not a correct description of the freight; and, where an innocent person has paid money relying on the representa-

tions contained in such bill, and sustains damages thereby, he may recover from such carrier the moneys so paid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 170; Dec. Dig. § 57.]

Commissioners' Opinion, Division No. 4. Error from District Court, Oklahoma County; Tom D. McKeown, Judge.

Action by A. S. Cleveland and others against the Chicago, Rock Island & Pacific Railway Company and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. J. Roberts, C. O. Blake, and W. H. Moore, all of El Reno, and K. W. Shartel, and Blake & Boys, all of Oklahoma City, for plaintiffs in error. E. L. Fulton, of Oklahoma City, for defendants in error.

EDWARDS, C. For convenience, the parties will be referred to as plaintiffs and defendants, according to their position in the lower court.

The plaintiffs commenced this action against the defendant the Chicago, Rock Island & Pacific Railway Company and V. P. Barrett, by filing their petition, and later their amended petition, in which, after formal and jurisdictional allegations, it is alleged, in substance: That on April 21, 1911, the defendant railway company, by A. B. Harding, its authorized agent, at Hobart, Okla., issued and delivered to defendant, V. P. Barrett, its bill of lading No. D-133, for 61 bales of cotton, marked "V. P. B.," weighing 30,500 pounds, a copy of said bill of lading being attached. That the signature of the said Harding was certified by said railway company, a copy of such certificate being also attached. That said bill of lading was wholly false, fraudulent, and untrue, and known by the said Harding and the said Barrett at the time same was issued to be false, fraudulent, and untrue. That the said Harding at the time knew that the defendant company had not received 61 bales of cotton, but knew that there had been delivered to said company 61 bales of grabbotts or oilmill motes, and knew that said grabbotts or oilmill motes were not cotton. That said bill of lading was fraudulently, wrongfully, carelessly, and negligently issued by said Harding. Then follows the allegation, that the said bill of lading was indorsed by the said Barrett, and a draft for \$3,965, drawn on plaintiffs at Houston, Tex., with said bill of lading attached, which was sent through banking channels in the ordinary course of business and presented and paid by plaintiffs before the arrival of said cotton at Houston, Tex., its place of destination. That said draft was drawn and paid pursuant to a general custom in the states of Texas and Oklahoma. That said 61 bales of grabbotts or oilmill motes were delivered by the defendant company to plaintiff under said bill of lading and received by

plaintiff for the reason that the same were delivered as comprising the shipment under said bill of lading, and that plaintiffs desired to protect themselves as far as possible by reason of the payment of said draft. That said grabbotts or oilmill notes were stored in a warehouse, which warehouse and said contents were later destroyed by fire, and the said grabbotts or oilmill notes were settled for by the insurance company at three cents per pound, aggregating \$1,022.28, an amount in excess of their actual value. Plaintiff further alleges that the said 61 bales of grabbotts or oilmill notes did not come within the description nor constitute the cotton described in the bill of lading in that grabbotts or oilmill notes were not cotton nor the product of any cotton gin. Judgment is prayed for the amount of the difference between the draft paid and the sum received from the insurance company. The defendant, V. P. Barrett, filed no answer. The defendant railway company filed an unverified general denial, with an admission of corporate capacity. Judgment was rendered by default against the defendant Barrett, and the action as to the defendant railway company tried to a jury, and a verdict rendered for the amount prayed for, upon which verdicts judgment was entered. A motion for new trial was filed by the railway company, which was overruled and exceptions saved, and, within extensions of time allowed, an appeal was filed in this court, with both the defendant Barrett and the defendant railway company plaintiffs in error, and the plaintiffs below as defendants in error.

[1] At the outset a motion to dismiss the appeal is urged, for the reason that, as the appeal is by case-made and no motion for new trial was made by the defendant Barrett, he is not properly in this court as a plaintiff in error, and the record, not being certified as such, cannot be treated as a transcript, and for the further reason that the waiver of issuance of summons in error and the entry of voluntary appearance was made prior to the filing of case-made and petition in error in this court. The record discloses that the defendant V. P. Barrett appears as a plaintiff in error; that the case-made was served upon him; that he waived the suggestion of amendments thereto, and waived notice of time and place of presenting the case-made to the trial judge for settling and signing, also waived the issuance and service of summons in error, and in the same instrument entered a voluntary appearance, in these words:

"I, V. P. Barrett, the undersigned, defendant in the above-entitled cause, hereby waive the issuance and service of summons in error out of the Supreme Court of the state of Oklahoma in the above-entitled cause, and hereby voluntarily enter my appearance in said court in said cause."

These seem to be unusual steps for a plaintiff in error to pursue in taking an appeal to this court. Just why a plaintiff in error

should deem it necessary to serve his case-made upon himself and make the waivers mentioned we are at a loss to comprehend, unless it is to meet just such a condition as is here presented.

While two separate verdicts were rendered in this action, one against each of the defendants, the one against the defendant Barrett by direction of the court, and by default, the one against the defendant railway company after a trial, yet the judgment entered upon these verdicts is a joint judgment against the defendants, and it is well settled by this court that all persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment. A failure to join any of them is ground for the dismissal of the appeal. The authorities, however, do not require that the parties in the trial court shall be before this court in any particular capacity, but permits them to appear as plaintiff in error or defendant in error, and to be brought in by summons or voluntary appearance. *Outcalt v. Collier*, 6 Okl. 615, 52 Pac. 739; *Id.*, 8 Okl. 473, 58 Pac. 642; *Wedd v. Gates*, 15 Okl. 602, 82 Pac. 808; *Strange et al. v. Orinsson*, 22 Okl. 841, 98 Pac. 937; *Weisbender et al. v. School Dist. No. 6 of Caddo County*, 24 Okl. 173, 103 Pac. 639; *John v. Paullin et al.*, 24 Okl. 636, 104 Pac. 385; *First National Bank v. Jacobs*, 26 Okl. 840, 111 Pac. 303; *Vaught v. Miners' Bank of Joplin*, 27 Okl. 100, 111 Pac. 214; *Burns v. Toney*, 27 Okl. 728, 117 Pac. 209; *Trugeon et al. v. Gallamore*, 28 Okl. 73, 117 Pac. 797; *Gwinnup et al. v. Grifins et al.*, 34 Okl. 117, 124 Pac. 1091; *Wiley v. Cobb*, 38 Okl. 71, 131 Pac. 1098; *Southwestern S. & I. Co. v. Hall*, 40 Okl. 447, 139 Pac. 305. So, then, if the defendant below, V. P. Barrett, is in this court by voluntary appearance, it is immaterial whether he be styled a plaintiff or a defendant in error. All jurisdictional requirements having been met, the plaintiff in error, railway company, would have a right to have its appeal reviewed in this court, although V. P. Barrett, on account of his failure to file a motion for new trial, would not have such right. Having reached this conclusion, it is immaterial that the case-made is not certified as a transcript.

[2] It is further urged, as a ground for dismissal, that the signing of the waiver of summons in error before the settling and signing of the case-made by the trial judge is insufficient to give this court jurisdiction. This is an entirely new question, and the only authority cited by either party is the case of *Taylor v. Riggs* (Kan. App.) 52 Pac. 910, in which it is held that the waiver of summons in error after the case-made has been settled and signed is sufficient, the court in that case saying:

"There is no statute authorizing a person to waive the issuance and service of summons prior to the commencement of an action in the district court. The taking of a case from the trial court

to the Court of Appeals is not the commencement of an action, but is an appeal, and controlled by other statutory provisions. In proceedings for the review of a judgment of a trial court, the defendant in error or his attorney may waive in writing the issuance and service of a summons in error. * * * We see no reason why such waiver may not be made at any time after the case-made has been settled and certified by the trial judge."

That case is, we think, in point, the only difference being in that case the waiver was signed after settling and signing, while in the case at bar the waiver was signed prior to the settling and signing of the case-made. The mere settling and signing of the case-made does not make the waiver effective—the case might be settled and signed and never filed; such waiver can have no effect until the appeal is filed in this court. The mere fact that the waiver was executed prior to the filing of the appeal, or prior to the settling and signing of the case-made, would not, we think, affect the appeal. The practice among the attorneys of this state of waiving in writing summons in error prior to the settling and signing of the case-made is, and for many years has been, very general, and we see no good reason for withholding judicial sanction of such practice. The law apprises the counsel for a successful litigant and his client of the right of the adverse party to appeal, and if such successful litigant, even before the case-made is settled and signed, elects to waive the issuance and service of summons in error, he will not be heard to question the sufficiency of the appeal on that ground. When the case-made is filed in the appellate court, the waiver becomes effective. The motion to dismiss is therefore overruled.

[3] Our statute (Rev. Laws 1910), defining bills of lading and touching their negotiability, is as follows:

"828. A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it; stating the name of the consignor and the terms of the contract for carriage, which may include reasonable requirements as to notice and demand of damages; and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

"829. All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof, in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

"830. When a bill of lading is made to bearer, or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement."

A bill of lading is a receipt as to the quantity and description of the goods shipped and a contract to transport and deliver the goods to the consignee or order (*Delaware v. Oregon Iron Co.*, 14 Wall. 579, 20 L. Ed. 779), and we construe the petition in this case to state a cause of action for negligence and want of ordinary care on the part of the agent of the defendant railway company in issuing the bill of lading complained of. Though the petition

contains allegations tending toward the theory that the action is one for fraud, yet, considered as a whole, the action is based on the negligence and want of ordinary care of defendant's agent. As was said in the case of *M., K. & T. Ry. Co. v. Sealy et al.*, 78 Kan. 758, 99 Pac. 230:

"In the petition in this case there are averments * * * sufficient to set up a cause of action for a breach of contract; and there are averments that the bills were issued fraudulently, and that by reason thereof the plaintiffs have suffered damage, but these latter may be regarded as merely statements averring a breach of the contract, for it sufficiently appears that the action is solely to recover the amount advanced upon the faith of the statements contained in the contracts. The doctrine is well settled that where a petition contains a good cause of action for a breach of contract the addition of words or averments which are appropriate to a cause of action for a wrong will not change the action from contract to tort."

[4-6] The question for our determination then is, Were the 61 bales of grabbots properly described in the bill of lading, or, if not, did the agent for the railway company use ordinary care in describing in the bill of lading the said produce received for shipment? "A bale of cotton," as the term is used commercially, means a package of merchantable lint cotton, separated from the seed by and the first produce of a cotton gin, weighing approximately 500 pounds and classable under one of the recognized grades of cotton. Cotton might be baled before being ginned, and in such state might, in a popular sense, be called a bale of cotton, but it could not be so classified in a commercial sense. The same is true of "linters" and of "grabbots." Grabbots, or oilmill motes, are composed of the small particles of refuse cotton, detached from, but left with, the seed in the first process of ginning and generally recovered from the seed by a process of reginning. In a generic sense grabbots are cotton, but not in that sense in which the term "cotton" is used in the commercial and business world. The statute, section 828, supra, requires the bill of lading to describe the freight so as to identify it, yet no one in the cotton business would identify 61 bales of grabbots under a bill of lading describing 61 bales of cotton. It follows that the bill of lading does not properly describe the freight shipped. The case was tried upon the theory that it was the duty of the agent of the railway company to use ordinary care in issuing bill of lading. The court instructed the jury:

"* * * It is also the duty of such agent, where a general custom prevails that shippers of a certain kind of products, after having secured a bill of lading to draw a draft with such bill of lading attached, and that such drafts would be paid by the person upon whom the same were drawn before the product or the goods for which the bill of lading was issued is delivered to the person paying the draft, to use ordinary care in issuing the bill of lading in reference to the description or quantity of goods for which the bill of lading was issued."

Ordinary care and negligence are defined in the instructions. Was there a want of or-

inary care on the part of Harding, the agent for the railway company, in issuing the bill of lading in question, and in describing the freight as "cotton," without any qualifying or modifying term such as would apprise any person on whom a draft might be drawn with this bill of lading attached, that the produce therein described was not the ordinary merchantable bale of cotton contemplated by the business world in the use of such term? The record discloses that previous to the time the bill of lading in question was issued, the Hobart Cotton Oil Company, of Hobart, Okl., sold to one R. M. Simmons the 61 bales of "grabbots" involved in the action, and that prior to the issuance of said bill of lading Simmons sold said grabbots to the defendant Barrett, and before the bill of lading was issued the manager of the said Cotton Oil Company called the agent of the defendant railway company, who issued the bill of lading by phone, and advised him that said Barrett was on his way to the depot to have bill of lading issued, and notified the said agent that the product to be billed was grabbots. On the arrival of Barrett at the depot the said agent made further inquiry, and was informed by Barrett that the product was grabbots, but that grabbots were cotton and not linters. The tariff in force at that time contained two classes for baled lint from cotton, designated as "cotton" and "linters." The "cotton" designation and rate was deemed by the agent of the railway company to be the proper one, and he thereupon issued the bill of lading for "sixty-one bales of cotton—V. P. B.—not compressed," consigned to order of V. P. Barrett, Houston, Tex.

The custom of drawing drafts on cotton bills of lading was shown; it was known to the agent of defendant. In every town and village throughout the cotton producing section the producer sells his cotton to the local merchant or buyer. In a great many instances the local buyer ships the cotton, takes a bill of lading, and draws a draft on the consignee, with the bill of lading attached. The draft is paid in regular course of business, upon the faith of the bill of lading, and ordinary care, at least, should be exercised in issuing such bills so that innocent parties, dealing on the strength of the representations made therein, may not be misled. See *Wichita Savings Bank v. A. T. & S. F. Ry. Co.*, 20 Kan. 519. In the case of *Wichita Falls Compress Co. v. W. L. Moody & Co.* (Tex. Civ. App.) 154 S. W. 1032, the carrier was held liable upon a bill of lading in which half bales, weighing an average of about 250 pounds, were described in the bill as bales, the court saying:

"It was shown that the term 'bale of cotton' has a definite meaning in the cotton business; that it means a merchantable bale weighing approximately 500 pounds. * * * It was also shown that the general custom and practice as

to handling the cotton business, financing the crop, and moving it to market was for the owner to deliver his cotton to the carrier and secure shipper's order bill of lading therefor, and make draft on purchaser at destination; that banks and others will generally advance to the shipper the cash called for in the draft, and thus such draft, with bill of lading attached, will make its way through the exchange centers to destination. Instead of delivering 485 bales of cotton called for by this bill of lading, 485 half bales were delivered. It was the necessary expectation of this appellant, in issuing such bill of lading, that a business transaction would be consummated upon the faith of same with W. L. Moody & Co., said firm being mentioned therein, and that said transaction would probably include advances made upon the faith of such bill of lading. * * * We are of the opinion that, under the facts in this case, this applicant is estopped to deny that it received the 485 'bales of cotton' as said term was used and understood among those dealing in and handling cotton, viz. of the approximate weight of 500 pounds."

In the case at bar the agent for the defendant railway company had special warning and notice that the produce to be shipped was not the ordinary merchantable cotton, but was grabbots, but, notwithstanding such notice, the agent issued the bill for the product as cotton without any qualifying or modifying term or description which would, in any manner, give notice to any person who might deal on the representations contained in the bill. This we think was a failure to exercise ordinary care, and negligence for which the railway company is liable.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

TINSLEY v. STATE. (No. A-2616.)

(Criminal Court of Appeals of Oklahoma. Oct. 21, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW §1158(2)—APPEAL—REVIEW—QUESTIONS OF FACT.

When a plea of former jeopardy is interposed and counsel elect to submit the question to the jury rather than insisting upon a determination of the proposition of law by the court, the finding of the jury will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3062; Dec. Dig. §1158(2).]

Appeal from County Court, Craig County; E. M. Probasco, Judge.

Tom Tinsley was convicted of violating the prohibitory law, and appeals. Affirmed.

Clyde McGary, of Vinita, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Tom Tinsley, was convicted at the October, 1915, term of the county court of Craig county, on a charge of violating the prohibitory law, and his punishment fixed at imprisonment in the county jail for 30 days and a fine of \$50.

There is only one assignment of error briefed and argued in this case. This assignment is based upon a plea of former jeopardy.

It is the contention of counsel that the plaintiff in error had been tried and acquitted upon an information alleging a sale, in practically the same language as the information in the case at bar. The record shows, however, that counsel chose to make this a question of fact for the jury and introduced his proof accordingly and relied upon the jury to exonerate his client rather than for the court to determine the same as a proposition of law.

After counsel for plaintiff in error introduced his evidence upon this proposition, the state was permitted to introduce evidence in rebuttal. The issue was fairly submitted to the jury under the facts disclosed. The jury found against the contention of plaintiff in error, and this court will not disturb the finding. If counsel had elected to stand on his plea as a proposition of law for the determination of the court, he would have been in a different attitude here; but, having elected to make the issue one of fact and law combined to be submitted to the jury, he is bound by their decision when there is evidence tending to support the finding. In this case there is ample evidence.

The judgment is affirmed.

DOYLE, P. J., and BRETT, J., concur.

GALBERT v. STATE. (No. A-2264.)
(Criminal Court of Appeals of Oklahoma. Oct. 21, 1916.)

(Syllabus by the Court.)

1. HOMICIDE §250 — EVIDENCE — SUFFICIENCY.

In a conviction for murder, where eyewitnesses testified that they saw the defendant shooting at the deceased, coupled with the fact that immediately after the shooting a revolver was taken from the defendant with five empty shells in it, the exact number of shots fired, the verdict will not be disturbed on the ground that it is not sustained by the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. §250.]

2. CRIMINAL LAW §629—TRIAL — PRELIMINARY PROCEEDINGS — SERVICE OF LIST OF WITNESSES.

A defendant in a murder case should know before he announces ready for trial whether or not he has been misled by a nickname or other cognomen ascribed to a witness in the list of witnesses served on him in conformity to the constitutional requirement, and whether or not from the list he understands what their post office address is; and if he announces ready for trial without objecting to any inaccuracy or defects in regard to these matters, he waives such defects, and an objection to such matters made after the case has gone to trial comes too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. §629.]

Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Raize Galbert was convicted of murder, sentenced to life imprisonment, and brings error. Affirmed.

C. C. Williams, of Ada, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. In this case the plaintiff in error, who will be referred to as defendant, was tried and convicted of murder and sentenced to life imprisonment.

[1] 1. He complains, first, that the verdict of the jury is not sustained by the evidence.

The deceased, Haywood Armstrong, was killed at a church entertainment at Maxwell, Pontotoc county. And the evidence on behalf of the state shows the deceased closed a stove door that a boy by the name of Rado Gillespie had opened. Gillespie told deceased to leave the door alone, and opened it again. To this deceased replied that the stove was smoking, and would fill the house with smoke, and that he (Gillespie) should not do that way, and in reply to this Gillespie began to curse deceased; whereupon deceased started toward the door, as though he intended to leave the house. The defendant, Galbert, called to him before he reached the door, and as he turned around, several eyewitnesses testify, without warning, or any demonstration on the part of the deceased, the defendant began shooting at him. Five shots were fired, some of which inflicted minor wounds, but two entered the body of deceased and produced almost instantaneous death. Immediately after the difficulty the father of defendant took a pistol from him containing five empty shells, and also took a pistol from Gillespie containing five loaded shells, one of which had been snapped.

The defendant denied shooting deceased, and claimed that his pistol was empty when he went to the entertainment, and that he emptied it in the afternoon shooting at a bush near his home, and never reloaded it, but says that he missed the bush he shot at; hence it bears no mute evidence in his behalf. But he was corroborated by his mother and sister to the effect that he did fire five shots in the afternoon near the house. But under the testimony of eyewitnesses that they saw the defendant shoot at the deceased, coupled with the fact that defendant's father, immediately after the shooting, took a revolver from him with five empty shells in it, which was the exact number of shots fired, and that the revolver of the Gillespie boy, which was taken from him at the same time, had not been discharged, but only snapped once, we could not think of disturbing the verdict in this case on the ground that it is not sustained by the evidence.

[2] 2. The only other matter defendant complains of is that among the names of the

witnesses served on him, under the constitutional requirement, the only cognomen ascribed to one witness was "Rev. Walker," and, further, that the post office address of the first witness was given as Maxwell, Okl., and, instead of writing the words, "Maxwell, Okl.," after each successive name, that only ditto marks appeared under the words "Maxwell" and "Oklahoma" opposite the names of all the other witnesses, and contends that this was a serious infringement upon his constitutional rights. But the purpose of the constitutional provision that "in capital cases, at least two days before a case is called for trial, the defendant shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations in the indictment or information, together with their post office addresses," is to apprise the defendant who the witnesses are and where they may be found, and thus enable him to investigate their character, learn what their testimony will be, and take whatever steps he may desire to offset or rebut their evidence; and if the defendant in this case had not been able to locate the witness Walker by the cognomen given, or did not understand what these ditto marks meant, and had been misled by reason of their use, he should have made his troubles known to the court before announcing ready for trial. But he did not do this. He answered ready for trial, and waited until Rev. Walker was called upon the witness stand, and then objected to his testifying on the grounds above set out. But the objection came too late. He should have known before announcing ready for trial whether or not he had been misled by these ditto marks and the cognomen of Walker. He does not contend, or even intimate, that there was more than one Rev. Walker in the community, and that he had investigated the character of one Rev. Walker and talked to him, and that the Rev. Walker produced as a witness was another and different person to the one he had talked with, and whose character he had investigated. And under these conditions the defendant waived any right he might have had to require the state to furnish him more definite information as to the name of this witness, and his post office address; and the court properly overruled his objection. This proposition is thoroughly discussed and settled in *State v. Frisbee*, 8 Okl. Cr. 406, 127 Pac. 1091; *Franklin v. State*, 9 Okl. Cr. 178, 131 Pac. 183; and *Walker v. State*, 10 Okl. Cr. 533, 139 Pac. 711.

In *Walker v. State*, supra, the Christian name of one witness was omitted, in the list of witnesses served on the defendant; but the surname of that witness was given in the list with his post office address. There was no objection on the part of the defendant to the list served on him before going to trial, and no showing was made that he had

been misled or prejudiced by the omission of the Christian name of this witness. And in that case the court held:

"* * * That where it affirmatively appears that the defendant has not been misled to his prejudice by the omission of the given name of a witness, whose surname and post office address appeared upon the list furnished to the defendant, he is not entitled to a reversal because the testimony of such witness has been received."

There appearing to be no prejudicial error, the judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

CAMPBELL v. SARATOGA STATE BANK (two cases). (Nos. 837, 838.)

(Supreme Court of Wyoming. Oct. 16, 1916.)

1. APPEAL AND ERROR ⇌ 807—VACATION OF DISMISSAL—MOTIONS.

Where it was not alleged that dismissal of proceedings in error was erroneous on the record as it then stood, but it was sought to amend the record, the proper procedure was by motion to reinstate, and not by petition for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177-3188; Dec. Dig. ⇌ 807.]

2. APPEAL AND ERROR ⇌ 807—VACATION OF DISMISSAL—GROUNDS—"UNAVOIDABLE CASUALTY."

Since it is the duty of the plaintiff in error to see that the record is in its proper form and duly authenticated, and although it is the clerk's duty to properly authenticate and file papers in the case, it is not an "unavoidable casualty" sufficient to warrant reinstatement of proceedings in error, dismissed for defects in the record, that the clerk failed to authenticate certain papers, which the attorney of plaintiff in error must have had before him when briefing the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177-3188; Dec. Dig. ⇌ 807.]

For other definitions, see Words and Phrases, First and Second Series, Unavoidable Casualty.]

Error to District Court, Uinta County; David H. Craig, Judge.

On motion of plaintiffs in error to reinstate cause, and motion of defendant in error to strike motion to reinstate from the files. Both motions denied.

For former opinion, see 158 Pac. 267.

N. R. Greenfield, of Rawlins, for plaintiffs in error. Brimmer & Brimmer, of Rawlins, for defendant in error.

PER OUBIAM. The proceedings in error in these cases were dismissed June 29, 1916, on account of the defective record presented to this court. 158 Pac. 267. Counsel for plaintiffs in error has filed a motion, supported by affidavits, for a vacation of the order of dismissal and for a reinstatement of the cases on the docket; and counsel for defendant in error have filed their motion to strike the motion of plaintiffs in error from the files. Both motions have been submitted together.

Counsel for plaintiffs in error does not dispute the insufficiency of the record, as stated in the opinion, but seeks to excuse the imperfection and to be allowed now to withdraw the record and have it amended, and states in his affidavit that he sent the bill of exceptions to the clerk of the district court with directions to file it; that he was called away from home, and was necessarily absent for several weeks, and did not have opportunity to see and examine the record before it was filed in this court; that he relied upon the clerk of the district court to file and properly certify all of the original papers in the case to the Supreme Court in compliance with its order so to do, and that he had been informed by said clerk that he had done so; that he had no knowledge that the record and papers were not properly authenticated until advised by the opinion of this court dismissing the proceedings in error; that his attention was not called to the defects at the oral argument. The clerk of the district court makes affidavit to the effect that the failure to file and authenticate the bill was his oversight and mistake, and that he is willing to do so.

[1] The motion to strike plaintiffs' motion from the files is based upon the ground that the application to vacate the order of dismissal and reinstate the cases should be by petition for rehearing, and not by motion. We do not think that point well taken. *Cronkhite v. Bothwell*, 8 Wyo. 736, 31 Pac. 492; *Gramm v. Fisher*, 4 Wyo. 1, 31 Pac. 767, in which cases like motions were entertained. As above stated, it is not claimed that there was error in dismissing the proceedings upon the record presented; and counsel does not ask for a rehearing on that question, but seeks to have the cases reinstated and be permitted to amend the record. It differs from a case in which it is contended that the order of dismissal was erroneous. A motion to strike a motion is not the proper practice. *Reld v. Fillmore*, 12 Wyo. 72, 73 Pac. 849. The motion to strike plaintiffs' motion from the files is denied.

[2] This court can consider and determine cases brought to it by proceedings in error only upon the record as made in the trial court, and cannot assume that that record is other than as certified to be such record. It is true that it is the duty of the clerk of the district court to properly file the papers in a case, and, when required to do so, to properly authenticate and certify the record to this court; but it is likewise the duty of an appellant to see to it that the record is in proper form and duly authenticated. In the present case, counsel unquestionably had the purported bill of exceptions before him when he prepared his brief, and a casual examination of it would have disclosed that it was not such a part of the record as could be considered by this court. Counsel insists that when he filed his application with the

clerk of this court for an order to the clerk of the district court to certify and transmit the record in the case to this court, he had done all that was required of him by the statute and rules of court. No doubt he had done all that was required to procure such order, but the duty still rested upon him to see to it that such a record was presented to this court as it is authorized to consider. *Gramm v. Fisher*, supra. In *Milliken v. Martinez* (N. M.) 159 Pac. 952, the court said: "Before filing the transcript of record with the clerk of this court, the attorney for appellant should see to it that it is properly prepared and certified, thus avoiding all objections in this regard."

We think the same duty rests upon counsel to see that the record is properly authenticated under the present statute, as was required prior to the amendment of 1901, when the plaintiff in error was required to file with his petition a transcript of the final record, with such original papers or a transcript thereof as are necessary to exhibit the errors complained of. We do not think the showing made by the affidavits in support of the motion disclose such unavoidable casualty as to entitle plaintiffs in error to a reinstatement of the cases on the docket.

The motion to vacate the order of dismissal and to reinstate the cases on the docket is denied.

Both motions denied.

BIG HORN POWER CO. v. MARTIN.

(Supreme Court of Wyoming. Oct. 16, 1916.)

ESTOPPEL §79—EMINENT DOMAIN—AGREEMENT FOR JUDGMENT.

Where a power company commenced a proceeding to condemn land, and, after the report of commissioners to assess compensation had been filed, the parties abandoned the statutory procedure and stipulated that damages were in the amount of the report for which judgment should be in favor of the owner, who accepted such amount and agreed upon payment thereof, to deliver a deed to the company, and that execution should not issue on the judgment within 60 days, and where a judgment was entered to that effect, the owner, after so electing to take an unconditional personal judgment against the power company and a lien upon all its realty within the county and the right to enforce judgment by execution, could not assert a right of action for damages for flooding his land, as the agreement entitled the company to immediate possession of and the right to flood the land.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 211-213; Dec. Dig. §79.]

Error to District Court, Fremont County; Charles E. Carpenter, Judge.

Action by Frank E. Martin against the Big Horn Power Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded.

E. H. Fourt, of Lander, for plaintiff in error. L. E. Winslow, of Lander (V. H. Stone, of Lander, of counsel), for defendant in error.

BEARD, J. On May 31, 1909, the Big Horn Power Company, a corporation, plaintiff in error, commenced a proceeding in the district court of Fremont county to condemn for reservoir purposes a tract of land situated in said county, containing 187.17 acres, and owned by Frank E. Martin, defendant in error. On June 1, 1909, said court appointed commissioners to ascertain and determine the compensation to be paid to the owner for the taking of said land for said purposes. Said commissioners duly qualified, and on June 10, 1909, filed in said court their report and certificate of assessment, by which they assessed the value of the land at \$20 per acre, and that Martin be allowed to remove his improvements thereon. June 24, 1909, the power company filed in said court its exceptions to the report and certificate of the commissioners, and on the same day filed its application for a trial by jury. It is admitted that these proceedings were regularly and legally conducted under the statute. December 6, 1909, the parties, by their respective counsel, entered into and filed in said court their agreement in writing, by which the power company withdrew its exceptions to the report of the commissioners, and its application for a trial by jury, and admitted that Martin's damages for the taking of said land, was the sum of \$3,343.40, for which sum, with costs of the proceeding, judgment should be entered against it in favor of Martin. That Martin accepted the award of the commissioners; and that upon the payment by the power company of said award, \$3,343.40, interest and costs, he would execute and deliver to the power company a deed to said lands, and that execution should not issue on said judgment for 60 days from said date. That the report and certificate of the commissioners be confirmed by the court.

On the same day the court, after reciting at length the proceedings had in the matter up to that time, and that said proceedings had been regular and in compliance with law, entered judgment as follows:

"It is therefore considered, ordered, adjudged and decreed by the court, that the report of said commissioners be, and the same is hereby, in all respects confirmed. And the court being fully advised in the premises, finds that the value of the real estate, in controversy, is the sum of three thousand three hundred forty-three and 40/100 dollars. That the parties by their respective attorneys have stipulated in writing, that judgment in the sum of \$3,343.40 in favor of the defendant, Frank E. Martin, may be entered by the court. It is therefore considered, ordered, adjudged and decreed by the court that the said Frank E. Martin do have and recover of and from the said Big Horn Power Company the full and just sum of \$3,343.40, and that the said Big Horn Power Company pay the costs herein, now taxed at \$—.

"Done in open court, this 6th day of December, A. D. 1909."

It appears by the evidence that the dam in the stream was completed in 1909, causing the land in question to be flooded.

This action was commenced April 5, 1912, by Martin against the power company, alleging the commencement of the condemnation proceedings, the judgment of December 6, 1909, the nonpayment thereof, the construction of the dam and flooding of the land, and claiming damages in the sum of \$4,000; that the dam be abated and defendant enjoined from further maintaining the same, and for general relief. By its answer the power company pleaded that the judgment of December 6th become *res adjudicata*, and that plaintiff was thereby estopped from maintaining the action.

On the trial the court found generally in favor of plaintiff and against the defendant, and after reciting the proceeding leading up to, and the entering of the judgment of December 6th, the nonpayment of the same, the construction of the dam and flooding of said land, and that the same was without the consent of plaintiff and without right, entered a decree as follows:

"Wherefore, it is by the court considered, ordered and adjudged that the defendant, the Big Horn Power Company, its successors in interest, and the agents, servants and employes and each and all of them and all persons claiming or to claim by through or under them, be and they are hereby enjoined from making any use of said dam for beneficial purposes and are restrained and enjoined from using or operating the machinery in said dam for the generation of electricity or any other beneficial use until the full amount of said judgment of \$3,343.40 with interest and costs be fully paid and satisfied, and the said defendant herein is now and hereby required to forthwith open all gates, spillways and wasteways that may be in the said dam and to so open and keep open all such gates, spillways and wasteways in said dam as to afford the least possible obstruction to the waters of the Big Horn river and to permit as much of said waters to escape as will flow through said openings in said dam, and this order of injunction is hereby made permanent and perpetual and to remain in full force and effect until said described judgment with interest and costs be fully paid, together with the costs of this action now taxed against the defendant in this cause in the sum of \$41.15, for which judgment is rendered. To which findings and judgments the defendant excepts. Done in open court at Lander, this 29th day of June, A. D. 1912."

From that judgment defendant brings error.

As stated by counsel for plaintiff in error:

"The real question before this court is whether or not the defendant in error, Frank E. Martin, having elected to take a judgment for the payment of money only, against the plaintiff in error, has elected that remedy, and is estopped thereby from further harassing and annoying the company with suits."

Had the parties proceeded under the statute for the condemnation of real estate, after exceptions to the report of the commissioners had been filed and a jury trial demanded, and had a verdict been returned fixing the amount of damages, the court could not properly have entered judgment against the power company, for the amount so found, but could simply have confirmed the verdict; and upon due proof that the amount so found had been paid or deposited, should then have

entered an order as provided in section 3882, Compiled Statutes 1910, which order is required to contain a description of the property, the fact of the ascertainment of compensation, with the manner of making it, and the payment or deposit of the same according to the facts. The statute provides that when such order is entered (a certified copy of which is to be filed in the office of the county clerk) the petitioner shall become seised in fee of the property. Under those provisions of the statute, until such payment or deposit has been made, the party seeking to condemn the property may discontinue the proceedings. *Cunningham v. Memphis R. Terminal Co.*, 126 Tenn. 343, 149 S. W. 103, Ann. Cas. 1913E, 1062 et seq. And when the proceedings are conducted to a conclusion in accordance with the statutory provisions, neither the right to possession by the condemnor, nor title to the property passes to him until actual payment or deposit has been made, except as provided by sections 3884, 3885, and 3886, Comp. Stat. 1910. In the present case the statutory procedure was not followed to a conclusion, but was abandoned by agreement of the parties after the filing of exceptions to the report of the commissioners and application for a jury trial. When the property of one is subject to be condemned and taken by virtue of the power of eminent domain, there is nothing in the Constitution or statute which limits or restricts the right of the owner of the property and the party desiring it, either before or after the commencement of condemnation proceedings, to agree upon the amount of compensation, or the manner in which it shall be paid or secured. But if they do not so agree, then the statute points out the method by which the compensation shall be determined and when and how it shall be paid or secured. Martin, by agreeing upon the amount of compensation, avoided the liability of having the amount awarded by the commissioners reduced by the verdict of a jury; and by electing to take an unconditional personal judgment against the power company, instead of concluding the proceedings under the statute, thereby secured a lien upon all of the real estate of the power company within the county, and the right to enforce payment of the judgment by a general execution. By agreeing that such a judgment should be entered against it, the power company waived its right to refuse to pay the amount, even if it should conclude to abandon the project and not take the property. The agreement and judgment entered in pursuance thereof entitled the power company to the immediate possession of and the right to flood the land, although the legal title was to remain in Martin until the judgment should be paid. Martin having voluntarily abandoned his rights under the statute, and having elected to otherwise se-

cure the payment of his damages, cannot now be permitted to assert a right which he waived and upon which waiver the power company acted. Counsel for defendant in error has cited numerous decisions to the effect that property cannot be taken under condemnation proceedings until payment is actually made or secured as provided by law. But those cases are not applicable here, where the statutory proceedings were not followed to a conclusion, but were abandoned by agreement and another method substituted therefor.

For the reasons above stated the judgment of the district court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

POTTER, C. J., concurs. SCOTT, J., did not participate in this opinion.

STUDEBAKER CORP. OF AMERICA v. HANSON. (No. 818.)

(Supreme Court of Wyoming. Oct. 16, 1916.)

1. PRINCIPAL AND AGENT §22(2)—PROOF OF AGENCY—DECLARATIONS OF AGENTS.

It is not an attempt to prove agency by declarations of the agents, where sufficient independent circumstantial evidence is introduced for that purpose, and their declarations introduced are confined to admissions of a defective condition of an article involved in the action.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. §22(2).]

2. EVIDENCE §78—FAILURE TO OFFER—INFERENCE.

It is a well-settled rule of evidence that, when the circumstances and proof tend to fix a liability upon a party who has it in his power to offer evidence of all the facts as they existed and rebut the inferences which the circumstances and proof tend to establish, and he fails to offer that proof, the natural conclusion is that the proof, if produced, would support the inferences against him, and the jury is justified in acting upon such conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 98, 100; Dec. Dig. §78.]

3. APPEAL AND ERROR §1050(4)—HARMLESS ERROR—EVIDENCE.

The admission of copies of letters, the only effect of which was to explain later correspondence, the originals of which had been admitted, was harmless, though the trial court admitted such copies on other grounds, since the admission of secondary evidence, merely cumulative in character, though erroneous, will not justify reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4156; Dec. Dig. §1050(4).]

4. APPEAL AND ERROR §852(4)—REHEARING—SCOPE—WAIVER OF ERROR.

Exception to a ruling of the trial court, refusing to direct defendant to elect on which cause of action of his counterclaim he sought to proceed, was waived, on petition for rehearing, where the point was not made in the original brief.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3221; Dec. Dig. §832(4).]

Error to District Court, Laramie County; William C. Mentzer, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 157 Pac. 582.

Kinkead & Henderson, of Cheyenne, and Dana & Blount, of Denver, Colo., for plaintiff in error. W. E. Mullen and Hilbard S. Ridgely, both of Cheyenne, for defendant in error.

POTTER, C. J. A petition for rehearing has been filed in this case by counsel for plaintiff in error. In disposing of it we deem it unnecessary to again enter upon a discussion of the question of the agency of the concern from whom the car was purchased by the defendant. We held that the evidence was sufficient to establish the fact of such agency, to the extent at least that it was authorized to sell the car with plaintiff's warranty and supply the necessary parts and labor to put the defective car in proper condition. But it is stated in the brief in support of the petition for rehearing that the only evidence on that question was the testimony of the witness Roberts and the defendant concerning the actions and statements of Mr. Hicks, particularly his statement that the several Studebaker companies were one and the same. That was not the only evidence on the question. The several letters written by the plaintiff to the defendant, referred to and quoted from in the former opinion, were not only competent and pertinent upon the question, but tended strongly as admissions to show the identity of plaintiff corporation as the one for whom the car had been sold and warranted, and also the agency of the concern who sold it.

[1] It is argued also that the question in the case as to this matter of agency was not the sufficiency of the evidence, but its admissibility. But we held that the evidence objected to was competent and admissible, and therefore referred to it in considering whether the evidence was sufficient to sustain the verdict. And we remain of the opinion that it was competent and properly admitted. As to certain letters shown by copy, we held, without deciding whether the notice to produce the originals was sufficient or not to render the copies admissible, that the ruling admitting them would not, if erroneous, justify a reversal; the reason therefor being stated in the opinion. And therefore we said that we would not be inclined to scrutinize very closely the action of the court in admitting such copies, though we suggested that the court may have regarded the notice on the trial to produce as sufficient on the ground that a duty rested on the plaintiff to have the originals in court as papers intimately connected with the issues in the case.

Counsel also find ground for complaining of the decision in that, as stated in the brief,

the plaintiff was held by this court to the same consequences as by the jury, because of its silence as to facts attempted to be proven by incompetent evidence. But we held that the evidence referred to was not incompetent, and we are constrained to adhere to that view, for we remain convinced that the trial court properly applied the rules of evidence relating to the admission of the declarations of alleged agents. We suppose that counsel refer to the remark in the former opinion, after reciting the evidence as to the agency of Hicks and others, that no evidence was introduced by the plaintiff to disprove the fact of such agency, as well as a similar remark concerning the failure of the plaintiff to produce or offer in evidence the contract, if any, under which the Denver company was engaged in selling cars of the kind sold to defendant, or to offer to show what the arrangement was between the said selling company and the manufacturer, in which connection we said:

"It seems to us that there must have been some arrangement or contract, and that it was within the power of the plaintiff, especially as the secretary of the Denver company was a witness in its behalf, to show what such arrangement was, if it was different from that which might be inferred from its correspondence with the defendant and the other evidence in the case."

[2] Now that was not going out of the record or supplying something through the imagination to cure a failure of proof, as counsel seem to suggest. We had in mind a familiar rule of evidence, which is stated in Jones' Commentaries on Evidence as rewritten by Horwitz (The Blue Book), as follows:

"It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion." Volume 1, § 19.

In Jones on Evidence (2d Ed.) § 19, the presumption from failure to produce evidence is thus explained:

"The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party. It is a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable."

And the author quotes the following remark of Lord Mansfield in *Blatch v. Archer*, Cowp. 68:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."

The rule is referred to in *Wigmore on Evidence* (vol. 1, § 285), and the learned author

concludes the discussion of the matter by saying:

"The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause."

Several cases are then cited and quoted from to illustrate the rule, including *Blatch v. Archer*, *supra*, and *Rex v. Burdett*, 4 B. & Ald. 122, wherein Best, J., said:

"If the opposite party has it in his power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just."

Of course, if the case of one party is not established by competent evidence, it is not necessary for the other to produce any, and no presumption will in such case arise against him. But that is not the situation in this case in our view of the evidence.

[3] We said in the former opinion, referring to the objection to the admission of copies instead of the originals of certain letters, that they were admitted as explanatory of plaintiff's subsequent letters. Counsel do not so understand the record. What the trial court said when first ruling that such copies be admitted is this:

"As part of this correspondence has gone in, I believe I will permit this in evidence."

Upon that statement our remark was based that the copies were admitted as explanatory of the subsequent letters, the originals of which had been admitted, and that seemed to the writer to express what was intended by the language quoted. It may be that it does not correctly represent the thought in the mind of the trial court; but we think it immaterial, if it does not. The only effect of the letters, as stated in the original opinion, was to explain the later correspondence. Counsel also seem to challenge the correctness of the statement in that opinion to the effect that such copies were admitted following a ruling at first sustaining an objection thereto, after the defendant had further testified showing the details of mailing the letters he had written and the return of the one he had received, and identifying the copies. There is just this much to sustain counsel's understanding of that matter, if it differs from the writer's. The record shows that the objections were at first sustained. Then came the demand for the production of the originals. Following the explanation of the plaintiff's counsel in reply to such demand, the court made the remark quoted above directing that the copies be admitted. But counsel for plaintiff then proceeded to cross-examine the defendant, who was on the stand, and after one question had been propounded and answered, another objection was interposed to the copy of one of the letters, on the ground that no foundation had been laid for secondary evidence, whereupon the trial judge stated that he did not know that

sufficient foundation had been laid, and defendant's counsel at once proceeded to examine him relative to the mailing and the accuracy of the copies of the letters he had written and the original of the one he had received and returned; and he was cross-examined upon the matter. The objections to the copies were then renewed and overruled. Thus they were not finally admitted until the further testimony mentioned in the opinion. This is, however, immaterial, in view of the ground upon which the exceptions to said rulings were and must be disposed of by this court, viz. that as merely cumulative evidence the admission of the secondary evidence, even if erroneous, would not justify a reversal.

In commenting upon the evidence relating to the damages, counsel overlook the testimony of the defendant that the car he received was practically of no value, as well as other evidence explaining the condition of the car. There ought to be no difficulty in understanding the ground or the reasoning upon which we held the two instructions as to the measure of damages not inconsistent when applied to the evidence in the case, and that the case should not be reversed for a technical misstatement of the law in one of said instructions. We think it unnecessary to add to what was said in the original opinion concerning those instructions.

[4] One of plaintiff's contentions on the trial appears to have been that several causes of action were stated in defendant's counterclaim, on which only the case was tried, and, at the close of the evidence for defendant, the plaintiff moved that the defendant be required to elect upon which such several causes of action "he seeks to proceed," whether on the written warranty, the oral warranty, an implied warranty, or upon a right to recover back the money expended. It is now insisted that the refusal of the court to direct such election was error. The point was not made in the original brief, and the exception to the ruling was therefore waived.

We perceive no good reason for granting a rehearing, and therefore the application will be denied.

BEARD, J., concurs. SCOTT, J., did not participate in this decision.

NATWICK v. TERWILLIGER. (No. 823.) (Supreme Court of Wyoming. Oct. 16, 1916.)

1. CORPORATIONS § 76 — SUBSCRIPTION TO STOCK—ACCEPTANCE.

Where a party subscribes to corporate stock, agreeing to pay by conveying a lot of land, acceptance by the company is essential to constitute the subscription a contract at all.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. § 76.]

2. CORPORATIONS §78 — SUBSCRIPTION TO STOCK ON SPECIAL TERMS.

Where one subscribes to corporate stock on the special terms that the company accept a lot of land in payment, after acceptance by the company, his liability is governed by the special terms of his subscription, and he is not liable to pay for the stock in money except in case of his refusal or inability to convey the land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 219; Dec. Dig. §78.]

3. CORPORATIONS §81—"CONDITIONAL SUBSCRIPTION" TO STOCK.

Where a subscriber to corporate stock specified on the subscription list, after his name, that it was conditional, and the subscriber took a written statement from the organizer of the company that it was conditional upon the company's taking land in full payment, there being a provision that the subscriber should not be liable for the subscription unless the company accepted the land, and the directors subsequently provided for issuing the stock only on delivery of a deed to the property "as per condition and agreement when he signed said subscription list," such subscription was conditional on the company's acceptance of the land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266-284; Dec. Dig. §81.]

4. CORPORATIONS §81 — SUBSCRIPTION TO STOCK ON CONDITION SUBSEQUENT—INTENTION OF PARTY.

In determining the real meaning of a contract of subscription to corporate stock made upon a condition subsequent, as in the construction of conditions in other contracts, the intention of the parties is to be looked to.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266-284; Dec. Dig. §81.]

5. CORPORATIONS §81 — CONDITIONAL SUBSCRIPTION TO STOCK — SUBSCRIPTION ON SPECIAL TERMS.

The distinction between a conditional subscription to corporate stock and a subscription upon special terms, is that a conditional subscription does not make the subscriber a stockholder, nor render him liable on his subscription until performance of the condition or the happening of the contingency, while a subscription on special terms is absolute, making the subscriber a stockholder, and rendering him liable as such from the time his subscription is accepted, whether the conditions are performed or not.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266-284; Dec. Dig. §81.]

6. CORPORATIONS §81—STOCKHOLDER'S LIABILITY—CONDITIONAL SUBSCRIPTION.

Where a subscription to corporate stock was made conditional upon the company's accepting the subscriber's land in payment, and the directors of the company, at their first meeting, accepted such conditional subscription, the subscriber was not liable as a stockholder unless the company took the land within a reasonable time.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266-284; Dec. Dig. §81.]

7. CORPORATIONS §88—CONDITIONAL SUBSCRIPTION—VALIDITY—STATUTE.

Under Comp. St. 1910, § 3989, a subscription to corporate stock, conditional upon the company's accepting in payment land of the subscriber, was valid, the statute authorizing the directors of any corporation of the sort to purchase property necessary for its business and to issue stock to the amount of the value thereof in payment, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337-364, 425-428; Dec. Dig. §88.]

8. CORPORATIONS §81—CONDITIONAL SUBSCRIPTION—WAIVER OF CONDITION.

Though a subscriber to corporate stock, conditional upon the company's accepting his land in payment, participated in the organization meeting, accepted the offices of director and secretary, and acted in such capacities with the understanding and expectation that the shares of stock conditionally subscribed for by him were to be issued as full paid in payment for the property offered by him, he did not waive the condition of the subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266-284; Dec. Dig. §81.]

9. CORPORATIONS §81—LIABILITY AS STOCKHOLDER—ESTOPPEL.

Nor was he estopped to set it up to escape liability as a stockholder to the company's trustee in bankruptcy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266-284; Dec. Dig. §81.]

10. CORPORATIONS §88—CONDITIONAL SUBSCRIPTION TO STOCK—PAYMENT.

Where a party subscribed to corporate stock conditionally upon the company's accepting his realty in payment, and the company allowed him to vote the stock at the organization meeting, thereafter moving into and occupying the building, the acts amounted not only to an acceptance of the subscription, but to an acceptance of the property, the stock thereby becoming fully paid, though the subscriber could be required to execute and deliver a deed to the company, the equitable owner.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337-364, 425-428; Dec. Dig. §88.]

11. CORPORATIONS §90(6) — CONDITIONAL SUBSCRIPTION—REFUSAL OF COMPANY—SUFFICIENCY OF EVIDENCE.

In an action by the trustee in bankruptcy of a company to recover a sum alleged to be due on a subscription to stock conditional upon the company's accepting realty of defendant in payment, evidence held to show that the company declined to take the property and fulfill the condition of the subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416; Dec. Dig. §90(6).]

12. BANKRUPTCY §285—STOCKHOLDER'S LIABILITY—LEAVE TO SUE.

An order, made in the United States District Court, wherein the bankruptcy matter of a corporation was pending, authorizing the trustee to institute and prosecute suit to recover a sum alleged to be due on a subscription for stock, the order reading, "And this referee having heard the arguments of counsel, and being fully advised in the premises, does find that there is probable cause that a right of action exists in favor of said trustee [defendant], and it is therefore hereby ordered," etc., did not hold that defendant, the alleged stock subscriber, was liable.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §285.]

Error to District Court, Carbon County; V. J. Tidball, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 157 Pac. 696.

M. A. Kline, of Cheyenne, for plaintiff in error. McMicken & Blydenburgh, of Rawlins, for defendant in error.

POTTER, C. J. Counsel for plaintiff in error has filed a petition for rehearing in

this case. The action was brought by the trustee in bankruptcy of an insolvent corporation to recover a sum alleged to be due from the defendant upon a subscription for stock, and the judgment in defendant's favor was affirmed on the ground that the condition upon which the subscription was made had not been complied with on the part of the company; Justice Beard concurring specially, on the ground that defendant's only obligation was to convey certain property in consideration for the stock, and that as the stock had not been issued and the deed had not been demanded the action was not maintainable.

It appeared that prior to the incorporation and organization of the company the defendant signed the original subscription list for 25 shares of stock, adding after his signature the word "conditional," and at the same time received from the organizer of the company, who circulated the subscription list, a written statement certifying to the fact that defendant had signed the list conditionally, and that it was understood that the company should take in full payment for the stock a certain town lot, and that he should not be liable for said subscription unless the company should accept the same under said conditions. See former opinion, 157 Pac. 696, 697.

The defendant was present at the organizational meeting of the stockholders and voted 25 shares of stock, but no stock had been issued to him or to any one who had signed the list, and his subscription had not then been accepted. But the evidence shows, we think, that the other subscribers or at least all who became stockholders, knew the terms and conditions of defendant's subscription, and that there was at least a tacit understanding that it would be accepted upon the said conditions, and that with that understanding the defendant participated in the meeting. He was selected and acted as secretary of that meeting, and was elected as one of the directors of the corporation then being organized. He was also present at the first meeting of the directors held on the same day and was elected secretary of the company. At that meeting the proceedings were had with reference to his subscription which are copied in the former opinion from the record of the meeting in the evidence, viz.: A motion was made and carried that 25 shares of stock be issued to the defendant "upon the delivery of a good and sufficient deed to lot 4, block 22, in the town of Encampment, Wyo., as per condition and agreement when he signed said subscription list; said deed to be accepted in full payment for said stock subscribed"; the lot thus described being the property offered by defendant as shown by the organizer's written statement of the fact and conditions of the defendant's subscription.

On the trial the defendant was called as a witness for the plaintiff and examined with

reference to the company's records, including the record of the first meeting of the directors, and upon cross-examination he testified that he had executed a deed of the lot to the corporation pursuant to the resolution referring to his subscription, but the deed does not appear to have been delivered.

By a resolution adopted on March 11, 1908, by the executive committee, quoted in the former opinion, the president and secretary were directed not to issue any stock to the defendant in payment for the lot aforesaid, "inasmuch as" the deed thereto had not been delivered to the company in accordance with the original agreement, and it was provided that rent should be paid the defendant for the use of the building by the company. It is stated in the former opinion that the evidence shows certain other reasons for that action, and that it was the result generally of the company's desire not to take the property or to issue the stock to the defendant upon his subscription, and before concluding this opinion those reasons will be stated more in detail, for they tend to explain what was intended by the resolution aforesaid, and the ground for the statement in the former opinion that by said action the company finally concluded not to accept the subscription on the conditions named.

[1, 2] It was contended on the original hearing that the subscription was not conditional, but a subscription on special terms as to payment; that it was accepted by the company at the time of its organization, and that the defendant then became liable to pay for the stock either in the property mentioned or in money; that having failed to convey the property he became liable upon his subscription for the par value of the stock; and that the action of the executive committee was invalid as against creditors as a release of the defendant's liability to pay for the stock. It was also contended that defendant's liability is shown by the fact that he voted the shares at the first meeting of the stockholders, accepted the office of director and secretary and member of the executive committee, and acted in those capacities, and that the company went into possession of the property aforesaid and occupied it. The same contentions are again made by the petition for rehearing and the brief in support thereof; and counsel states in the brief unqualifiedly the following proposition as settled law: That a condition in a subscription to the capital stock of a corporation by which the subscriber agrees to pay in labor or property is a condition subsequent, and the subscriber becomes a stockholder immediately upon the organization of the company. Aside from the rule that in a subscription like the one at bar an acceptance by the corporation is essential to constitute it a contract at all, which is not recognized by the proposition as stated by counsel, we are of the opinion that such a subscription may be so made as to entitle it to be called and con-

strued as a conditional subscription. It may not be very material whether the subscription in this case be considered as a conditional subscription or one on special terms, for if the latter an acceptance by the company would be necessary, whereupon the subscriber's liability would be governed by the special terms, and he would not be liable to pay for the stock in money except in case of a refusal or inability on his part to convey the property. 1 Morawetz on Priv. Corp. (2d Ed.) § 82. And we are of the opinion that the evidence does not show a refusal by the defendant to convey, but, on the contrary, a conclusion by the company not to take the property, to which the defendant assented because of a determined opposition to taking the property that had developed among the stockholders.

[3, 4] But we adhere to the view that this subscription was conditional. It was not only so specified on the subscription list, and in the written statement that it was conditional upon the company taking the property in full payment for the stock, but it was also provided that the subscriber "shall not be liable for said subscription unless said company accepts same under said conditions." That is to say, the condition of the subscription was that the company shall take the property in full payment, and that no liability shall be incurred by the subscription unless accepted on that condition, viz. that the company "shall take" the property. In thus requiring that his liability be expressly limited, the defendant did what may properly be done, as said in Thompson on Corporations in these words:

"If a subscriber desire to make his liability depend upon the performance of some stipulations by the corporation, it is very easy for him to do so in express terms."

The author was there discussing the rule for determining the real meaning of a contract of subscription made upon a condition subsequent, and had stated what is of course the law that as in the construction of conditions in other contracts the intention of the parties is to be ascertained. 1 Thomp. on Corp. (2d Ed.) § 632. And that the intention of the parties is the controlling question is stated elsewhere in the work cited. Sections 626, 627. And by other text-writers. 1 Morawetz on Priv. Corp. (2d Ed.) § 90; 1 Cook on Stockholders and Corp. Law (3d Ed.) § 85. Mr. Cook says in the section cited that:

"Conditional subscriptions, like other contracts, are to be construed reasonably and according to the intent of the parties, as indicated by the language used in the contract. The circumstances under which the subscription was made are also to be taken into consideration."

In a case often cited in support of this rule it is held that:

Whether a condition be precedent or subsequent "is a question purely of intent; and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract as well as

the nature of the act required and the subject-matter to which it relates."

And applying that rule a subscription for stock was held to be upon a condition precedent, because so intended and understood by the parties, and that the condition was to be strictly performed before the subscriber could be held liable. Bucksport & Bangor R. R. Co. v. Brewer, 67 Me. 295.

[5] That defendant's subscription was intended as and understood to be one upon condition and not absolute is evident not only from the terms thereof as expressed in the writing aforesaid and the addition of the word "conditional" to the defendant's signature on the list, but also from the terms of the motion referring to it adopted by the directors, providing for issuing the stock only on delivery of a deed to the property, "as per condition and agreement when he signed said subscription list." And especially must this be so in view of the distinction between a conditional subscription and a subscription on special terms. That distinction is stated in Thompson on Corporations (2d Ed.) § 626, as follows:

"The first distinction to be noted is, as already suggested, that a conditional subscription does not make the subscriber a stockholder, nor render him liable on his subscription, until the performance of the condition or the happening of the specific contingency. On the other hand, a subscription on special terms is an absolute subscription, which makes the subscriber a stockholder and renders him liable as such from the time when his subscription is accepted, whether the conditions are performed or not. The special terms attached to a subscription are regarded as independent stipulations, the remedy for the breach of which is an action against the corporation for damages."

In view of the language employed in stating the conditions upon which this subscription was made, and in the recorded action of the directors of the corporation thereon at their first meeting, it is clear to us that it was intended and understood that the subscription was conditional upon the property being taken by the corporation at the par value of the stock and in full payment therefor, and that there should be no liability on the subscription if that was not done. A similar subscription was considered in Junction Railroad Co. v. Reeve, 15 Ind. 236, cited in a note to section 600 in Thompson on Corporations (2d Ed.). The subscription in that case was for stock to be paid in real estate to be conveyed to the corporation within a stated period, but it was also provided by the subscription that if the company should not take the land at the price, the subscription was to be void. The court said:

"The subscription in question was clearly conditional; or rather, it was a simple proposition to put in the land at the specified price, in case the company would take it at that price, otherwise the subscription was to be void."

The provision in the statement of the terms of the subscription here in question that there was to be no liability unless accepted under the conditions stated is in effect

one declaring the subscription to be void unless accepted on the conditions stated—that the company take, not merely agree to take, the property in full payment for the stock. We perceive no reasonable ground for holding that the defendant intended or that the company understood that his only right or remedy would be to recover damages if the company should decline to issue the stock or take the property.

We do not agree with counsel's contention that a subscription payable in property is uniformly held by the authorities to be a subscription on special terms. It is true that some text-writers, referring generally to such a subscription, say that it is not, properly speaking, a conditional subscription, but an absolute subscription on special terms. See *Morawetz on Priv. Corp.* (2d Ed.) § 82. But Mr. Cook, in discussing the subject of conditional subscriptions, says that any condition which can legally be performed or complied with by the corporation may be a condition to a subscription for stock, and that "the condition may be that payment shall be in labor or materials." And again:

"In general, however, subscriptions to the capital stock of a corporation may be conditional as to time, manner or means of payment, or in any other way not prohibited by statute, or the rules of public policy, and not beyond the corporate powers of the corporation to comply with." 1 *Cook on Stockholders and Corp. Law* (3d Ed.) § 83.

Whatever may be the general rule with reference to the term to be applied to subscriptions payable in property, or their effect respecting the subscriber's liability, we are convinced that the subscription before the court in this case was a conditional subscription, and that to hold otherwise would disregard the clear intention and understanding of the parties, as indicated by the written statement of the terms and conditions of the subscription, and by the language of the motion adopted with reference to it at the first meeting of the directors.

[6] Assuming that the action taken upon the subscription by the directors at their said first meeting constituted an acceptance thereof and was so intended, something more was necessary to render the defendant liable, at least to pay for the stock in money. The rule in such case is stated in *Cook on Stockholders and Corporation Law* (3d Ed.) as follows:

"The acceptance by the corporation of a conditional subscription is necessary to the formation of the contract. Until such acceptance the conditional subscription is but a continuing offer. After acceptance the subscriber is bound, until performance of the condition by the corporation, to await such performance; he cannot withdraw the conditional subscription after it has been accepted. It seems, however, that if the performance of the condition is delayed unreasonably by the corporation, the conditional subscriber will be thereby released from his obligation." Section 84.

"A condition to a subscription for stock must be performed or complied with before the subscriber can be compelled to pay such subscrip-

tion. * * * A conditional subscriber is not a stockholder or member of the corporation until after the condition is performed. Whether or not the condition has been performed is a question of fact. Performance may be proved by parol or by the records of the corporation." Section 88.

"Subscriptions payable in property are not subject to calls, and a demand for the property must be made by the corporation." Section 89.

The rule is stated in *Thompson on Corporations* (2d Ed.) as follows:

"In cases of unconditional subscriptions the acceptance by the corporation renders the subscription binding. But in the very nature of the case this cannot be true as to conditional subscriptions; their binding effect depends ultimately on the performance of the condition. It is evident, therefore, that the mere acceptance of a conditional subscription is only in the nature of an agreement to entertain the proposition of the subscriber, and does not, without more, render the subscription binding. Some of the cases proceed upon the theory that there must be an acceptance and then a performance of the condition, or that the two may be concurrent. In such cases the effect of the acceptance is to give the subscriber a conditional status which is confirmed by the performance of the condition. Another class of cases proceed on the theory that the performance of the condition is an acceptance of the subscription; in such cases the acceptance and performance are identical, and their effect is to make the subscription binding. The rule as gathered from the effect, rather than the direct holdings of the cases, seems to be that the conditional subscription is in the nature of a continuing offer which may be withdrawn before acceptance; but after acceptance in any manner by the corporation the subscriber is bound until the corporation has performed the condition, or for a reasonable time; or, in other words, he must wait a reasonable time for such performance by the corporation. After acceptance and before performance, or a reasonable time for performance, he cannot withdraw or otherwise revoke such conditional subscription. * * * When subscriptions are made upon conditions, and the conditions have been complied with, the subscribers thereupon become entitled to all the rights and privileges of stockholders, and they come under correlative obligations and duties of holders of stock in a corporation." Section 601.

"That a valid condition to a subscription for the capital stock of a corporation must be performed before a subscriber can be compelled to pay his subscription, where there has been neither waiver nor estoppel, is a proposition that is universally supported by the authorities; and the performance must be within the time prescribed in the contract, if any is stated, or within a reasonable time, if none is stipulated, and if not performed within such time the subscriber is discharged." Section 603.

[7] The validity of the condition is not questioned in this case, nor do we see any reason to doubt its validity. The statute expressly authorizes the directors of any corporation of the kind here involved to purchase property necessary for its business and issue stock to the amount of the value thereof in payment therefor, and provides that the stock so issued shall be declared and taken to be full stock, and not liable to any further calls, nor the holders thereof to any further payments under the provisions of the statute for the demand and payment of money upon stock subscriptions and making stockholders severally and individually liable

to creditors to the amount of unpaid assessments on the stock held by them respectively. Comp. Stat. 1910, § 3939. And there is no statute in this state applicable to such a corporation requiring a certain amount or proportion of the capital stock to be subscribed as a condition precedent to incorporation or acquiring a corporate existence or to the corporation engaging in business, or limiting the authority of one who solicits or takes a subscription.

[8, 9] We were convinced when this case was decided, and remain of that opinion, that neither waiver of the condition nor estoppel is shown by the evidence, but that on the contrary, the defendant participated in the organization meeting, accepted the office of director and secretary and acted in those capacities, with the understanding and expectation that the shares of stock conditionally subscribed for by him as aforesaid were to be issued as full paid stock in payment for the property offered by him. The delay resulting in the final action upon the subscription, shown by the resolution adopted in March, 1908, is explained by the testimony, which is referred to generally in the former opinion and will be more fully stated in this.

[10, 11] It is argued in the brief that when the defendant was allowed to vote the shares, and the company moved into and occupied the building, the company did all it was obligated to do, whereupon the defendant became the owner of said shares of stock and obligated to pay therefor in money or money's worth, and that the company's right to maintain an action on the contract was then complete. But if the defendant became a stockholder through the act of the company in allowing him to vote the shares at the organization meeting, supplemented by its act in moving into and occupying the building, it must be because those acts amounted not only to an acceptance of the subscription upon the condition named, but to a taking and acceptance of the property, for such occupation of the property was with the defendant's knowledge and at least his tacit consent; and thereby also the stock became full-paid stock, without any further liability thereon, though the defendant as the holder of the legal title to the property might be required to execute and deliver a deed to the company, the equitable owner. And that would be the situation now, if the defendant had become a stockholder, as claimed, and if the action taken on March 11, 1908, was invalid, though it would not aid the plaintiff in this action to recover the par value of the stock in money, since it is not shown that defendant refused to convey the property or that he was or is incapable of making a valid conveyance. The company certainly did not pay for the property unless it was taken in full payment for the stock, and it had no right to take or occupy it, so far as the record shows, prior to March 11, 1908, except that acquired by the subscrip-

tion and the acceptance thereof, which required it to be taken, if at all, in full payment for the stock. There is this much further evidence to show that the property was occupied by the company pursuant to the subscription and the condition thereof, and the understanding that defendant's stock, if he was a stockholder at all, or entitled to act as such, was fully paid. The property was entered in the company's ledger as an asset at a valuation of \$2,700, but without description; the entry being: "Real Estate, January 1, Inventory \$2,700." It was explained as referring to said property, as the company owned no other real estate. A counter entry was made to balance it after the adoption of the resolution of March 11, 1908. But it does not appear that defendant knew of either entry. Mr. Fry, the organizer and manager of the company, who was examined about the entry, testified on cross-examination by defendant's counsel as follows:

"Q. This real estate, then, that you have testified to, was turned over to the company for 25 shares of stock for Mr. Terwilliger? A. That is right; yes, sir. Q. And that was all he was to pay—that was the agreement with the corporation? A. Yes, sir; it was. Q. Then, having entered this, why did you order this entry in this book? A. I don't remember that item, Mr. Blydenburgh. I don't know whether I did or not. Q. At the time, then, this entry was made, January 1, 1908, you considered that real estate as the property of the corporation, did you? A. Yes, we did. Q. And that the board of trustees had accepted the condition? A. The condition—there was a condition. Q. And that they had accepted the condition and become the virtual owners of the real estate—that is the reason you made this entry? A. Undoubtedly."

The same witness on being recalled as a witness for the defense again testified about that matter. His attention was called to the entry of January 1st in the ledger, and to an entry on the opposite side of the account showing a credit which balanced it, viz.: "March 31, 1908, \$2,700," and was asked as to the latter entry this question: "What did that consist of?" He answered: "That was to balance that account when the stock was turned back, when we decided not to take the store building." He was then interrogated and testified as follows:

"Q. There was no cash passed, but simply a return of that stock? A. Yes, sir. Do you want me to explain what that \$2,700 was for? Q. You have explained that. * * * Q. Now, I believe you stated, Mr. Fry, in your examination for the plaintiff, that you considered this property, from the date of the organization of the company until March, as the property of the company? A. Yes, sir. Q. After that time what did you consider it? A. We considered it the property of Mr. Terwilliger, and paid rent on it from then. Q. You considered before this meeting of March 11, 1908, that the company had fulfilled the conditions? A. Yes. Q. And thereby became the owner of the property? A. Yes. Q. You may explain, then, why and how this meeting of March 11, 1908, came about? A. Well, I had sold some stock to some parties at Elk Mountain and they had agreed to finance the business over there, to increase the business. We agreed that the old building was not large enough, and we talked of a new building across from the Encampment Bank. In fact, these par-

ties went to Mr. Blank to draw plans for this new building, and they wanted that agreement with Mr. Terwilliger canceled. They said that, as long as the stock was not turned over or deed made, and the building wasn't large enough, that it would be to our advantage to cancel that agreement and put up a new building in a better location. And then I went to Mr. Terwilliger with the proposition. Q. The object of this meeting was, then, to cancel Mr. Terwilliger's stock? A. That is it, exactly. Q. How many shares did Mr. Terwilliger own in that company after that meeting? A. One share. Q. How many shares, at meetings of stockholders after that time, did Mr. Terwilliger ever vote? A. One share."

In our opinion the evidence must be understood as showing, either that the defendant had paid for the stock through the taking of the property by the company, leaving him obligated only to convey the legal title, or that the company declined to take the property for the stock, in which the defendant deemed it advisable to acquiesce, under the circumstances referred to. Under the former view, if the act of the executive committee in March 1906, although ratified by the stockholders at the succeeding annual meeting, was invalid for any reason, the fact remains that no deed was demanded and no stock issued or tendered; and if a surrender of the property accompanied by a refusal to issue the stock was invalid as a fraud upon creditors, the liability of the defendant, if any, would not be upon his subscription, or to pay for stock, nor would the action that was brought and is here to be determined on error be the proper remedy. But we think the latter view, viz. that the company declined to take the property and thereby fulfill the conditions of the subscription is the correct one, in view of all the evidence in the case. Although the resolution of March 11, 1906, recites the nondelivery of the deed as a ground for directing that the stock be not issued, it seems to have been so recited, not as the primary reason for the action taken, but to show that the company was in a position to withdraw from its acceptance of the subscription on the proposed conditions, which acceptance, by its terms, authorized the issuance of the stock only upon a delivery of a deed to the property. There is nothing to show a refusal on defendant's part to deliver the deed, but the fair implication is that he was ready and willing to deliver it, and refrained from doing so because of the feeling among the stockholders that they did not want the property. It is argued that the defendant, as secretary, might have issued the stock to himself. But the form of certificate of stock adopted by the company required the signature of the president as well as that of the secretary; and the defendant, no doubt, felt, as well he might, that he would not be justified in using his position or authority as secretary to complete the transaction between himself and the company by issuing and delivering the stock to himself, or accepting for the company a de-

livery of the deed, in view of the opposition on the part of many of the stockholders, including the manager of the company's business, to taking the property.

We think it is fairly to be implied from the evidence, if not directly stated, that in offering the property and in acting upon the offer the thought or expectation was that it would furnish a suitable location and accommodation for the company's business; in other words, that if taken the property would be occupied and used as the company's place of business. The objection to the property for that purpose that afterwards developed was not confined to the proposed new stockholders, but it appears that soon after the company began business some of the stockholders became dissatisfied with the conditions of the defendant's subscription or the action taken thereon, which grew into a persistent opposition to taking the property and defendant's connection with the company, at least upon the terms of his subscription, so that as early as November, 1907, plans for another building in a different location were discussed. Dr. Mohahan, who was vice president of the company and a member of the executive committee, testified to such facts; he says that a "large number" of the stockholders were dissatisfied, that they wanted to get the defendant out, as the store was too small, that "the store was too small to handle the business of the corporation; the corporation had done a big business and was crowded for room, and their object was to get out of this place and build a new building, sufficiently large to accommodate the growing business." The witness states that this condition existed before the end of the summer of 1907, and that the defendant felt that because of the friction thus caused he ought to get out. He further testified that such pressure was brought upon the defendant "that summer that he was deliberately beaten upon the street," and he (the witness) waited upon him as his physician, that he (the defendant) "was knocked down and knocked insensible too." These facts, we think, account for the nondelivery of the deed, and the failure of the company to demand it and to issue or tender the stock.

It is unreasonable to view defendant's conduct as a waiver of the conditions to his subscription or as having estopped him from denying a liability to pay in money the par value of the stock subscribed for. Finally, the matter was settled by the action taken by the executive committee in March, 1908. It appears that the resolution was drawn by the legal adviser of the company, who was also a stockholder; and we think it was intended as a refusal to take the property, and that such is its effect, when considered in connection with the facts and circumstances leading up to it, whereby the company failed to comply with the conditions of the subscription. Although some of the wit-

nesses speak of turning back or canceling the Terwilliger stock as the object or result of the March resolution, that is not, strictly, a correct explanation of what was done, as we understand the circumstances. Except conditionally, awaiting the exchange of the property for the stock, the defendant had no stock, and none was turned back or canceled. In March, 1908, the parties believed the company to be solvent. Mr. Fry, the manager, testified that the company was then solvent. And after that meeting some of the proposed new stockholders were secured, to whom were issued at least 18 shares of stock upon full payment in money.

Counsel complains of the absence from the former opinion of any reference to a case, which, it is claimed, is on all fours with the case at bar, and sustains the contention that defendant is liable in this action. The case referred to is *Singer, Nimick & Co. v. Given*, 61 Iowa, 93, 15 N. W. 858. Although it was not mentioned in the former opinion, it was not overlooked. We did not then and do not now regard it as a case on all fours with this case. It differs from this case upon the facts in at least two important particulars. If the subscription in that case was conditional, and the evidence on the subject seems to have been conflicting, the condition was that the amount subscribed be paid in buildings of the subscriber and his partner, but without expressly providing against liability, as was done in the case at bar, if the property was not taken. Again, although the corporation in that case went into possession of the property without a conveyance, and occupied it for a time, the company afterwards surrendered the same to the receiver of the defendant subscriber and his partner, and canceled the subscription. Thus the property offered in payment was not the sole property of the defendant in that case, but it belonged to him and his partner, and the affairs of the partnership having gone into the hands of a receiver, and the property not having been conveyed to the company, the company surrendered the property to the receiver; evidently, it would seem, for the reason that the receiver had the better right to it. The court said that if the defendant had conveyed the property, as he alleges he agreed to do, the company would have been, by that much, the more able to pay its creditors. We think it not improper to infer from that statement that the failure of the defendant to convey the property caused its surrender to the receiver, and it is not at all improbable, though the fact is not stated in the opinion, that the property was surrendered upon the receiver's demand. It is certainly reasonable to suppose that the company in surrendering its possession acted on the theory that it had no right to retain possession as against the receiver. The latter may, indeed, have sued to recover possession. The defendant having become incapa-

ble of conveying the property, and having neglected to convey it while he had the power, if he was able at any time to do so, he was by his own fault unable to comply with his offer of the property in payment of his subscription. A very different situation from that in the case at bar.

[12] Prior to the commencement of this action an order was made in the United States District Court, wherein the bankruptcy matter was pending, authorizing the trustee to institute and prosecute the suit and expend therein a stated amount. It was suggested in the argument at the original hearing, and it is stated in the brief filed in support of the petition for rehearing, that by said order the United States court held that the defendant was liable. We would not be inclined, ordinarily, to notice a proposition so entirely without merit; but its repetition in the brief now being considered indicates that counsel relies upon the order permitting the bringing of the suit and the expenditure of money in doing so as a decision contrary to the conclusion of this court upon the facts of the case. Indeed, the brief states that by said order the court held, "under the facts of this case," that the defendant was liable. It would be evident, without any showing as to such an order except that it was made, that the court making it did not decide the question to be ultimately determined in the suit authorized to be brought, but only that the showing was sufficient to justify an order permitting the bringing of the suit. That would be evident from the nature of the proceeding. Such an order would not in any sense control or influence the ultimate determination of the suit upon the facts, even if brought in the same court in which the order had been entered. It would have no force in that or any other court as a precedent to be followed or considered in determining, upon the facts disclosed in the trial of the case brought pursuant to the order, the question as to the right or liability sought to be established by the suit. And we think this is well understood by the profession. But there is nothing in the record here to show that the facts appearing on the trial of this case were before the United States court, or the referee in bankruptcy, on the hearing of the trustee's petition for such order. That petition and the order made by the referee are all we find in this record touching that proceeding, aside from the averments of the petition in this suit as to the order authorizing it to be brought, which add nothing to the showing made by the petition for the order allowing the trustee to sue. The petition in the United States court alleged that defendant had subscribed for 25 shares of stock at the organization meeting, that he had been elected as a director at such meeting and continued as director and secretary until the corporation was adjudged bankrupt, and had not paid for said stock except one share; but nothing was alleged as to the terms or con-

ditions of the subscription, or the occurrences with reference to the stock after the organization meeting, other than, as above stated, that the stock had not been paid for. Nor does the order show that the matter to be determined by the authorized suit was decided by the referee or court. It recites what was decided as follows:

"And this referee having heard the arguments of counsel, and being fully advised in the premises, does find that there is probable cause that a right of action exists in favor of said trustee, and against Charles D. Terwilliger, and it is therefore hereby ordered," etc.

These words do not seem to furnish even a plausible ground for asserting that either the referee or the court, in making the order aforesaid, held that the defendant was liable.

A rehearing will be denied.

BEARD, J., and SCOTT, J., concur.

STATE ex rel. WOLFE, Co. Att., v. DISTRICT COURT IN AND FOR PHILLIPS COUNTY et al. (No. 3936.)

(Supreme Court of Montana. Oct. 5, 1916.)

MANDAMUS — 3(8) — OTHER ADEQUATE REMEDY — COMPELLING ATTENDANCE OF WITNESSES — STATUTE.

In view of Rev. Codes, § 9486, providing that subpoena may be signed and issued by the county attorney, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried, a county attorney was not entitled to a peremptory writ of mandamus commanding the judge of the district court of the county to make an order authorizing the clerk to issue subpoenas for the attendance, at a criminal trial, of witnesses in excess of six, deemed by the attorney to be necessary for the proper prosecution of the case, as mandamus does not lie where other adequate remedy exists, while the judge's refusal could be corrected by the attorney himself.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 20, 23, 27; Dec. Dig. — 3(8).]

Mandamus by the State, on the relation of H. L. Wolfe, Jr., as County Attorney of Phillips County, against the District Court in and for the County of Phillips, and the Honorable Frank N. Utter, as judge thereof. Writ denied, and proceedings dismissed.

H. L. Wolfe, Jr., of Malta, and Norris & Hurd, of Great Falls, for appellant. Slatery & Kline, of Glasgow, for respondent.

SANNER, J. On the 23d day of September, 1916, there was pending and set down to be tried on October 12, 1916, in the district court of Phillips county, the case of State of Montana v. Walter A. James. James stands charged with the crime of murder, and the relator herein, as county attorney of Phillips county, applied to the court for an order authorizing the clerk to issue subpoenas for the attendance of certain witnesses in excess of six, deemed by the county attorney to be necessary for the proper prosecution of the cause. The respondent

judge allowed the application in part and denied it in part, whereupon the relator petitioned this court for a peremptory writ commanding said judge to make the order desired.

It is needless to inquire into the reasons for the refusal, because the relator is not entitled to the relief sought. Section 9486, Revised Codes, provides:

"The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by: * * * 3. The county attorney, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried. 4. The clerk of the court in which an indictment or information is to be tried," etc.

It is perfectly obvious that this statute reposes in the county attorney a power which is subject to no restraint, save his own responsibility under the sanction of his official oath, and subpoenas issued by him pursuant to this statute are in pari materia with those issued by the clerk. The witnesses whose attendance is thus required have the status of other witnesses; they may be called and the right of the state to have them testify is to be determined by the rules that apply to other witnesses; they are subject to contempt for not appearing, and their absence has the same effect in an application for continuance as though they had been subpoenaed by the clerk.

Mandamus does not lie where other adequate remedy exists, and since the respondent's refusal may be corrected by appropriate action on the part of the relator himself, the writ here sought must be denied, and the proceedings dismissed. It is so ordered.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

Ex parte SATTERTHWAITE. (No. 3930.)

(Supreme Court of Montana. Oct. 4, 1916.)

1. INFANTS — 16 — JUVENILE DELINQUENT — PROCEEDING FOR TRIAL — PETITION.

Petition in a proceeding under Act March 7, 1911 (Laws 1911, c. 122), for trial of an alleged juvenile delinquent, failing to make the parents parties, or to allege, as required by section 5, that they are unfit guardians of the child, unwilling or unable to care for it, or consent that it may be taken from them, is insufficient.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. — 16.]

2. INFANTS — 16 — JUVENILE DELINQUENT — PROCEEDING FOR TRIAL — CITATION.

Citation to the parents, in a proceeding under Act March 7, 1911 (Laws 1911, c. 122), for trial of an alleged juvenile delinquent, required by section 5, is necessary.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. — 16.]

3. INFANTS — 16 — JUVENILE DELINQUENT — PROCEEDING FOR TRIAL — JURY.

Right of jury trial, in a proceeding under Act March 7, 1911 (Laws 1911, c. 122), for trial of an alleged juvenile delinquent, secured by sec-

tion 8 to the parent or child unless waived, can be waived only in the manner provided by law.

[Ed. Note.—For other cases; see *Infants*, Cent. Dig. § 16; Dec. Dig. ¶16.]

4. **INFANTS** ¶16—**JUVENILE DELINQUENT**—**PROCEEDING FOR TRIAL—JUDGMENT.**

Before a delinquent child can be taken from its parents and given to the custody and control of the state, in a proceeding under Act March 7, 1911 (Laws 1911, c. 122), the court must, under the requirement of section 14, first adjudicate that the parents are unfit guardians, or unable or unwilling to care for it, and that it is for the best interest of the child and the people of the state.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 16; Dec. Dig. ¶16.]

5. **HABEAS CORPUS** ¶99(1)—**GROUND FOR RELIEF—INVALID PROCEEDINGS—JUVENILE DELINQUENT.**

Under the facts, *held*, the proceedings for trial of a juvenile delinquent under Act March 7, 1911 (Laws 1911, c. 122), were invalid, and afforded no justification for retention of the child, against habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. ¶99(1).]

Application of Margaret Satterthwaite, mother of Mamie Satterthwaite, for writ of habeas corpus. Child ordered released.

D. H. Wittenberg, of Butte, for complainant. W. H. Poorman, Asst. Atty. Gen., for respondent. J. A. Walsh, of Helena, *amicus curiae*.

HOLLOWAY, J. On April 12th of this year, the chief probation officer of Silver Bow county presented to the district court a petition charging Mamie Satterthwaite, a minor child under the age of 17, with delinquency. A judgment was rendered finding the allegations of the petition to be true, and the child was committed to the House of the Good Shepherd at Helena, an institution for delinquent children. Upon application of the mother of the child, this court issued a writ of habeas corpus, and, return thereto having been made, the matter was submitted for decision.

It is the contention of the mother that the record of the trial court discloses on its face such a disregard for the statute or such deviations from the procedure prescribed by law, as to render the judgment void.

[1] 1. *The Petition.* The act relating to juvenile delinquents was approved March 7, 1911 (Laws 1911, p. 320). Section 4 provides that a proceeding for the trial of an alleged delinquent shall be instituted by a duly verified petition filed with the clerk of the court. Section 5 provides for the contents of the petition.

It must charge the delinquency of the child and, in addition thereto, that the parents, custodian, or guardian of the child "are unfit or improper guardians, or are unwilling or unable to care for, protect, train, educate, control or discipline such child or that the parent, parents, guardian or custodian consent that such child be taken from them. The petitioner shall set forth either the name or that the name is unknown to the petitioner (a) of the person having the custody of such child; and (b) of each of the par-

ents, or the surviving parent of a legitimate child, or of the mother of an illegitimate child, or (c) if it alleges that both of said parents, or such mother is dead, then of the guardian, if any, of such child; (d) if it alleges that both parents are, or that such mother is dead, and that no such guardian of such child is known to petitioner, then of a near relative, or that none such is known to petitioner. The petition shall also state the residence of such parties, as far as the same are known to such petitioner. All persons named in such petition shall be made defendants by name and shall be notified of such proceedings in the same manner as is or may hereafter be required in civil proceedings by the laws of this state."

The petition filed in the district court recited that Mamie Satterthwaite was then in the care, custody, and charge of her parents, residents of Silver Bow county. The name and residence address of the mother were given, but the mother was not made a party defendant as the statute requires. The petition is insufficient, in that it fails to charge that the parents of the child are unfit or improper guardians of the child, or unwilling or unable to care for, protect, train, educate, control, or discipline the child. Neither does the petition recite that the parents consented that the child might be taken from them. These proceedings are purely statutory, and substantial compliance with the terms of the statute is essential to the validity of the proceedings. In the present instance there was such failure to follow the plain mandate of the law as amounted substantially to a disregard of it.

[2] 2. *The Citation.* Section 5 of the act provides that upon filing the petition a citation shall issue to the child's custodian to show cause, and to all persons made defendants to appear and answer the petition on the return day. The record of the trial court discloses that, notwithstanding the name and place of residence of this child's mother were known on April 12th, the citation was not served upon her until April 29th. The record further recites that the hearing or trial of the charges against the child was had on April 12th, or 16 days before the mother was notified.

In requiring service of the citation before the hearing is had, the statute has a real purpose in view even aside from any consideration of the question of due process of law:

The parent within the jurisdiction of the court whose residence is known must be made a party to the proceedings. Upon this the statute does not admit of discussion. The mother of this child was not made a party and never had her day in court. If the statute had been complied with in this respect, then the mother would have been entitled to the notice provided by the act before the hearing or trial was had.

(a) She was entitled to a reasonable time to prepare her defense, if any she had.

(b) If the court found the case to be a

proper one, the child might be returned to her mother, for the declared purpose of the act is "that no child should be taken away or kept out of his home or away from his parents or guardian any longer than is reasonably necessary to preserve the welfare of the child and the interest of this state" (section 14, p. 332); and the mother had the right to an opportunity to show, if she could, that this was such a proper case, for the return of her child to her as is contemplated by the statute.

(c) The parents of an alleged delinquent "may be compelled to perform their moral and legal duty in the interest of the child" (section 24, p. 337); but a judgment of this character could not operate upon a parent who was not given a chance to be heard.

Other reasons might suggest themselves; but, in any event, in the wisdom of the Legislature it was deemed indispensable that the notice be given, and for the failure to give it in this instance no excuse is suggested.

[3] 3. *The Trial.* Either the accused child or its parent "shall have the right to demand a trial by jury which shall be granted as in other cases unless waived." Section 3, p. 321. The right to a jury trial is secured. It can be waived only in manner provided by law. *Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038. The mother of this child was not even accorded the opportunity to exercise or waive the right which the statute confers, and the record fails to disclose whether a jury trial was had, whether the child waived her right, or whether she was apprised of it.

[4] 4. *The Judgment.* Before a delinquent child can be taken from its parents and given over to the custody and control of the state, the court must first adjudicate that the parents of such child "are unfit or improper guardians, or are unable or unwilling to care for, protect, educate or discipline such child, and shall further find that it is for the best interest of such child and for the people of this state that such child be taken from the custody of its parents." Section 14, p. 328. The record in this instance omits altogether any reference to this statutory requirement. Indeed, it appears that a formal judgment was not entered at all.

In considering a very similar statute, the Supreme Court of Utah said:

"But when a complaint is filed and one or more of the acts constituting delinquency are set forth, the court only acquires jurisdiction of the child for the purpose of investigating into its condition or conduct. Quite true, in some states, a formal complaint in writing may not be an essential, but it is made so in this state, and hence must be observed; but, when the court has investigated the matters set forth in the complaint and finds some or all of the charges to be true, it does not follow, from that fact alone, that the state should forthwith be substituted in place of the parent or legal guardian and take full control of the person of the child. All that the court

has established so far is that the child is a delinquent in view of the provisions of the act. The question as to whether the parent has been derelict in respect to his duty, or whether he is a competent person or not to have charge of the child, and whether he has forfeited his natural and legal right to continue the relation, has not been touched upon, and no finding or adjudication of that fact has been made. There is nothing, therefore, up to this point, in the proceedings upon which a judgment can be based substituting the state as guardian of the person of the child in place of the parent. The whole fabric of the law, as is clearly shown by all the decisions cited, supra, rests upon this theory, and those laws are sustained by virtue of it. Until something is made to appear that the child is not cared and provided for in respect to the matters involved, there exists no reason for the state to take charge of the person of the child, and hence no right exists to do so under the act. * * * We are constrained to hold, therefore, that before a child can be made a ward of the state, at least two things must be found: (1) That the child is a delinquent within the provisions of chapter 117; and (2) that the parent or legal guardian is incompetent or has neglected and failed to care and provide for the child the training and education contemplated and required by both law and morals." *Mill v. Brown*, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935.

[5] For the reasons indicated, the proceedings had in the district court of Silver Bow county were invalid, and the commitment affords no justification for the retention of the child.

It is ordered that Mamie Satterthwaite be released forthwith from her detention at the House of the Good Shepherd at Helena.

SANNER, J., concurs.

Ex parte PALM. (No. 3923.)

(Supreme Court of Montana. Oct. 7, 1916.)

HABEAS CORPUS ~~30~~(2)—GROUNDS—DEMUR-
RER TO INFORMATION—PROCEDURE.

Under Rev. Codes, §§ 9203, 9204, relative to proceedings upon demurrer to the information, where defendant in a felony case demurred to the information, but, before the court passed upon his objections, the county attorney moved to dismiss and for leave to file a new information, whereupon, as recited by the court's minutes, pending ruling on the demurrer to the information, on motion of the county attorney and by consent of court, the information originally filed was ordered dismissed and a new information ordered filed, the court then stating that he sustained the demurrer to the first information, the new information being filed, defendant could not secure his release from custody on habeas corpus for irregularity in the procedure, which conformed to the statute.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ~~30~~(2).]

Petition for habeas corpus by Jack Palm. Proceeding dismissed, and petitioner remanded to custody.

McCormick & Russell, of Missoula, for petitioner. W. H. Poorman, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. Jack Palm was charged by information with the commission of a felony. He demurred to the information, but

before the court passed upon his objections, the county attorney moved to dismiss and for leave to file a new information. The court's minutes recite the procedure had as follows:

"Pending the ruling on demurrer to information, on motion of county attorney and by consent of the court, the information originally filed is ordered dismissed and a new information is ordered filed. The court then stated that he sustained the demurrer to the first information."

The new information was filed and the accused applied to this court for his release from custody on habeas corpus.

The applicant contends that he is entitled to his release because of irregularities in the procedure in the court below. Sections 9203 and 9204, Revised Codes, provide:

"9203. Upon considering the demurrer, the court must give judgment, either allowing or disallowing it, and an order to that effect must be entered upon the minutes.

"9204. If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, or another or an amended information, directs the case to be submitted to another grand jury, or directs another or an amended information to be filed."

The irregularities of which complaint is made are more apparent than real. The application of the county attorney for leave to dismiss the original information amounted to nothing more than a confession of the demurrer, and the order granting the motion and the order sustaining the demurrer in legal effect amounted to a judgment of the court that the original information was insufficient. That document out of the way then, the question whether a new or amended information should be filed was addressed to the court. It could be filed only upon the order of the court, and such order could be made only in the event that the court first determined that the objection to the original information could be avoided in the new one. Section 9204, above. It is true, as petitioner contends, that the record does not disclose, as it might well have done, that the court entertained such opinion; but the statute does not require that the opinion itself shall be spread upon the record or that the record shall recite that the court had first formed such opinion. The record does disclose that the court ordered the new information to be filed.

The provision of section 9204 is intended to safeguard the rights of the accused against an altogether unwarranted prosecution or the possible malice of the prosecuting officer (*State v. Vinn*, 50 Mont. 27, 144 Pac. 773); but it is not intended to shield an offender against prosecution merely because of some technical defect, irregularity, or insufficiency in the original information or indictment.

The burden of determining whether further proceedings shall be taken is placed upon

the court. It cannot be shifted to the county attorney who may be biased or prejudiced (*State v. Crook*, 16 Utah, 212, 51 Pac. 1091); but when the court orders the new information to be filed, the order itself presupposes the existence in the mind of the court of that opinion upon which alone the order can be made.

The record, though informal, discloses that the rights of the accused were secured, and that the requirements of the statute were observed. *People v. O'Leary*, 77 Cal. 34, 18 Pac. 856. The accused will not be heard to say that he ought to escape even a trial, merely because the county attorney omitted from the original information a material allegation, which he could properly include in a new one.

The proceeding is dismissed, and the petitioner is remanded to the custody of the sheriff of Missoula county, to await further action by the court below.

Dismissed.

SANNER, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

Ex parte HILL. (No. 3924.)

(Supreme Court of Montana. Oct. 7, 1916.)

Original application by Aaron Hill for writ of habeas corpus. Dismissed.

McCormick & Russell, of Missoula, for petitioner. W. H. Poorman, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. The facts in this case are identical with those involved in the application of Jack Palm, 160 Pac. 348, just determined. Upon the authority of that decision this proceeding is dismissed, and the petitioner is remanded to the custody of the sheriff of Missoula county, to be dealt with according to law.

Dismissed.

SANNER, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

LUKINS v. TRAYLOR et al. (No. 1856.)

(Supreme Court of New Mexico. Sept. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §633 — PROCEEDINGS TO TRANSFER CAUSE — DEFECTS AND OBJECTIONS.

Where a bona fide attempt has been made to perfect an appeal under the provisions of chapter 77, Laws 1915, and said provisions have been followed, the same will amount to showing of good cause which will defeat a motion by appellee to docket and affirm the judgment under the provisions of section 4490, Code 1915, notwithstanding the procedure should have been according to the law prior to the act of 1915, supra.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2772-2774; Dec. Dig. § 633.]

2. HUSBAND AND WIFE §131(3) — WIFE'S SEPARATE PROPERTY—PRESUMPTION.

Property acquired by the wife under Desert Land Laws of the United States (Act Cong.

March 3, 1877, c. 107, 19 Stat. 877 [U. S. Comp. St. 1913, §§ 4674-4676]), will be conclusively presumed, in favor of an incumbrancer in good faith and for a valuable consideration, to be her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 474, 476, 478; Dec. Dig. § 131(3).]

Appeal from District Court, Eddy County; G. A. Richardson, Judge.

Action by F. J. Lukins against Lucy A. Traylor and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with instructions.

J. H. Jackson and J. D. Atwood, both of Artesia, for appellant. R. C. Reld, of Roswell, for appellees.

PARKER, J. On May 21, 1915, an appeal was granted to this court, which appeal, under the statute, was returnable on September 28, 1915. At the time of the rendition of the judgment and the taking of the appeal the statute required the filing in the office of the clerk of this court, at least ten days before the return day of the appeal or writ of error, a transcript of the record and proceedings in the court below, and required the same to be printed in cases where the value of the property in dispute exceeded \$1,000, of which class of cases this was one. See sections 4490 and 4508, Code 1915. At that time the rules of this court required the filing of ten printed copies of such transcript. See subsection 4 of rule 13 (141 Pac. xiv) of this court, in force from and after April, 15, 1912. In the meantime the Legislature had changed the law in regard to the filing of transcripts in this court and had provided, by chapter 77, Laws 1915, for the filing of three typewritten copies of the transcript of record, and ten copies of a printed abstract of the record. See sections 6 and 7, c. 77, Laws 1915. This act was approved March 16, 1915, and went into effect June 11, 1915.

It thus appears that after the taking of the appeal in this case, and before the return day thereof, the law had been entirely changed as to the requirements of printing the transcript of record, there being substituted therefor the requirement that an abstract of the record be prepared, printed, and filed. Counsel for appellant adopted the procedure under the new act and filed typewritten transcripts of the record and printed abstracts thereof, on the 23d day of September, five days before the return day of the appeal.

[1] 1. A motion has been filed by the appellees to docket and affirm the judgment, based upon the theory that the old law, which was in force at the time the appeal was taken, is the law which governs the re-

quirements as to perfecting the appeal, which law had not been complied with by the appellant. This application does not meet with favor at the hands of the court. The statute, authorizing such a procedure, provides that where the appellant or plaintiff in error fails to perfect his appeal in time the appellee or defendant in error may produce and file what is commonly called a skeleton record, and may move the court to docket the cause and affirm the judgment; and if it appear that a judgment was rendered and appeal or writ of error has been sued out therefrom, the court shall affirm such judgment, "unless good cause be shown to the contrary." Section 4490, Code 1915. In this case there was a bona fide attempt made by the appellant to perfect his appeal. All of the requirements of the new law (chapter 77, Laws 1915) were complied with. There was much confusion in the minds of practitioners as to the procedure required, and we deem, under all the circumstances, that a bona fide attempt to perfect an appeal under the act of 1915 was a showing of good cause why a judgment should not be docketed and affirmed upon the motion of the appellee or defendant in error.

Assuming, without deciding, that the old law governs the procedure as to the perfecting of an appeal taken before the new law went into effect, in this case, it would be an idle ceremony to now require the printing of the transcript. We have before us three typewritten copies of the transcript and the printed copies of the abstract of record, and we will not, under these circumstances, require the transcript to be printed, as it will serve no useful purpose. It follows that the motion to docket and affirm should be denied.

[2] 2. This case is identical in its facts with the case of State National Bank of Artesia, Appellant, v. Lucy A. Traylor et al., Appellees (No. 1848) 159 Pac. 1006, which has just been decided. The same procedure was had in this case as in that in regard to the demurrers to the complaint, the amendment of the complaint, the demurrers to the amended complaint, and the judgment sustaining the demurrers. For the reasons stated in the opinion in that case, the same result will follow in this case.

For the reasons stated, the motion to docket and affirm the judgment will be denied, and the judgment of the court below will be reversed and the cause remanded, with instructions to overrule the demurrers interposed by the appellees, and to proceed with the cause in accordance with this opinion. And it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

KEMP LUMBER CO. v. STANLEY.

(No. 1889.)

(Supreme Court of New Mexico. Sept. 9, 1916.)

*(Syllabus by the Court.)*1. TRIAL \S 1 — TIME FOR TRIAL — DEMURRER UNDISPOSED OF.

The fact that a demurrer to the complaint, interposed by one defendant, and which attacks the sufficiency of the complaint as against him alone, and does not attack the general sufficiency of the complaint, remains undisposed of when the other defendant is put to trial of the issues between him and plaintiff, furnishes no ground for complaint by the latter defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 1, 2; Dec. Dig. \S 1.]

2. PRINCIPAL AND SURETY \S 126(6) — DISCHARGE OF SURETY—FAILURE TO BRING ACTION AGAINST PRINCIPAL.

In the absence of statute, as in this state, failure of a creditor to present his claim against the estate of a deceased principal, or failure to bring suit against the principal upon request or demand of the surety, does not relieve the surety from liability upon the demand.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. \S 350, 350½; Dec. Dig. \S 126(6).]

Appeal from District Court, Chaves County; McClure, Judge.

Action by the Kemp Lumber Company against J. R. Stanley. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. Mell, of Roswell, for appellant. George S. Downer, of Albuquerque, for appellee.

PARKER, J. This was an action brought by the plaintiff, appellee here, against the defendant, appellant here, and others upon a promissory note. The defendant filed an answer admitting the execution of the note, and by way of new matter alleged that at the time the defendant signed the note, the plaintiff was aware that he was signing as surety, and that another defendant was the principal; that at divers times after the maturity of the note the defendant informed the agent of the plaintiff that the principal debtor was contemplating selling its property and leaving the state, and demanded that the plaintiff sue on said note, telling the plaintiff that he was not financially able to pay said note, but that the principal was and would pay if sued; that the defendant wrote one of the attorneys for the plaintiff and requested him to attach property to secure the payment of said note; that plaintiff knew that one of the members of the firm which was the principal debtor had died, and that it neglected to file any claim against the estate of said member; that plaintiff neglected, failed and refused to act in the matter of the collection of said note until all the members of the firm which was the principal debtor had disposed of their interests in New Mexico and had removed from the jurisdiction of the court; that by reason of

the laches on the part of the plaintiff the defendant had been released from the liability on said note.

The plaintiff demurred to the answer by way of new matter, upon the ground that the same did not state facts sufficient to constitute a defense for the reason that these facts if true were not sufficient in law to discharge the defendant from liability on the said note, either as surety or otherwise. This demurrer was sustained by the court, and, the defendant electing to stand upon his answer and not to plead further, the cause came on for trial.

In the meantime upon motion of the defendant, James M. Dye, administrator of the estate of Frank J. Chance, deceased, was made a party defendant to plaintiff's complaint. He thereupon filed a demurrer to the complaint upon the following grounds, to wit: (1) That the complaint sets up three several causes of action, and that they have been improperly united in that the second and third causes of action do not concern the defendant Dye, administrator, but affect only the defendant Stanley; (2) that said complaint does not state facts sufficient to constitute a cause of action as against the defendant Dye, administrator, in this, to wit: (a) That there is nothing in said complaint to show that this defendant's intestate, Frank J. Chance, was one of the makers of the promissory note set out; (b) that there is nothing in said complaint to show that said promissory note or any claim founded thereon has ever been presented for allowance either to the defendant Dye, administrator, or to the probate court in which the estate of said intestate is being administered. This demurrer of Dye, administrator, was never acted upon by the court. Thereafter a stipulation was entered into between the plaintiff and the defendant Stanley, reciting that the case was composed of three separate causes of action; that the demurrer of the plaintiff to the answer by way of new matter to plaintiff's first cause of action had been sustained, and that the defendant Stanley desired to appeal from the ruling of the court thereon. It was thereupon stipulated and agreed that the second and third causes of action, stated in plaintiff's complaint, be separated from the first cause of action, and that the second and third causes of action be set down for trial upon their merits without delay and without waiting for the outcome of the appeal from the ruling of the court on the demurrer to the answer to the first cause of action, and that upon the failure of the defendant Stanley to plead further as to the first cause of action, a separate judgment might be entered by the court thereon.

Thereafter the first cause of action came on for trial, the demurrer to the complaint of the defendant Dye, administrator, not hav-

ing been disposed of, and the court awarded judgment for the amount due upon the note, together with attorney's fees and costs, from which judgment this appeal is taken.

The defendant objected to going to trial on the first cause of action for the reason that the issues were not made up; a demurrer to the complaint, by the defendant Dye, administrator, being still pending and undisposed of.

[1] 1. The first two assignments of error are to the effect that the court erred in compelling defendant Stanley to go to trial when there remained, undisposed of, the demurrer of the defendant Dye, administrator. In this connection it is to be observed that the cause was at issue between plaintiff and defendant Stanley, the appellant here. The demurrer of the defendant Dye, administrator, raised two points, viz. that there was a misjoinder of causes of action as to him, and that the complaint failed to state a cause of action against him as such administrator. There was no demurrer attacking the general sufficiency of the complaint and no point was raised which could by any possibility avail the defendant Stanley. Under such circumstances he cannot avail himself of the error of the court, if error it was. Counsel relies upon the proposition that where there is a demurrer interposed by one defendant, no trial can be had as to any of the defendants until the demurrer is disposed of, and the judgment on the demurrer inures to the benefit of all. He cites *State v. Williams*, 17 Ark. 371. An examination of that case discloses that the demurrer went to the whole case made by the complaint. It is there pointed out that if the demurrer had been special in behalf of one defendant, and had involved no matter common to both defendants, a different result would follow. See, also, 31 Cyc. 349; *Byington v. Stone*, 51 Iowa, 317, 1 N. W. 647; *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830. In each of these cases the pleadings interposed by one defendant was general and went to the whole cause of action, and was not special to the defendant interposing the same. It is apparent that the doctrine relied upon by appellant applies only when the demurrer goes to the general sufficiency of the entire complaint.

The appellant also, on this point, runs counter to the fundamental doctrine that only such parties as are injured or prejudiced by a judgment or other action of the court have the right to appeal. 3 C. J. p. 629, § 491; *In re Switzer*, 201 Mo. 66, 98 S. W. 461, 119 Am. St. Rep. 731, and note at page 747. It is wholly immaterial to the defendant in this case what becomes of the demurrer of the defendant Dye, administrator.

[2] 2. The fourth assignment is to the effect that the court erred in sustaining plain-

tiff's demurrer to the answer of the defendant by way of new matter. The answer raised two points, viz. that plaintiff, after request by defendant, failed and refused to bring suit against the principal, and that plaintiff failed to file its claim against the estate of one of the makers, then deceased. Counsel admits that he is without authority to support his contention that this discharged the defendant, but he argues that these facts constituted an equitable defense which the court ought to entertain. Counsel for appellee, in support of the judgment, makes the point that, in the absence of statute, failure of the creditor to present his claim against the estate of a deceased principal, or failure to bring suit against the principal upon request or demand of the surety, does not relieve the surety of liability. This proposition is abundantly supported by authority. *Yerxa v. Ruthruff*, 19 N. D. 13, 120 N. W. 758, 25 L. R. A. (N. S.) 139, Ann. Cas. 1912D, 809, and note; 32 Cyc. 91, where a multitude of cases are collected. The action of the court, therefore, in sustaining the demurrer to the answer of the defendant is correct.

It follows that the judgment of the court below should be affirmed, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

SIMON v. EL PASO & S. W. CO.
(No. 1907.)

(Supreme Court of New Mexico. Sept. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §347(3) — TIME FOR TAKING PROCEEDINGS—JUDGMENT NUNC PRO TUNC.

The time within which an appeal may be taken from a judgment entered nunc pro tunc as of a former day, commences to run from the date of the entry of the nunc pro tunc judgment, and not from the former day.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1898; Dec. Dig. §347(3).]

2. JUSTICES OF THE PEACE §161(5)—REVIEW OF DECISIONS — DISMISSAL OF APPEAL — APPEARANCE.

Where an appellee in the district court, on appeal from a justice of the peace, first moves to dismiss said appeal because not taken in time, and afterwards, by evident oversight, files a second motion to "dismiss the cause," but bases said motion upon grounds for dismissal of the appeal only, and takes therein no position and asserts therein no grounds available for a dismissal of the cause, he will not be held to have entered a general appearance so as to waive irregularities in taking or perfecting the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 598; Dec. Dig. §161(5).]

Appeal from District Court, Guadalupe County; D. J. Leahy, Judge.

Action by W. R. Simon against the El Paso & Southwestern Company. From a judg-

ment for plaintiff, defendant appeals. Dismissed.

Hawkins & Franklin, of El Paso, Tex., and Edwin Mechem, of Alamogordo, for appellant. Frank Faircloth, of Santa Rosa, for appellee.

PARKER, J. This case was before the court on a former occasion, and the appeal was dismissed without opinion. A rehearing was granted, and the case was argued upon the appellee's motion to dismiss the appeal. This action originated before a justice of the peace and resulted in a judgment in favor of appellee for the sum of \$200 and costs. The judgment was rendered on the 24th day of October, 1914. On the 3d day of December the appellant appeared before the justice of the peace and filed its appeal bond, which was approved by the justice of the peace, and the case was sent up to the district court by him. On January 23, 1915, a motion to dismiss the appeal was filed in the district court by the appellee, setting up that the district court had no jurisdiction of the cause for the reason that the appellant did not perfect its appeal within ten days after the rendition of the judgment, as required by statute. On the 2d day of April, appellee filed what is denominated a further motion to dismiss, but for some reason the motion is to dismiss the cause and not to dismiss the appeal. The motion is founded upon the same ground as the motion of January 23, 1915, setting out the grounds more in detail. On April 6, 1915, the judge made an entry upon his docket ordering a dismissal of the appeal. On the same day the clerk, in entering up the judgment upon this order of the court, entered up a judgment dismissing the cause instead of dismissing the appeal. On September 29, 1915, appellee filed a motion to correct the judgment and make it conform to the facts, and to show that the appeal and not the cause was dismissed. On the same day the court ordered and adjudged that the said judgment be corrected and made to show that the appeal was dismissed instead of the cause, and that said judgment be entered nunc pro tunc as of the date of April 6, 1915. A motion to vacate the nunc pro tunc judgment filed by appellant was afterwards overruled. On October 22, 1915, an appeal was granted to appellant to this court.

In this court appellee moves to dismiss this appeal upon two grounds: (1) Because this court has no jurisdiction to entertain the appeal for the reason that the appeal was not taken by appellant within six months from the date of final judgment in the district court, the final judgment having been entered on the 6th day of April, 1915, and the appeal having been taken on the 19th day of October, 1915, more than six months after the rendition of the judgment; (2) because this court has no jurisdiction to entertain the appeal for the reason that the district court had no

jurisdiction of the cause, as the appeal was not taken from the judgment of the justice of the peace within the statutory time required for appeal in such cases, to wit, ten days, as shown by the transcript filed herein.

[1] 1. The first proposition involves the question as to the time within which an appeal may be taken from a judgment entered nunc pro tunc as of a former day. It is urged by appellant, we think correctly, that the time within which an appeal may be taken to this court in a case of this kind commences to run from the date of the entry of the nunc pro tunc judgment, and not from the date of the original judgment. This must be so. This case well illustrates the necessity for such doctrine. Appellee waited from April 6th to September 29th, more than four months and a half, before he applied for the correction of the judgment. If he could wait four months and a half, he could wait more than six months. During all this time the appellant could not appeal from the judgment because there was nothing in the judgment from which it desired to appeal. The judgment as it stood upon the records of the district court was a judgment in its favor, it being one of dismissal of the cause of action. If, after expiration of the statutory period of six months for appeal, the appellee could move for the correction of a judgment and secure a judgment correcting the same, and have such judgment entered nunc pro tunc as of the date of the former judgment which was corrected by the latter, and if thereupon the time within which an appeal could be taken by any person aggrieved by such judgment as amended or corrected is to be computed from the date of the original judgment, the right of appeal would be thereby lost and destroyed. Such a proposition is not to be countenanced. The date when the time within which to take an appeal begins to run from a judgment entered nunc pro tunc as of a former day is the date of the entry of nunc pro tunc judgment. 3 C. J. 1058, § 1056.

[2] 2. Appellee urges that the district court had no jurisdiction of the cause for the reason that the appeal from the justice of the peace was not taken within time, and that, consequently, this court has no jurisdiction of the cause. Appellant attempts to demonstrate that the district court did have jurisdiction of the subject-matter and of the person of the appellee. We do not understand appellant to contend that this court has jurisdiction of the cause unless the district court also had jurisdiction of the same. The argument of appellant is based upon the proposition that the appellee entered a general appearance in the district court, thereby waiving any irregularity in the appeal proceedings from the court of the justice of the peace to the district court. The claim that the appellee entered a general appearance is based upon the fact that his second or fur-

ther motion to dismiss was a motion to dismiss the cause. This feature of this motion was evidently in error and by oversight on the part of the appellee. The first motion filed was a motion to dismiss the appeal, and was based upon the same grounds set out in the second motion, viz. that no appeal had been taken within time. The only difference between the two motions is that, in the second motion the reasons why the appeal had not been taken in time are set out in great detail and with great particularity. It is also apparent from the action which the district court took that he treated the motion as a motion to dismiss the appeal, and it was evidently so treated by all the parties concerned. The grounds set up in the motion are not grounds for the dismissal of the cause, but, on the other hand, they are grounds for the dismissal of the appeal. To hold the appellee to an evident misprision would be to put form above substance, and to render the administration of the law a scheme to defeat justice. If there were any evidence in either of the motions that the appellee intended to enter a general appearance or take any position or ground in the motions consistent with a general appearance, he would of course be bound thereby. But the contents of the motion show clearly that no general appearance was intended to be entered. There was therefore no general appearance entered in the cause by the appellee.

This being the situation, it is apparent that the motion of appellee to dismiss the appeal in this court is to be sustained. The district court obtained no such jurisdiction of the cause of action as would be required in order to render its judgment effective for any purpose other than the dismissal of the appeal. The appellee appeared therein and moved to dismiss the appeal for the reason that it had not been taken in time, and the action of the court in sustaining such motion was correct. It would be more logical to affirm the judgment of the district court dismissing the appeal from the justice of the peace; but, as the parties have suggested no such consideration, but have treated the motion to dismiss as the proper procedure, the court will do so also.

The motion to dismiss the appeal will be sustained, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

SHIPP v. EL PASO & S. W. CO. (No. 1906.)
(Supreme Court of New Mexico. Sept. 12, 1916.)

(Syllabus by the Court.)

TIME FOR APPEAL.

The decision of this case is controlled by the decision in *Simon v. El Paso & Southwestern Co.* (No. 1907) 160 Pac. 352, just decided.

Appeal from District Court, Guadalupe County; D. J. Leahy, Judge.

Action by R. R. Shipp against the El Paso & Southwestern Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Hawkins & Franklin, of El Paso, Tex., and Edwin Mechem, of Alamogordo, for appellant. F. Faircloth, of Santa Rosa, for appellee.

PARKER, J. The facts in this case and the record of the proceedings in the courts below are identical with the case of *Simon v. El Paso & Southwestern Co.* (No. 1907) 160 Pac. 352, and for the reasons therein stated, the appeal will be dismissed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

BRADSTREET v. GILL et al. (No. 1893.)
(Supreme Court of New Mexico. Sept. 9, 1916.)

(Syllabus by the Court.)

1. MORTGAGES §283(1)—TRANSFER OF PROPERTY—ASSUMPTION OF DEBT BY PURCHASER.

As between the vendor of mortgaged premises and the vendee who assumes and agrees to pay the mortgage debt, the latter becomes the principal debtor and the former becomes his surety. But as between them and the mortgagee, they both remain principal debtors.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 756; Dec. Dig. §283(1).]

2. APPEAL AND ERROR §1010(1)—REVIEW—QUESTIONS OF FACT.

A finding of fact sustained by substantial evidence will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3981; Dec. Dig. §1010(1).]

3. MORTGAGES §458 — FORECLOSURE — SUPPLEMENTAL COMPLAINT.

Relate to the facts.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1339-1342; Dec. Dig. §458.]

Appeal from District Court, Chaves County; G. A. Richardson, Judge.

Action by Lionel H. Bradstreet against John B. Gill and another. From a judgment for plaintiff, defendants appeal. Affirmed.

R. D. Bowers, of Roswell, for appellants. U. S. Bateman, of Roswell, for appellee.

PARKER, J. Plaintiff, appellee, brought an action to foreclose a mortgage. The note for which the mortgage was given as security was executed by the defendant and appellant Swann. After the execution of the mortgage the defendant Swann conveyed the premises to the defendant appellant Gill, who "assumed and agreed to pay" said note. Later defendant Gill conveyed the premises to other parties who assumed and agreed to pay the said note. On March 13, 1914, prior to the institution of the action, appellee executed a writing to the effect that he agreed with appellant Gill to extend the loan se-

cured by the mortgage until April 1, 1916, on condition that the interest be promptly paid on each semiannual interest period, and if the interest should not be paid promptly, as agreed, then the agreement to cease. It appears that this paper represented only a part of the agreement between appellee and appellant Gill, and that in addition thereto, it was agreed at that time that appellant Gill should pay \$150 past-due interest on the mortgage debt, and that he should give additional security on other lands. It further appears that appellant Gill shortly thereafter found that it would be impossible for him to give the additional security, and that he so informed appellee and offered to return the extension agreement, requesting a return of the \$150 paid by him, or offered to permit the appellee to retain the \$150 if the latter would consent to the extension without the additional security. Appellee refused to either return the \$150 or to stand by the extension agreement. There is conflict in the testimony as to whether this extension agreement was ever delivered to the appellant Gill. Appellee testified that he caused the same to be prepared, and, after signing the same, left it with his attorney in Roswell upon the express understanding that it was not to be delivered until the additional security, mentioned above, was forthcoming. The attorney, through oversight, delivered the same to the appellant Gill. Upon this subject the court found, upon conflicting evidence; that the extension of time for the payment of the mortgage debt was never made, and that the contract of extension was delivered to the appellant Gill by mistake of the person in whose custody it had been left, brought about by hurry and press of business; that the negotiations between the appellee and appellant Gill never became executed because the said Gill failed to give the additional security that had been agreed upon between them; that the \$150 paid by the appellant Gill to the appellee was for past-due interest, and was paid as such interest, for the payment of which interest said appellant Gill at the time was legally bound.

About 60 days after the failure of the negotiations between the parties concerning the extension, the appellee brought this action, but there had intervened between the time of the payment of the \$150 no semiannual interest payment date, although the principal of the note was then past due.

Appellant Gill answered and set up the extension agreement, and alleged that by reason thereof the suit was prematurely brought; that by reason of the sale of the premises by him to other parties, he was a mere surety and was not primarily bound to pay the \$150 which he did pay appellee for said extension agreement; that the refusal of the appellee to return to him the \$150, when he learned that Gill was unable to give the additional security agreed upon, con-

stituted an estoppel against the appellee to say that said extension agreement was not valid and binding.

Appellant Swann answered and set up that he, having sold said premises to appellant Gill, who assumed the indebtedness, became a mere security, and by reason of the extension of time between appellee and appellant Gill, without the knowledge or consent of said Swann, he was released from personal liability. Appellee denied that Gill was merely a surety, and denied all of the allegations of Gill's answer in regard to the estoppel, except that he admitted that he refused to return the \$150, and denied appellant Swann's plea of release from personal liability.

[1] 1. Appellants' first proposition is to the effect that appellants, Gill and Swann, were sureties, and therefore secondarily liable to pay the debt secured by the mortgage; the primary obligation being upon the persons who had purchased the land from Gill and had assumed and agreed to pay the debt; therefore at the time appellee and appellant Gill agreed upon the extension, and Gill paid the \$150, the amount of past-due interest, Gill was only secondarily liable for such interest. We fail to understand the application of this proposition. While it is no doubt true that, as between a vendor and a vendee of mortgaged property, where the vendee assumes and agrees to pay the incumbrance, the vendee becomes the principal debtor and the vendor becomes his surety. But how the holder of the mortgage can be compelled by the contract of third persons to recognize this new relationship we do not understand. So far as the appellee is concerned, the two appellants were both principal debtors, and he had a right to take a deficiency judgment against such. See 27 Cyc. 1352(c), 1356(e), and cases there collected; 2 Jones on Mortgages (7th Ed.) §§ 760a-762.

[2] 2. The second point made by appellants is that the extension agreement was a valid agreement under the circumstances, and the court erred in holding that the same was invalid. A complete answer to this proposition is that the court found as a matter of fact that the extension agreement was never delivered and never became an executed contract between the parties. This he found upon substantial evidence, and under the well-recognized rule in this jurisdiction, his finding will not be disturbed. Therefore, so far as this case is concerned, there was no agreement for an extension, and the whole argument upon this second point fails. As a part of the argument under this point it is further urged that the court should have held that there was an extension agreement because the appellee kept the \$150. It is urged that the testimony shows that this \$150 was a part of the consideration for the extension agreement, and that if the appellee elected to retain the same he must perform his part of the contract. The trouble with

this argument is that the court found, upon substantial evidence, that this \$150 was not a part of the consideration for the extension, but was for the payment of past-due interest, and was so accepted and received by the appellee. The consideration for extension, as it appears from the record, was the agreement to thereafter pay the semiannual interest promptly when due and to give additional security. The appellant Gill having failed to give this security, the contract of extension never became executed.

[3] 3. The appellant Swann urges that he, by his sale to appellant Gill, and the latter's assumption of the indebtedness, became a surety for appellant Gill, and that therefore the extension agreement made without his knowledge or consent released him from further liability. The trouble with this argument is that there was no extension agreement, and, consequently, if Swann was a surety for Gill, he was not released, and, as between him and appellee, he was not a surety, but was a principal debtor.

4. Appellants complain of the action of the trial court in allowing the appellee to file a supplemental complaint in the cause after the occurrence of the next semiannual interest date. It is argued that this was improper to thus bolster up a complaint which had been prematurely filed on account of the fact that there had been no default in the payment of interest at the time of the filing of the original bill. There is no merit in this contention. The mortgage was past due, and the appellee, under the terms of the instrument, was authorized at the time he filed the complaint to maintain the bill. The supplemental bill, so far as we can see, was entirely unnecessary and in no way prejudiced the right of the appellants.

It follows that the decree of the court below was correct, and should be affirmed, and the cause remanded for such further proceedings, if any, as may be necessary or proper; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

WARD v. BUCHANAN et al. (No. 1869.)
(Supreme Court of New Mexico. July 17, 1916.
Rehearing Denied Oct. 18, 1916.)

(Syllabus by the Court.)

1. TRUSTS §1 — CREATION — "EXPRESS TRUSTS."

Express trusts are those which are created by the direct and positive acts of the parties, by some writing or deed, or will, or by words either expressly or impliedly evincing a desire to create a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1; Dec. Dig. §1.

For other definitions, see Words and Phrases, First and Second Series, Express Trust.]

2. FRAUDULENT CONVEYANCES §273, 282, 301(1)—TRANSACTIONS INVALID—EVIDENCE.

Upon an inquiry into the validity of a conveyance alleged to be fraudulent, a fraudulent

intent of the grantor must be shown and a knowledge thereof or a participation therein by the grantee must likewise be proven, and the knowledge on the part of the grantee may be proven by circumstances tending to show a knowledge of the designs of the grantor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 805, 817, 818, 904; Dec. Dig. §273, 282, 301(1).]

Appeal from District Court, Quay County; T. D. Leib, Judge.

Action by J. F. Ward against William T. Buchanan and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with instructions.

This action was brought in the district court of Quay county by the plaintiff below, who is appellee here, to quiet title to certain real estate described in his complaint, a number of defendants being joined, with only one, the appellant Roy Buchanan, appearing in answer. The facts, briefly stated, are as follows:

The land in question was owned by Rebecca T. Buchanan, who, on January 27, 1911, transferred the same to her son, Roy Buchanan, then a minor, reserving a life interest in the property; the consideration for the deed being natural love and affection and an agreement by the minor son to support his mother. A few months thereafter the said Roy Buchanan and his mother joined in a deed to one W. F. Buchanan, the father and husband, respectively, of the grantors, for an express consideration of \$5,000, no part of which Roy Buchanan received. This latter deed was also made during the minority of said Roy Buchanan.

While the said W. F. Buchanan was in possession of the property referred to, the receiver of the National Bank of Commerce of Tucumcari, N. M., one H. B. Jones, held a certain judgment against the said William F. Buchanan, upon which execution was duly issued, and the property described in the complaint was sold thereunder and bought in by the said receiver, who thereafter sold the property to the appellee, J. F. Ward, who, as plaintiff in the court below, instituted the suit against the several members of the Buchanan family, seeking to quiet his title.

The defendant who appeared, Roy Buchanan, made answer to the complaint, denying generally the allegations thereof, and admitted that he asserts an interest in the real estate described in the complaint, and by way of cross-complaint, seeking to quiet his title to the property in question upon the ground that the deed executed by himself and his mother for the property referred to was executed during his minority on the 21st day of April, 1911, that on coming of age on the 19th day of December, 1913, he became the owner in fee simple of the land in controversy, and by his cross-complaint he disclaimed and disaffirmed the execution of the said deed, and claimed the entire

property as his sole property. Relief is prayed that his title be held good and valid, and that the said J. F. Ward and H. B. Jones, receiver, be barred and estopped from claiming any right, title, interest, or estate of any kind or nature in and to the lands described, and that his title be quieted and set at rest.

The receiver, H. B. Jones, and appellee, J. F. Ward, made answer to the cross-complaint of Roy Buchanan, and each set up the following facts: That the said Rebecca T. Buchanan was the owner in fee simple of the property described in the complaint; that at the time she executed the deed in favor of her son, Roy Buchanan, without consideration, it was not her intention to divest herself of the ownership of the said property, but that she continued to be the true owner thereof until she executed and delivered the deed to W. F. Buchanan; that her purpose in concealing the ownership of the said property by her conveyance to Buchanan was to avoid payment of certain indebtedness to certain creditors and especially to J. A. Street; that the said Roy Buchanan had never had any interest in the property except as the holder of the record title thereof in trust for the said Rebecca T. Buchanan, and in pursuance of said trust and without any consideration to him, said Roy Buchanan joined in the deed to said W. F. Buchanan, who was a purchaser from the said Rebecca T. Buchanan. The issues were found in favor of plaintiff, from which judgment this appeal was prayed.

Reed Holloman, of Santa Fé, for appellants. H. H. McElroy and C. C. Davidson, both of Tucumcari, for appellee.

HANNA, J. (after stating the facts as above). While there are numerous assignments of error presented for our consideration, the one vital question in this case is whether there was a trust created by the deed from Rebecca T. Buchanan to her son, Roy Buchanan, who is appellant here and who seeks to disclaim and disaffirm his deed conveying said real estate to W. F. Buchanan, because the same was executed during his minority.

The right of a minor to disaffirm his deed after attaining his majority is not questioned by the appellee. His contention is that the conveyance in trust being valid as between the parties to the instrument, no rights of creditors having intervened, and the property which was subject to the trust having passed to an innocent purchaser through the exercise of a power of sale in the trustee, that all the title possessed by the trustee has passed out of him; that the trust having been executed, it may now be proven by parol, and, by reason of the fact that Rebecca T. Buchanan joined in the deed with the trustee, her life estate was thereby divested, and the entire interest of both trustee and cestui que trust has merged in the appellee

through the purchase from the receiver. It is contended by appellee that the trust is an express trust, and such was necessarily the case because, if one existed, it was by reason of an agreement between the parties, and clearly does not arise by implication of law.

[1] Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will, or words, either expressly or impliedly evincing a desire to create a trust. 39 Cyc. 24; *Mining Co. v. Hamilton*, 14 N. M. 271, 91 Pac. 718. The existence of the trust, it is contended by appellee, is shown by a number of circumstances. First, by alleged admissions or statements of the said Rebecca T. Buchanan, which will be more fully referred to hereafter; her retention of control and possession in contradiction of her avowed purpose in making the deed; the contradiction by her testimony, as a witness, of the terms of the deed; and her final sale of the property to W. F. Buchanan for a consideration of \$5,000, no part of which was received by Roy Buchanan; other minor facts, such as that she caused the deed to be recorded, and her reservation of a life estate in the property conveyed, are likewise relied upon as circumstances evidencing the existence of the alleged trust.

Appellant's assignments of error are to be grouped under several propositions, but we conclude that the one vital question being whether or not a trust has been proven, the assignments of error which pertain thereto are the only ones which are necessary for consideration.

[2] In this connection it is first contended by appellant that there is no evidence that the said conveyance from Rebecca T. Buchanan to Roy Buchanan constituted, or was intended to constitute, a trust in favor of said Rebecca T. Buchanan, or of any other person. It is next contended that there is no evidence to sustain the findings of fact by the court to the effect that such a trust was proven. So far as the record discloses, the evidence of the existence of a trust rests upon the testimony of one Myron B. Keator, a notary public, who took the acknowledgments of the grantor, Rebecca T. Buchanan, and who testified concerning certain statements made to him by her at the time she executed the instrument. The witness testified that Mrs. Buchanan stated that she was making the deed for the homestead and several other pieces of her property to the son, because she was afraid that, inasmuch as she had signed notes with her son, Tom Buchanan, she might have to pay these obligations out of her property. This witness further testified that he had left the deed with Mrs. Buchanan, who further stated that Roy Buchanan had agreed to transfer the property back to her after the settlement of the Tom Buchanan notes on which she was surety, and that she did not mean the deed as an actual transfer of the property; that she was not dividing her prop-

erty with the children, and that Roy Buchanan had no funds to purchase the property with.

Appellant objected to the testimony of this witness, upon the ground that the statements made were privileged communications and were not binding upon appellant because not made in his presence, and as to the first objection introduced some evidence of a former employment of a partner of Mr. Keator, who was an attorney at law, and who had been consulted by Mrs. Buchanan as a client. From the present state of the record we do not believe this objection is well taken, for reasons not necessary to be stated further than to say that the relation of attorney and client was not clearly established, and the privilege, if existing, would be in favor of Mrs. Buchanan and probably could not be availed of under the circumstances of the case by Roy Buchanan.

It is not shown that the alleged statements or admissions of Mrs. Buchanan were made in the presence of the defendant Roy Buchanan, nor is there anything to indicate that he had any knowledge either of the statements or of the condition which the statements would tend to indicate existed at the time. There is no contention that the defendant Roy Buchanan had any actual notice of the alleged fraudulent intent of the grantor, but, as we understand the position of appellee, it is argued that notice of the condition must be imputed to the grantee, Roy Buchanan, by reason of the circumstances which we have pointed out, and which, it is contended, he must have known.

A deed, absolute in form, is not to be set aside except upon the clearest proof. Nor can a trust be proven except upon proof of circumstances clearly evidencing such intention.

It is seriously contended by appellee that the conduct of Mrs. Buchanan and her son, Roy Buchanan, as well as her testimony, are wholly inconsistent with the theory that no trust was contemplated. This contention, it is argued, is supported by the fact that the consideration expressed in the deed was natural love and affection, and the agreement by Roy Buchanan to support the mother. We cannot agree with this argument because the consideration referred to is a good and valuable consideration and would support the instrument in the absence of fraud. It is further contended that by her testimony she contradicted her expressed purpose in the deed, by stating that one of her purposes in making the conveyance was her belief that her son was better able to manage the property than herself. Even though this be true, it is not contradiction of the terms of her deed, and in itself is not sufficient to cast a suspicion thereupon.

The alleged inconsistency of her statement as to his better qualifications for management of the property and her reservation of a life estate is next cited by appellee as a

circumstance tending to support the alleged trust, and again we see no inconsistency here, as she might properly possess the life estate and yet elect to turn over the management of her property to her son. We are not unaware that retention of possession of property in the face of an absolute conveyance is some evidence of a fraudulent intention. But in this case it is not inconsistent with her interest reserved by the deed which was a life interest, or life estate. The collection of rents by Mrs. Buchanan is further cited as an evidence supporting the contention of appellee, but again this is not inconsistent with her reserved estate. The fact that she joined in the deed to W. F. Buchanan and immediately thereafter left for California, and that she received the consideration expressed in said deed, are further facts cited tending to show that she was the real party in interest; but again these facts are not inconsistent, but rather are in harmony, with the terms of the deed reserving to her a life estate in the property, there being nothing disclosed by the record which would indicate that the life estate conveyed by her was not worth the expressed consideration in the deed.

We have been unable to find any case involving facts similar to those now under consideration in the case at bar. The necessity to prove the existence of the trust, however, in order to defeat appellant's right to rescind his deed executed during minority, which trust depends upon the alleged intent of the grantor to conceal her property in order to hinder, delay, or defraud her creditors, makes this case analogous to the numerous reported cases where a conveyance for such purpose is sought to be set aside by creditors on the ground of fraud. And while such is not the purpose here, still, it is contended, that if the purpose was to defraud creditors, even though no creditors were actually defrauded, such purpose would negative a bona fide purchase or sale of the property and create a trust which the plaintiff below, or appellee here, can avail himself of, if capable of proving, and which if existent will clearly preclude the attempt of appellant to rescind his deed executed while a minor.

In an early case (*Foster v. Hall*, 12 Pick. [Mass.] 89, 22 Am. Dec. 400), it was held that in an inquiry into the validity of a conveyance alleged by the creditors of the grantor to be fraudulent, they may give in evidence the acts or declarations of the grantor, prior to the conveyance, tending to show that he had a fraudulent intent, without being required to prove a knowledge on the part of the grantee, of the particular acts or declarations from which such an intent of the grantor was to be inferred; the conveyance, however, not to be defeated unless it was also proved that the grantee had knowledge of the fraudulent intent, which knowledge on the part of the grantee may be proved

by any circumstance tending to show a knowledge of the designs of the grantor. In other words, it was decided that a fraudulent intent of the grantor and a knowledge thereof or participation therein by the grantee are both to be proved. This rule is not only a salutary one, but a necessary one, unless deeds absolute in form are to be lightly set aside and thereby property rights seriously unsettled, if not destroyed.

It was also said, in another early case (*Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209):

"To prove fraud in the grantor, his conduct and his declarations before the conveyance may be the best, and often the only, evidence within the power of the creditor. * * * If fraud is thus proven upon him, then the knowledge of it on the part of the grantee is to be proved, which may be done by showing a trifling consideration, or none at all; by acts inconsistent with the bona fide ownership of the property; by confessions of the nature of his bargain; or by other circumstances tending to show a knowledge of the designs of the grantor."

It has also been said, and is doubtless the rule, that where the grantee has had notice of facts calculated to put a reasonable and ordinarily prudent man upon inquiry, which, if followed, would lead to a discovery of the fraudulent intent of the grantor, it is sufficient to charge him with notice of the fraud. See *Moore on Fraudulent Conveyances*, vol. 2, p. 578; *Kansas Moline Plow Co. v. Sherman*, 3 Okl. 204, 41 Pac. 623, 32 L. R. A. 33.

Tested by the foregoing rules, we conclude that there is no evidence disclosed by the record in this case tending to show that a knowledge of the alleged fraudulent intent of the grantor was had by the grantee, and in fact there is nothing that indicates that the grantee was acting in any way inconsistent with his character as the grantee in an absolute deed of conveyance. The record is devoid of all evidence, as we read it, which would tend to charge the grantee with responsibility as a trustee under an express trust, and because of this failure to bring home to the grantee a knowledge of the alleged conditions, the cause must be reversed and remanded, with instructions to quiet title of appellant in the fee. And it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

STATE ex rel. NEW MEXICO STATE
BANK v. MONTOYA, Treasurer.
(No. 1891.)

(Supreme Court of New Mexico. Sept. 20, 1916.)

(Syllabus by the Court.)

STATUTES § 248—CONSTRUCTION—TIME OF
TAKING EFFECT—CONSTITUTIONAL PROVI-
SION.

Held, that the constitutional limitation appearing in section 23 of article 4 of the Constitution, providing that laws shall go into effect

90 days after the adjournment of the Legislature enacting them, except general appropriation laws, etc., is a limitation upon the right of the Legislature to provide a shorter period than 90 days after the adjournment of the Legislature when legislative enactments shall become effective.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 330; Dec. Dig. § 248.]

Appeal from District Court, Socorro County; M. C. Mechem, Judge.

Petition by the State, on the relation of the New Mexico State Bank, for mandamus to Max Montoya, Treasurer of Socorro County. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action for mandamus against the county treasurer of Socorro county, N. M. The petition recites that the relator, the New Mexico State Bank of Socorro, N. M., on June 14, 1915, applied to the board of county commissioners of Socorro county to be designated a depository of public funds of said county under the provisions of chapter 57 of the Laws of 1915, and under the direction of said board executed a bond in the sum of \$17,000, which was duly approved, and took other steps necessary to qualify as a depository of such funds, all of which was approved by the said board on June 26, 1915, and that the respondent is, and was at the time of the relator's said application and qualification, the duly elected and acting treasurer of said county and had in his hands as such, subject to deposit under the provisions of said act, the sum of \$100,000, of which amount the relator was entitled to receive the sum of \$15,000; that respondent had refused to deposit said sum of \$15,000 with the relator as it was his duty to do under the provisions and requirements of said act, or to deposit any other sum. The answer makes no question as to the qualification of the relator, or as to the fact of defendant being county treasurer of said county and having in his hands the funds stated in the alternative writ, but sets up as a defense that at the time the relator made application to be designated as a depository of public moneys, and at the time the said application was approved, said chapter 57 of the Laws of 1915 was not in effect. On July 21, 1915, the relator filed a motion to quash the answer and return on the ground that the same was insufficient and presented no defense to the alternative writ. Thereafter the trial court entered an order overruling the motion to quash, denying the peremptory writ, and dismissing the case, from which judgment this appeal was prayed.

Barnes & Nicholas, of Socorro, for appellant. James G. Fitch, of Socorro, for appellee.

HANNA, J. (after stating the facts as above). The appellant in his argument seems to assume that an attack by appellee is made

upon his motion to quash the answer which was filed in the court below, and cites authority in support of his contention that this was the proper procedure for him to follow. By the brief of appellee, however, it appears that no attack of this character is seriously urged, and appellee takes the position that the motion to quash respondent's answer was rightly overruled, and evidently elects to present the question upon its merits, rather than upon one of the technical procedure.

This court held, in a recent opinion in the case of *State ex rel. Garcia v. Board of County Commissioners*, 157 Pac. 656, that an answer to an alternative writ of mandamus under our statutes may assign any legal reasons upon which respondent relies to defeat the issuance of the peremptory writ, as well as plead the facts, if any exist, upon which he relies to defeat the issuance of the same.

The present case, like the *Garcia Case*, raises a legal question by the answer to the writ, and the point relied upon by appellant for a reversal is that the alternative writ states a clear case of qualification by relator under the terms and provisions of chapter 57, Laws of 1915, to receive public funds of Socorro county, N. M., on deposit; that the respondent, the treasurer of said county, was under a legal and absolute duty to make the deposit applied for under the terms of said act; that he was in a position to do so, and failed and refused so to do; that the performance of his official duty in the premises can be properly enforced by mandamus, and in refusing to compel performance of this duty the trial court committed error.

The propriety of the ruling of the trial court in dismissing the motion to quash and sustaining the legal objection set out in the answer is the sole ground in inquiry to which our attention is directed. The legal question raised by the answer was whether or not chapter 57 of the Laws of 1915 is a valid legislative enactment, and whether or not said act was in force at the time relator undertook to invoke its provisions to compel the relator to perform the duties imposed upon him by said act. If it was not a valid legislative enactment, or if it was not in force at the time, the action of the trial court was correct, and this, therefore, is the sole point to be determined.

By the act in question it was provided that the act should go into effect and be in full force from and after January 1, 1917. The act was approved March 12, 1915, and is asserted to be in conflict with section 23 of article 4 of the Constitution of New Mexico, providing as follows:

"Laws shall go into effect ninety days after the adjournment of the Legislature enacting them, except general appropriation laws, which shall go into effect immediately upon their passage and approval. Any act necessary for the preservation of the public peace, health or safety, shall take effect immediately upon its passage and approval, provided it be passed by two-

thirds vote of each House and such necessity be stated in a separate section."

Appellant relies upon the opinion of Mr. Justice Lamar in the case of *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060, which, briefly stated, lays down the rule that:

"The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

It is argued that the constitutional provision in question means what it says and that all laws shall go into effect 90 days after the adjournment of the Legislature enacting them, other than those in the excepted classes, and that section 24, c. 57, of the Laws of 1915, is in direct and positive conflict with the provision of the Constitution, in that it attempts to make the enactment take effect and be in force at a date later than 90 days after the adjournment of the Legislature enacting it.

Appellant further contends, under the authority of the case of *Supervisor v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044, that:

"The general proposition must be conceded that, in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded."

And that therefore section 24 of chapter 57, being in conflict with the constitutional provision on that subject, would fail, and the remainder of the act, being in no sense dependent upon that provision, and being complete within itself, would take effect, according to the constitutional requirements, 90 days after the adjournment of the Legislature enacting it. This being so, it was in full force and effect at the time the relator made application to be designated under it to be a depository of the public funds of the county, and that respondent, when the relator had qualified, violated the express requirements of the act, and failed in the performance of his duty as required by it, and the performance of this duty should have been required by peremptory writ of mandamus.

These contentions of appellant are answered by appellee on the theory that section 23 of article 4 was intended as a prohibition against laws (except as therein provided) taking effect within the 90-day period, and not as a prohibition against their taking effect after the lapse of such period.

It is pointed out by appellee that Mr. Justice Lamar, in the same opinion (*Lake County v. Rollins*), used the following language:

"If the words convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted."

In this connection, appellee points out that, in the construction of the constitutional provision such as the one under consideration, the Constitution as a whole must be examined, and, if different portions seem to conflict, the courts must harmonize them, if practicable and give such a construction as will render every clause operative. A number of provisions in our state Constitution are pointed out as either contemplating or requiring that certain laws shall not go into effect until after the expiration of the ninety day period. The other provisions of the Constitution referred to are, first, the provision for legislative reapportionment, appearing at the end of article 4 of the Constitution, which, it is suggested, could not go into effect at the end of 90 days without cutting off the term of all members of the Legislature affected by such reapportionment; and it is contended by appellee that it was evidently the intention that the reapportionment should take effect only at the next election of members of the Legislature.

Again, it is suggested that by section 27 of article 4, prohibiting the changing of compensation of any officer during their term of office, the Legislature is precluded from passing a law for such changing of compensation, if desired, unless the act should be designed to go into effect at a period later than 90 days after its enactment; this affording another illustration of legislation which could not be made effective under the provisions of section 23 of article 4. Appellee also points out that the Constitution gives the Legislature a free hand in the organization of counties by general law, and that it may abolish in time all of the present county offices and provide new offices with new powers, duties, and functions, but that by reason of the provisions of section 2 of article 10, to the effect that all county officers shall be elected for a term of two years, it would appear that the Legislature would not be able to legislate any of these county officers out of office during the term for which they were elected by abolishing their office; hence, such a law could not go into effect until the two-year term had expired.

Upon these several contentions and upon a further argument that in this country it has been quite common practice, both in Congress and in the several states, to provide for the taking effect of legislative enactments at often longer periods of time after the passage of the acts and that the intent of the Constitution in the limitation of 90 days, as referred to in the provision under consideration, and the purpose to be served thereby, is to prevent the practice of making laws take effect immediately upon their passage, and before they could become known to the public, which intent and purpose have resulted in the adoption of constitutional provisions similar to the one under consideration, but that such limitations do not inhibit the fixing of a later time than that of

the constitutional provision, as a proper time for the taking effect of the enactment.

In the case of *State ex rel. Cummings v. Trewitt*, 118 Tenn. 561, 82 S. W. 480, a similar constitutional provision was under consideration; the provision of the Constitution of Tennessee (article 2, § 20) being as follows:

"No law of a general nature shall take effect until forty days after its passage unless the same or the caption shall state that the public welfare requires that it should take effect sooner."

And the Supreme Court of Tennessee said, in construing such provision, that:

"It is clear that under this provision of the Constitution a statute will always take effect at the expiration of 40 days from its passage—that is, 40 days from its approval by the Governor (*Logan v. State*, 3 Heisk. [Tenn.] 442, 445)—unless a contrary purpose appear on the face of the act itself; but there is nothing in this provision to prevent the Legislature fixing a date subsequent to the expiration of the 40 days, or at any time subsequent to the passage of the act, for its becoming operative. The purpose of the section of the Constitution above quoted was to secure a sufficient interval between the date of the passage of an act, and its going into effect, to enable the public to become acquainted with its terms and to conform thereto (*Cooley*, Const. Lm. marg. p. 156; *Sammis v. Bennett*, 32 Fla. 458, 14 South. 90, 22 L. R. A. 48), with the saving that, if the public should require it, the Legislature, by special direction to that effect, might cause it to become operative at once. There is nothing in the provision referred to, or in any other provision of the Constitution, to forbid the Legislature making even a longer interval than the one that was specially designated as a safeguard."

In an earlier case, *Price v. Hopkin et al.*, 13 Mich. 318, the Supreme Court of that state, in passing upon the constitutional provision (article 4, § 20) that "no public act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, unless the Legislature shall otherwise direct," said:

"The purpose of this provision undoubtedly was to give the people time and opportunity to learn what changes were to be made in the law before those changes should come into operation, and some countenance is therefore afforded to the position of defendants that the law becomes notice from its passage, notwithstanding it has not yet taken effect. But the idea embodied in this constitutional provision is, not that the passage of the law is notice, but that 90 days from the end of the session are required to bring knowledge of the law to the public at large. * * * And when the Legislature, for reasons satisfactory to them, decide to postpone the period for the statute to come into operation to a later period, it is to be presumed, nothing appearing to the contrary, that in the particular case it was deemed important that more time be allowed for citizens to ascertain the proposed changes, and to become acquainted with their bearings. The time thus allowed is the reasonable time fixed by the Legislature to bring knowledge of the law home to parties interested, before they are required to govern their actions by it."

The reasoning of the two cases referred to would clearly show the intent of the framers of the Constitution in adopting the limitation as contained in section 23 of arti-

cle 4, and we cannot consider this provision as otherwise than a limitation upon the time within which laws can be made effective, and it would clearly appear that, if the Legislature in its wisdom conceived that public interest was best to be served by providing for a longer period than 90 days after the adjournment of the Legislature within which their enactments should become effective, such would be in harmony with the spirit and purpose of the Constitution and should not be interfered with by a strict interpretation of said section 23. We therefore hold that the constitutional limitation appearing in section 23 of article 4 of the Constitution, providing that laws shall go into effect 90 days after the adjournment of the Legislature enacting them, except general appropriation laws which shall go into effect immediately upon their passage and approval, is a limitation upon the right of the Legislature to provide a shorter period than 90 days within which laws shall become effective, and does not preclude the Legislature from fixing a longer period than 90 days after the adjournment of the Legislature, when legislative enactments shall become effective.

Based upon our conclusion, it is evident that the answer of respondent stated a sufficient legal objection to the petition for a writ of mandamus, and that this objection to the petition was therefore properly sustained by the trial court, for which reason the judgment of the trial court must be affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

STATE v. PRUETT. (No. 1845.)
(Supreme Court of New Mexico. Sept. 23, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1151—APPEAL—DISCRETION OF COURT—CONTINUANCE.

A motion for a continuance is addressed to the sound discretion of the trial court which will not ordinarily be disturbed, especially in the absence of injury to the moving party.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.]

2. CRIMINAL LAW §1169(1)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of an item of evidence which is immaterial and which, technically, is inadmissible, where it in no way reflects upon the guilt or innocence of the defendant, and is consequently not prejudicial to him, is not sufficient cause to reverse a judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169(1).]

3. HOMICIDE §158(1)—EVIDENCE—ADMISSIBILITY—THREATS.

Evidence of the communication to the deceased of a threat of the defendant against him, is relevant, where, as in this case, the evidence for the prosecution as to the actual occurrence at the time of the homicide is entirely circumstantial, and where the action of the deceased,

under the circumstances, was to be determined without the aid of direct proof, except as developed by the testimony of the defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 293; Dec. Dig. § 158(1).]

4. CRIMINAL LAW §459—EVIDENCE—OPINION EVIDENCE—ADMISSIBILITY.

Any witness may express an opinion, upon a nontechnical subject, based upon data which he has observed, when it is impossible by word of mouth or gesture to reproduce the data before the jury so that the jury may intelligently draw the inferences therefrom which the witness has drawn. The principle applies to opinions in regard to fingerprints of a man.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1048-1050; Dec. Dig. § 459.]

5. WITNESSES §374(1)—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE.

Evidence of a meeting of witnesses for the prosecution to organize a mob to hang the defendant, if it establishes such meeting, is admissible to show bias and prejudice of such witnesses. But where such evidence fails to show such meeting, it was correct for the court to strike it out on motion of the prosecution.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1201; Dec. Dig. § 374(1).]

6. HOMICIDE §193—EVIDENCE—ADMISSIBILITY.

Evidence that the deceased knew he would meet the defendant on the road at a certain place and that he went there armed is material and competent in a case like the present as reflecting upon the state of mind and probable conduct of the deceased when he met the defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 416; Dec. Dig. § 193.]

7. CRIMINAL LAW §419, 420(10)—WITNESSES §382—HEARSAY EVIDENCE—IMPEACHMENT OF WITNESSES.

The defense put upon the stand a witness, Silas Crook, who testified to the circumstances of the first difficulty between the defendant and the deceased, occurring about one week before the homicide. He was asked on cross-examination whether, on the next day, he had not told one Walter Hern that the wife of deceased would be a widow within a week. On rebuttal, the prosecution was permitted to prove by the witness Hern that the witness Crook had made such statement. The evidence is held to be inadmissible from any standpoint, and to be highly prejudicial to the defendant, requiring a reversal of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 980-983; Dec. Dig. § 419, 420(10); Witnesses, Cent. Dig. § 1223; Dec. Dig. § 382.]

Appeal from District Court, Union County; Leib, Judge.

James C. Pruett was convicted of voluntary manslaughter, and appeals. Reversed and remanded, with instructions to award a new trial.

O. P. Easterwood, of Clayton, for appellant. H. S. Bowman, Asst. Atty. Gen., for the State.

PARKER, J. Appellant shot and killed one Cleasie Cheek on October 17, 1914. He was indicted for murder on March 5, 1915, and thereupon entered a plea of not guilty on that day. The case was set down for trial for March 12th, but the trial did not begin until March 15, 1915. Appellant was

convicted of voluntary manslaughter and sentenced to the penitentiary for the term of not less than eight nor more than ten years.

[1] 1. Upon the coming in of the indictment and the entry of the plea of not guilty, appellant filed his motion for a continuance, based on the following grounds, viz.: (1) That his principal attorney, Theodore Pruett, a brother of appellant, resided in Anadarko, Okl., and was then engaged in the trial of causes in the district courts of Oklahoma, and on that account was unable to absent himself from his business there to appear at Clayton, N. M., where this trial was to be had; that he had employed Mr. O. P. Easterwood of Clayton, N. M., to assist his principal attorney, but that he had never communicated to him in detail the facts in regard to his defense, and had no opportunity to do so for the reason that he had been and then was confined in jail; and that said Easterwood was so engaged with other business at the then pending term of court that he would not be able to prepare appellant's defense until the next term of court. (2) That defendant did not have sufficient funds with which to secure the attendance of his witnesses, and that he had not less than from 12 to 20 whom he needed in his defense. (3) That on account of the high state of excitement and prejudice in the locality of the homicide, and on account of the numerous threats by people residing in such locality, and the great danger to the life of appellant and his said brother, they had been afraid to visit the locality for the purpose of gathering the evidence necessary for his defense. (4) That a large number of witnesses had appeared before the grand jury which indicted appellant, and that he could, if allowed sufficient time to visit the neighborhood of the homicide, procure evidence to impeach and discredit the testimony of a large number of such witnesses, but that at the time of making of the affidavit he had no way of knowing the names of such proposed witnesses. (5) That appellant could, if permitted time and opportunity, procure witnesses to show that the deceased was a quarrelsome and dangerous man, and that appellant was a quiet, peaceable, and law-abiding citizen; that appellant's character witnesses were mostly residents of Oklahoma, and had signified their desire and willingness to attend the trial upon reasonable notice, but that on account of the condition of the roads in Oklahoma it was impossible to gather these witnesses and get them to Clayton for the trial. (6) Appellant was informed that the prosecuting witnesses in the cause had employed two or three firms of attorneys to assist in the prosecution of the cause, and that a great deal of money had been expended by them in securing evidence and witnesses against the defendant, and that the defendant was without funds to meet such an array of counsel and wit-

nesses at the present term of this court, but that he could do so and could secure evidence to discredit or rebut the evidence of such witnesses at the next term of the court.

A counter affidavit was filed by two attorneys who had been employed to assist in the prosecution, in which they state that they had recently visited the scene of the homicide and had made careful inquiry as to the state of feeling in the locality against the defendant, and that, so far as they could ascertain, no feeling of hostility existed, and that no foundation for any apprehension of any violence toward the defendant or any one representing him, who might go into that locality seeking evidence, existed, and that according to their best information and belief, the defendant or any one representing him might have gone into the locality for the purpose of securing evidence without danger or molestation.

The court overruled the motion for a continuance. The principal attorney, the brother of the appellant, appeared at the trial and participated in the same. The appellant produced at the trial 21 witnesses in his behalf, thus showing that, notwithstanding his fears, he was, as a matter of fact, able to produce his witnesses and have them testify in the case. The appellant admitted the killing, claiming that it was done in self-defense. There was no eyewitness to the homicide. All of the testimony in the case was circumstantial, except that of the defendant and his declarations made to other persons. In the motion for a new trial no showing whatever is made of any prejudice to the defendant by reason of the absence of witnesses whom he might have secured had he had further time in which to do so.

In the brief of counsel for the appellant, no reliance is placed upon the fact that the Oklahoma witnesses could not be produced at the trial, and we assume that no injury is now predicated thereon.

Under such circumstances we do not understand how the appellant can complain of the action of the court in overruling the motion for a continuance. It does not appear that he suffered any injury whatever. His principal counsel from Oklahoma was present at the trial, and, so far as appears, all of the witnesses upon whom he relied, 21 in number, were present and testified. Even if the action of the court, at the time the motion for a continuance was overruled, could have been subject to criticism, the appellant is in no position to complain of the same here, he having suffered no injury therefrom. The doctrine in this jurisdiction is firmly established that a motion for continuance is addressed to the sound discretion of the trial court, and ordinarily the court's action thereon will not be disturbed. *Territory v. Padilla*, 12 N. M. 1, 71 Pac. 1084; *Mogollon G. & C. Co. v. Stout*, 14 N. M. 245, 91 Pac. 724; *Ross v. Carr*, 15 N. M. 17, 103 Pac. 307; *Perea v. Insurance Co.*, 15 N. M. 899, 110

Pac. 559; Territory v. Lobato, 17 N. M. 666, 134 Pac. 222; Territory v. Emilio, 14 N. M. 147, 89 Pac. 239.

In this case there was no abuse of discretion nor injury to the appellant, and of course he cannot complain in this court under such circumstances.

[2] 2. It appears from the record that the difficulty between appellant and the deceased originated out of the fact that the deceased, in a violent manner and while armed with a pistol, ordered the appellant off and away from the Cross L. Ranch, where he was at the time. It appears that the deceased was one of the older hands upon the place, and that a man by the name of Trumball was foreman of the ranch. Upon leaving the ranch the foreman instructed the deceased that if the appellant came upon the ranch during his absence to order him off. The prosecution put the witness Trumball on the stand and proved by him, over the objection of appellant, that he had given such order to the deceased. The assistant district attorney, in explaining the object of the testimony, stated to the court that it was introduced in order to show motive for the crime. In this he was in error. The only facts in evidence which would tend to show motive for the homicide were the facts that the deceased ordered the appellant off the ranch and did so in an insulting and violent manner. It was perfectly immaterial why he ordered the appellant off, and the evidence admitted by the court that the foreman had instructed the deceased to order appellant off was immaterial, and should have been excluded. It is not pointed out in the brief of counsel for appellant, however, in what manner this evidence prejudiced the rights of his client. It is a fact in the case, standing alone, entirely disconnected from any theory advanced by either the prosecution or defense, and in no way reflected upon the guilt or innocence of the defendant. The admission of the testimony was technically erroneous, but under the circumstances, so long as no injury to the appellant resulted, the judgment should not be reversed.

[3] 3. It appears from the record that the appellant, shortly after the deceased had ordered him off the ranch, asked the witness Hardesty if he knew what the trouble was about, and the witness Hardesty told him he did not. Appellant then asked the witness Hardesty if he did not have a gun which he could loan him, and said that if they were looking for trouble that he would meet them off the ranch some time. The witness Hardesty was then asked whether he communicated this conversation to the deceased prior to the homicide, and he answered that he did, which testimony was objected to by counsel for appellant; the objection being that it was incompetent to show that a threat of the appellant was communicated to the deceased.

In regard to this testimony it is to be noticed that the evidence for the prosecution

was entirely circumstantial. No one was present at the time of the homicide, except the deceased and the appellant. Just how the deceased behaved himself and what he did on that occasion was relevant and material to the inquiry as to the guilt or innocence of the appellant. If he was informed of a threat by the appellant, then his actions upon encountering the appellant would be governed accordingly; at least, probably so. The only legitimate inference to be drawn from the testimony is that the deceased, having been warned of the threat, at once became the aggressor upon meeting appellant at the time of the homicide, or that he prepared to defend himself. We do not understand how the appellant can object to this testimony, because it is not only not prejudicial to him, but is favorable to him. It tends to corroborate his testimony wherein he describes the occurrence and says that the deceased came riding up, pulled his Winchester, and said he was going to kill appellant, and had his gun leveled at appellant when the fatal shot was fired.

[4] 4. Counsel for appellant objected to the action of the court in permitting the witnesses for the state to testify, over the objection of the defendant, that they saw kneeprints adjacent to a cedar bush near the scene of the homicide. The theory of the prosecution was that the homicide was a murder in the first degree, and was accomplished by means of lying in wait. At least one of the witnesses for the prosecution testified that the kneeprint which he identified was located at the natural distance from a footprint of the left foot, and that there was an impression of the ball of the right foot about opposite the kneeprint. Other witnesses testified with less particularity, but identified the impression on the ground as that of the impression of a knee. Counsel for the appellant does not seem to deny the proposition that a foot track might be identified as such by witnesses, but seems to argue that a kneeprint is of such an indefinite character as to be incapable of identification, and argues therefrom that the testimony was a mere conclusion or opinion of the witnesses, and not the evidence of the facts. No authority is cited in support of the contention, and none can be found supporting it, we assume.

We do not deem it necessary to go into any extended discussion of the so-called "opinion rule" of exclusion of testimony. It will be sufficient merely to state the underlying principle by which said rule is applied. That principle is that any person may express an opinion before a jury, upon a non-technical subject, based upon data which he has observed when it is impossible by word of mouth or gesture to reproduce the data before the jury, so that the jury may intelligently draw the inference therefrom which the witness has drawn. This principle is expressed by Mr. Wigmore as follows:

"There is a rule of evidence which excludes, on the ground of superfluity, testimony which speaks to the jury on matters for which all the materials for judgment are already before the jury. This testimony is excluded simply because, being useless, it involves an unnecessary consumption of time and a cumbersome addition to the mass of testimony. In the majority of instances the testimony thus excluded will consist of an 'opinion' by the witness, i. e. a judgment or inference from other facts as premises, and it will be excluded because the other facts are already or may be brought sufficiently before the tribunal. If they are not or cannot be, then the witness' judgment or inference will be listened to." 1 Wig. on Evid. § 557.

Again he says:

"The second group of persons to whom the opinion rule has to be applied includes those who concededly have no greater skill than the jury in drawing inferences from the kind of data in question. Such a witness' inferences are inadmissible when the jury can be put into a position of equal vantage for drawing them; in other words, when by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion." 3 Wig. on Evid. § 1924.

Various attempts have been made to classify subjects about which nonprofessional witnesses may, according to this principle, give opinion evidence. For example, in *Hardy v. Merrill*, 56 N. H. 241, 22 Am. Rep. 441, it is said:

"All concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention."

See, in this connection, 3 Wig. on Evid. § 1977, where many cases are collected in a note. See, also, 1 Wharton's Crim. Evid. (10th Ed.) § 460.

Applying this principle to the testimony in regard to the knee tracks it is perfectly apparent that the same was competent. It was impossible for the witnesses to describe the kneeprints with such detail as would be required to give the jury a fair idea of the data upon which the witnesses based their opinion that it was a kneeprint. A familiar example of the application of this principle is furnished by a case of identification of a person. To illustrate: A witness meets a person on the street whom he identifies as A. His identification of A. depends upon a vast number of details about his form, the color of his eyes, the sound of his voice, his walk, and many other things which it would be impossible for the witness to reproduce by word of mouth before the jury. His identification of the person whom he met as A. is a mere conclusion from many items of data which he could not describe and which he might in fact be unable to state, and his identification would still be complete and perfect.

The only case to which we have been referred, expressly recognizing the admissibility of testimony in regard to kneeprints, is the English case of *Rex v. Brindley*, reported in *Warwick Spring Assizes*, and decided in 1816, and quoted from in the note to section 935 of 2 Wharton's Criminal Evid. (10th Ed.). But there can be no doubt about the admissibility of such testimony.

[5] 5. The defendant put a witness on the stand for the purpose of showing that a meeting of citizens had been held in what is called the Detherage schoolhouse, for the purpose of organizing a mob to hang the defendant in case he was not convicted at the trial, in which meeting several of the witnesses for the prosecution were alleged to have participated. He had previously shown by another witness that a meeting had been called for the 13th of September if the parties were at home, at Bob Detherage's house. The witness first mentioned testified that she was a school teacher at the schoolhouse near Detherage's house; that she dismissed school on March 1st, to attend the grand jury in this case, and when she left the schoolhouse that evening three or four of the girls stayed and were sweeping the room when she left. When she returned the next Friday morning the door of the schoolhouse was unlocked, the seats moved up around the stove, the wood and kindling were burned, there was mud all over the floor, and it looked as though it had been carried in on shoes, and that the persons who had been there had been chewing tobacco and spitting on the stove, around the stove, and in the ash bucket. On cross-examination the witness testified that she saw in Clayton, where the grand jury convened, all of the witnesses for the prosecution to which this testimony related, except one. At the close of this testimony the assistant district attorney moved to strike out the same as immaterial, which motion was sustained by the court and exception taken by the appellant. Appellant argues that this action of the court was erroneous, and that the testimony was admissible in order to show bias and prejudice on the part of the witnesses for the prosecution. That the testimony, if it established the fact of a meeting of the witnesses for the prosecution and others at the schoolhouse, was admissible as tending to show prejudice and feeling on the part of the witnesses is not to be questioned. The trouble with the testimony is that it failed to show any meeting of persons at which the witnesses for the prosecution were present. The testimony of the witness who preceded the school teacher does not show that any meeting had been arranged at the schoolhouse. On the other hand, it tends to show that a meeting had been arranged at the house of the witness for the prosecution, Detherage. There is, therefore, no error in striking out this testimony, and the cases cited by counsel for appellant in regard to

the right to show bias or prejudice of witnesses have no application.

[6] 6. On cross-examination of the witness for the defendant Silas Crook, he was asked whether he had not requested permission to go back before the grand jury and make a statement of something he had left out. He answered that he did make such request. He was then asked whether he did not make the statement, referring to the deceased, that:

"When Saturday evening came he seemed to be in a hurry. He shaved at noon so he could start home early. After 5 o'clock he came up to go home. Other times he never did leave until after dark. But we knew and he knew that Mr. Pruett (appellant) would be right on the road that he would go over."

The witness denied making such statement. The stenographer who took the testimony before the grand jury was put on the stand in rebuttal and testified that the witness did make such statement.

Counsel for appellant argues that this examination of the witness Crook was for the purpose of contradicting him upon an immaterial matter upon which the district attorney was bound by his first answer. The witness had been asked on cross-examination whether he knew at the time the deceased left the ranch that he would go right over the road that the defendant was on. He denied that he knew where Pruett was, and asserted that he had no idea where he was. All that he knew was that appellant was going to be at a certain neighbor's house to take some cows there, but did not know where he would be on the road. It was clearly immaterial as to whether the witness knew that the deceased would meet the defendant on the road. It was not immaterial, however, whether the deceased knew that he would meet the appellant on the road. Under the facts and circumstances in this case, and in view of the defense of defendant interposed, the conduct, frame of mind, and actions of the deceased were relevant to the issues. If the witness had stated before the grand jury that the deceased knew that he would meet the appellant on the road, it was material to show the same. Just why the prosecution desired to put in this testimony or why the appellant desired to exclude it we are unable to understand. The proof of the statement of the witness before the grand jury was detrimental to the prosecution and beneficial to the appellant. It follows that there was no error in the admission of which the appellant can complain.

[7] 7. The original difficulty between the appellant and the deceased occurred on the 11th of October, 1914, at the Cross L. ranch. On the following day this same witness, Silas Crook, is alleged to have stated to the witness Sanford Hern that Minnie Cheek, wife of the deceased, would be a widow inside of a week. The witness Crook denied making any such statement, and said that he had never thought of such a thing, and

that there was no threat made by the appellant against the deceased. The witness Sanford Hern was put upon the stand in rebuttal, and was asked whether the witness Crook had made the statement mentioned above, and he answered in the affirmative, over the objection of the appellant.

Upon what theory this testimony could have been offered by the prosecution we are unable to understand. So far as we can see, it is inadmissible from any standpoint, or any rule governing the admission of evidence. It antagonizes the hearsay rule, it does not tend to contradict the witness upon a relevant or competent issue, it does not reflect upon the bias or interest of the witness, and is wholly inadmissible for any purpose. This was evidently an attempt to show by indirection and hearsay that the witness knew from something that occurred on the occasion of the first difficulty, that the appellant intended to attack and kill the deceased, and that he thereafter asserted that Mrs. Cheek would be a widow within a week. He was not asked, however, on direct or cross-examination as to whether appellant made any threat against the deceased or said or did anything from which the inference could be drawn that he intended to attack the deceased. This was not admissible, and the testimony was highly prejudicial to the defendant. The Attorney General does not attempt to justify the introduction of this evidence, but argues that it was so immaterial as to be harmless. We do not so consider it. The testimony must have been intended to mean and did mean, before the jury, that the witness knew something from the defendant, either by way of threat or some other action, that he intended to attack the deceased. Counsel for appellant have cited and digested many cases, but we do not deem it necessary to refer to them, as this proposition seems easily to be settled upon general principles.

8. Much argument is made in the brief concerning alleged error growing out of the conduct of the court in conducting the trial, and in making alleged comments upon the testimony and upon the conduct of counsel for the defendant, in attempting to put in the defense of the appellant. We will not consider the same for the reason that this cause will be remanded for a new trial in any event.

9. Errors are assigned upon the giving of numerous instructions. The Attorney General argues that these instructions are not before the court for consideration, because they are not embodied in the bill of exceptions, and no order requiring them to be filed in the cause is found in the record. Upon the next trial of this case such defects or irregularities may be corrected in case of another conviction and appeal.

10. Counsel makes an elaborate analysis of the testimony to show that there is no evidence in the case sufficient to convict the

defendant. They also complain of misconduct of the jury in that the jurors were permitted to separate. None of these considerations become material in view of the disposition to be made of the case, and will therefore not be discussed.

For the reasons stated in the seventh paragraph, the judgment of the court below will be reversed, and the cause remanded, with instructions to award a new trial; and it is so ordered.

HANNA, J., concurs. ROBERTS, C. J., being absent, did not participate in this opinion.

KING v. STROUP. (No. 1811.)

(Supreme Court of New Mexico. Sept. 12, 1916. On Motion for Rehearing, Oct. 7, 1916.)

(Syllabus by the Court.)

1. ESTOPPEL \S 81—DISTRIBUTION OF ESTATE—ESTOPPEL OF BENEFICIARY.

Where an administrator pays debts and legacies prematurely or without authority of law, at the request or by the insistence of the sole beneficiary of the estate, the latter is estopped from subsequently questioning the legality of such payments.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 218, 217; Dec. Dig. \S 81.]

2. ESTOPPEL \S 54—EQUITABLE ESTOPPEL—KNOWLEDGE OF LAW AND FACTS.

Where one's conduct has led another to take a position detrimental to his interest, the former will not be heard to say that he is not estopped because of his ignorance of his legal rights in the first instance, provided he has full knowledge of the facts.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. \S 54.]

Appeal from District Court, Bernalillo County; H. F. Reynolds, Judge.

Action by Ruth L. King, administratrix of the estate of Lewis H. King, against A. B. Stroup. From a judgment for defendant, plaintiff appeals. Affirmed.

Neill B. Field and John Venable, both of Albuquerque, for appellant. Mann & Nicholas, of Albuquerque, for appellee.

PARKER, J. This is an appeal from the judgment of the district court of Bernalillo county approving the final account rendered under the statute (section 2298, Code 1915) by appellee, as administrator with the will annexed, and discharging him and his sureties on the administrator's bond.

Lewis H. King died in Albuquerque on July 23, 1913, leaving surviving him as his only heir at law the appellant, Ruth L. King. On August 15, 1913, there was filed for probate an instrument purporting to be the last will and testament of the said Lewis H. King, deceased. That instrument attempted to devise certain land to appellant, and to bequeath \$1,000 to a Mrs. F. H. Gross, and

\$3,000 in trust for appellant, under certain specified conditions. On October 8, 1913, the said instrument was admitted to probate, and appellee was appointed administrator with the will annexed of the said estate, and qualified the same day. It would appear that appellee was appointed as such administrator because of the nonresidence of the executor named in the will and the desire of the appellant that he should undertake the administration of the estate. Shortly after being appointed, appellee received the proceeds of a certain life insurance policy written on the life of the deceased and made payable to his personal representatives, as well as a sum of money constituting renewal premiums on insurance apparently written by deceased. Thereafter, and within less than 60 days after being appointed, appellee, without the order of the court, paid claims against the estate in the sum of \$1,020.65. On November 25, 1913, appellee presented an account to the probate court showing the payment by him of said claims, and the court thereupon approved the same. On January 13, 1914, appellee verbally reported to the probate court that there remained in his hands, as assets of the estate, the sum of \$4,000, whereupon the probate court ordered him to pay therefrom \$1,000 to Mrs. F. H. Gross, and \$2,500 to the Mercantile Trust Company of St. Louis; the latter sum to be held in trust for appellant, under the terms of the alleged will, both items being legacies provided for therein. Appellee shortly thereafter made such payments.

On February 2, 1914, appellant petitioned the probate court for the revocation of the letters issued to the appellee. This petition was dismissed, an appeal perfected to the district court, and the prayer of the petition granted in the court, ordering that the estate be administered as though the said Lewis H. King had died intestate. Thereafter the appellant was appointed administratrix of the estate, demanded an accounting from appellee, and, when made, objected thereto, principally on the ground that the payments of the debts and legacies were premature and unauthorized, and hence the appellee should not receive credit therefor.

[1] 1. The appellant assigns 20 grounds of alleged error, but she argues only 4 general propositions. In effect those propositions are: That the payment of the debts and legacies were void acts; that the proceeds of the insurance policy were not subject to the payment of debts; that appellant is not estopped from objecting to the illegality of said payments; and that appellee should be required to pay over to appellant the entire assets of the estate as received by the former in the first instance.

The only question which will be considered is whether the appellant is estopped from claiming that the disbursements of the assets were illegal, for a determination of that

question will dispose of this case. At the outset we shall assume, without deciding, that the payment of the debts and legacies prior to the expiration of six months after the appointment of the administrator with the will annexed and without an order of distribution made by the probate court was at least irregular and was made at the personal peril of the appellee. On behalf of the appellant it is contended that there were no false representations or concealment on the part of appellant in this matter, and the argument is then made attempting to show that the facts of the case do not justify the conclusion that the appellant's conduct constitutes estoppel by false representations. On behalf of appellee it is argued that the debts and legacies were paid at the instance and behest of appellant, and that the latter cannot now, after appellee relied and acted upon such representations, assume an attitude inconsistent with that position, to the detriment of appellee.

In 16 Cyc. 785, the doctrine is thus stated:

"Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner or asserted a particular claim, title, or right, he cannot afterward assume a position inconsistent with such act, claim, or conduct to the prejudice of another. It is upon this principle that a person is said to be estopped to take advantage of his own fraud or wrong. So where a person has acted or refrained from acting in a particular manner upon the request or advice of another, the latter is estopped to take any position inconsistent with his own request or advice, to the prejudice of the person so induced to act."

Equitable estoppel or estoppel in pais will be found fully discussed in all its phases in 10 R. C. L. p. 688 et seq. On page 689 it is said:

"Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, * * * nor hampered by the narrow confines of a technical formula. So while the attempted definitions of such estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case. * * * The cases themselves must be looked to and applied by way of analogy, rather than rule."

The author then ventures the following summary of the rule:

"That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon."

See Bigelow on Estoppel (5th Ed.) and the sixth edition, p. 602 et seq.

Shortly after the death of the deceased the appellant left New Mexico and did not return until January 28, 1914. During the time she was absent from the state she corresponded with the appellee with reference to the matters of the estate. She first consented that he should act as administrator, then stated that she preferred that the debts be paid from the personal property of the estate,

rather than from the real estate, declaring that the real estate could not be sold on such short notice. Appellee advised her that as the insurance policy was made payable to the estate all the debts could be paid from the proceeds thereof, and that after the payment of the debts the legacies would be paid. Appellant stated that she knew he would settle the matters of the estate as quickly as possible, saying that they worried and irritated her. Appellant was advised by appellee that the probate court would be in session in September, 1913, and that shortly thereafter the matters of the estate would be settled. In a letter of subsequent date, appellant said that she wished very much to get the bills paid, especially one in favor of a bank. Appellee thereafter, on September 24, 1913, sent appellant a list of bills against the estate, all of which were approved by appellant with the exception of one item. On September 27, 1913, appellant again inquired as to how soon the matters of the estate would be settled. Several days thereafter she advised a creditor of the estate to present his bill for services against the estate, saying that the probate court would meet on October 6, 1913, and that all bills would be paid as soon after that as possible. On November 3, 1913, appellee wrote the appellant to the effect that he had not yet received the insurance money, but that he expected to receive it that week, in which event he would "settle things so fast as I can." On December 16, 1913, appellee was given to understand by the appellant that he was free to go ahead and settle the affairs of the estate as fast as he could, saying that she wished he would rush matters as fast as possible. To the same effect was a letter from appellant to appellee under date of December 30, 1913. In this letter appellant proposed that she present a bill against the estate for \$500, so that there would remain but \$2,500 to be placed in trust under the terms of the will, to which appellee consented, provided Mrs. Gross would approve of such a bill, and both would release him from liability in the premises.

The appellee testified that he relied on the matters contained in the letters of Mrs. King to him, and that the matter of the settlement of the estate was effected as quickly as possible because of the express desire of the appellant that it should be so. Appellant testified that she would not have permitted the debts to be paid out of the insurance money had she known that under the law the insurance money was not subject to the payment of debts.

It is clearly evident that in the first instance the appellant took the attitude that the debts and legacies should be paid at once. It is just as evident that the appellee hastened to pay the debts and procure the order of the court to pay the legacies to accommodate the appellant. He, it appears, sought to administer the estate in conformity with the wishes of the parties who were beneficially

interested therein. Appellant now assumes an attitude with respect to the disbursements of the assets entirely inconsistent and at variance with that first proposed by her and acted on by appellee at her special instance and request. The disbursements were made in accordance with her wishes, and it would be inequitable and unjust for her now to be allowed to take a different position with success. The facts of this case are such that the doctrine of estoppel in pais is especially applicable. While we have been cited to no case where the facts are similar to the one at bar, it appears to us that the doctrine is well illustrated in those cases wherein the heirs and the administrator have agreed that a certain business be continued after the death of the intestate, and the courts have held that such facts estop the parties injured thereby from claiming damages or reimbursement from the administrator. Such is the case of *Poole v. Munday*, 103 Mass. 174. The court said:

"An administrator who, in a particular transaction, acts in good faith, under the direction of all the personal representatives who are interested in the estate, is to be protected, in rendering his accounts in the probate court, from a claim, on the part of such representatives, that he has not administered strictly according to law in respect to such transaction. He may prosecute or defend suits, compromise claims upon the estate, or deal with the assets in a particular way, not usual or strictly legal, as by continuing the property in business; and the personal representatives, by whose request or assent it has been done, will not be permitted to charge him with maladministration."

In *Swaine v. Hemphill*, 165 Mich. 561, 131 N. W. 68, 40 L. R. A. (N. S.) 201, the court said:

"We are of opinion that it was the conviction of all the complainants, as well as of Mr. George, * * * that it was best to continue the business in the hope that it might be disposed of as a going concern. Changes and improvements in the method of manufacturing malt * * * made it impossible to realize this hope. It would be unjust and inequitable to now compel this defendant to bear the loss occasioned by this course of action."

Again the court said:

"There seems to be no doubt, however, that, when all those interested in an estate agree that a certain course should be followed, the executor or administrator will be relieved from personal liability if disaster follows."

A number of cases will be found collected in the note to the last-cited case, reported in 40 L. R. A. (N. S.) 201, note page 234. The conduct of appellant in the case at bar was such as to cause appellee to pursue the course he did pursue. Assuming that such course was a deviation from the strict letter of the law, or was without authority of law, it makes no difference, because the appellant cannot now be heard to say that the action taken was void, or that it resulted in casting upon appellee personal liability in the premises, unless the doctrine of estoppel should not be applied because of the asserted ignorance by appellant of her legal rights in the

premises at the time the conduct creating the estoppel arose.

[2] 2. It is urged by appellant that she did not know of the invalidity of the will; that appellee did not advise her of the same, but rather concealed such knowledge from her; that she had been advised by appellee that the proceeds of the insurance policy were subject to the payment of the debts of the estate, and therefore she believed that the same was true; that she had no information upon such matters except that derived from appellee; and that her mistaken belief as to her legal rights was founded on ignorance—hence the doctrine of estoppel cannot be applied.

The record discloses that appellee was employed as administrator, not as legal adviser of the appellant; that appellee did give it as his opinion that the life insurance money might be used to pay the debts of the estate; that appellee did not occupy the relation of attorney to the appellant, and was under no obligation to advise her concerning her rights; that appellee did not conceal from the appellant the fact that she might contest the will, nor did he lead her to believe that the same was valid, but simply conducted himself on the assumption that the same was valid; that both of the parties were fully cognizant of all the facts, but that both were mistaken as to the law in regard to the insurance money being available to pay the debts, assuming that such is not the case under the law of this state.

In 10 R. C. L. at pages 695, 696, it is said that while some cases hold that a party is not estopped when he is ignorant of his legal rights, yet "ignorance of his legal rights will not prevent one's conduct from working an estoppel, if he has full knowledge of the facts."

In *Rogers v. Portland, etc., Railway Co.*, 100 Me. 86, 92, 60 Atl. 713, 715, 70 L. R. A. 574, 577, the court applied the rule that ignorance of one's legal rights would not prevent the estoppel from being applied in a proper case, saying:

"But it is urged that the plaintiff, in thus assuming the rights of an owner in making the contract with Gerald, and in failing to give him notice of the true state of facts, acted innocently or thoughtlessly, with no fraudulent design to mislead and deceive Gerald, and that he was ignorant of his legal rights, or want of them, in the premises. Assuming that this is so, it is no answer to the estoppel. * * * 'But it is not necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive.' Neither would ignorance upon the part of the plaintiff of his legal rights, provided he had full knowledge of the facts, be an answer to the estoppel relied upon. We again quote from *Martin v. Maine C. R. Co.*, 83 Me. 100, 21 Atl. 740: 'The presumption is that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim property, in opposition to all the equitable circumstances stated upon the mere pretense that he

was at the time ignorant of his title.' " (Authorities.)

In note at page 773, to the case of Knauf v. Elkhart Lake Sand & G. Co., reported in 48 L. R. A. (N. S.) 744, and also in 153 Wis. 308, 141 N. W. 701, will be found several cases holding that ignorance of one's legal rights will not prevent the application of the doctrine of estoppel in pais where the facts and circumstances otherwise justify it. The author of the note says:

"It seems that positive acts will be ground for estoppel although done in ignorance of law. This view is in harmony with the view of the courts on the matter of mistake of fact."

We are aware that there are cases holding to the contrary of this doctrine, but we regard the rule stated as applicable in this case. The entire argument of appellant as to why estoppel should not be applied in this case, although able and exhaustive, does not convince us. Without answering such argument in detail it is sufficient to say that under the facts and circumstances of this case the appellant cannot now change her former position to the detriment of appellee.

The judgment of the trial court will therefore be affirmed, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

On Motion for Rehearing.

PARKER, J. A motion for a rehearing has been filed upon the ground that the opinion is in conflict with the law of estoppel as laid down by the territorial court in Dye v. Crary, 13 N. M. 439, 85 Pac. 1038, 9 L. R. A. (N. S.) 1136, which case was not called to the attention of the court by counsel. Just why the decision in the case at bar is in conflict with the Dye-Crary Case is not pointed out in the motion nor in the statement of counsel accompanying the same.

Inasmuch, however, as the doctrine involved is of much importance we have re-examined the Dye-Crary Case with the view of pointing out that there is no conflict between it and the case at bar. In that case a mining claim had been sold under an alias writ of attachment which was held by the court to have been void because not authorized by the statute. Crary and Heinman took an option to purchase the property from the execution purchaser, and during the pendency of the option they had a conversation with the plaintiff, Dye, as follows:

"Mr. Dye visited the mine and while there in the presence of Mr. Alexander and Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim or any other claims on the compromise. He immediately answered there was. The Scranton claim took off about 100 feet, and he said as to other claims there would be nobody but himself. And he says 'I have allowed all my time to lapse and I have no claim whatever.' With that he wished me success and hoped it would prove a good mine."

It appeared that, at the time of this conversation, Dye was ignorant of the law and was not aware that the attachment proceedings were void. The court held that this statement or admission by Dye was a mere statement of his supposed legal rights, and not of a matter of fact. It is pointed out by the court that Dye, having no knowledge that the proceedings in attachment were void for want of jurisdiction, could not have been guilty of fraudulent representation or concealment when he had the conversation. In that connection the court cited *Brant v. Virginia, etc., Co.*, 93 U. S. 326, 23 L. Ed. 927, as to the effect where an admission in regard to the condition of a title is relied upon by way of estoppel there must generally accompany such admission some intended deception in the conduct or declarations of the party to be estopped or such gross negligence on his part as to amount to constructive fraud. The court also cited *Henshaw v. Bissell*, 18 Wall. 255, 21 L. Ed. 835, to the same effect. It was upon the principle announced in those cases and others cited that the trial court held that Dye was not estopped by his admission that he had lost his claim because he had allowed his time to lapse; such statement being unaccompanied by inducement or representation held out to Crary and Heinman to influence them to buy the claim.

The principal reason, however, for holding that Dye was not estopped was because Crary and Heinman did not rely upon his admission, and therefore were not misled thereby to their detriment.

We see no conflict between the Dye-Crary Case and the case at bar, inasmuch as the facts are entirely different. In the case at bar, as pointed out in the opinion, both parties were mistaken as to the law, it is assumed, but the appellant, by her affirmative conduct and direct insistence, put the appellee in a position to his detriment and from which he cannot now recede without pecuniary loss.

For the reasons stated the opinion will be adhered to, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

STATE v. FINNIGAN et al.

(Supreme Court of Oregon. Oct. 17, 1916.)

1. ESCHEAT — PLEADING — ISSUES — ADJUDICATION OF COUNTY COURT.

In an escheat proceeding, where the state claimed personality of deceased as well as the realty, and answering defendants pleaded an adjudication of the county court, which, when proved, would utterly defeat the claim of the state as to the personality and the state replied by denying that the county court had made the adjudication, proof that the county court made the order would prevent the personality from being forfeited to the state, and it was therefore competent to introduce findings and order of the county court.

[Ed. Note.—For other cases, see *Escheat*, Cent. Dig. §§ 7-17, 24; Dec. Dig. § 6.]

2. APPEAL AND ERROR — 1050(2) — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE — FACTS ADMITTED.

Although the trial court might have considered an oral statement of counsel as a waiver of the state's claim to the personality, as the state did not in unequivocal terms admit the fact to be that the county court had ordered a distribution of the personal property to persons whom that court had found were the heirs of the deceased, and since proof of the fact would establish the claims of the defendant and defeat the claim of the state, the admission of evidence of the order made by the county court was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. — 1050(2).]

3. ESCHEAT — 6 — PLEADING — ISSUES — ADJUDICATION OF COUNTY COURT.

As the state's claim to the personality made it necessary for the defendants to plead the order of distribution, a binding disclaimer by the state did not of its own force render incompetent the order and findings of the county court.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 7-17, 24; Dec. Dig. — 6.]

4. TRIAL — 48 — EVIDENCE — ADMISSIBILITY FOR PARTICULAR PURPOSE.

Where the order of the county court was inadmissible to prove heirship to the realty, but was nevertheless competent to prove ownership of the personality of deceased, its incompetency for one purpose did not destroy or affect its competency for the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. — 48.]

5. TRIAL — 255(4) — INSTRUCTIONS — REQUESTS.

Although refusal of an instruction limiting the evidence to the single issue as to personality would be an error, no error can be predicated upon the court's failure in that respect, in the absence of a request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632; Dec. Dig. — 255(4).]

6. ESCHEAT — 6 — TRIAL — INSTRUCTIONS.

An instruction, that the fact for the jury to determine was whether deceased at the time of his death died without any heir, and that so far as the particular case was concerned before the jury could determine he died leaving heirs they would have to find that some of the parties set up in the answer were his heirs, was not improper as requiring the state to prove that the deceased left no heirs.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 7-17, 24; Dec. Dig. — 6.]

Department 1. Appeal from Circuit Court, Washington County; J. U. Campbell, Judge.

Escheat proceedings by the State of Oregon against William T. Finnigan, as administrator of the estate of James McNulty, deceased, and others. Judgment for the defendants, and plaintiff appeals. Affirmed.

The state of Oregon is attempting to escheat to it the property owned by James McNulty, who died intestate in April, 1907, leaving real and personal property. The county court appointed William T. Finnigan as administrator. After paying all the claims against the estate, the administrator filed his final account showing real property undisposed of and cash on hand amounting to \$1,023.26. Notice was duly given of the time fixed for hearing the final account. Petitions

for the distribution of the cash were filed by different persons who claimed to be heirs of the deceased. The contesting claimants of the estate submitted evidence upon the hearing of the final account and petitions, and then the county court on December 27, 1910, made findings of fact and conclusions of law that John McNulty, Kate McNicholas, and Mary McAndrews are first cousins of the deceased and his only heirs at law, and ordered the cash to be paid to them.

The escheat proceeding was commenced on January 12, 1911, against the administrator, the Shute Savings Bank, and 24 persons who claim to be heirs of the deceased. Among the averments of the information are allegations that James McNulty left real and personal property and that he died intestate "without heirs at law or next of kin, and said real and personal property so belonging to said estate should be escheated to the state of Oregon"; that all the defendants, except the administrator and the Shute Savings Bank, have falsely represented themselves as heirs of the deceased and have filed petitions with the county court asking that the estate be distributed to them; that "it is desired and necessary to have delivered the personal property of said estate of James McNulty, deceased, now in the hands of the administrator, over to the proper persons authorized by law and by this court to take possession of said personal property now in the hands of William T. Finnigan, as administrator"; and that it is for the best interest of the estate that a receiver be appointed to take charge of the personal and real property. The information concludes with a prayer which in part asks that the court adjudge the "real and personal property to be the property of the state of Oregon," and that the administrator be dispossessed "of said real and personal property."

The administrator and the Shute Savings Bank filed separate answers, Mary McAndrews and Kate McNicholas joined in an answer, and Thomas McNulty with nine others filed a joint answer. All the appearing defendants, except the bank, pleaded the order of distribution made by the county court, for the purpose of defending against the claim which the state makes to the personal property. The replies traverse the allegations concerning the order of distribution.

During the trial the defendants offered the findings and order of distribution which the county court had made. Counsel for the state objected to the offer on the ground that the findings and order of the county court were incompetent, and "also that the state has not made any claim as to the personal property of the decedent. While it is alleged in the information that he has left it, we have no claim as to the personal property, and therefore, as the court had no jurisdiction to settle the real estate, the findings

would be of no value and it is incompetent." The objection was overruled, and the court received the proffered evidence. A jury trial resulted in a verdict for the defendants, and the state appealed from the consequent judgment.

John M. Wall, of Hillsboro (E. B. Tongue, of Hillsboro, and Jay H. Upton, of Prineville, on the brief), for the State. Dan J. Malarkey, of Portland, for respondent Finnigan. E. P. Stott, of Portland (E. B. Seabrook, of Portland, on the brief), for respondents Thomas McNulty, Bridget McNulty, James McNulty, John McNulty, Rose McNulty Walshe, John McNulty, James McNulty, Patrick McNulty, Catherine McNulty, and Bridget McNulty Conlon. Wm. G. Hare, of Hillsboro (Bagley & Hare, of Hillsboro, on the brief), for respondents Mary McAndrews, Kate McNicholas, and Shute Sav. Bank.

HARRIS, J. (after stating the facts as above). [1-3] The state is in no position to complain of the ruling which permitted the defendants to introduce the findings and order of the county court. The state alleged in plain terms in the information that it was claiming the personal property as well as the realty; the answering defendants pleaded an adjudication of the county court which, when proved, would utterly defeat the claim of the state to the personal property; and the state replied by denying that the county court had made the adjudication. The pleadings raised a clear-cut issue concerning the personal property. Proof that the county court made the order pleaded in the answers would prevent the personal property from being forfeited to the state (State v. O'Day, 41 Or. 495, 69 Pac. 542; State v. McDonald, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444), and it was therefore competent to prove the order which the county court made. It is true that the trial court might have considered the oral statement of counsel as a waiver of the claim to the personal property which the state had made in its pleading; but it is also true that the state did not in unequivocal terms admit the fact to be that the county court had ordered a distribution of the personal property to persons whom that court had found were the heirs of James McNulty, and, since proof of the fact would establish the claim of the defendants and defeat the claim which the state had solemnly written into its pleadings, it was not prejudicial error for the trial court to permit the defendants to offer evidence of the order which had been made by the county court. Bannister v. Alderman, 111 Mass. 261. By claiming the personal property, the plaintiff made it necessary for the defendants to plead the order of distribution; the defendants pleaded what it was necessary for them to plead and what they had a right to plead; and, consequently, they were entitled to prove what they had right-

fully pleaded, so that, even if the state did make a binding disclaimer, that act did not of its own force necessarily render incompetent that which undeniably would be competent in the absence of a disclaimer. An oral renunciation of the pleaded claim to the personalty might have avoided the need of evidence to show that the plaintiff had no right to the personal property, but it would not necessarily prevent the court from permitting the introduction of evidence to prove that in truth the state had no rightful claim to the personalty.

[4, 5] The county court had authority to distribute the personal property, but it had no jurisdiction to determine the descent of the real property, and the state therefore argues that it was error to receive evidence of the order distributing the personalty because it also mentioned the real property. Even though it be assumed that the order was inadmissible to prove heirship to the real property, it was nevertheless competent to prove ownership of the personal property, and its incompetency for one purpose did not destroy or even affect its competency for another purpose. An instruction limiting the evidence to the single issue which made it competent would have been proper; and, of course, when evidence is competent for one purpose but incompetent for another, it is error if the court refuses a request to limit the evidence to the purpose for which it is competent. 3 Ency. of Ev. 188. The plaintiff, however, made no such request, and therefore, in the language of Mr. Justice Moore, in *Smitson v. Southern Pac. Co.*, 37 Or. 74, 89, 60 Pac. 907, 913:

"No error can well be predicated upon the court's failure in that respect, in the absence of a request for such instruction." 3 Ency. of Ev. 190.

Moreover, the state is now complaining, not on account of the mere failure of the court to limit the application of the evidence, but because of the admission of the evidence for any purpose.

[6] The appellant next contends that the instructions of the court were too broad and "required the state of Oregon to prove that the deceased left no heirs"; and that the jury should have been required "to find whether the defendants, or some of them, in this proceeding, were the particular heirs of deceased." An examination of the instructions given by the court will disclose that, when considered in their entirety, they are not open to the objection now being urged by the state. Quoting from the charge to the jury:

"So now there is the fact for you to determine: Did James McNulty at the time of his death during the year 1907 die without any heirs? And, so far as this particular case is concerned, before you can determine he died leaving heirs, you would have to find that some of those parties set up in the answer were his heirs."

The remaining assignments of error will not be discussed, for the reason that the

state does not argue them in its printed brief.

The judgment is affirmed.

MOORE, C. J., and BURNETT and McBRIDE, JJ., concur.

ST. MARTIN v. HENDERSHOTT et al.
(Supreme Court of Oregon. Oct. 17, 1916.)

1. DEATH § 2(1)—PRESUMPTION OF DEATH FROM ABSENCE—STATUTE.

By L. O. L. § 799, subd. 26, there is a presumption that a person, not heard from by his acquaintances or any members of his family for more than seven years, is dead.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1, 2; Dec. Dig. § 2(1).]

2. TENANCY IN COMMON § 15(10)—ADVERSE POSSESSION—SUFFICIENCY OF EVIDENCE.

In suit between cotenants, to set aside a decree and to partition real property, evidence held insufficient to substantiate defendants' allegation of title by adverse possession with the degree of certainty required between tenants in common.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 51; Dec. Dig. § 15(10).]

3. TENANCY IN COMMON § 13—POSSESSION OF COTENANT—PRESUMPTION.

Possession by one tenant in common is presumed to have been in the interest of all others.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 28, 29; Dec. Dig. § 13.]

4. LIMITATION OF ACTIONS § 21(1)—STATUTE OF LIMITATIONS—SIX-YEAR CLAIM.

In an action between cotenants to set aside a decree affecting plaintiff, and to partition real property, where defendants claimed for half the taxes admitted to have been paid by them, the allowance, as an offset to plaintiff, of half the sum of \$250 expended by her in securing patent for the land more than six years before, was error; the statute of limitations as to such claims having run before suit was instituted.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90, 94, 96, 98; Dec. Dig. § 21(1).]

5. PARTITION § 85—IMPROVEMENTS.

In suit between cotenants to partition real property, plaintiff, who made improvements on the land, building an addition to the house, which was burned, could derive no benefit therefrom.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.]

6. PARTITION § 85—IMPROVEMENTS.

In suit between cotenants to partition the land, no allowance will be made plaintiff for trivial improvements.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.]

Department No. 2. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by Margaret St. Martin against William M. Hendershott and others. From a decree for plaintiff, defendants appeal. Decree modified and affirmed.

See, also, 151 Pac. 706.

This is a suit to set aside a decree so far as it affects the plaintiff, Margaret St. Mar-

tin, and to partition real property. It is alleged in the complaint, in effect, that the plaintiff is the owner in fee and in the possession of an undivided one-half of lots 1, 2, 3, and 4 in section 21, township 4 south, range 1 west, of the Willamette Meridian; that the defendant Libbie E. Hendershott is the owner of the other moiety thereof; that the defendant William M. Hendershott is the husband of Libbie E., and has no interest in the land, except an inchoate right of curtesy; that the defendant Napoleon Legault holds a mortgage upon Mrs. Hendershott's interest in the premises; that in a former suit, wherein John Arquette, Michel Arquette, and Margaret St. Martin, the plaintiff herein, were plaintiffs and William M. Hendershott and Libbie E. Hendershott, the defendants herein, were defendants, it was decreed that those defendants were the owners in fee simple of the entire premises, hereinbefore described, and that their title thereto was quieted as against each of such plaintiffs; that the plaintiff herein never engaged an attorney to represent her in that suit, nor did she know that she had been made a party thereto; that the attorney, naming him, who instituted the suit fraudulently neglected to appear at the trial, and the decree referred to was permitted to be given, of which this plaintiff had no knowledge until after the time to take an appeal had elapsed. The answer admits that William M. Hendershott and Libbie E., are husband and wife; that the latter is the owner of an undivided one-half of the premises; that Legault holds a mortgage upon the land; and that the decree referred to was entered. It is further substantially averred that the plaintiff ought to be estopped to controvert the validity of such decree. For another defense it is alleged that William M. and Libbie E. Hendershott are the owners in fee of the entire tract of land described in the complaint; that they have been in the actual, open, notorious, exclusive, and adverse possession of the whole of such premises for more than ten years prior to the commencement of this suit, holding the land adversely to the plaintiff and to all other persons; and such defendants have paid the entire taxes imposed upon the real property for the years 1911, 1912, and 1913, amounting to \$256.36, no part of which has been repaid. The reply denied all the allegations of new matter in the answer, except that Mrs. Hendershott was the owner of an undivided half of the land and the payment of the taxes stated. For a further reply it is alleged that in perfecting the title to the real property the plaintiff had paid out more than \$250, which sum should be offset against the taxes so paid. The cause was tried, and from the testimony received the court made findings of fact and of law, and, based thereon, granted the relief prayed for in the complaint,

and appointed referees to partition the land. From this decree the defendants appeal.

H. B. Nicholas and W. C. Nicholas, both of Portland (R. W. Nicholas, of Portland, on the brief), for appellants. John Bayne, of Salem, and O. R. Richards, of Portland, for respondent.

MOORE, C. J. (after stating the facts as above). An examination of a transcript of the testimony convinces us that the former suit was instituted and tried, and the decree rendered therein, without the plaintiff's consent, and that she had no knowledge thereof until the time for taking an appeal had expired.

[1-3] Considering the defendants' alleged title to the entire premises by adverse possession, the evidence discloses that on July 10, 1896, a patent was issued by the United States to the heirs of Margaret Arquette, successors in interest of Louis Forcier, granting to them the real property described in the complaint. It also appears that the heirs of Margaret Arquette are her sons John, Michel, Amab, and Isaac, and her daughter, Margaret, the plaintiff herein. Isaac Arquette, so far as known, had no lineal descendants, and since he has not been heard from by his acquaintances or any members of his family for more than seven years, he is therefore presumed to be dead. L. O. L. § 799, subd. 28. Mrs. St. Martin, Mr. Hendershott and his wife, indulging this presumption, conclude the land should be apportioned to the known surviving heirs, thereby giving to each originally an undivided one-fourth of the premises. John Arquette and his brother Michel, in the year 1889 delivered possession of the real property to Hendershott, to whom on October 19, 1891, they executed a special warranty deed, purporting to convey all such land. This deed was recorded February 8, 1892. Notwithstanding the patent from the United States, evidencing a grant of the lands, was not issued until July 10, 1896, a tax was attempted to be imposed on the premises the preceding year, and by reason of the nonpayment thereof the real property was sold to P. H. Marley, and, no redemption having been made, the sheriff, on December 12, 1898, executed to the purchaser a tax deed. Marley on December 30, 1902, conveyed whatever interest he so obtained to H. L. Sagsvold. Mrs. St. Martin commenced an action of ejectment against Sagsvold, and obtained a judgment against him January 16, 1909, wherein it was determined she was the owner in fee simple and entitled to the immediate possession of an undivided one-fourth of the real property described herein. Amab Arquette, on August 4, 1909, executed to Mrs. St. Martin a deed, conveying to her all his interest in the premises. Mrs. Hendershott, having become vested with all the title her husband had in the land, commenced a suit, February 16, 1912, against Mrs. St. Martin, alleging in the complaint that they

were "tenants in common and in possession of the following described tract of land in said Marion county, Oregon, viz.," specifying the lots, section, township, range and meridian, "each owning an undivided half thereof."

Mr. Hendershott testified that he lived on the land until September, 1896, when his tenants took and held possession for him until September, 1901, when the house on the premises was burned before the ten years' adverse possession had fully run, but that Mrs. Edna Carpenter, who was then occupying the building in his right, left in another domicile on the land some household goods which she did not remove until the following January, thereby completing the full measure of the statute of limitations. He explains his several ineffectual attempts to purchase Mrs. St. Martin's interest in the real property by stating upon oath that he did not then know Mrs. Carpenter's possession fully completed the prescribed limit, thereby defeating the plaintiff's right.

It is argued by defendants' counsel that the deed, executed by John Arquette and his brother Michel to Mr. Hendershott, purporting to convey the entire premises, having been duly recorded, thereby imparted to the plaintiff notice of the grantee's assertion of a claim to the whole tract of land, and that since the statute of limitations had fully run before he applied to purchase her interest in the real property, his mistake of fact does not prevent an enforcement of his right, and, such being the case, an error was committed in granting the relief awarded. We do not deem it necessary to consider the legal principles thus asserted, for an examination of the testimony leads to the conclusion that until the suit was instituted by John Arquette and others against Mr. and Mrs. Hendershott, they never intended to claim or assert a title by adverse possession. This deduction is manifest from an examination of the averments of the complaint in the suit brought by Mrs. Hendershott against Mrs. St. Martin to partition the land. It is also apparent from the cross-examination of Mr. Hendershott, who was asked:

"Now, you and Mrs. Hendershott don't want to claim more than that half" of the land "now do you?"

He replied:

"Yes. Q. Why? A. Because, when they started in to beat us out of our share, we were going to fight on adverse possession; never would have been any question if they hadn't attacked our rights there—not one bit; there is absolutely no question."

On redirect examination of this witness the defendants' counsel, referring to the period of limitation and to the land, inquired:

"During the ten years did you claim to own it?"

He answered:

"Why, I had a deed to the whole thing. Q. And you claimed to own it? A. Yes, sir."

Notwithstanding it might be inferred from the last reply that such a claim had been put forth during the entire period, we do not think the allegation of title by adverse possession has been substantiated with that degree of certainty that is required between tenants in common, the possession of one of whom is presumed to have been in the interest of all others. *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 449; *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; *Wheeler v. Taylor*, 32 Or. 421, 52 Pac. 183, 67 Am. St. Rep. 540; *Beers v. Sharpe*, 44 Or. 386, 75 Pac. 717.

[4] The plaintiff testified that in securing a patent for the land and thus obtaining a legal title to the premises she was obliged to expend the sum of \$250, one-half of which the defendants agreed to refund, but that they had not paid any part thereof. It will be remembered the reply seeks to offset such part against the claim for one-half the taxes, which is admitted in that pleading to have been paid by the defendants. The patent was obtained in 1896, and more than six years, the limit of the statute in such claims, had run against the demand before this suit was instituted. That claim was therefore barred, and an error was committed in allowing any part of it as an offset.

[5, 6] The testimony shows that the plaintiff made some improvements upon the land, the chief of which was an addition to the house; but, as this building was burned, the plaintiff can now derive no benefit therefrom. The other improvements were trivial, and no allowance will be made therefor.

For the error committed in offsetting the plaintiff's claim against that of the defendants, the decree is modified so as to require her, as a condition precedent to partition of the premises, to pay to the defendants one-half of \$252.36, the sum laid out by them on account of taxes.

In all other respects the decree is affirmed.

BEAN, BENSON, and McBRIDE, JJ., concur.

CITY OF PORTLAND v. GRAHS.

(Supreme Court of Oregon. Oct. 17, 1916.)

1. CRIMINAL LAW §1179—APPEAL—INCOMPLETE RECORD.

On appeal from judgment of the circuit court dismissing complaint against defendant for violation of a city ordinance after conviction by the municipal court, where the only papers before the court were a copy of the original complaint, judgment in the municipal court, notice of appeal to the circuit court and the undertaking, the judgment of the circuit court, the notice of appeal on behalf of the state and its undertaking, the Supreme Court cannot determine whether the decision of the circuit court was erroneous.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3001; Dec. Dig. §1179.]

2. CRIMINAL LAW §1134(6)—APPEAL—DECISION.

On the city's appeal from judgment of the circuit court holding unconstitutional an ordinance under which defendant had been convicted in municipal court, the Supreme Court must affirm, though the ordinance was constitutional, if the facts disclose that defendant was innocent, since a sound ruling of the circuit court as to guilt or innocence must be sustained, notwithstanding the Supreme Court's dissent from the reasons upon which it was made.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2991; Dec. Dig. §1134(6).]

Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

E. J. Grahs was convicted in municipal court of the violation of an ordinance of the city of Portland, and from judgment for him on appeal to the circuit court, the state appeals. Judgment affirmed.

In the municipal court for the city of Portland the defendant was convicted of the violation of a certain ordinance relating to the height of fences. He appealed to the circuit court. The result of the hearing in that tribunal was the following judgment:

"Now at this time this matter coming on for hearing, upon appeal from the municipal court of the city of Portland, wherein the defendant was fined the sum of \$25 for a violation of section 483 of Ordinance No. 29916, being entitled an ordinance amending section 483 of Ordinance No. 21455, as heretofore amended, and the facts having been stipulated herein, and the court having considered said ordinance and the facts, as stipulated, and being fully advised in the premises, finds that said section 483 of said ordinance is unconstitutional and void, and it is therefore, hereby considered, ordered and adjudged that the said complaint or action filed herein against the defendant be and the same is hereby dismissed, and it is further ordered and adjudged that the defendant's bondsmen be and he is released from further liability herein."

The city has appealed.

Stanley Meyers, of Portland (W. P. La Roche, of Portland, on the brief), for appellant. O. A. Neal, of Portland (Wilson, Neal & Rossman, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1, 2] There is no bill of exceptions. All we have before us is a copy of the original complaint in the municipal court; the judgment there; the notice of appeal to the circuit court and its attendant undertaking; the judgment of the latter tribunal already quoted; and the notice of appeal on behalf of the city, with its undertaking. In such a condition of the record we cannot determine whether the decision was erroneous or not. It may have been that the facts stipulated did not disclose an offense against the municipal enactment. We are not concerned with the reason given by the court for its conclusion. If, indeed, the facts disclosed that the defendant was innocent we would be compelled to uphold the decision of the cir-

cult court, although the judge put it on the ground that the defendant was baldheaded, and hence entitled to favorable consideration. In paraphrase upon the language of Mr. Justice Field in *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565, if this position is sound the ruling of the circuit court as to the guilt or innocence of the defendant must be sustained, notwithstanding our dissent from the reasons upon which it was made. It is the duty of the appellant to put his finger on substantial error in the judgment as a result of the trial. It avails him nothing to quarrel with the argument of the court if the final determination may be right.

Owing to the paucity of the record we cannot settle whether the ultimate conclusion of the court was erroneous or not, and hence the judgment must be affirmed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

WAKEFIELD v. SUPPLE.

(Supreme Court of Oregon. Oct. 17, 1916.)

1. APPEAL AND ERROR ⇨1015(3)—REVIEW—NEW TRIAL.

The trial court having the power, within the time allowed, to set aside a final determination and order a new trial when it discovers a mistake of law has been made which would necessitate a reversal on review, the question to be considered on appeal from an order allowing a motion to set aside a verdict and judgment, and for a new trial, because of error committed by overruling a motion for nonsuit and a motion for a directed verdict for defendant because an alleged oral modification of an original written contract was not established, is whether the evidence received in respect to the alleged oral modification was sufficient to authorize a submission of the cause to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3866; Dec. Dig. ⇨1015(3).]

2. CONTRACTS ⇨238(2) — MODIFICATION — WRITTEN CONTRACTS—SUBSEQUENT PAROL AGREEMENT.

The terms of a written contract may be altered by a subsequent parol agreement of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1123; Dec. Dig. ⇨238(2).]

3. CONTRACTS ⇨248 — EVIDENCE — SUFFICIENCY.

In an action to recover compensation for additional work done, not contemplated in an original written agreement, but alleged to have been authorized by a subsequent parol modification of the written contract, evidence of conversations and correspondence between the parties held insufficient to go to the jury as tending to establish that the alleged subsequent oral agreement modifying the written contract was made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1140; Dec. Dig. ⇨248.]

Department 2. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Robert Wakefield against Joseph Supple. Judgment for plaintiff, and, from an order allowing defendant's motion for a new trial, plaintiff appeals. Affirmed.

This was an action to recover money. The basis of the action is a contract, set out in the complaint, and reads:

"Joseph Supple having entered into a subcontract with the Portland Iron Works for the furnishing of all labor and material and for the building of steel hulls, trusses, ladders, etc., as well as all carpenter and wood work, for the two United States engineers' dredges 'Multnomah' and 'Wahkiakum,' hereby enters into an agreement with Robert Wakefield, whereby on consideration hereinafter mentioned:

"Joseph Supple agrees to prepare the ways, falsework and scaffolding, at the yards of the O. W. R. & N., known as the 'Boneyard,' for the building and erection of the two dredges above named, and deliver f. o. b. cars, all of the steel work for hull, fabricated and ready for erection, but not riveted, nor bolted up, and all of the steel work for trusses and ladder, fabricated and riveted, but not assembled.

"Robert Wakefield agrees that he will receive this material from cars, and will furnish his own means and apparatus for unloading the material, storing same until wanted, and erect and assemble same in place, in accordance with the plans and specifications, approved for this work, by the United States engineers.

"That he will do all of the bolting up, riveting, caulking and testing, to the satisfaction of the inspector, and in accordance with these plans and specifications.

"Joseph Supple will furnish all labor and material necessary for blocking, staging and launching. It being herewith reiterated, that all tools and all gears for handling and rigging of all steel work of whatever nature, will be furnished by Robert Wakefield, and that all wood work and material and labor for foundations will be furnished by Joseph Supple, except that used for hoisting and hoisting gears.

"In consideration of the above agreement, Joseph Supple agrees to pay Robert Wakefield, fifteen dollars (\$15.00) for every ton of hull material erected and put together, and seven and one-half dollars (\$7.50) per ton for the assembling of the trusses and ladders.

"It is mutually agreed on, that the actual weight on cars shall be ascertained from the R. R. Co., and that these weights shall be taken as basis on which Robert Wakefield shall make his charges.

"Joseph Supple agrees to make payments to Robert Wakefield, at the time and at the rate, as he receives his payments for work completed from the Portland Iron Works.

"It is particularly understood between the two contracting parties, that the same conditions of the terms of the specifications above referred to, as well as the conditions of the contract entered upon between Joseph Supple, and the Portland Iron Works, as far as they prevail, and that any dispute as to the interpretation of these specifications and contract, shall be subject to the decision of the inspector representing the contracting engineer of the U. S. government.

"Inasmuch as Joseph Supple has entered into a subcontract with the Great Lakes Engineering Company, of Detroit, Michigan, to fabricate for him the steel hull material above mentioned, and inasmuch as this last-named company is responsible for the proper fabrication of the material, in accordance with the specifications and plans, and have agreed to have one of their men present while the work of erection and assembling is under way, it is hereby agreed that Robert Wakefield hereby accepts the guarantee furnished Joseph Supple by the said Great Lakes Engineering Works, and agrees to take up and settle with said representative, any discrepancies which may be discovered on the work and material, and make his own agreements for extra charges for the

correction of any possible changes or mistakes discovered, due to faulty fabrication on the part of the Great Lakes Engineering Works.

"In witness of the above the parties herein mentioned have hereto set their hands and seals.

"Portland, Ore. Feb. 11, 1913.

"[Signed] Joseph Supple.

"[Signed] Robert Wakefield."

The initiatory pleading charges, in effect: That when the plaintiff entered into that agreement he had been and was a bridge builder and was unacquainted with the construction of any part of a ship or the cost of doing such work. That the defendant for a long time had been engaged in shipbuilding and knew the plaintiff was not familiar therewith, and that he relied upon the representations made by the defendant and his agents in relation thereto. That, when informed of the plaintiff's want of knowledge in these particulars, the defendant advised him to consult with Fred Ballin, a shipbuilding engineer who had prepared the plans for the dredges and was to have charge of the construction thereof and upon whose word he could rely. That plaintiff thereupon conferred with Ballin, who informed him that the steel plates to be used in building the dredges would arrive in Portland, Or., with all the smaller parts riveted to the larger portions in such manner as to be conveniently shipped by rail and plaintiff would be required only to bolt and rivet the larger sections together on the job; that the material to be used would be free from rust, each piece plainly marked, all plates to be calked would be beveled-sheared; that all punched holes would be reamed so as to countersink the rivet heads; that all necessary bolts would be supplied by the defendant; that plaintiff would be required to drive only about 150 rivets to the ton of material; and that all the plates would be painted before delivery. That the plaintiff believed and relied upon each of these representations. That at the time they were made Ballin was interested with the defendant in whatever profits the latter might make under his contract for constructing the dredges, of which partnership the plaintiff had no knowledge. That immediately upon signing the contract the plaintiff engaged mechanics and laborers, assembled his machinery, and notified the defendant of his readiness to commence work on the dredges, but no material therefor was delivered until June 15, 1913, when that which arrived was not connected in any manner. That no bolts were furnished. That it was necessary for the plaintiff to drive 240 rivets to the ton of material. That the members thereof were not marked for identification. That the punched holes did not fit one with another and were not reamed, and that material was rusty and unpainted. That at the time Ballin made such representations he knew they were false and uttered them with intent to defraud the plaintiff and to induce him to enter into the contract herein-

before set forth. That when the delivery of the material was thus delayed, and the plaintiff discovered the extra amount of work required, and learned of Ballin's financial interest in the profits which he was to obtain, the plaintiff informed the defendant of the falsity of his agent's representations, called attention to the faulty condition of the material, and to the amount of work necessary to assemble and prepare the parts, and informed him of the resulting delay and damage which the plaintiff would sustain by reason thereof.

"That thereupon the defendant orally requested plaintiff to enter upon and complete the work of erecting said materials in place, and thereupon agreed orally with plaintiff that he (defendant) would pay plaintiff whatever the work and labor was found to be reasonably worth at the conclusion of said work, taking into account all the facts and circumstances in connection with the work, including the delay, and agreed to pay plaintiff the reasonable worth and value of any materials furnished by plaintiff. That, in reliance upon said oral promise, this plaintiff did completely erect and assemble all materials in place for said two hulls upon the dredges 'Multnomah' and 'Wahkiakum' and furnished various materials therefor. That the reasonable worth and value of the work, labor, and materials so furnished by plaintiff to defendant upon said two hulls is the sum of \$29,408.98, of which defendant has paid only \$8,785, leaving a balance due plaintiff in the sum of \$20,623.98, which balance and any part thereof defendant refuses to pay, and said defendant refuses to recognize that this plaintiff has any rights in the premises other than the rights fixed in the written contract hereinbefore referred to, and said defendant refuses to consider with plaintiff, plaintiff's rights in the premises, and defendant renounces and denies plaintiff's rights in the premises."

Judgment was demanded for the sum of \$20,623.98.

The answer denied most of the material averments of the complaint, and particularly with respect to the alleged misrepresentations mentioned. For a separate defense, the answer sets forth the circumstances attending the making of the contract and alleges that the plaintiff received from the Great Lakes Engineering Works, which corporation furnished the material that was used in constructing the dredges, various sums of money as compensation and settlement for changes necessitated in the material furnished, and for the mistakes in the fabrication thereof, and thereupon he agreed to withdraw his claim for extra compensation on account of reaming and countersinking, and by reason thereof he is now estopped to assert or claim that any sum is due him therefor. Other matters are set forth in the answer as further defenses. The reply put in issue the allegations of new matter in the answer, and based on these issues the cause was tried, resulting in a verdict and judgment for the plaintiff in the sum of \$4,500. Upon application therefor, it was determined in part as follows:

"The court, after hearing arguments of the respective counsel, being fully advised, and being of the opinion that error was committed during the trial by overruling the motion for

nonsuit and overruling the motion for a directed verdict for defendant and that a new trial should be granted, it is therefore ordered that the motion to set aside the verdict and judgment, and for a new trial, be and the same is hereby allowed."

From this order the plaintiff appeals.

Coy Burnett, of Portland (McKinley Kane, of Madras, on the brief), for appellant. Arthur Langguth and Henry L. Lyons, both of Portland, for respondent.

MOORE, C. J. (after stating the facts as above). [1, 2] In *Smith Typewriter Co. v. McGeorge*, 72 Or. 523, 143 Pac. 905, it was held that when the trial court, within the time allowed, discovers that such a mistake of law has been made at the hearing of a cause as would necessitate a reversal of the judgment if brought up for review, such final determination may be set aside and a new trial ordered. To the same effect, see, also, *Rudolph v. Portland Ry., L. & P. Co.*, 72 Or. 560, 144 Pac. 93; *Frederick & Nelson v. Bard*, 74 Or. 457, 145 Pac. 669; *McGinnis v. Studebaker*, 75 Or. 519, 146 Pac. 825, 147 Pac. 525, L. R. A. 1916B, 868; *Delovage v. Old Oregon Creamery Co.*, 76 Or. 490, 147 Pac. 392, 149 Pac. 317; *Pullen v. Eugene*, 77 Or. 320, 146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474. Predicated upon this rule, the question to be considered is whether or not the evidence received in respect to the alleged oral modification of the original contract was sufficient to authorize a submission of the cause to the jury. The rule is settled that the terms of a written contract may be altered by a subsequent parol agreement of the parties. *Pippy v. Winslow*, 62 Or. 219, 125 Pac. 298; *City Messenger Co. v. Postal Tel. Co.*, 74 Or. 433, 145 Pac. 857. The plaintiff's testimony tends to support the averments of the complaint in respect to the delay occasioned by failing to deliver the material within the time expected, and also as to the extra amount of labor necessitated by reaming the punched holes in the plates. In a letter which he wrote to the defendant May 28, 1913, in referring to these matters, he says:

"Of course, this long wait has caused me considerable expense, as I have had to keep men within call and keep a plant down there ready at all times to unload the material. I think I am entitled to some compensation for all this delay and should be pleased to hear from you in the matter, as I do not wish to be unreasonable or make any unreasonable demands. Further, when I took the work it was expected that the erection bolts would be furnished with the material. I have had to furnish these bolts and think it would be no more than right that you should pay for them, as I took the work at a very low figure. As there is considerable of the material on hand now, we have started to get it together and think we should have some understanding about the lost time that has passed before going any further."

Plaintiff on June 11, 1913, again wrote the defendant as follows:

"I am assembling and riveting hulls for the two government dredges, the work having been undertaken, as per my contract of February 11, 1913. Not having specifications or plans show-

ing details and descriptions of the work, I derived my information for the work required from Fred A. Ballin. At the time our contract was signed it was expected that the steel would arrive in a few days. The last four cars of this steel arrived yesterday, being about two months later than expected and the other cars having been strung along one at a time made it necessary to keep a force of men on hand in readiness to unload this material and adding additional expense to the cost of the work. It was expected that erection bolts would be furnished with this material and as I furnished these bolts I should be paid for the same. The plates that have to be calked were to have been beveled-sheared, which was not done. All connections were to have been riveted to the large members. Failure to do this has increased the number of rivets to be driven and the steel being in small pieces adds to the difficulty and cost of handling same. The wedges to be used as stop waters at the butt of the lower sheets should have been punched at the shop and this will have to be done before they are driven, as it would be too expensive to drill them after they are in place. As these changes will make the work cost more than the prices given in my contract, I suggest that you and Mr. Ballin meet me at the yard at your earliest convenience and reach some agreement to take care of this additional cost. I do not wish you to be dissatisfied nor do I wish to be out any money on account of this work."

From a letter written by Wakefield to Supple July 12, 1913, an excerpt is taken as follows:

"I have written to you repeatedly stating the difference between the job we are doing and the job we contracted to do. The contract expressly states that the material is to be fabricated, which I understand, means ready to put together, while the actual work we are doing is reaming the thing entirely all over, or in other words there has been no work done except merely punching and a very poor job at that. The material is badly marked so that it is very difficult to find the pieces that belong together and lots of the material that should be put together under the clause 'Fabrication' is shipped loose, little pieces of angle 2x2, 4 to 6 ft. in length. I have written you a great many times about these differences but do not seem to get any direct results from them other than, 'will make it all right in the end' but there is so much to be made right that I think we ought to have an understanding now. I am perfectly willing to do as we agreed in our contract to leave our differences to the inspector for the government, Mr. Baxter. The clause in the contract referring to your having an agreement with the Great Lakes Engineering Company for the fabrication in which they are responsible for the proper execution of the same, their representative disclaims any responsibility for mistakes and says that the reaming is especially excluded from their contract."

Replying to this communication, the defendant on July 14, 1913, wrote the plaintiff a letter from which extracts are taken, viz.:

"Dear Sir: Your favor of the 12th inst. duly noted. You state that you have written a number of letters regarding our contract for the building of the two government dredges, and that I have failed to answer them in writing. Permit me to state that as far as differences are concerned, there is no need to take up any generalities, inasmuch as the contract itself, states very definitely and positively what part of the work is to be done by yourself and me. * * * You further agreed to settle with the representative of the Great Lakes Engineering Works, any discrepancies which may be discovered on the work and material, and make your own agreements for extra charges, and for their col-

lection for the correction of any possible changes or mistakes discovered, due to faulty fabrication on the part of the Great Lakes Engineering Works. * * * You further state, that I made you understand that I would 'Make it all right in the end,' implying that I acknowledged that there was something to make all right. I wish to dispel this impression emphatically, as so far nothing has appeared on which you could base any claims against me under our contract. I did say and meant to say, that where you could show that I owed you any money in the end, I would pay you, provided you could make the right kind of a showing. * * * I understand from Capt. Haight, representing the G. L. E. W., that he is willing to correct any mistakes made in fabrication."

The quotations from these letters partly express the dispute existing between the parties. It appears from the testimony that the plaintiff sustained a financial loss by reason of the delay in delivering the material; that he was hindered in the performance of his work in assembling the parts because the numbers placed thereon were worn off by transportation; and that he was hindered in attempting to find, or in procuring, substituted parts. The evidence shows that Mr. Wakefield settled with C. M. Haight, the representative of the Great Lakes Engineering Works, from whom he received a credit for extra work. What sum was thus accounted for is uncertain. Mr. Haight stated upon oath that \$135 was so credited, while S. R. Booth, who as bookkeeper had charge of the plaintiff's office, testified the plaintiff "received something like \$300 for these extras that cost him about \$20,000."

It will be taken for granted that the plaintiff's testimony was sufficient to be submitted to the jury as tending to substantiate the averments of the complaint with respect to the existence of a partnership between the defendant and F. A. Ballin, whereby the latter was to have received a consideration for personally supervising the work of constructing the dredges. It will also be assumed that Wakefield's testimony was adequate to go to the jury as tending to establish the allegations of the primary pleading as to Ballin's asserted representations, though such imputed declarations are denied by him. His financial interest in the contract and his alleged falsification of material facts to the plaintiff might show an inducement to modify the written contract. While such incentive could afford a valid reason for altering the original agreement, it is insufficient by itself to sanction a change in any of the terms of the writing.

In *Barber v. Toomey*, 67 Or. 452, 463, 136 Pac. 343, 346, Mr. Justice Ramsey says:

"In order to establish a contract, the evidence should show when, where, and with whom the contract was made, and the terms thereof."

A transcript of the testimony given at the trial of this cause, consisting of 812 pages, has been carefully read and considered; but from such research we have been unable to find any witness who testified to a modification of the original agreement.

The complaint charges:

"That upon the discovery by plaintiff of the delay in delivery of said materials and members and its condition, and the amount of work required to erect and assemble said materials in place and upon discovery by plaintiff that said Ballin was financially interested with said defendant in the profits to be made from said contract, this plaintiff informed defendant" thereof; and "that thereupon the defendant orally requested plaintiff to enter upon and complete the work of erecting said materials in place, and thereupon agreed orally with plaintiff that he (defendant) would pay plaintiff whatever the work and labor was found to be reasonably worth at the conclusion of said work."

The testimony shows that it required about three weeks to transport a carload of the material used in the construction of the dredges from Detroit, Mich., where it was 'fabricated,' to Portland, Or. William Wakefield, the plaintiff's son, testified that the first carload was sent out from the factory March 18, 1913, and the last carload on May 21st of that year. The first carload should have arrived about April 10, 1913, when the plaintiff evidently discovered that the smaller parts of the material had not been bolted or riveted to the larger members, and that the marks that had been placed on the plates had been worn off in transit. An examination of the letter from Wakefield to Supple, July 12, 1913, wherein it is stated, "I have written you a great many times about these differences, but do not seem to get any direct results from them other than, 'will make it all right in the end,' but there is so much to be made right that I think we ought to have an understanding now," will show that on that date no definite oral agreement had been made. On his direct examination the plaintiff's attention was called to the language thus employed, and he was asked by his counsel:

"Now, I wish you would tell the jury what conversations you had with Mr. Supple wherein he told you he would make it all right in the end, if any."

The witness replied:

"Well, we had numerous conversations relating to differences in the way the material was being delivered, and what I had anticipated and what the contract to my ideas called for; but Mr. Supple would not come right down to anything. He would always be sort of evasive and say he would look it up, and make it all right, and see that I didn't lose anything, and that kind of talk. Q: Now, along in June, down on the works, did you have a conversation with Mr. Supple? A: I had several. I had one I remembered in particular, in the early part of June; but it was all to the same purport, complaints of methods of delivery and condition of the stuff as delivered and the poor work that was done. Q: What did he say, if anything? A: He promised that he would make it all right; to stop kicking and he would see that it was all right. Q: See that what was all right? A: Why, I suppose the remuneration; that is what we were talking about. Q: Remuneration to whom? A: To me, I suppose; there was nobody else interested. Q: And for what? A: For the building of the dredges. Q: Did you then go ahead and build them? A: Yes, I went ahead and built them under protest right from the start, objecting at all times from the start about the time, and explained to him that the pro-

longation of the delivery was working a serious hardship on me; that wages were going up all the time; and that the men I had who would stay by me and knew me were all drifting away one at a time, and then had to be replaced by somebody else."

The testimony shows, however, that the only exact promise made by the defendant was to the effect that if he made any money by building the dredges, and the plaintiff lost any, in performing his part of the agreement, Supple would aid Wakefield. Thus Mr. Supple, as a witness, was directed by his counsel:

"Tell the jury what conversation you had with Mr. Wakefield over extras or over this contract in which he said something about suing you, and when was that?"

The defendant replied:

"Well, that was along, as near as I can remember, about four weeks or so before I paid him the last payment. He said he guessed he would have to sue me. He says, 'Well, Joe, you are going to make a whole lot of money off of this. We were both standing out there, and I think Mr. Clark was standing there, and he (the plaintiff) says, 'I am losing money on it, and I think I will have to sue you.' He had told me that before. I said, 'Well, Mr. Wakefield, if you will push this thing along, and I make any money off this job, and you don't, I will help you out.' Now, that is what I said to him. * * * Q. What did he say then? A. He said, 'All right, we will let it go at that.'"

This testimony is corroborated by that of C. M. Haight, who quoted Mr. Wakefield when the latter on September 24, 1913, referring to the adjustment of what he considered unusual amounts with respect to constructing the hulls of the dredges, said:

"But, Joe, you don't think for a moment that I ought to pay for all these extra bills? Q. Whom did he mean by 'Joe'? A. Mr. Supple. Mr. Supple sat right across the table from Mr. Wakefield, and Mr. Supple says, 'Well, you go ahead and rush this work through, and I don't know but what I am going to be at a loss the way the work is dragging on; and when the work is finished, if I have made any money and you show you have lost money, I will make it right with you.'"

Assuming, without deciding, that such a promise is enforceable, the testimony as to the avails received by the defendant under the terms of his contract with the Portland Iron Works to build and finish the dredges, except to furnish and install the machinery, shows that he lost money in complying with the terms of his agreement. The defendant, speaking of this matter and of Mr. Wakefield, testified as follows:

"Now, I didn't suppose I had to help him out, or I didn't owe him anything; but I would divide up with him; I would help him out if I made anything and he didn't. * * * Q. Did you make anything, or did you lose? A. I am out over \$13,000 in hard-earned money. I didn't get it out of any extras there either; and all through their fault with dilly-dallying along with the work. Q. What was the reason? A. Because they (the plaintiff and his employes) did not push the work ahead. They misrepresented the thing to me; said they had tools and men and everything and they would push this thing right along, and they only had a few tools and nothing like men enough to build a boat

one-quarter the size of either one of those in any kind of time. If they had done the work, I would have come out all right. Q. What does this \$13,000 consist of, this loss? Is it what the government holds back? A. It is money I paid out, and the most of it is money that the government took from me at a hundred dollars a day, because I could not get them to do anything. I could not get the work along."

A. F. Tarlton, the defendant's bookkeeper, was asked:

"Do you know whether or not Mr. Supple made or lost money on this contract, yes or no? A. He lost money. Q. State if you know what his loss was? * * * A. It is \$15,366.98."

The defendant testified that Mr. Ballin was to have received compensation for supervising the construction of the hulls of the dredges if any money had been made under the contract with the Portland Iron Works, and this witness further stated upon oath that he so informed the plaintiff before the latter subscribed his name to the agreement.

Mr. Ballin also testified that he made no misrepresentation to the plaintiff, but informed him generally of the nature and extent of the work required to be performed, and delivered to Mr. Wakefield a set of the completed plans before the contract was consummated.

[3] An examination of the testimony convinces us that the written contract was never modified by any subsequent oral agreement; that the evidence received on this branch of the case was insufficient to be submitted to the jury as tending to establish the averment of the complaint in this particular; and that no error was committed in setting aside the verdict and judgment.

It follows that the order of the court complained of is affirmed.

BEAN, BENSON, and McBRIDE, JJ., concur.

CORMACK v. CORMACK et al. (No. 118.)
(Supreme Court of Oregon. Oct. 17, 1916.)

MUNICIPAL CORPORATIONS \S 484(1)—STREET IMPROVEMENTS — ASSESSMENTS — PRESUMPTION—EXTENDING TIME FOR WORK.

The charter of Portland, declaring that an assessment for street improvement, and everything connected therewith, shall be presumed regular till the contrary is shown, and that the executive board shall fix the time in which an improvement shall be completed and may extend it if the circumstances warrant, an assessment cannot be held void, merely because the work was completed four days after the time limited, there being no evidence that the executive board, which accepted the improvement, did not seasonably extend the time, which it could do on its motion, though it appears that the city council attempted to extend the time after completion of the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1137; Dec. Dig. \S 484(1).]

Department 1. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge. Action by Florence A. Cormack against A. J. Cormack and others. From judgment for

plaintiff, defendant City of Portland appeals. Reversed and rendered.

This is a suit to determine an adverse claim to real property. The allegation of the complaint concerning the realty is as follows:

"That plaintiff now is and for a long time past has been the owner of the following described real property, situated in Multnomah county, state of Oregon: Lot 14 in block 40, Rosemere, an addition to the city of Portland."

This averment is denied by the answer, but the defendant Ordemann admits that he has an adverse claim to the premises. Affirmatively he alleges matter through which he became the owner and holder of a certificate issued by the city treasurer in pursuance of a sale to satisfy a delinquent assessment for a street improvement. The reply denies the transfer to the defendant Ordemann of the certificate and controverts the regularity of the action of the treasurer, but otherwise admits the allegations of the answer. The reply further gives a history of the street improvement, in which it is said that:

"The contract, among other things, provided that the said work should be fully completed within six months from the time the said contract was entered into; that the said work was not completed within six months of the time the contract was entered into and was not completed until the 4th day of November, 1913; and that no application was made by the said Oregon Independent Paving Company for an extension of time within which to complete the said work."

From the admissions in the pleadings and the stipulation of facts we derive the following résumé of the situation: Late in 1912, the council of the city of Portland regularly passed an ordinance providing for the improvement of certain streets, designating the same as district improvement No. 251; plaintiff's property being within the assessment district and liable to taxation to pay for the betterment. On April 30, 1913, the city contracted with the Oregon Independent Paving Company for making the improvement, and thereafter, in pursuance thereof, the company completed the work, which was subsequently approved and accepted by the council. The contract, "among other things, provided that the said work should be fully completed within six months from the time the said contract was entered into." In fact, it was not finished until November 4, 1913, and the contractor made no application for an extension of time; but on the date last mentioned the city council granted the contractor an extension to that day to complete the work. Thereafter the city authorities took regular proceedings to enforce the assessment as by the charter provided, resulting in the sale already mentioned, and it is the outstanding certificate of sale which is the basis of the adverse claim to plaintiff's property. It is agreed that the certificate was finally transferred to the city. The only defect in the whole procedure of which complaint is made is that the contractor was four days late in

completing its undertaking. Declaring the certificate null and void, the circuit court entered a decree in favor of plaintiff according to her prayer, and the defendants appeal.

L. E. Latourette, of Portland (Frederick De Neffe, of Portland, on the brief), for appellant. Fred L. Everson, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). Certain excerpts from the charter of the city of Portland are here set down:

"Sec. 404. In any action, suit or proceeding in any court concerning any assessment of property or levy of taxes authorized by this charter, or the collection of such tax or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith shall be presumed to be regular and to have been duly done or taken until the contrary is shown."

After the council passes an ordinance for making any improvement, the control of the proceeding according to the charter passes to a body called the executive board to advertise for proposals for making the improvement and to make contracts for the faithful completion of the work. In section 379, we find the following:

"It shall be the duty of the executive board to fix the time in which every such improvement shall be completed and it may extend such time should the circumstances warrant. The said board shall have power and authority to make all written contracts, * * * to provide for the proper inspection and supervision of all work done under the provisions of this article, and to do any other act to secure the faithful carrying out of all contracts, and the making of improvements in strict compliance with the ordinances and specifications thereof."

Section 380 provides, in substance, that, upon consummation of any improvement to his satisfaction, the city engineer shall certify his approval thereof to the auditor. The latter officer in turn publishes a notice of the completion, stating when the acceptance of the improvement will be considered by the executive board, at which time or prior thereto any property owner may file objections to the same. If upon consideration of the grounds of opposition it appears to the board that the job has not been finished in accordance with the specifications and contract, "the board shall require the same to be so completed before accepting it." After the executive board accepts an improvement, thenceforward the proceedings are ministerial, consisting of the entry by the auditor of the assessment upon the docket of the city liens, his certification to the treasurer after a certain time of delinquent assessments, and the sale by that officer of the property for the satisfaction of the lien.

From the record it appears that the plaintiff made no protest whatever against the proceeding ripening into the assessment until she commenced this suit. She did not embrace her opportunity to appear before the executive board as she might to object to the acceptance of the work. Under the require-

ments of section 404, already quoted, the burden is upon her to point out a fatal defect in the procedure. The presumption of its regularity attends the action of the municipal authorities until the contrary is shown. In this respect the charter is a restatement of the general rule that, where jurisdiction is shown to have attended the inauguration of a proceeding, it is safe from collateral attack except for defects which make it absolutely void on its face. If therefore the procedure under consideration appears to be consistent with what rightfully might have been done, it is immune from the attack aimed by this suit.

In *Duniway v. Portland*, 47 Or. 103, 112, 81 Pac. 945, 948, Mr. Chief Justice Wolverton, treating of objections to a city improvement, said:

"But, however this may be, the council, as we shall see presently, presumably passed upon the objections, and the plaintiffs are now precluded from again raising the issue in this collateral way, except it be shown that the council has itself proceeded fraudulently"—citing authorities.

In *Hendry v. City of Salem*, 64 Or. 152, 129 Pac. 531, Mr. Chief Justice McBride said:

"The proceedings for making this improvement seem to have been entirely regular, and the council had jurisdiction to order the improvement and to enter into the contract. This being the case, mere irregularities in the method of carrying on the work will not be sufficient to release the property owners from the obligation of paying their assessments. * * * The council accepted the improvement, and, in the absence of fraud, their decision that it complied with the contract is conclusive"—citing authorities.

No reference is made by the plaintiff to any act of the executive board. The prerogative of that body to fix the time for the completion of the work was invaded by the council when it put into the ordinance the provision on that point. In that respect the ordinance is not controlling in the issue here. For aught that appears, as it might properly have done, the executive board may have extended the time for the completion of the undertaking. It matters not that the contractor made no application for such an indulgence. In its capacity as general director of the undertaking the executive board could have extended the time on its own motion so as to bind the city and ultimately the taxpayer. It was the contract, and not the ordinance, that controlled the parties on that feature. Like all other contracts, the parties to the same by their lawfully authorized agents could waive or modify any of its requirements or make a new contract within the scope of the authority of the representative. Until the contrary is made to appear by the complaining party, under the precedents and charter cited, we must presume in aid of the proceeding that all this was done.

The complaint does not disclose any injury to the rights of the plaintiff. It would be inequitable to grant her exemption from pay-

ment for an improvement, the only objection to which is that it was not completed until four days after the time provided therefor seems to have elapsed, when we are able to presume that the executive board extended the time, and that, too, while the term of the contract was yet unexpired.

The decree of the circuit court is reversed, and one here entered dismissing the plaintiff's suit.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

STATE v. MISHLER.

(Supreme Court of Oregon. Oct. 17, 1916.)

1. INDICTMENT AND INFORMATION \S 110(13)—FOLLOWING LANGUAGE OF STATUTE—CONVERSION BY TRUSTEE.

An indictment charging that defendant, being trustee of certain money for benefit of M., did, with intent to defraud, unlawfully, convert it to his own use and benefit, being in the language of L. O. L. \S 1962, denouncing the crime of wrongful conversion of property by a trustee, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 291-294; Dec. Dig. \S 110(13).]

2. EMBEZZLEMENT \S 28 — INDICTMENT — DESCRIPTION OF MONEY—CONVERSION BY TRUSTEE.

It is enough for an indictment under L. O. L. \S 1962, for conversion by a trustee to charge the conversion of "\$10,000," without alleging what kind of money it was; section 1448, subd. 6, declaring an indictment sufficient if the act charged as a crime is stated with such a degree of certainty as to enable a person of common understanding to know what is intended.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 41, 42; Dec. Dig. \S 28; Indictment and Information, Cent. Dig. \S 279.]

In Banc. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Demurrer was sustained to indictment against Adam J. Mishler, and the State appeals. Reversed, and remanded for trial.

The defendant was indicted under section 1962, L. O. L., for the crime of wrongful conversion of property by trustee. Said section is as follows:

"If any person, being the trustee of any property for the benefit of another, or for any public or charitable use, shall, with intent to defraud, by any means convert the same or any portion thereof to his own use or benefit, or to the use and benefit of another not entitled thereto, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than \$50 nor more than \$1,000."

The material part of the indictment is as follows:

"Adam J. Mishler is accused by the grand jury of the county of Marion and state of Oregon, by this indictment, of the crime of conversion by trustee committed as follows: The said Adam J. Mishler on the 25th day of July, A. D. 1914, in the county of Marion and state of Oregon, then and there being the trustee of \$10,000 for the benefit of Henry J. Miller, did then and there with the intent to defraud unlawfully convert said \$10,000 to his own use and benefit."

There was a demurrer on the ground of insufficiency, which being sustained, the state appeals.

Ernest R. Ringo, Dist. Atty., of Salem, for the State. Julius N. Hart, of Portland, for respondent.

McBRIDE, J. (after stating the facts as above). [1] While the indictment is so meager in its statement of the acts constituting the offense that it comes very close to the line, we think it is sufficient. The offense is clearly a creature of the statute, and we have held that as a general rule it is sufficient in such cases to charge the facts constituting the offense in the language of the statute. *State v. Carr*, 6 Or. 133; *State v. Ah Sam*, 14 Or. 347, 13 Pac. 308; *State v. Lee*, 17 Or. 488, 21 Pac. 455; *State v. Light*, 17 Or. 358, 21 Pac. 132; *State v. Shaw*, 22 Or. 287, 29 Pac. 1028; *State v. Carmody*, 50 Or. 1, 91 Pac. 446, 1061, 12 L. R. A. (N. S.) 828. There are no adjudicated cases in this state directly involving this particular statute, but in cases of larceny by bailee, which offense is similar and closely akin to the crime here charged, we find frequent decisions to the effect that it is sufficient to charge the offense in the words of the statute. *State v. Thompson*, 28 Or. 296, 42 Pac. 1002; *State v. Chapin*, 74 Or. 346, 144 Pac. 1187. If in a case of larceny by bailee it is unnecessary to set out in the indictment the nature of the bailment or the circumstances under which the accused became bailee, it would seem equally unnecessary in an indictment for the unlawful conversion of money by a trustee to set up the facts or circumstances by which the defendant became trustee or to allege the precise way in which he converted the money to his own use. Whether he bought property with it, lost it at cards, or contributed it to charity is not material if he actually converted it, and the manner in which it was disposed of or converted would in many, if not most, instances be known only to himself. For fraudulent conversion of money by an agent *Mr. Bishop*, in *Directions and Forms*, § 406, gives the following precedent:

"That before the finding of this indictment, A., etc., being the agent or clerk of X., the said X., not being an apprentice, or under the age of eighteen years, embezzled, or fraudulently converted to his own use, money to about the amount of eighteen hundred dollars, and a bill of exchange to about the amount of eighteen hundred dollars, which came into his possession by virtue of his employment, against the peace," etc.

The indictment here substantially follows the form quoted, leaving out the allegation "not being an apprentice or under the age of eighteen years," which seems to have been a statutory exception in the state of Alabama, from which state the form given by Mr. Bishop was adopted.

[2] The next objection, and one upon which the authorities disagree, is that the indict-

ment fails to specify the kind of money converted. It is urged that as the indictment simply alleges that the defendant converted \$10,000, and does not state that such sum was of any value or was lawful money of the United States, there is room for the intentment that it was composed of "dollars" of Mexico, Confederate money, or worthless currency of some foreign country. We will first consider this contention upon principle. Our statute (subdivision 6, § 1448, L. O. L.) provides, in substance, that the indictment shall be sufficient if the act charged as a crime is stated with such a degree of certainty as to enable a person of common understanding to know what is intended. Now what does a "person of common understanding" actually understand when he hears the term "dollar" applied to a financial transaction? If he goes into a store and inquires the price of a coat and is told that it is \$20, he does not inquire whether the salesman means \$20 in Confederate money, Mexican money, or currency, or in Peruvian currency. He understands and knows that the currency of this country is meant. The laws of this country at one time recognized the Mexican dollar and made it current, but that law is now repealed and we recognize but one kind of dollar, the American dollar, which, considered either as a single coin or as a unit of value, is current for 100 cents and represents 100 cents of the currency of the United States. How much more information would the defendant here have had if the indictment had followed the ancient forms and charged that he "converted to his own use ten thousand dollars of the coins and currency of the United States of the value of ten thousand dollars, the particular denomination of said coins and currency being to the grand jury unknown"? Manifestly none. The allegations would have been as useless as "not having the fear of God before his eyes," or "being instigated by the devil," which our forefathers deemed so essential to a good indictment; nor could it prejudice the defendant upon the trial. If under this indictment the state had undertaken to show that the defendant converted ten thousand so-called dollars of Confederate money or other foreign currency, the testimony would have been promptly rejected on the ground that our law recognized no such "dollars," and that the indictment must be taken to mean American money. In larceny, either statutory or at common law, there were reasons for describing the coins taken. One reason was because in larceny it was sometimes essential to identify the particular coins taken. If, for instance, a \$20 gold piece and a half dollar were taken from the person of A., and B., previously impecunious, was found with a \$20 gold piece and a silver half dollar in his possession, this fact might, in connection with other circumstances, tend to identify him as the thief, and it was deemed proper, therefore, to give the defendant notice so far as possible of the exact de-

scription of the property he was charged with having stolen. This was especially true with respect to property other than money in those cases where the punishment of the offense depended upon the amount or value of the thing stolen. Even in such cases it has not been deemed essential to state that the value of the property was a particular sum in United States money. Thus, in form No. 11, p. 1012, L. O. L., we find the statutory form for an indictment for larceny is as follows:

"Feloniously took and carried away a gold watch (or as the case may be), the personal property of C. D. * * * of the value of more than \$35."

The word "dollars" means money in the form of the lawful currency of the United States. *U. S. v. Van Auken*, 93 U. S. 366, 24 L. Ed. 852. The word "dollar" means a certain amount of money and is of some value. An information for false pretenses which alleges that the accused with intent to defraud prosecutor obtained from prosecutor the sum of \$20, the property of prosecutor, is not objectionable as failing to allege that the money was worth something. *State v. Ryan*, 34 Wash. 597, 76 Pac. 90. This was a prosecution for obtaining money under false pretenses, and the opinion of the court is not only in point upon the exact question here under discussion, but also sustains our view upon the other questions discussed in this opinion, and is from a state whose statute contains provisions similar to ours concerning the certainty required in indictments. See, also, *People v. Millan*, 106 Cal. 320, 39 Pac. 605; *Oliver v. State*, 37 Ala. 134; *State v. Wilkerson*, 98 N. C. 696, 3 S. E. 683; *U. S. v. Fuller*, 5 N. M. 80, 20 Pac. 175; *Territory v. Hale*, 13 N. M. 181, 186, 81 Pac. 583, 13 Ann. Cas. 551, 584. The case last cited contains a very full discussion of the whole subject, from which we quote the following:

"But there is no allegation of the value of the money embezzled. The statute fixing the punishment regulates the same according to the value of the property embezzled, and, consequently, the value of the money must in some way appear in the indictment and proof. If it appears in this case, it appears by reason of the use of the words, 'dollars, in money.' The question, but arising under the postal laws of the United States, was before this court in *U. S. v. Fuller*, 5 N. M. 80, 20 Pac. 175. The indictment in that case was founded upon the clause of section 5467, Rev. St. U. S., which condemns the embezzlement of any letter or packet containing 'any other article of value,' and alleged the letter to contain 'eight hundred dollars,' without further description or allegation of value. In answer to the contention of counsel for appellant in that case the court said: 'If the packet had contained any other article to which the law fixes no certain value, then this would undoubtedly be true. For instance, a piece of jewelry. The law places no value on such article. Its value, if any, is regulated entirely by the usage of trade, and the law of supply and demand, and such value should be laid in the indictment, in the current money of the country, made by law the standard or unit of value. To charge that eight hundred dollars is of the value of eight hundred dol-

lars, would add no force or weight to the indictment. It would not make the charge stronger, nor would it give the defendant any more information of the nature and cause of the accusation against him than is contained in this indictment.' (The quotation, differing slightly from the printed report, is taken from the original opinion on file in this court.) It is here announced, in effect, that the word 'dollar' used in an indictment purports value and obviates the necessity of such an allegation. It is further said, in effect, that alleging a given number of dollars is alleging the same number of dollars in value. That case differed from this in that there are no grades of the offense under the federal statutes while under our statutes the offense has two grades according as the amount embezzled is less or more than a specified sum. Sections 1126, 1187, C. L. 1897. But if the allegation of so many dollars is an allegation of the same number of dollars in value, the difference between the two cases is of no importance. We are compelled, therefore, to hold the indictment in this case sufficient in this particular or depart from the holding in the *Fuller* Case. This we are not inclined to do. This view finds support in a few cases (*State v. Alverson*, 105 Iowa, 152 [74 N. W. 770]; *Gady v. State*, 83 Ala. 51 [3 South. 429]; *Warren v. State*, 29 Tex. 369); but we recognize it to be a departure from the current of authority, at least in cases arising under state or territorial statutes (2 Bish. Cr. Proc. §§ 320, 713; *Wharton, Crim. Pl. & Pr.*, §§ 213-218; *Brown v. People*, 173 Ill. 34 [50 N. E. 106]; *State v. Stimson*, 24 N. J. Law, 9; *Bork v. People*, 16 Hun [N. Y.] 476; *Reside v. State*, 10 Tex. App. 675; *Grant v. State*, 35 Fla. 581 [17 South. 225, 48 Am. St. Rep. 263]; *S. v. Thompson*, 42 Ark. 517; *People v. Donald*, 48 Mich. 491 [12 N. W. 669]; *Stephens v. State*, 63 N. J. Law, 245 [21 Atl. 1038]). It may be said, however, that this rule in regard to allegation of value, founded in reason as it is, and inflexible so far as concerns all property except money, has little reason to support it in a country like ours, where all forms of money are by law and in fact of uniform value. It becomes a mere naked rule of law, serving no useful purpose and affording persons charged with the larceny or embezzlement of money no additional safeguard against unjust conviction."

In the case last mentioned an officer was indicted for the embezzlement of public funds, in which cases some of the courts seem to hold that less particularity is required in describing the kind and value of the money converted than in those where the victim was a private individual; but in a case like the present it is difficult to see why a cestui que trust should be in any better position to know what particular description of coins or money his trustee had in his hands than the general public has of knowing the same fact when the money is received and embezzled by a public officer. The case of *Territory v. Hale*, supra, mentions the distinction only to show that it is immaterial, and in most of the cases cited above the victim was a private person.

Many cases hold the contrary view following the common-law rule, which has long been done away with in England by statute, and, as above shown, discredited by the later authorities in this country as obsolete and having no foundation in reason.

The judgment of the circuit court is reversed, and the cause remanded for trial.

BISHOP RANDALL HOSPITAL v. HARTLEY. (No. 857.)

(Supreme Court of Wyoming. Oct. 30, 1916.)

1. CHARITIES *§*11—"CHARITABLE INSTITUTION"—WHAT CONSTITUTES.

A hospital organized and maintained with funds donated, caring for all sick and injured persons brought to it, charging those who are able to pay and treating free of charge, those who are not, operated under a board of trustees consisting of the Protestant Episcopal bishop and the rector and church wardens, is a charitable institution.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. *§* 35; Dec. Dig. *§*11.

For other definitions, see *Words and Phrases*, First and Second Series, *Charitable Institution*.]

2. CHARITIES *§*45(2)—CHARITABLE ORGANIZATION—LIABILITY FOR TORTS OF EMPLOYEES.

A charitable institution operating a hospital is not liable for injuries to patients due to negligence of nurses employed in the hospital, in the absence of its own primary negligence in hiring incompetent nurses.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. *§* 103; Dec. Dig. *§*45(2).]

Error to District Court, Fremont County; Charles E. Winter, Judge.

Action by Elroy C. Hartley against the Bishop Randall Hospital. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

Edgar H. Fourt, of Lander, and T. S. Taliaferro, Jr., of Rock Springs, for plaintiff in error. John Dillon, of Lander, for defendant in error.

BEARD, J. In this case the defendant in error, Hartley, recovered a judgment in the district court against plaintiff in error, Bishop Randall Hospital, a corporation, on account of a personal injury sustained by him while he was a patient in said hospital, and which injury he claims was caused by the negligence of one of the hospital nurses who was caring for him. From that judgment the hospital brings error.

Two questions are presented for determination: "First, is Bishop Randall Hospital a charitable institution? Second, if so, is it liable for an injury to a patient caused by the negligence of one of its nurses, in the absence of allegation and proof of negligence of its officers or managers in the selection of such nurse?

There is practically no conflict in the evidence or controversy as to the facts in the case, and they are, briefly stated, that defendant in error, Hartley, fell on the sidewalk in Lander and broke a bone in his hip. He was taken to his room where he remained for about a week, when he was taken to the hospital. He employed his own physician, but whether before or at the time he was taken to the hospital does not appear, nor does the evidence disclose by whom or at whose direction he was taken there. Upon

his arrival at the hospital he was put under the influence of an anæsthetic for the purpose of reducing the fracture. A bed was prepared for him, in which hot water bottles were placed to warm it, and when he was put in the bed the hot water bottles were removed to the corners of the bed, and were left along the edge of the bed. In some manner, not explained in the evidence, one of the bottles got under his shoulder, and caused the burn and injury complained of. He was unconscious from the influence of the anæsthetic when placed in bed, and so remained until after he was burned. The hospital is a corporation organized and existing under the provisions of chapter 280, Compiled Statutes 1910, which authorizes the formation of corporations for one or more or all of 15 different purposes, the eighth purpose mentioned being, "To establish and maintain hospitals and infirmaries for the cure of the sick." Such corporation is empowered to sue and be sued; to contract and be contracted with in pursuance of its powers; to purchase or receive by gift, or otherwise, personal estate, such as may be necessary or proper for the purposes of such corporation, and to dispose of the same; to purchase or receive by gift, grant, devise or otherwise, real estate, such as may be necessary or proper for the purposes of the corporation, not exceeding \$50,000 in value. Such corporation is not required to have any capital stock. The objects of this corporation as set forth in its articles of incorporation are:

"(1) To found, establish and maintain a hospital at the town of Lander, in the county of Fremont in the state of Wyoming, and branches thereof at other points in said state as may hereafter be determined for the cure of the sick. (2) To provide surgical aid and nursing for patients suffering from injuries and medical aid and nursing for sick persons who cannot be properly cared for at their homes. (3) To visit the sick and suffering in their homes and afford them relief. (4) To receive and give proper care to persons who are convalescent. (5) To instruct and train women in the duties of nursing and attending upon the sick and disabled."

The articles further provide that the business and government of the corporation shall be directed by a board of trustees, not exceeding 13 in number, of whom four shall always be the Protestant Episcopal bishop of the missionary district or diocese of Wyoming, or that part thereof in which is situated the town of Lander, and the rector and church wardens of Trinity Church, Lander. The bishop shall be president of the board ex officio. The other members of said board (after the first year) shall be elected by the vestry of said Trinity Church. The rector of said Trinity Church shall always be the warden and chaplain of said hospital, and the work of nursing therein shall be done by trained nurses of the Protestant Episcopal Church; but private religious ministrations are not to be denied to any pa-

tient according to his or her conscience. The corporation has no capital stock and pays no dividends. The funds for the erection and equipment of the hospital building were provided by gifts and donations for that purpose, and neither such donors nor others receive any dividends or profits from the corporation.

It further appears from the evidence that a large portion of the funds for the support of the hospital is derived from donations. The superintendent of the hospital who has supervision over the nurses, and over the affairs of the hospital generally, is not paid by the corporation, but from missionary appropriations. That the patients receiving care in the hospital who are able to do so are expected to pay therefor, some being charged more than others, according to the rooms occupied, but those who are unable to pay are cared for gratuitously and receive the same care as paying patients, and all money received from paying patients is used to defray the expenses of maintaining the hospital, and is insufficient for that purpose; the balance being made up by donations. The defendant in error was charged on the books of the hospital, and a bill was sent to him, but whether or not he paid anything does not appear.

[1] Such being the state of the facts as disclosed by the record, we are of the opinion that the hospital was and is a charitable institution within the meaning of the law. The fact that it charges for the accommodations and care bestowed upon patients who are able to pay does not change its character. That rule is well established by the decisions. In *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141, it is said:

"It is claimed, however, that the defendant charges a compensation for the use of its rooms to those who are able to pay, and thereby loses one of the essential attributes of a charitable institution. But this in no way changes the character of the institution."

The same rule is announced in the following cited cases: *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; *Downs v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; *Duncan v. Nebraska Sanitarium*, 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913E, 1127; *Taylor v. Hospital*, 85 Ohio St. 90, 96 N. E. 1089, 39 L. R. A. (N. S.) 427; *Schloendorff v. New York Hospital*, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581; *Paterlini v. Memorial Hospital Ass'n* (D. C.) 229 Fed. 838; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453.

[2] Holding then as we do that Bishop Randall Hospital is a charitable institution,

we come to a consideration of the second question. There is no allegation, proof, or claim in the present case that there was any negligence on the part of the managers of the hospital in the selection or employment of the nurse whose negligence is claimed to have caused the injury. The authorities are almost unanimous in holding that such institutions are not liable in damages for the negligence of their physicians or nurses, in the absence of proof of negligence in their selection. In addition to the cases above cited, which are also authorities on this point, we cite the following: *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179; *Farrigan v. Pevear et al.*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, and note, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109; *Williams v. U. P. R. R. Co.*, 20 Wyo. 392, 124 Pac. 505; *Union Pacific Ry. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. In the last cited case the court said:

"The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them" (citing cases).

The decisions are not in accord in assigning the reasons for the rule; some of them putting it upon the ground that the money in the hands of those managing such institutions—

"constitutes a trust fund devoted to a charitable purpose, and the courts refuse to permit it to be diverted to the very different purpose of paying for the malpractice of their physicians or the negligence of their attendants."

Others place the nonliability on the ground that the relation of master and servant does not exist in such cases, and that the doctrine of respondent superior does not apply. Still others hold:

"That one who accepts the benefits of a charity enters into relation which exempts one's benefactor from liability for the negligence of his servants in administering the charity."

Each of the reasons for the doctrine of nonliability is supported by forceful argument and authority, and, notwithstanding the difference in the reasons assigned, the courts have almost, if not entirely, united in their conclusions. As said in *Schloendorff v. New York Hospital*, supra:

"Certain principles of law governing the rights and duties of hospitals when maintained as charitable institutions have, after much discussion, become no longer doubtful. It is the settled rule that such a hospital is not liable for the negligence of its physicians and nurses in the treatment of patients."

Over the objection of defendant the court instructed the jury as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence in this case that the plaintiff, Elroy O. Hartley, did on or about the 31st day of January, 1915,

enter into the Bishop Randall Hospital as a patient and placed himself under the care of the nurses in charge of said hospital, and that he was charged the sum of \$15 a week while in said hospital for the use of the bed in which he slept and the care and attendance of a nurse and his board; and if the jury further believe from the preponderance of the evidence that, on or about the 31st day of January, 1915, the plaintiff, while an inmate of said hospital, was burned on his back and shoulders by reason of the fact that the nurse, an agent of defendant at said hospital, had left in bed of plaintiff, or on the edge of bed of plaintiff, a hot water bottle filled with hot water, while the plaintiff was in an unconscious condition, and while in this unconscious condition plaintiff was burned by reason of this hot water bottle coming in contact with his back and shoulder and remaining there a sufficiently long time to burn plaintiff—then the jury will find in favor of plaintiff and against defendant."

The defendant requested the court to give to the jury the following instruction, which it refused to do, viz.:

"The jury are instructed that under the laws of the state of Wyoming and the evidence the Bishop Randall Hospital is an incorporated, public, and charitable institution, organized [here, setting out the object of the corporation as contained in its articles of incorporation], and that such an institution or corporation can only be charged with negligence in the selection of its employees. And that if you believe from the preponderance of the evidence that the said defendant used due care and ordinary diligence in the selection of its nurses, to select such as were lawfully competent to take care of the plaintiff, then you are instructed to find for the defendant, Bishop Randall Hospital, and the plaintiff can take nothing by this action."

Upon the undisputed facts in this case, under the law as we find and believe it to be, this hospital is a charitable institution, and not liable for injuries sustained by a patient therein by reason of the negligence of its nurses, in the absence of proof of negligence in their selection or employment. Therefore the giving of the instruction above quoted and the refusal to instruct as requested by defendant were errors for which the judgment must be reversed. The judgment of the district court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

POTTER, C. J., concurs. SCOTT, J., did not participate in this decision.

VAN BUSKIRK v. RED BUTTES LAND & LIVE STOCK CO. (No. 821.)

(Supreme Court of Wyoming. Oct. 23, 1916.)

WATERS AND WATER COURSES §84—APPROPRIATION—STATUTORY REMEDIES—SUIT FOR DAMAGES.

The statutory remedy for securing the distribution of water from a stream through application to the water commissioner does not give any remedy to an appropriator of water for the wrongful diversion of the water before distribution by the commissioner, or in violation of the statute after such distribution, and therefore does not deprive such appropriator of

his common-law right to sue for damages for such wrongful diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 76; Dec. Dig. § 84.]

Error to District Court, Albany County; V. J. Tidball, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 156 Pac. 1122.

Cassius M. Eby, of Laramie, for plaintiff in error. Corthell, McCollough & Corthell, of Laramie, for defendant in error.

POTTER, C. J. This case is before the court at this time on a petition for rehearing. A candid and careful consideration of the able brief filed in support of the petition has not caused us to doubt the correctness of the decision, or convinced us that a rehearing ought to be granted. The only point made by the petition is that we erred in holding that the remedy provided by statute (Comp. St. 1910, § 801) for securing a just and lawful distribution of the water of a stream through application to the water commissioner did not supersede and exclude the remedy of an action for damages for deprivation of the use of such water. Counsel courteously say in the brief that an examination of the opinion in the case has led them to conclude that they did not, in the former brief and argument, make clear in all respects their contention that the remedy of applying to the water commissioner to regulate the distribution of the water was exclusive of an action for damages; but that they are content if the court should feel, on re-examination of the subject, that it was clearly presented and fully understood upon the former hearing, insisting, however, that the question is one calling for the clearest possible exposition of the subject, and the most careful and comprehensive consideration of the origin, scope, and purpose of the statutes, and the practical effect of the decision upon the future administration of the water laws, and the jurisdiction and functions of the courts.

We think that we appreciate to the fullest extent the importance of the question and the effect of the decision, though we do not entertain the view that the decision is in any way inconsistent with the scope or purpose of the statutes, or in disregard of their origin; nor that the effect of the decision will be to prevent, retard, or embarrass the proper and effectual administration of the water laws.

We have again examined with care the cases decided under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), cited and strongly relied on by counsel, but remain of the opinion that they are not in point, except as previously stated. To show the point decided in those cases a reference to the case of Texas & Pacific Ry. Co. v.

Ablene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075), mentioned in the former opinion in this case (156 Pac. 1122, 1127) will, we think, be sufficient. It was held in that case that a shipper, seeking reparation predicated upon the unreasonableness of the established rate, must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power to originally entertain proceedings for the alteration of an established schedule alleged to be unreasonable. The suit was brought to recover an alleged excessive amount exacted by the railway company on shipments of carloads of cotton seed, and it was alleged as ground for recovery that the rate charged was unjust and unreasonable. The court stated the fundamental question to be:

"The scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers."

In the course of the opinion in that case the court conceded the principle to be settled that at common law, where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge, and then stated that as the act to regulate commerce did not, in so many words, abrogate such right, the contention that the right was taken away by such act rests upon the proposition that the result was accomplished by implication, and that in testing the correctness of the proposition the court must be guided by the principle that repeals by implication are not favored, and that a statute will not be construed as taking away a common-law right, unless that result is imperatively required—

"that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would, in effect, deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

The court then referred to the pertinent provisions of the act to regulate commerce, and, among others, the provisions requiring only just and reasonable rates to be charged, that schedules of rates be established, published, and filed with the Commission, and conferring upon the Commission power "to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future," and to compel compliance with the award of repara-

tion "by invoking the authority of the courts of the United States in the manner pointed out in the statute." Following that, the court proceeded to demonstrate that if power was left in the courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises, the enforcement of the act would be impossible, because a conflict might arise between the decision of a court and the action of the Commission, since the established schedule might be found reasonable by the Commission in the first instance and unreasonable by the court acting originally.

In other later cases the Supreme Court of the United States has held: That the Interstate Commerce Act did not supersede the jurisdiction of the courts, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission. For example, that if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage, and that such suits may be prosecuted either in the state or federal courts. *Penna. R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867. That, while reasonableness of rates and permissive discriminations based upon differences in conditions are administrative matters for the Commission, the courts may determine whether differentials in rates can be allowed for the same commodity under similar conditions of traffic, on account of differences in the disposition of the commodity. *Penna. R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. That the state courts have jurisdiction in a case for damages against a carrier for failure to deliver cars in accordance with its own rules for distribution, where the rule itself is not attacked, but discrimination against plaintiff notwithstanding the rule is the basis of the suit. *Ill. Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306. And in other courts jurisdiction is upheld where no question of the reasonableness of rates is involved. Thus, that the courts have jurisdiction, in a suit to recover back the difference between fixed charges collected at destination on an interstate freight shipment and the prepaid charge, to determine whether there was an overcharge under the rates as established and published. *Wolverine Brass Works v. Southern Pac. Co.*, 187 Mich. 893, 153 N. W. 778.

Thus, in such cases, the right of action is denied where the claim is based upon the alleged unreasonableness of duly established

and published rates filed with the Commission as required by law, for the reason that under the act to regulate commerce the power to determine whether the rate complained of is reasonable or unreasonable is conferred upon the Interstate Commerce Commission, with provisions for hearing and disposing of complaints as to that matter, and for awarding reparation to the injured person and enforcing the same, and that such power, if disturbed by the exercise of conflicting jurisdiction by the courts, would overthrow the design of the act to regulate commerce and render its enforcement impossible. In other words, because of those considerations, the act is construed as abrogating the common-law right of action in such cases. But, generally, where such reasons do not apply, it is held that the jurisdiction of the courts is not superseded, nor the right of action taken away. This we understand to be the effect of the decisions under the Interstate Commerce Act. We have not attempted to make the discussion of the question as arising under said act complete, for this is not a case depending upon a construction of that act. Our purpose has been only to show the underlying reason for the decisions in the cases relied on holding a right of action to have been abrogated, for such cases are important here only by way of analogy, and we think they do not sustain the contention made in the case at bar.

The duty of the water commissioner is not to award reparation to an appropriator injured through an excessive use of water by another from the common source of supply; nor is such a power conferred upon the commissioner, the division superintendent, or the board of control, though the commissioner, when called upon to distribute the water of a stream, and, finding that an appropriator is then diverting more water than his adjudicated priority permits, is authorized to reduce the amount of water diverted to that prescribed by the decree adjudicating the priorities on the stream by regulating the headgate. His action in doing that is not, however, conclusive upon the courts, nor is the only remedy for erroneous action on his part the appeal allowed by statute, but it is uniformly held, and we understand it to be conceded in this case, that an injunction will lie, to restrain such erroneous action. No conflict of jurisdiction can arise with reference to the power and duty of the water commissioner by sustaining the jurisdiction of the court in an action for damages for a wrongful diversion of water by one appropriator to the injury of another; the existence of such a right of action cannot render impossible or hinder the performance of the duties imposed upon the commissioner, or the exercise of the power conferred upon him, or the proper administration of the laws governing the use and distribution of the public waters subject to appropriation for beneficial uses. A wrongful diversion of

water by one party to the injury of another who has a right to the water diverted might occur before an official distribution could be secured, and unless a right of action can be maintained for the damages caused by such wrongful diversion, the injury would be irremediable. Whether, or how far, if at all, the failure by the injured party to request an official distribution of the water upon discovery of the wrongful diversion might be considered in mitigation of the damages subsequently accruing, or as evidence against the claim therefor, is a question not here for decision, as suggested in the former opinion.

It must be remembered that the water commissioner is not authorized to determine the question of priorities. In the discharge of his duties he is bound by existing decrees establishing the various priorities and the quantity of water to which each appropriator is entitled. The statute does not provide for continuous service of the commissioner in controlling every diversion and use of the water of the streams within his district. It is provided (section 803, Comp. Stat. 1910), as an exception to the provision that water commissioners shall receive a stated per diem compensation for each day when actively employed in the duties of the office; that where the service may be improved by continuous employment and upon recommendation of the division superintendent, the commissioner shall receive pay at a stated monthly rate, to be paid by the county in which the work is performed as in the case of the per diem compensation. But unless the commissioner has assumed control of a headgate or controlling works of a diverting ditch or canal, as provided in section 801, the water may be diverted by an appropriator for his own use, without first obtaining the permission of the commissioner or other water officer, subject, of course, in case of excessive diversion to the injury of another, to the remedies provided by law for the redress or prevention of such injury. Thus it may happen that more water than an appropriator is entitled to will be diverted by him to the injury of another having a better or superior right. And after a water commissioner has assumed control of the diversion of water into a particular ditch it may be physically possible, though in violation of the statute, for the owner to cause the diversion into such ditch of a greater quantity of water than that permitted by the commissioner, or authorized by the decree, to another's injury and damage. As suggested, that would be a violation of law for which the violator might be punished, but, without the right to maintain an action for damages, the injured party might be left without redress.

It is true that in a district where the commissioner is not employed throughout the irrigation season he is required to begin his

work upon written demand therefor by one or more appropriators. Where he is employed by the month, it is required that he shall begin work and terminate his services as the superintendent of his water division may direct. And the superintendent may, under any condition, call upon the water commissioner for work within his district whenever the necessity therefor may, in his judgment, arise. Comp. Stat. § 805. The right to call for an official distribution of the water of a stream in accordance with existing decrees is, of course, a remedy open to an appropriator, claiming that water to the use of which he is entitled is being wrongfully diverted by another, for, no doubt, even in a district where the commissioner is employed throughout the irrigation season, the superintendent may be requested to direct a distribution by the commissioner, or the latter, we suppose, might have general instructions, under which he could respond to a proper demand made upon him by an appropriator at any time. But we see nothing in the statutes, or in the scope or purpose thereof, making such remedy an exclusive one, taking away the right of action for damages caused by a wrongful diversion. It is a preventive remedy merely; and yet the statute, as shown in the former opinion, seems to recognize the jurisdiction of the courts to prevent a wrongful diversion by injunction. It does not seem to us to have been intended as a substitute for an action for damages; and certainly it does not afford financial redress to one who has been injured by a wrongful diversion. And, as such right of action is not expressly taken away by the statute, we have perceived no good reason for holding that it has been impliedly abrogated.

In a case recently coming to our notice, decided by the Supreme Court of Colorado, the effect of the statutory proceedings for establishing priorities to the use of water and the distribution thereof upon other remedies for injury occurring through a wrongful diversion is considered with reference to the particular facts in that case. It was not an action for damages, but to enjoin certain ditch owners and water users from diverting the water from certain streams otherwise than in accordance with the decrees therefor. The water officials, not having consented to become plaintiffs, were made defendants. It appears to have been contended that no cause of action was stated, for the reason that the plaintiffs had a plain, speedy, and adequate remedy at law. Referring to that contention, the court said:

"It is true an elaborate statutory method of establishing priorities to the use, and for the distribution of water thereunder, exists in this state, and that any water commissioner who fails to perform any of the duties imposed upon him by the statutes, and likewise any persons, violating the water commissioner's order, relative to the opening or shutting down of headgates, or the using of water for irrigation purposes, are severally guilty of criminal offenses.

Chapter 72, Rev. Stat. 1908. However, these statutes do not afford a complete and adequate remedy for the injury and loss occasioned by taking water from the streams by a junior appropriator, when it is needed and demanded by a senior appropriator of the same stream within the same irrigation division. While the acts of a water officer in permitting the water to be so taken by a junior appropriator, and the taking thereof by the latter against the order of the former, are crimes, for the commission of which the people may prosecute the respective violators of the law, the result, nevertheless, constitutes a special injury to the senior appropriator. Acts of such character may be enjoined by a court of equity. *People ex rel. v. Tool*, 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198. An injury to private property is in its nature special and peculiar, and constitutes a private wrong, though the act causing the injury may also be a disturbance or obstruction to the public right. The right of all the people to have the laws of society observed in no sense limits or curtails the right of the individual to maintain a suit in equity to restrain the threatened injury, the commission of which would certainly result in a private wrong to him by injuring or depriving him of his property rights." *Rogers v. Nevada Canal Co. et al.*, 60 Colo. 59, 151 Pac. 923.

A statute of Michigan (How. Ann. St. Supp. 1883-89, § 2085) provided that if any person or persons shall put any logs, timber, or lumber into a lake, river, or stream for the purpose of floating the same to the place of manufacture or market, without making adequate provisions for breaking jams of such logs, timber, or lumber in the lake, river, or stream, or for clearing the same from the banks thereof, or for running or driving the same, and shall thereby hinder the removal of logs, timber, or lumber from the banks thereof, or obstruct the floating or navigation of the lake, river, or stream, it shall be lawful for any other person engaged in floating or running logs, timber, or lumber in such lake, river, or stream so obstructed to cause such jams to be broken, and such logs, timber, or lumber to be run, driven, or cleared from the banks of the lake, river, or stream, at the cost and expense of the person, or persons, owning the logs, timber, or lumber causing the obstruction; and that such owner shall be liable to such other person for such cost and expense; and that such other person shall have a lien on the logs, timber, or lumber for the reasonable charges and expense in breaking the jams or clearing the obstruction, and entitled to take and retain possession of the same, or so much thereof as may be necessary to satisfy the amount of such charges and expense therein. The person claiming such lien was authorized by the statute to bring an action of assumpsit against the owner of the property to determine and satisfy the amount of the lien; and a proceeding was provided to ascertain and determine the amount of the lien if the owner of the property could not be ascertained, or was without the jurisdiction of the court. That statute was held not to have the effect of abrogating the right of action at common law to recover the damages occasioned by obstructing a river or

stream to the injury of another who was prevented by such obstruction from floating his logs, timber, or lumber, where the defendant had not used any means to remove the obstruction. *Bellant v. Brown*, 78 Mich. 294, 44 N. W. 326. We doubt if a different rule would have been made, or would have been proper, if the statute had provided for removing the obstruction by a public officer at the expense of the person causing the obstruction or at public expense; for, even in that event, the person prevented from floating his logs, timber, or lumber might be damaged without means of redress, except an action at common law. In the case cited the court said that the fact that a statute had been passed giving a right of action different in form from that at the common law did not abrogate the right to proceed at common law, without some special provision of statute to that effect.

It is suggested in the brief in support of the petition for rehearing that the intention that an administrative remedy shall supersede a judicial remedy will be much more readily inferred than the intention to replace one judicial remedy with another, where it is possible to reconcile the old with the new. We think the correctness of that proposition, at least for universal application, may be doubted. But if it should be accepted as a correct statement of the law, we think there is no reasonable ground for the inference under the statute considered in this case. We believe that we fully understood the contention of counsel at the former hearing. The question was ably presented and carefully considered. A rehearing will be denied.

Rehearing denied.

BEARD, J., concurs. SCOTT, J., did not participate in this decision.

In re MARRON et al. (No. 1961.)
(Supreme Court of New Mexico. Sept. 23, 1916.
Rehearing Denied Oct. 16, 1916.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT \S 42—MISCONDUCT—CONCEALING DOCUMENT.

An attorney at law, having in his possession a copy or duplicate of an original contract, the contents of which are material to the determination of the issues in a case, who conceals the same, and replies, when called upon by opposing counsel to produce it, that the contract was not in his possession or custody or under his control, when, as a matter of fact, the said contract is at that time where it had been concealed by him, is guilty of unprofessional conduct and subject to a reprimand therefor.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 54; Dec. Dig. \S 42.]

2. ATTORNEY AND CLIENT \S 42—SUSPENSION—GROUNDS—DECEPTION OF COURT.

An attorney at law who offers in evidence on behalf of his client an alleged release as constituting valid and admissible evidence of payment

and discharge of the cause of action against his client, and who moves to instruct the jury that said release constitutes a valid and sufficient defense on behalf of his client, when in truth and in fact the said release was not a valid and lawful release, discharge, or satisfaction of the claim, all of which was then well known to the attorney, is guilty of unprofessional conduct in the practice of intentional deceit of the trial court before whom the cause was then pending, and by reason of said conduct is subject to suspension from practice in the courts.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 54; Dec. Dig. \S 42.]

3. ATTORNEY AND CLIENT \S 44(1) — SUSPENSION—MISCONDUCT AS TO CLIENT.

Attorneys at law, accepting employment from one client and in the course of such relations gaining information adverse to the interests of such client, which, after the termination of such employment, is used to secure the employment of such attorneys by the person in such adverse relations to the former client, are guilty of unprofessional conduct, deserving of suspension from practice before the bar in the courts of this state.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 55, 62; Dec. Dig. \S 44(1).]

(Additional Syllabus by Editorial Staff.)

4. ATTORNEY AND CLIENT \S 44(2) — SUSPENSION—MISCONDUCT AS TO CLIENT.

That attorneys agreed with their client that they should receive one-half of a recovery for libel, and compromised the action for \$1,750, of which they paid the client only \$450, is not shown to be unprofessional conduct where the attorneys had expended a large amount of labor on the case, and successfully maintained a cause of action in a companion case, and the client refused to allow the case to go to trial and testified that she was entirely satisfied with the settlement made by the attorneys.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 56; Dec. Dig. \S 44(2).]

5. ATTORNEY AND CLIENT \S 53(2) — SUSPENSION OF ATTORNEY — SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to show unprofessional conduct of attorneys in attempting to procure additional fee from client in divorce case.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 75; Dec. Dig. \S 53(2).]

6. ATTORNEY AND CLIENT \S 53(2) — DISBARMENT OF ATTORNEY — SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to sustain a charge that attorneys extorted an additional fee from a client by threats of criminal proceedings.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 75; Dec. Dig. \S 53(2).]

7. ATTORNEY AND CLIENT \S 37—DISBARMENT—GROUNDS—MISREPRESENTATION OF COURT.

That attorneys were shown and approved before publication the body of an article is insufficient to show improper conduct where the comments and heading of the article which constituted the objectionable portion misrepresenting the action of a court were not shown to or approved by the attorneys.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. \S 50-63; Dec. Dig. \S 37.]

Original proceedings for the disbarment of Owen N. Marron and another. Respondents suspended from practice for one year.

Frank W. Clancy, Atty. Gen., for the State.
A. B. Renehan and E. R. Wright, both of Santa Fé, for respondents.

HANNA, J. [1] There are nine specifications in the accusation filed against the respondents. The first specification is to the effect that in a certain civil action pending in the district court of Bernalillo county said respondent Francis E. Wood having then and there in his possession a certain copy or duplicate of an original contract, the contents and purport of which were material to the determination of the issues in said cause, concealed the same beneath a blotter in the office of the clerk of said court and when, afterwards, he was requested by counsel for the opposite party to produce his said copy of said contract, he replied in substance that the contract was not in his possession or custody or under his control, when as a matter of fact the said contract was at that time remaining where it had been concealed beneath a blotter in the office of the clerk of the district court.

It is contended by the respondent Francis E. Wood that this copy of the contract was not material to the issues in said cause, and that therefore his conduct was not subject to criticism. It is urged by the Attorney General, however, that regardless of the materiality of the said document in the trial of the issues in said cause, the conduct of the said respondent Francis E. Wood was reprehensible to the same degree as if the said document were material and necessary to the trial of the issues in said cause. With this contention we fully agree. The conduct of the said respondent in concealing the paper from and deceiving the court and opposite counsel by statements bordering upon, if not amounting actually to falsehood, is certainly unbecoming a member of the legal profession.

The court therefore finds that said Francis E. Wood in the particulars hereinbefore mentioned has been guilty of unprofessional conduct requiring punishment at the hands of the court.

It is, therefore, considered, ordered, and adjudged by the court here that said Francis E. Wood, by reason of his said conduct, is deserving of the reprimand of this court.

[2] The second specification of the accusation is to the effect: That the respondent Francis E. Wood, while engaged as counsel for the defendant in the trial of a certain cause before the district court of Bernalillo county in which Ernest Meyers was plaintiff and the Meyers Company, Incorporated, was defendant, offered in evidence on behalf of the defendant a certain alleged release, which was in words and figures as follows:

"Albuquerque, New Mexico, Nov. 1st, 1913.

"Whereas, by article 8 of the contract between the Meyers Co. Inc., of Albuquerque, New Mexico, and myself, dated Jan'y. 1st, 1912, said Company is required to make a certain payment to me in the matter of Alex D. Shaw & Co., of New York, on the happening of certain events therein stated.

"Now, therefore, in consideration of the sum of one dollar and other valuable considerations to me in hand, receipt of which is hereby ac-

knowledgeed, I hereby release said Meyers Co. from any payment to me of the sum of \$501.88 or any part thereof mentioned in said Article 8 as a credit to said Alex D. Shaw & Co.

"Ernest Meyers."

That said respondent Francis E. Wood then and there alleged and pretended to the court that the said release constituted valid and admissible evidence of the payment and discharge of the cause of action upon which the plaintiff had brought suit in said court. That said respondent Francis E. Wood moved and requested the court to instruct the jury that said release constituted a valid and sufficient defense on behalf of the defendant in said cause, and that he thereby caused the district judge then presiding in said cause to so instruct the jury, which jury, under the instructions of the court, returned a verdict finding the issues for the defendant. That in truth and in fact the said alleged release was not a valid and lawful release, discharge, or satisfaction of the said defendant from liability to the said Ernest Meyers, and that the said respondent Francis E. Wood then and there well knew the same.

It appears from the evidence that the said release was procured from the plaintiff Ernest Meyers for the purpose of enabling the firm of Alex D. Shaw & Co. of New York City to recover from the Meyers Company the sum of \$501.88 which had been placed with the defendant the Meyers Company by the said Ernest Meyers as security against possible liability upon a merchandise account at that time unsettled and disputed. At the time the said release was introduced in evidence it appears from the proofs that the said respondent Francis E. Wood was thoroughly familiar with all of the facts and circumstances surrounding the execution and delivery of the said release, and knew that the same had never been delivered to the Meyers Company except for the purposes hereinbefore stated. He also knew at that time that a reassignment of the said claim had been executed by the said Alex D. Shaw & Co. to the said Ernest Meyers, which was intended to supersede and cancel the said alleged release.

In consideration of all the facts and circumstances in regard to this specification, the court finds that the said Francis E. Wood, in so introducing in evidence the said release, was guilty of deliberate and intentional deceit of the district judge before whom the said cause was then being heard, and that his conduct requires punishment.

It is therefore considered, ordered, and adjudged by the court, that said Francis E. Wood, be, and he is hereby, suspended from further practice in the courts of New Mexico as an attorney at law for and during the period of one year from the date hereof.

The third specification in the accusation is to the effect that in a certain cause in the district court of Bernalillo county wherein W. J. Johnson was plaintiff and the New

Mexico Fire Brick Company was defendant, the district judge of said court entered a default judgment in favor of the plaintiff, upon the express understanding with the respondent Francis E. Wood, who was attorney for the said plaintiff, that upon application, without any showing of meritorious defense, the said district judge would open said default; that the said district judge shortly thereafter left the state for a vacation; that before leaving the jurisdiction, the said district judge left word with the clerk of the court that he did not desire any other district judge to be called in to hear and determine any application to open the said default which might be filed by the defendant; that thereafter there was filed in said cause a motion by the defendant to vacate the said default judgment; that in the absence of the said district judge, the said respondent Francis E. Wood attempted to call up the said motion before another district judge who was unfamiliar with the facts and circumstances under which the said default was entered, thereby intending to secure an undue advantage over the defendant in said cause and an advantage which he could not take had the presiding district judge been present and heard the said motion.

The proofs offered in regard to this charge entirely fail to establish the fact that the said respondent Francis E. Wood was informed or knew that the said district judge desired personally to hear the motion to vacate the said default. All that can be drawn from the proofs would be a mere inference or suspicion that the said respondent Francis E. Wood desired, in the absence of the presiding judge who knew all of the facts in regard to such default judgment, to present the same to some other judge unfamiliar with the facts, and before whom he might be enabled to secure an undue advantage over the defendant. The court does not feel justified in drawing any such inference or in acting upon any such suspicion. There is no substantial evidence upon which the court could base any judgment against the said respondent Francis E. Wood in the record, and said charge is therefore dismissed.

[4] The fourth specification of the accusation is to the effect that the said respondents Owen N. Marron and Francis E. Wood were the attorneys of one Mrs. A. S. Averyt in a civil action against the Journal Publishing Company of Albuquerque, N. M., for libel, and that the plaintiff agreed with the respondents that they should receive one-half of the amount of any recovery from the defendant; that with the consent of the plaintiff the said cause of action was compromised and settled for the sum of \$1,750; that the said respondent Owen N. Marron retained out of the said sum \$1,300 and paid the plaintiff the sum of \$450; that said retention of the said amount was unconscionable, and that said respondent Owen N.

Marron in so doing was guilty of overreaching his client.

It appears from the proof in the case that the plaintiff, after having employed the respondents and having agreed with them to allow them one-half of all sums recovered in the case, absolutely refused to go further with the trial, stating to them that she could not endure the notoriety of a public trial; that prior to the time when the question arose as to whether the trial should proceed, the respondents had successfully carried to judgment a companion case involving the same facts and questions of law; that there remained to be litigated the sole question of the amount of damages recoverable by the plaintiff against the defendant; that the labor expended by the respondents was large, they having successfully maintained the cause of action both in the district court and in this court upon appeal. The plaintiff testified before us and stated that she was entirely satisfied with the settlement which was made with the respondents; that she knew fully all of the facts when she made the settlement, and was not now complaining of the same.

Under all of the facts and circumstances, it seems perfectly clear that the respondents were guilty in this regard of no unprofessional conduct. We know of no reason why an attorney at law may not make a contract with his client which, under the circumstances, brings him the fair compensation for his services. While it is true there was uncertainty as to the amount which the plaintiff might have recovered in that case, it seems perfectly reasonable to assume that she would in all probability have recovered more than was recovered in the companion case, she being a woman and the plaintiff in the companion case being a man. We find no evidence in the record of overreaching or mistreatment of the plaintiff in that case, and we therefore dismiss the said charge.

[5] The fifth specification under the charges presented is that Marron & Wood, a firm composed of Owen N. Marron and Francis E. Wood, were attorneys and counsel for Anna Machette Edgar in a certain civil action against William Edgar, which was No. 10065 on the civil docket at the district court of the county of Bernalillo, being an action for divorce from the defendant and for the settlement of certain property rights between the parties. It is alleged that in pursuance of an agreement between Owen N. Marron, one of the attorneys for the plaintiff, and Thomas N. Wilkerson, the attorney for the defendant, and the defendant himself, the defendant paid to Owen N. Marron the sum of \$500 in full settlement, discharge, and satisfaction for their services rendered and to be rendered to the plaintiff in said cause, but that after receiving the said sum and after the decree of divorce had been entered in said cause, the said Owen N. Marron de-

manded of said plaintiff a further sum of \$500 for services rendered by his firm, notwithstanding the fact, as alleged, that the said services had been fully paid for by the payment of the aforesaid sum of \$500, previously paid to Mr. Marron by the defendant. It is asserted that the attempt to collect from his client the additional sum of \$500 constituted unfaithful and unconscionable conduct towards his said client, and this is the essential feature of the charge under consideration.

The client in this case referred to, Mrs. Anna Machette Edgar, was not produced as a witness. The deposition of William Edgar was taken and introduced in evidence, but throws no light upon the essential element of the charge in question. The respondent Owen N. Marron as a witness fully covered the situation, explaining that he had informed his client that he would expect her to pay the difference between the amount recovered from the defendant William Edgar and a fee of \$1,000 which he considered his firm entitled to in view of the large property interests involved in this particular litigation. His testimony in this respect is not in any essential particular contradicted by the other evidence introduced before us, and we therefore conclude and find that this charge has not been supported by the evidence, which condition is admitted to be the fact by the Attorney General, for which reason the charge is dismissed.

[6] The sixth specification of the charges against the respondents has to do with the same divorce action of Edgar v. Edgar, in the district court of Bernalillo county, and particularly refers to alleged misconduct on the part of the respondent Owen N. Marron in demanding and securing from the said William Edgar a fee in the sum of \$500, by threatening and intimidating the said William Edgar and stating to him in substance that in the event the said sum was not paid to the said Owen N. Marron, criminal proceedings would be taken against the said Edgar which would tend to bring him in disrepute among the citizens of Albuquerque; the essential element of his charge, therefore, being that the fee in question was extorted by threats or intimidation.

The facts upon which the charge is based are testified to by Thomas N. Wilkerson, attorney for the defendant, and contradicted in all essentials by the testimony of the respondent Owen N. Marron. The deposition of William Edgar, introduced in evidence in this case, does not support the evidence of Mr. Wilkerson in the matter of the threats or intimidation, but tends to support the testimony of the respondent Owen N. Marron, for which reason it would seem clearly apparent that the charge is not supported by the evidence introduced with that clearness and certainty which should be required, and we therefore must find the respondent Owen

N. Marron not guilty of the charge in question, which is therefore dismissed.

The seventh charge as incorporated in the specification of charges against the respondents is that some time in the month of July, 1910, the said Owen N. Marron and Francis E. Wood accepted employment from one Petra G. Garcia of the city of Albuquerque, N. M., in connection with the administration of the estate of one Elias G. Garcia, deceased the son of the said Petra G. Garcia, and that in the course of said employment and during the continuance of their relations as attorneys and client, the said Marron and Wood were informed of the existence of a possible claim against the said estate of Elias G. Garcia, on the part of a woman then residing in Salt Lake City, Utah, which information it is alleged was divulged to the attorneys in question for the purpose of enabling them to meet such claim should the same subsequently arise; that thereafter the employment of the said Marron & Wood was terminated by the said Petra G. Garcia, subsequent to which it is alleged that the said Owen N. Marron, on behalf of the firm of Marron & Wood, wrote a letter to an attorney in Salt Lake City, Utah, requesting him to put in a Salt Lake City paper an advertisement asking Mrs. Elias Garcia, the alleged common-law wife of said Elias Garcia, deceased, to call at the office of the said attorney who had something of importance to communicate to her; that as a result of such advertisement the woman in question appeared at the attorney's office in Salt Lake City, and subsequently employed the said Marron & Wood to bring a suit in behalf of her child, which was alleged to be the child of said Elias G. Garcia.

The gist of this charge is that the said firm of Marron & Wood, on information imparted to them in connection with their employment by said Petra G. Garcia, failed to maintain inviolate the confidence and preserve the secrets of their client and by their conduct in stirring up litigation, soliciting and accepting employment in the manner aforesaid, violated their duties as attorneys at law and members of the bar of this court.

[7] The eighth specification of the charges against the respondents deals with the same case as the specification last referred to, and particularly charges the two respondents with wrongfully attempting to place the federal district court before the public in the attitude of receding from a position previously taken by that court in said cause, concerning alleged acts of the said Owen N. Marron and Francis E. Wood in connection with certain letters which had been introduced in evidence in the federal court and which were subsequently alleged to be altered or fabricated documents. The plaintiff and her attorneys had contended in the trial of the case in the federal court that such letters were written by one Elias G. Garcia, and the court held in effect that said letters were spurious. The

said attorneys subsequently presented to the federal court in a motion in which references were made to the effect that the opinion of the court referred to had been understood by the public and members of the bar as imputing to the firm of Marron & Wood responsibility for such altered or fabricated exhibits, or that they were in some manner privy to the alteration or fabrication thereof, and the court was asked to state more fully the facts found in this particular and pertaining to the exhibits in question. The federal court thereupon did so and made a further finding, disclaiming an intention to impute improper conduct to the attorneys, Marron & Wood. A copy of this opinion or finding of the federal court was subsequently published in the Albuquerque Evening Herald at the instance of the said Owen N. Marron with headlines and comments alleged to have been submitted to the said Owen N. Marron prior to publication, and by him approved. The substance and effect of the finding, as alleged by the charge numbered 8, did not justify the headlines and comment as the same appeared in the publication in question, which it is alleged was well known to the said Owen N. Marron at the time he gave his approval to said headlines and comment, and that the act and conduct of the said Owen N. Marron in this particular was done with an intent to deceive and mislead the public into believing that the court had exonerated him and the said Francis E. Wood in connection with all of the acts of alleged improper conduct ascribed to the said respondents in connection with the trial of the case in the federal court, the main ground of this charge being more briefly stated as an attempt on the part of the said Owen N. Marron to betray the trust and confidence of the federal district judge and wrongfully attempt to place the said judge before the public in the attitude of receding from the position previously taken in a former opinion in said cause, concerning the acts of the said Owen N. Marron and Francis E. Wood.

The evidence in support of this latter charge, in connection with the Garcia Case, does not disclose that the comments or heading of the article in question, as published in the Albuquerque Evening Herald, were shown or exhibited to the said Owen N. Marron and by him approved. The body of the article unquestionably was shown to him and by him read and approved, but the evidence fails in the essential particular that it does not bring home to him, the said Owen N. Marron, a knowledge of the objectionable matter contained in the heading of the article or the comments pertaining thereto which appeared as a portion of said heading. The failure of the evidence in this respect does away with charge No. 8 in connection with the publication referred to in the charge.

[3] The Garcia Case resulted in proceedings for disbarment instituted in the federal

court for the district of New Mexico, upon a number of grounds, and this proceeding resulted in a finding by the judge of the federal district court sustaining the charges upon three of the grounds and dismissing upon a fourth, the findings of the court being as follows:

"1. As to charge 1 the court finds the respondents and each of them guilty. It is clear that the firm of Marron & Wood were, as alleged, employed by Mrs. Petra G. Garcia in July, 1910, and within a few days after the death of Elias Garcia. This conclusion is reached solely upon what has emanated from the respondents, and without taking into consideration anything on this point proceeding from other sources. The answer of the respondents to the present proceeding in effect admits this employment. The complaint in a suit for fees filed in the district court of Bernalillo county October 18, 1910, by the firm of Marron & Wood against Petra G. Garcia alleges services. The testimony of respondent Wood in that case, introduced in evidence here, is unqualifiedly to the same effect, and the testimony of the same respondent before the court in the present case shows this relationship between the firm and Mrs. Garcia. The claim by respondent Wood that the above-mentioned suit of Marron & Wood v. Petra G. Garcia, although in form one for fees, was intended in reality as a slander suit against Mrs. Garcia, falls far short of mitigating the situation, especially in view of the fact that the complaint is verified as a suit for fees by respondent Wood. With this relationship of attorney and client existing between respondents and Mrs. Petra G. Garcia, in July, 1910, respondents received as a result of such employment and in the course of consultation thereunder certain information to the effect that a woman living in Salt Lake City, and claiming to be the wife of Elias Garcia, was likely to make a claim jeopardizing the whole estate. The representations of Mrs. Garcia by Marron and Wood terminated about August 1, 1910, but the confidential information which they possessed as a result of the brief employment, and especially upon the point above named, still necessarily remained with them. On August 10, 1910, the possession of this information led to their advertising in a newspaper at Salt Lake City, the place that had been named to them as the residence of this claimant, in which advertisement there was an invitation for 'Mrs. Elias Garcia, the wife of Elias Garcia of Albuquerque, New Mexico, to call.' A person claiming to be within the description responded to the advertisement, and contracts were entered into by respondents to represent her and her infant child. This was followed by litigation on behalf of that child in the above-named case, No. 202. Thus it came about that confidential information received by respondents during one employment was used by them to secure a client adverse to that employment. This was clearly unethical. Information so received is sacred to the employment to which it pertains, and to permit it to be used in the interest of another, or, worse still, in the interest of the adverse party, is to strike at the element of confidence which lies at the basis of, and affords the essential security in, the relation of attorney and client. Respondents seek to meet this view of the matter upon the ground, first, that they in 1912, and before the bringing of the case No. 202, asked the opinion of the attorney who had succeeded them in representing the Garcia estate in the probate court, as to whether that attorney objected to respondents bringing case No. 202, and whether the attorney thought it ethically permissible to bring the suit, and that such attorney stated he had no objection to the bringing of the suit by Marron & Wood, but that the matter of ethics was one for them to decide for them-

selves. But such an incident lacks value as an excuse. The utmost that is claimed is that the attorney said he had no objection. But even had there been an express consent, the power of an attorney employed by an estate for a restricted purpose did not include an agreement that a suit in another court might be brought against the estate. In addition, the conversation did not pretend to be an expression upon ethics, but that the matter was in terms remitted to the place where it belonged, to wit, the consciences of the respondents. As an evidence of good faith the incident likewise lacks importance for the reason that the gist of the present charge is not the bringing of the suit in 1912, but that respondents showed lack of professional integrity in using confidential information received in July, 1910, as a guide by which to seek for and locate a client in August, 1910. What may have been done in 1912 is a matter far subsequent to the relevant issue which arose in 1910. Equally unavailing is the further defense made by respondents that as the Garcias never objected to respondents appearing in case No. 202 during the progress of that litigation in 1912-1914, they are to be deemed to have waived any objection thereto. But the question here is not one of the rights of the Garcias, but as to whether respondents have adhered to proper professional standards. The silence of the Garcias while being made the victims of unprofessional conduct by members of the bar, cannot mitigate the law's prohibition upon such conduct, and cannot avail to render the respondents immune from the consequences of such misconduct.

"It is accordingly found as to the first charge that the respondents, Owen N. Marron and Francis E. Wood, and each of them, is guilty as charged, and that the conduct of each in the respect charged was contrary to the ethics of the profession of the law.

"2. Charge 2 concerns itself not with the manner in which respondents obtained the information as to the existence at Salt Lake City of a claimant against the Elias Garcia estate, but with the accusation that respondents having such information, however acquired, used it as a basis upon which to advertise for a client, and thus to stir up a protracting and extensive litigation against the Elias Garcia estate. The facts of this solicitation for business are not denied. That the conduct of respondents in this respect was unethical was frankly admitted on the stand in the present trial by the respondent Wood. The Code of Ethics of the American Bar Association and of the Bar Association of New Mexico are each to the same effect. Such conduct is equally denounced by the common law.

"Respondents are accordingly found guilty under charge 2.

"3. A careful consideration of charge 3, which, it will be noted, is against the respondent Marron alone, leads to the belief in its truth. An additional finding made upon respondents' request on August 6, 1915, in the case of *Garcia v. Garcia*, No. 202, upon the single question of whether Marron & Wood had been connected with the fabrication of four exhibits in the Garcia Case, and leaving undisturbed and untouched the expressions of the court as to the conduct of respondents upon all other features of the case, was within a day or two after the making of the findings represented to the public by a number of newspapers, including the Albuquerque Evening Herald, as exonerating the firm of Marron & Wood 'from all suspicion of wrongdoing in connection with the famous case of *Garcia v. Garcia*.' Of this intended misstatement of the court's action respondent Marron had knowledge before the publication, and in it he acquiesced. The conclusion is inevitable that he was more de-

sirous of vindication, however unwarranted, in the public mind than that the action of the court should be correctly reported. This was to overlook the fact that as an officer of the court the duty rests upon an attorney to guard the court against misrepresentations before the public. That respondent Marron did not do this constitutes a failure in a professional duty, and he is found guilty.

"4. The prosecuting committee are unanimous in the position, and have so stated in open court, that the fourth charge accusing respondents of complicity in the fabrications of Exhibits 144b, 145, 146b, and 147, used in the case of *Garcia v. Garcia*, No. 202, and of using such letters knowing them to be spurious, should be dismissed. Upon a careful review of the extended testimony taken upon this trial, as to this issue, the court concurs in the view of the committee, and holds that this charge is not sustained by the proofs. In view of the additional proofs presented upon the present trial, the court reiterates as its conclusion the finding made on August 6, 1915, as follows: 'The court finds no evidence in the case justifying the belief that Owen N. Marron and Francis E. Wood, or either of them, were either parties or privies to the fabrication of said letters. Indeed the evidence found in the record upon this issue is to the contrary.'

The record of the proceedings in the federal district court has been introduced in evidence before us in this case upon the theory that the record constitutes a *prima facie* case against the respondents. We agree with the contention, and while we have examined the evidence, offered by respondents in an attempt to justify their alleged acts of misconduct in connection with the Garcia Case, we are not disposed to agree with them that that evidence explained away the consequences of their alleged acts. It would not serve any useful purpose to discuss the facts further than they have been referred to in this opinion, and believing that the conduct of respondents in connection with this case is such as to deserve punishment, we find that the respondents and each of them should be suspended from further practice as attorneys at law in this and the district courts of the state of New Mexico for a period of one year from the date of this opinion, the suspension in this connection, so far as it applies to the respondent Francis E. Wood, to run concurrently with the suspension ordered in the Meyers Case as previously referred to in this opinion.

The ninth specification of the charges against Owen N. Marron and Francis E. Wood has been dismissed by the Attorney General and required no consideration at our hands.

Wherefore, it is ordered and adjudged that respondents, Owen N. Marron and Francis E. Wood, and each of them, be suspended from practice in the courts of the state of New Mexico for a period of one year; and it is so ordered.

PARKER, J., and NEBLETT, District Judge, concur.

FEE v. MCPHEE CO. et al. (Civ. 1475.)

(District Court of Appeal, Third District, California. Aug. 28, 1916. Rehearing Denied by Supreme Court Oct. 27, 1916.)

1. ACCOUNT STATED \Leftrightarrow 19(3)—EVIDENCE—SUFFICIENCY.

In an action on an account stated, evidence held sufficient to sustain a finding that the defendant corporation's president knew the contents of the statement prepared by the bookkeeper and presented to him by plaintiff at the time he approved it, so as to make it an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 93; Dec. Dig. \Leftrightarrow 19(3).]

2. ACCOUNT STATED \Leftrightarrow 1—ELEMENTS.

An "account stated" is a writing which exhibits the state of an account between the parties and strikes a balance which is agreed upon by them so as to become a new contract.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1-8; Dec. Dig. \Leftrightarrow 1.]

For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

3. ACCOUNT STATED \Leftrightarrow 11—CORRECTION—MISTAKE.

Where an account stated, because of a mistake of the bookkeeper in addition, does not show the true balance between the parties, it may be opened and corrected.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 61-72; Dec. Dig. \Leftrightarrow 11.]

4. ACCOUNT STATED \Leftrightarrow 13—CORRECTION—BURDEN OF PROOF.

A party seeking to avoid an account stated must allege the error, mistake, or fraud on which he relies, and establish it by clear and satisfactory evidence.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 77-80; Dec. Dig. \Leftrightarrow 13.]

5. ACCOUNT STATED \Leftrightarrow 11—CORRECTION—IN-SECTION OF NEW ITEMS.

In an account stated between a contracting corporation and its superintendent who was to receive a proportion of the net profits on certain contracts, where the account was based on the corporation's books which were kept in the same manner as they had been in previous similar transactions, the account cannot be corrected by charging against the profits certain expenditures for president's salary and other items not chargeable to any particular contract, and never before charged against the superintendent, the charges being made for the first time on the corporation's books after the institution of suit on the account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 61-72; Dec. Dig. \Leftrightarrow 11.]

6. INTEREST \Leftrightarrow 39(5)—ACCOUNT STATED—PERIOD OF COMPUTATION.

Under Civ. Code, § 1917, providing that in the absence of express contract, interest is payable on all moneys due on any settlement of account, from the day on which the balance is ascertained, and section 3287, providing that every person entitled to recover damages, certain or capable of being made certain by calculation, is entitled to recover interest thereon from the day the right to recover is vested in him, plaintiff in an action on an account stated is not limited to interest from the date of the judgment, but may recover it from the commencement of the action.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 87; Dec. Dig. \Leftrightarrow 39(5).]

7. PARTNERSHIP \Leftrightarrow 12—CREATION—SHARING PROFIT AND LOSS.

A contract between a contracting corporation, not shown to have authority to enter into a copartnership, and its superintendent, whereby the superintendent was to receive a percentage of the net profits on certain contracts and to be charged with a similar percentage of the losses, the superintendent having no interest in the property of the corporation used in the work, does not make the parties copartners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 27; Dec. Dig. \Leftrightarrow 12.]

8. EVIDENCE \Leftrightarrow 471(3)—OPINION EVIDENCE—CONCLUSION—ACCOUNT BOOKS.

Where a witness has identified the account books and explained the items therein shown, a question as to what the books showed to have been the profits of a certain job is not objectionable as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2151, 2164; Dec. Dig. \Leftrightarrow 471(3); Witnesses, Cent. Dig. § 833.]

9. TRIAL \Leftrightarrow 69—DISCRETION OF COURT—ADMISSION OF EVIDENCE AFTER MOTION FOR NONSUIT.

It is discretionary with the court to allow evidence to meet objections made by the motion for nonsuit for lack of proof on certain matters.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165; Dec. Dig. \Leftrightarrow 69.]

10. EVIDENCE \Leftrightarrow 184—ADMISSIBILITY—SIMILAR FACTS—ACCOUNTS.

In an action on an account stated, showing plaintiff's share of the profits of certain contracts where defendant claimed that certain items of expenditure should have been charged against the contract, thereby reducing the profits, evidence of previous similar transactions between the parties which had been settled without including similar items of expenditure is admissible to aid the court in determining what the parties meant by net profits.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 404, 406; Dec. Dig. \Leftrightarrow 184.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Two actions by Grant Fee against the McPhee Company and others. From the judgments for the plaintiff in each action, and from orders denying new trials, the defendants appeal. Affirmed.

William P. Hubbard, of San Francisco, for appellants. Aitken & Aitken and R. H. Countryman, all of San Francisco, for respondent.

CHIPMAN, P. J. Two actions between the same parties are included in the appeal, one having been numbered in the court below 17,022, the other 18,032, both having been tried together. The transcript on appeal covers 1,292 printed pages, and the briefs comprise half as many more. The appeals are by defendants from the respective judgments and from orders denying their motions for new trials made in each case, and 354 alleged errors of law are specified in the assignments of errors.

The complaint in the first action, No. 17,-

022, was filed June 6, 1908. It is therein alleged that defendant McPhee Company was a corporation organized and existing under and by virtue of the laws of California, with its office and principal place of business in the city and county of San Francisco; that defendants Daniel McPhee and Anna McPhee were at all times husband and wife; that defendant Daniel, during all the times mentioned, was doing business under the name and style of McPhee Company; that defendants sued fictitiously as First Doe, Second Doe, and Third Doe were the owners of one share each, and defendants Daniel and Anna McPhee were the owners of 248½ shares each of the capital stock of said corporation, the entire issued capital stock being 500 shares; "that said defendants other than the defendants sued herein as stockholders of the defendant McPhee Company are indebted to this plaintiff in the sum of \$13,649.27 upon and as for and upon an account stated made by and between said defendants except said defendants sued herein as stockholders and this plaintiff." It is then alleged that "said defendants other than those who are sued as stockholders of said defendant corporation within two years last past * * * entered into a written agreements with this plaintiff from time to time, by which it was agreed that in the course of the erection and construction of certain buildings, this plaintiff should act as the superintendent thereof and receive 40 per cent. of the net profits of the erection and construction of said buildings"; that plaintiff performed his part of said contracts and from time to time received various sums of money on account thereof; that, on May 28, 1908, plaintiff and defendants "other than said defendants sued as stockholders" entered into an account stated and the amount of the indebtedness to plaintiff was fixed at the sum of \$13,649.27, which said defendants promised to pay; that no part thereof has been paid and that said stockholders are liable for their proportionate amount of said indebtedness.

In a second count of the complaint it was stated "that this plaintiff performed certain work and rendered certain services to defendants other than said defendants sued herein as stockholders of the defendant corporation," and that plaintiff was to receive 40 per cent. of the net profits received for the construction of said buildings; that the said profits thereof were \$65,229.56; that 40 per cent. thereof is \$25,991.82; that plaintiff has been paid \$12,342.45, leaving due him the sum of \$13,649.27. The prayer is for the last-mentioned sum; judgment being asked against the five stockholders named for their proportionate amounts.

A demurrer to the complaint was overruled, and defendants, other than those fictitiously named, answered: Denied that Daniel McPhee "was doing business under the

name and style, or name or style, of McPhee Company, otherwise or at all except under the name of McPhee Company, a corporation"; denied that defendant Anna was the owner of any greater number of shares of the capital stock of said corporation than ten shares; denied the indebtedness sued for; denied that they entered into written agreements with plaintiff by which it was agreed that plaintiff should act as superintendent of the construction of the buildings referred to and should receive 40 per cent. of the net profits thereof; denied performance by plaintiff of the conditions of the contracts alleged; denied making an account stated and that any amount of indebtedness was fixed. The averments of the second cause of action were specifically denied.

The trial commenced on November 17, 1909, and, before its conclusion and on December 1, 1909, an amended complaint was filed, containing two counts. The allegations were the same as in the original complaint, with these exceptions: W. M. Willett, J. F. Campbell, and W. E. Lowe were substituted as defendants for First Doe, Second Doe, and Third Doe; it was alleged that defendant Daniel McPhee was the owner of 483 shares, and defendant Anna McPhee of 10 shares of the capital stock of said corporation; that the account stated was for \$13,749.27, and that \$100 had been paid thereon; the amount alleged in the second cause of action to be due was \$15,649.27, and judgment was prayed for that amount.

A demurrer to the amended complaint was overruled, and an answer was filed, with similar denials as those contained in the answer to the original complaint.

On April 6, 1910, an amendment to the answer was filed, setting up two additional further and separate defenses, in the first of which it was alleged that in any account stated between the parties, mistakes, errors, and omissions were made therein by the bookkeeper who prepared "such alleged account stated," and that it showed only "gross profits and losses," the items being enumerated and aggregating \$14,544.59 "as appearing in favor of the plaintiff herein." It was also alleged, as a further and separate defense, that both counts of the complaint were barred by the provisions of subdivision 1, section 339, of the Code of Civil Procedure.

On April 1, 1912, plaintiff filed an "amendment to amended complaint" to be added to the first count, setting up a mistake by the bookkeeper by which \$5,000 of the net profits made by the defendant corporation were omitted from the account upon which plaintiff was to receive 40 per cent., "and if said account stated had expressed said real intention of plaintiff and the defendant corporation, said account would have shown an additional \$5,000 of net profits, and said account should and would have been stated for the correct sum due plaintiff, to wit,

the sum of \$15,749.27." A denial of these allegations was filed by defendants.

The complaint in action No. 18,032, filed July 31, 1908, contained similar averments to those set up in the original complaint in action No. 17,022, alleging an indebtedness of \$1,123.78, for which amount judgment was asked. An amended complaint was filed December 1, 1909, containing the same changes as made in the amended complaint filed in the other action on the same date. Answers were filed to both pleadings, denying the material allegations thereof.

Very full findings were filed in each action. A nonsuit was granted as to the defendant Daniel McPhee, doing business under the name of McPhee Company. The judgment in action No. 17,022 was in favor of plaintiff against the corporation for the sum of \$14,491.33, with interest from the date of the commencement of the action, the aggregate being \$18,529.15; judgment was also entered against defendant Daniel McPhee for \$17,899.17, and against defendant Anna McPhee for \$370.56. In action No. 18,032, the judgment against the corporation, including interest from the commencement of the action, was \$1,427.78, against defendant Daniel for \$1,379.20, and against defendant Anna for \$28.54.

As is apparent from the pleadings, the corporation defendant McPhee Company was engaged in the general contracting business in San Francisco and plaintiff was its superintendent of construction. Six written agreements were entered into by the plaintiff and defendant corporation, which were received in evidence and marked, respectively, Exhibits 1 to 6. Exhibit 1 was as follows:

"San Francisco Cal., April 1/05.

"This is to certify that Grant Fee is entitled to 40 per cent. of the net profits on our contract, Fairmont Hotel dated, Jan. 13/05, salaries and office expenses to be charged to the contract.

"All money allowed Grant Fee during construction to be charged against his 40 per cent., on settlement at completion of the contract.

"McPhee Company,

"D. McPhee, Pres't."

Exhibit No. 2 was as follows:

"San Francisco, Cal., Nov. 3/05.

"This is to certify that Grant Fee is entitled to 40 per cent. of the net profits of our contract, Deming Building located on the southeast corner of Post and Stockton St., S. F.

"Should there be a loss on the building it is agreed that 40 per cent. of the net loss on the Deming Building is to be deducted from Grant Fee's share of the profits on our contract, Fairmont Hotel dated Jan. 13/05." (Same signatures as to Exhibit No. 1.)

Exhibit No. 3, dated June 25, 1906, certified that plaintiff was entitled to 40 per cent. of the net profits on 17 specified contracts.

Exhibit No. 4 was dated December 1, 1906, covered three separate contracts, and contained the following clause:

"Should there be a loss on any of the above-named contracts it is agreed that Grant Fee is

to assume 40 per cent. of such loss, the same to be deducted from his share of the profits."

Exhibit No. 5, dated April 18, 1907, covered 4 separate contracts and contained a clause in the same words and figures as last above quoted.

Exhibit No. 6, dated September 28, 1907, covered two contracts and provided that in case of loss on said contracts, "Grant Fee is to stand 40 per cent. of said loss same to be deducted from his share of profits on other work."

Appellants, in their opening brief, urge the following general points as demanding reversal of the judgments: (1) There was no account stated. (2) Interest was allowable only from the date of judgment. (3) The judgment rendered was for 40 per cent. of gross profits and not for 40 per cent. of net profits. (4) The contracts created the relation of a partnership or joint undertaking between plaintiff and defendant corporation. (5) The court erred in its rulings during the trial. (6) The court erred in other particulars in its findings.

The court found that the defendant corporation entered into written agreements with plaintiff by which it was agreed that in the course of the construction of certain buildings, plaintiff should act as superintendent thereof and receive therefor 40 per cent. of the net profits arising from the construction of said buildings, and that plaintiff performed all the terms and conditions of said agreement on his part to be performed, and there became due plaintiff various sums as his proportion of said net profits; that said proportion at the commencement of the action amounted to the sum of \$87,334.46, and that said 40 per cent. of said net profits amounted to the sum of \$26,933.78, of which plaintiff has been paid \$12,442.45, leaving due and owing to plaintiff from defendant corporation the sum of \$14,491.33, no part of which has been paid; that on May 30, 1908, plaintiff and defendant made and agreed to an account stated of said indebtedness due to plaintiff, and as a result of said accounting the amount of the net profits of defendant on said buildings and the construction thereof was shown to be \$65,288.43, and defendants' indebtedness to plaintiff, after charging all debits against him, was fixed and stated to be the sum of \$13,749.27, and it was then and there so agreed between plaintiff and defendant, and defendant thereupon promised and agreed to pay plaintiff the said sum of \$13,749.27; "that in said account stated and in the making thereof, mistakes, errors, and omissions were made by which mistakes, errors, and omissions net profits amounting to \$2,046.03 made by the defendant corporation McPhee Company in the erection and construction on said buildings upon which plaintiff was to receive 40 per cent. of the net profits, was omitted from said account," and said account, through said errors, did not

represent the real intention of plaintiff and defendant; that said errors were made by the defendants' bookkeeper in erroneously adding up a certain column of figures contained in what defendant called the "Cost Book," showing the sum of money expended by defendant in said work, and through said error there was set down as expenditures the sum of \$5,000 more than the true sum; that by reason of the mistake as to the said sum of \$5,000, or, rather, with certain other mistakes, errors, and omissions of said bookkeeper, the said net profits were in fact \$2,046.03 in addition to said \$65,288.48, the total net profits being \$67,334.46, and the correct amount of net profits due plaintiff should be and is the sum of \$14,491.33.

The court found adversely to all the errors, omissions, and mistakes alleged in the answer to have occurred in stating the account, to wit, items in respect of salaries, office expenses, interest, insurance, use of donkey engine, and as to these the court found that none of said items was "omitted from said account stated in making up said account stated through mistake, error, or omission of said plaintiff and defendant corporation McPhee Company, or through the mistake, error, or omission of the bookkeeper of said defendant corporation," except "the court has allowed \$800 for insurance and given the defendant corporation credit therefor in ascertaining the net profits as hereinbefore found, and in finding the additional net profits which should have been allowed to the plaintiff in making said stated account." The court also found that defendant's bookkeeper did in fact figure the office expenses to be \$1,800, which sum is the correct sum and was charged for office expenses in making said account stated. The court also found that neither cause of action was barred by the statute of limitations.

As conclusions of law, the court found the plaintiff was entitled to judgment as we have hereinabove stated.

We shall address ourselves to the principal action (No. 17,022 in the superior court), in which judgment for the larger amount, \$18,529.15, was rendered. No question arises as to the ownership of the shares of defendant corporation, 97 per cent. of which belonged to defendant D. McPhee—he and his wife owning over 98 per cent. of the 500 shares; nor is there any question as to his authority as president and manager of the corporation, to represent and act for it during all the time plaintiff was connected with it. There had been no meeting of the stockholders or directors for years, its business being carried on by McPhee. The corporation, in fact, represented his business incorporated. Our reference, when made to the defendant, will mean the corporation.

[1] 1. One of the principal questions in the case is whether or not the finding that there was an account stated is supported by the

evidence. The account was introduced as Exhibit 7, and is as follows:

San Francisco, May 22/08, 190

M
Statement of McPhee Co. with Grant Fee.
To McPhee Company, Dr.
Contractors

Mill and Yard: 1308 to 1350 Sixteenth Street 1908	Telephone Market 449
Borel Bank	Profit
Pacific Union Club.....	\$ 7140 93
	29 75
	\$ 7170 93
40%	\$ 2868 27
Nov. 17/08	
First page	
E P M J	

Feb. 22/08
Statement of account between McPhee Co.
& Grant Fee.

	Profit	Loss
1906		
To Fairmont Hotel.....	\$23810 80	
Deming		\$ 4326 53
Newhall, Folsom St.....	3506 84	
Halleck St	3095 20	
Pope Estate, Front St.....		974 63
Pope Estate, Mission St.....	2536 42	
Irwin residence		
Galvanized iron & sidewalk.....	371 70	
Forward	\$32320 96	\$ 5301 16
Forward	\$32320 96	\$ 5301 16
Bush St	2418 17	
Aronson Bldg. scaffolding.....	212 87	
Repair work	5291 13	
Lick job	34 30	
Brick work, Call.....	2835 92	
Call Powerhouse, brick.....	1622 13	
" floors	1932 15	
J. D. Spreckels.....	78 46	
Borel fence etc.....	9 50	
Sash & frames, Call.....		1865 95
Halleck St. underpinning.....	133 99	
Dunphy residence	106 87	
Cunningham	19069 42	
Office work		1900 00
	\$67070 97	\$ 8967 11
Less loss	8367 11	
Net profit	\$58103 86	
Net profit	\$58103 86	
40%	\$23241 54	
Cash rec'd to & including 2/21/08	10710 00	
	\$12531 54	

Nov. 17-08
Second page
E P M J

May 23/08		
Transformer house	47 95	
Manhole	11.17	
Call Powerhouse, floor.....		29 35
" brick		75.00
	59.12	104 25
		59.12
		45.23

O.K.
A.M.G.
Balance, Feb. 21/08..... \$12531 54
Loss

40%

O. K. McPhee \$10831 00

The notations, "Nov. 17/08, First page E P M J" and "Nov. 17/08, Second page E P M J," were made by his honor, Judge Mogan, at the trial.

The notation: "O. K. A. M. G." on second page was placed there by defendant's bookkeeper, Mrs. Goodspeed. Otherwise than the notation made by Judge Mogan, the account is as it was handed to plaintiff by the bookkeeper.

It will be observed that there are two pages comprising this account, each initialed by the trial judge. The one spoken of in the testimony as the "second page" is signed: "O. K. McPhee." This account covers transactions concerning the contract made April 1, 1905, in relation to the Fairmont Hotel, and ending February, 1908, the account having been first stated February 22, 1908.

The "first page," so-called, brings the account down to May 28, 1908. This page was not signed by McPhee. The facts as to the preparation of the account and its signing by McPhee were given in the testimony of plaintiff and of Mrs. Goodspeed, who was the defendants' bookkeeper. Plaintiff testified that he asked the bookkeeper to make a statement of the profits and losses on the different jobs in which he was associated or superintended and the moneys drawn by him and the moneys due him; that she made the statement in writing and gave it to plaintiff showing the account down to February 21, 1908; that he gave the paper to McPhee between the 1st and 10th of March. He testified:

"I told him this was the statement made up by the bookkeeper, showing the profits and losses on the different jobs, the amount of money drawn by me, and the amount of money due me at this date. * * * He took the paper and said that he would look it over"; that McPhee retained it in his possession until the other account ("first page") was handed him more than two months later; that at plaintiff's request, the bookkeeper continued the account down to May 28, 1908, showing the profits and losses and moneys drawn to that date; that this continuation was a carbon copy of the prior statement which had been handed to McPhee; that on May 28, 1908, the bookkeeper prepared a further statement as to two buildings—the Borel Bank and Pacific Union Club—just completed; that this statement was pinned to the prior statement, the two constituting what is referred to as Plaintiff's Exhibit 7. The carbon copy of the February account with its continuations, being the portion referred to as "second page," and the subsequent account constituting what is referred to as the "first page."

He testified that on May 30, 1908, he gave McPhee—

"the carbon copy of that same paper and the extension brought down and the other business pinned onto it." "Q. Were they attached together with a pin? A. At that time; yes, sir. Q. And the papers were in the same condition then as they are now, as to figures, totals, etc.? A. Yes, sir. Q. Was that written in lead pencil on that second page 'O. K. McPhee'? A. He placed that on there that day."

As to what occurred at that time, he testified:

"I handed the paper to Mr. McPhee, and told him that was a statement of the profits and losses on the jobs, and the moneys that I had drawn, and what was due me to date, and that Mrs. Goodspeed did not want to put this amount to my credit on the books without he first O. K.'d

the statement. * * * Mr. McPhee took the paper and he looked it over for a little while and O. K.'d the paper and signed his name to it and handed it to Mrs. Goodspeed, and told her that was all right, to place it in the books."

Mrs. Goodspeed testified:

"I saw Mr. Fee on that occasion hand this paper to Mr. McPhee; that paper, plaintiff's Exhibit 7, as near as I can remember, was, at that time, in its present condition and I think both pinned together. As near as I can remember, Mr. Fee said: 'Mr. McPhee,' he says, 'here is a statement of the profits and losses and the balance due me as far as I know.' * * * The Court: Q. Did Mr. McPhee look at the paper? A. Yes, sir. Mr. Aitken: Q. Then what? A. He looked at it quite a few minutes, and then he said, 'That is all right, Grant.' Q. Did he sign it? A. I saw him sign it. * * * Q. Did he say to you, asking about putting it in the books to Mr. Grant Fee's credit? A. I turned around to Mr. McPhee, and I said, 'Mr. McPhee, will I put this in the books?' and he said, 'Yes.'"

She testified that McPhee handed the paper to her with this instruction, and that later she gave it to plaintiff.

Both before and after this account was stated as plaintiff testified, he had been demanding from McPhee money on account for the purpose of building a house and also to make a contemplated trip east, and these demands amounted to \$9,000; that McPhee made frequent promises to meet his demands, but put him off to await a payment due or soon to become due on the Call building.

"The Court: Q. At that time he had in his possession, and there was due you, you claim, eleven odd thousand dollars? A. Yes, sir. The Court: Q. But you were only asking a certain sum on account? A. Yes, sir."

After plaintiff commenced the action, plaintiff met McPhee at the latter's request. Plaintiff testified:

"Mr. McPhee wanted to know why I had brought suit. I told him I was unable to get the money that was due me; he had promised repeatedly and I could not succeed in getting any of it, and I brought suit to protect myself; that I needed the money and wanted it. * * * He said he owed me the money, but he did not have the money just then. * * * There was no question about his owing me the money. * * * He and I conceded that there was this amount due me of \$13,000 and some odd dollars."

Later they met in the office of John R. Aitken, one of plaintiff's attorneys, to talk over the matter. Mr. Aitken testified quite fully to what was said in his office by the parties. Among other things, he testified:

"Mr. Fee used words like these: 'You owe me this money; why don't you pay it? Why don't you keep your word?' Mr. McPhee said: 'Well, I owe the money, I know I owe you the money,' or words to that effect, substantially that he owed the amount of money we had sued for. I am trying to give you almost the exact words used by Mr. Fee and Mr. McPhee. * * * Substantially it was this: Mr. Fee said: 'You owe me this money'; and Mr. McPhee said he owed the amount of money that we had sued for. * * * I used the words, stating the amount, \$13,049, and Mr. McPhee said that he owed the amount, but that he did not have the money and would give his notes at 15, 30, and 60 days for it without security, and I advised Mr. Fee not to accept the offer. * * * The Court: Q. Was the amount mentioned in the conversation,

or was the claim mentioned? A. The amount was mentioned in the conversation, I know."

It is not necessary to state more of the testimony to show that McPhee knew the contents of the Exhibit 7 and the amount therein stated as the balance due plaintiff and the amount plaintiff claimed to be due him.

[2] We think also that this Exhibit 7 was what the law regards as an account stated. In *Mercantile Trust Co. v. Doe*, 28 Cal. App. 246, 256, 146 Pac. 692, 695, we had occasion to say:

"To turn an account into an account stated, it must have been rendered with a view of ascertaining the balance and making a final adjudication of the matter involved in the account; or, in other words, to bring about a meeting of the minds of the parties."

That this is precisely what was effected in the case here seems to us plain enough.

In *Gardner v. Watson*, 170 Cal. 570, 574, 150 Pac. 994, 995, the Supreme Court very recently said:

"Over what in law constitutes an account there was never any question in this state, and very little uncertainty exists in other states."

Quoting from *Baird v. Crank*, 98 Cal. 297, 33 Pac. 65, the court said:

"It must appear that at the time of the accounting certain claims existed, of and concerning which an account was stated, that a balance was then struck and agreed upon, and that defendant expressly admitted that a certain sum was then due from him as a 'debt.'"

And as was said in *Coffee v. Williams*, 108 Cal. 556, 37 Pac. 506:

"An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract."

See 1 *Ruling Case Law*, p. 207, title *Accounts & Accounting*.

We need to go no further into the books to warrant the finding of the court that the document here in question was an account stated.

[3] 2. Appellants contend that the account was opened up by proof of mistakes, errors, and omissions, and hence it ceased to be an account stated. Defendants' bookkeeper testified that the account was stated from entries in what were called "Cost Books," in which were entered all the items of receipts and disbursements relating to the contracts with plaintiff, as had been done in agreements not now involved, but similar previous transactions which had been carried on by the same parties and had been closed up in the same manner. She testified that after this account had been stated she discovered that in adding the column showing expenditures on the Fairmont Hotel, she had made a mistake of \$5,000 which affected the profits to that extent on that contract, and made a difference in plaintiff's balance of \$2,000. She also discovered some other minor mistakes, both debits and credits, resulting in \$48.06 more to pass to plaintiff's balance.

"In the absence of allegation and proof of fraud or mistake which taints the entire account, the court will not open and unravel it as if no accounting had been made, but the settlement will be binding except for the errors shown." 1 *Corpus Juris*, p. 721.

We held in *Adams v. Gerig*, 25 Cal. App. 638, 640, 145 Pac. 106, that it was proper for the court, in an action for an account stated, to allow evidence of omissions and errors therein and find in favor of plaintiff in accordance with the facts.

Johnson v. Gallatin Valley Milling Co., 38 Mont. 83, 98 Pac. 883, was a case where an account was stated in relation to an invoice of wheat sold by plaintiff to defendant. A balance was struck and plaintiff signed at the bottom a receipt in full payment. He afterwards discovered that there was a shortage in the number of bushels and in the true balance due, to his disadvantage, and he demanded of defendant to make the correction, which being refused, he brought the action to surcharge the account stated. Said the court:

"The rules of law applicable to such cases as the present, wherein one of the parties seeks to avoid the settlement and reopen the account, are simple and of easy application. The balance ascertained from a statement of accounts was formerly held to be the result of so deliberate an act by the parties as to preclude an examination into the items for the purpose of correcting errors or mistakes; but this rule has been so far relaxed that, while the promise to pay the ascertained balance is in effect a new promise, the settlement being regarded as the consideration for it, the settlement does not create an estoppel, but furnishes a strong prima facie presumption that the result is correct." (Citing cases.)

[4] It was held that the burden of proof is cast upon the party seeking to avoid this new promise and open up to investigation the antecedent dealings between the parties, and he must allege the error, mistake, or fraud on which he relies and establish it by clear and satisfactory evidence. See, also, note to *Jasper Trust Company v. Lampkin*, 136 Am. St. Rep. 48.

It was in obedience to this rule that defendant sought to surcharge the account and introduced evidence of what it regarded as errors, omissions, and mistakes.

[5] 3. At this point we may dispose of defendants' contention that it was error to find against it in these particulars. The precise point urged is that the judgment rendered was for 40 per cent. of gross, and not 40 per cent. of net, profits, and this because it failed to take into account certain items which defendant contends should have been considered.

Defendant devotes much attention to the cases and text-writers on the question of what constitute net profits as contradistinguished from gross profits, and the rule by which they are to be ascertained, but he deduces the conclusion that the term "net profits" used in the contracts necessarily implies that the items claimed by defendant should have been included as expenditures, thus reducing proportionately the net profits

on the several contracts. Defendants' position might find support were this an accounting of the general business of the corporation between persons mutually interested in such general business, which it is not. There were six separate contracts, each referring to a particular building or buildings, or to particular work at certain places. There was no necessary connection between any two or more of them except as provided in the contracts themselves. Expressly in some and impliedly in others, there was by the terms of the contracts to be a settlement at the completion of each contract. Forty per cent. of the net loss in the Deming building (No. 2) was to be deducted from plaintiff's share of the profits on the Fairmont Hotel contract. No. 3 embraced the Newhall building and "the net profits on repair work" at certain designated places, and plaintiff was to be allowed his profits "on settlement at completion of the contract and work." No. 4 mentions the second Newhall building, the Pope Estate building and certain work on the Claus Spreckels building, and the contract provided that:

"Should there be a loss on any of the above-named contracts, it is agreed that Grant Fee is to assume 40 per cent. of such loss, the same to be deducted from his share of the profits."

No. 5 contained a similar provision as to the work therein provided for, that is, plaintiff was to share losses in any of the work therein mentioned. In No. 6, the Borel Building, and brick work on the Call powerhouse, the contract reads:

"Should there be a loss on the above-named work, it is agreed that Grant Fee is to stand 40 per cent. of said loss, same to be deducted from his share of profits on other work."

Whether the terms "other work" referred to work mentioned in that contract or in all others is not clear. It is not very material since in preparing the stated account the bookkeeper took up the work from the beginning and entered the profits and losses on each, and struck a balance, thus giving defendant the benefit of all losses. But the contracts show and the evidence was that plaintiff had nothing to do with the other business of the corporation or enterprises in which it was engaged, or in the private enterprises or business of McPhee outside of the corporation which amounted to a large sum and absorbed most of McPhee's time. The testimony of the bookkeeper and of plaintiff was that the account was made from entries in defendants' books showing the receipts and disbursements—the profits and losses—connected with each contract and building and piece of work constructed or performed under it. Mrs. Goodspeed testified that she was then and had been bookkeeper for defendant for about six years. She testified: "I keep a ledger, journal, cashbook and the cost books; they are the books of the McPhee Company." She testified that she "kept the accounts of the receipts, expenditures, and disbursements relating to those buildings (re-

fering to the six different contracts) in the cashbooks of the McPhee Company" and that she made up the document—Plaintiff's Exhibit 7—and that it represented "the profits and losses shown on the books at that time. * * * That is the summary of the accounts as kept by the McPhee Company in the cost book." "Q. That is the way you kept the account of these jobs in the cost book? A. Yes."

Speaking of one of these cost books, and it seems there were several of them, the witness said:

"The book I have in my hand is the cost book of the McPhee Company, No. 5. The cost of the various buildings and work done by the McPhee Company was kept in the journals and ledgers and the cost books. The items were first entered in the journal and ledger, and in the cost book right afterwards."

This cost book No. 5 contained the items as to the Lowe building, which the witness gave in detail as she did as to the other buildings of which entries were made in other cost books commencing with cost book No. 1. For example, cost book No. 1 contained the items as to the Deming building—a \$21,000 job in which the loss was over \$4,000 charged against plaintiff. Cost book No. 2 contained the items as to the Newhall, Folsom, and most jobs on which there was a net profit, and some other jobs; this book also contained the items as to the Newhall Halleck street job and the Pope Estate job. Cost book No. 3 contained the Pope Mission street job, Irwin residence, Bush street job, Aronson Building, and other jobs. No. 4 contained items of repair work. The items of all these jobs were read into the record "as shown by the books of the company." The witness testified the date the work mentioned in the contracts "was completed so far as the McPhee Company was concerned on the 23d day of May, 1908," and the amount of money drawn by plaintiff on the various jobs, which, as appeared by the ledger, was \$12,385.10 and \$157.35 merchandise.

4. We cannot pursue the testimony as to the character and purpose of these cost books. It showed that they were kept with the view of recording just what the parties to the contracts meant should be in them, and what they intended were to be considered in ascertaining the receipts and expenditures from which were to be computed the net profits of the work called for. Some time after this action was begun, Mr. McPhee employed an accountant to examine the books and make a summary of the net profits after there had been written into these cost books by McPhee's direction certain items aggregating \$36,334.31, the principal item being McPhee's salary as defendant's president and manager at \$1,000 per month, amounting to \$55,000, of which he directed \$29,633.33 to be distributed upon a proportion fixed by himself among the numerous jobs embraced in these six contracts. This distribution was entirely arbitrary as it was in respect of the charges for

warehouse and storage rent, caretaker, interest, and use of a donkey engine, for it was not possible to say what part of any one of these items was justly chargeable to any particular contract. There was no evidence explaining why, during the period these contracts were running, none of these items had been carried into the cost books, nor was there any evidence that this omission was by mistake. The books had been kept in this way for years, and Mrs. Goodspeed received her education and instruction in bookkeeping from her predecessor, who kept the books under McPhee's directions prior to Mrs. Goodspeed's employment. Some of the items which McPhee directed to be entered in the books, notably his salary, had never before appeared on the books in any form or been considered in any settlement with plaintiff for his services. There never had been, as was shown by the minutes of the corporation, any agreement made by the directors to pay him a salary, or authority given him to charge for his services as president and manager. He knew the system under which his books were being kept, and he knew that the items he caused to be entered in the books after the action had been commenced were items never before considered in previous settlements, and had not been entered at any time during the two or three years these contracts were in force. He had in his possession for two months the stated account as first shown him, and, presumably, did what he told plaintiff he would do, namely, "look it over." He approved it as presented to him again, with some additions to cover later jobs, and subsequently, and after suit brought, admitted the indebtedness there shown. The burden was on him to show that, through mistake, the account did not include the items he now claims should have been entered on the cost books. He did not meet this burden.

These books were, in fact, so far as they went, duplicates of the journal entries and were placed in the cost books at the same time. Their only office seems to have been to furnish in separate books in convenient form, the various items constituting receipts and expenditures relating to the contracts here involved and from which the profits and losses on the contracts could be readily ascertained.

We think the facts and circumstances shown justified the court in rejecting the items written into these books by McPhee's direction after the action was commenced and accepted the cost books as the correct source of the stated account.

[8] 5. It is claimed that interest was improperly allowed from the commencement of the action and should have been, if at all, from the date of the judgment.

Section 1917 of the Civil Code provides:

"Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per centum per an-

num after they become due, on any instrument of writing, except a judgment, and on moneys lent, or due on any settlement of account, from the day on which the balance is ascertained. * * *

Section 3287 provides:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

The general rule is that interest is chargeable on a stated account from its date. *De la Cuesta v. Montgomery*, 144 Cal. 115, 77 Pac. 887; 22 Cyc. 1511, 1515.

Where the action is for general damages, or liquidated, or quantum meruit, or quantum valebat, for the recovery of the reasonable value of goods sold and delivered or services rendered, interest is allowable only from the date of the judgment under the Code rule. Here the demands were for "moneys due on settlement of account" and "the balance ascertained" and agreed to as witnessed by the stated account (Civ. Code, § 1917); and we think interest was recoverable because the damages were "certain or capable of being made certain by calculation" (Civ. Code, § 3287). Even under some circumstances, interest may be allowed in an action upon a contract for unliquidated damages. *Courteney v. Standard Box Company*, 16 Cal. App. 600, 615, 117 Pac. 778.

The following cases would seem to warrant the charge for interest from the commencement of the action: *McCowen v. Pew*, 18 Cal. App. 482, 487, 123 Pac. 354; *Lane v. Turner*, 114 Cal. 396, 46 Pac. 290; *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692, 697, 75 Pac. 564; *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312; *Farnham v. Cal., etc., Trust Co.*, 8 Cal. App. 268, 273, 96 Pac. 788.

[7] 6. It is further contended that the contracts created the relation of a partnership of joint undertaking between plaintiff and defendant. It is hence claimed that there could be no action other than a suit for an accounting. The pleadings nowhere raise this issue. Ordinarily, in the absence of special authority, a corporation cannot enter into partnership with a private person (10 Cyc. 1142, 1143), and no such authority was shown. A corporation may enter into a contract by which it is agreed that the gains and losses of the venture shall be borne equally (*Bates v. Coronado Beach Co.*, 109 Cal. 162, 41 Pac. 855), but such agreements do not necessarily make the parties partners in legal contemplation.

The question here does not involve the question of partnership as affecting third parties. *Kennedy & Shaw Lumber Co. v. Taylor*, 3 Cal. Unrep. Cas. 697, 31 Pac. 1122, cited by defendant, only held that the associates were liable as partners to plaintiff. As be-

tween themselves, their rights were not involved. In the case here, plaintiff had no interest in the profits as property; he was simply employed under an arrangement by which he was to receive for his services a given sum out of or a proportion of the profits. *Berthold v. Goldsmith*, 24 How. 536, 16 L. Ed. 762. "The general rule is," as was stated in *Jernee v. Simonson*, 58 N. J. Eq. 282, 48 Atl. 370, "if there is no community of interest in the property of a business, that there is no partnership inter sese by mere participation in the profits."

In *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087, the agreement was to work a farm upon shares. Speaking of the contract, the court said:

"It gives no power to one to bind the others; it contemplates no common liability; it does not make one the agent for the others in carrying on any business whatever; it contains no agreement, either express or implied, for the division of any losses; and there is no intimation in it that plaintiff was to be liable to third persons for all the obligations of the partnership, jointly with his copartners." Civ. Code, §§ 2404, 2429, 2442, 2443. Nor does it contain any agreement among themselves that the party of the one part should be bound to any extent for the obligations of the party of the other part. They were not to be partners, therefore, either as to third persons or inter sese."

This case presents many features similar to the one here. See, also, *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147; 30 Cyc. 376, 377; *Cudahy Packing Company v. Hibou*, 92 Miss. 234, 46 South. 73, 18 L. R. A. (N. S.) 975, and note, 1032.

The discussion loses some of its importance in view of the fact that whatever the relation of the parties was, they settled their account with each other and agreed upon the balance due from one to the other.

[8] 7. It must not be expected that we can give specific attention to over 350 alleged errors. Such an array might give one pause, if each suggested a separate and distinct error. In fact but few points are involved. For example, after the cost books were identified and the entries explained, as to the different contracts, to each of the hundred or more questions an objection being interposed, plaintiff's counsel would ask the question: "What does the cost book show to be the profits of (naming the job)?" The answer was merely the result of these figures, and was not a conclusion of the witness, and the result was not, as defendant contends, a showing of gross profits; the result clearly was net profits.

[9] 8. The motion for nonsuit was directed to this point and was properly overruled. It was discretionary with the court to allow evidence to meet objections made by the motion based on the lack of proof on certain matters. The motion also presented the point that the action should have been in the form of an accounting on the theory that a partnership existed. This point has already been noticed; no partnership was proven.

[10] 9. Evidence was admitted that plain-

tiff and defendant had made similar contracts prior to the ones in the suit. This evidence was objected to. Defendant contended at the trial and still contends that these cost books and the profits referred to in the contracts had relation to gross profits and not net profits as claimed by plaintiff. The evidence now urged as inadmissible was introduced to aid the court in viewing the circumstances surrounding the parties, when the contracts were made, and to clear up the situation of the parties at that time—in short, to put itself in their place. It appeared from the evidence that plaintiff and defendant had been operating from 1901 and up to the time contract No. 1 was made, in a series of jobs not unlike the ones here, and under terms quite similar. In one of them, for example, plaintiff was to receive 20 per cent. for his services; in another they were to "divide the profits in half on any work or contracts," and neither of them was to receive a salary, and in all these contracts the McPhee Company was to "finance the jobs." It is true that in the cases where he got 50 per cent., plaintiff was to procure, as well as superintend, the jobs, but we cannot see that that affects the question. Plaintiff and defendant had been engaged in doing work for three or four years under substantially the same conditions and circumstances as for the time here involved.

In giving interpretation to their agreement, and to ascertain what they meant by "net profits," it seems to us the court was justified in allowing the evidence. "Previous and contemporaneous transactions may properly be taken into consideration to ascertain the sense in which the parties used particular terms, or to ascertain the subject-matter of the contract." 17 Cyc. 671. The Supreme Court said, in *First Nat. Bank v. Bowers*, 141 Cal. 253, 262, 74 Pac. 856, 860, that "where the meaning of terms is debatable," facts which tend to illustrate or explain the language used in a contract and to place the court or jury as nearly as may be in the situation of the parties "are always admissible." The courts "may avail themselves of the same light which the parties possessed when the contract was made." *Merriam v. United States*, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531.

10. Counsel takes up in his brief each one of these jobs and endeavors to show that the cost books do not correctly exhibit the receipts and disbursements, and hence do not show the net profits. We cannot follow all these intricate details. The bookkeeper testified to the correctness of the accounts in these cost books, and so far as we have been able to analyze the figures and entries upon which her testimony rests, we cannot say she was mistaken. Defendant approved the stated account, and the principal issues before the court were whether or not it constituted a stated account, and in any case should have

included the items written into the cost books by defendant's direction, after the commencement of the action, should have been included in it.

As we understand the record, the action No. 18032 involves the same questions mutatis mutandis as in No. 17022, and the decision in the latter covers the decision in the former.

We have endeavored to consider such of defendants' numerous objections as seemed to demand attention, and, failing to discover any prejudicial error in the record, the judgments and orders are affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

DOERR et al. v. FANDANGO LUMBER CO. et al. (Civ. 1509.)

(District Court of Appeal, Third District, California. Aug. 28, 1916. Rehearing Denied by Supreme Court Oct. 27, 1916.)

1. CORPORATIONS ~~426~~(7) — CONTRACTS — RATIFICATION.

A corporation ratified a mortgage alleged to have been executed by its president without authority when it made a deed of trust of all its property, and in that deed expressly referred to the mortgage and made the deed subject to the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ~~426~~(7).]

2. CORPORATIONS ~~426~~(7) — CONTRACT — RATIFICATION.

The corporation again ratified the mortgage when its board of directors passed a resolution authorizing a deed of all of its property subject to its debts, and which resolution not only expressly recognized the deed of trust, but recognized by express reference thereto the mortgage of the plaintiffs as a prior and valid lien upon such properties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ~~426~~(7).]

3. CORPORATIONS ~~426~~(10) — CONTRACTS — ESTOPPEL.

The defendant corporation is estopped from denying the validity of the mortgage by having received, retained, and used the consideration therefor for its legitimate purposes with full knowledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1704, 1714; Dec. Dig. ~~426~~(10).]

4. CORPORATIONS ~~426~~(7) — CONTRACTS — RATIFICATION.

Although the resolution of defendant's directors did not in express terms refer to the indebtedness between the plaintiffs or the mortgage, the fact that the board, in construing the language of the resolution by making a deed of trust, authorized by the resolution, subject to the mortgage, amounted to a recognition of the mortgage as imposing a valid obligation upon the corporation as effectually as if express authority to do so had been by the resolution vested in the board.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ~~426~~(7).]

5. CORPORATIONS ~~426~~(7) — CONTRACTS — RATIFICATION BY RECOGNITION.

Where a trust deed, recognizing the plaintiffs' mortgage as a valid and prior lien, has been in existence for a long time, and has never been repudiated by the corporation, the corporation must be deemed to have acquiesced in and ratified all the covenants and conditions of the trust deed, including any that were unauthorized.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ~~426~~(7).]

6. CORPORATIONS ~~426~~(7) — CONTRACTS — RATIFICATION.

Where a defendant, as trustee under a deed of trust from defendant corporation which recognized plaintiffs' mortgage, and as receiver under appointment of the court, accepted the deed of trust, and as president of the defendant corporation executed a deed of the company's property, he admitted not only for the corporation, but for himself as trustee, the validity of the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ~~426~~(7).]

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Henry Doerr and others against the Fandango Lumber Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Cornish & Robnett and Daly B. Robnett, all of Alturas, and N. J. Barry, of Susanville, for appellants. Jamison & Wylie, of Alturas, and W. Lair Thompson, of Lakeview, Or., for respondents.

HART, J. The plaintiffs instituted this suit to foreclose a mortgage upon certain real property of the Fandango Lumber company, given to secure a loan to the latter of the sum of \$10,000, evidenced by a promissory note executed by the Fandango Lumber Company in favor of the plaintiffs. The property upon which the mortgage was given is located in Modoc county, and consists of about 2,100 acres of timber and agricultural lands, upon which a sawmill stands.

The Fandango Lumber company (to be hereafter referred to variously as the Fandango Company and the company) is a regularly organized corporation, doing business in California, with its principal place of business and offices at Ft. Bidwell, Modoc county, this state. The note to secure which the mortgage in question here was given is set out in full in the complaint. It was executed and delivered to the plaintiffs on the 23d day of December, 1911, and is payable on demand.

It is alleged that at the time of the delivery of said note, and for the purpose of securing the payment of the principal sum thereof, and the interest thereupon accruing, the Fandango Company duly executed and delivered to the plaintiffs its mortgage, bearing date of December 23, 1911, "conveying the premises described in said mortgage," that said mortgage was duly acknowledged and certified so as to entitle it to be recorded,

and that the same was duly recorded in the office of the county recorder of the county of Modoc. It is alleged that the defendants W. R. Wilkinson, W. R. Wilkinson, as trustee, and W. R. Wilkinson, as receiver, "have or claim some interest in, or lien on, said mortgaged premises; but all of said claims, if any, have accrued since the lien of said mortgage." The mortgage is made a part of the complaint, and purports to have been executed by the Fandango Company, "by A. G. Duhme, President."

The answer denies all the material averments of the complaint, but, while admitting that Wilkinson, as an individual, claims no interest in, or lien upon, the alleged mortgaged premises, alleges that he, as trustee and as receiver, has and claims some interest in and lien upon said premises.

The answer further alleges that the said A. G. Duhme, as president of the Fandango Company, was never at any time authorized by the board of directors of said company, at any meeting thereof, or at all, to borrow any money from the plaintiffs, or to execute and deliver to the latter the said note for \$10,000 as evidence of a loan in that amount, or to execute the mortgage the foreclosure of which is sought by this action; that the transaction involving the execution of said note and mortgage was never ratified by the board of directors of said company.

As an alleged "second and separate" defense, the answer charges collusion between the plaintiffs and the said A. G. Duhme for the purpose of fraudulently bringing about a foreclosure sale of the mortgaged property at which said property would be purchased by the plaintiffs, thereby preventing other creditors of the Fandango Company from securing satisfaction of their respective claims against said company, amounting in the aggregate to approximately \$40,000, and which claims are unsecured. No testimony having been offered or received in support of the charge so made, further consideration thereof is obviously unnecessary.

The court found that the Fandango Company or its board of directors never at any time or place authorized the said Duhme, as president of said company, or otherwise, to borrow for the company from the plaintiffs the sum of \$10,000 or any other sum, or to execute on behalf of said company the note and the mortgage in question; that the said company or its directors never at any time subsequent to the making and delivery of said note and the execution of said mortgage ratified the same or the action of said Duhme in the transaction resulting in the consummation of the loan from the plaintiffs and the giving to them of said note and said mortgage; that therefore "the said note and mortgage are not, nor are either of them, the note or mortgage of the said Fandango Lumber Company."

From the findings, of which the foregoing

is an epitomized statement, the court concluded as a matter of law:

"That the said note and mortgage, and each of them, and every part thereof, are void and of no effect as creating any obligation against the said defendants or any of them, or as to constituting any lien against the property of said defendants, or any of them, described in said mortgage and complaint, or otherwise."

Judgment for the defendants followed, from which the plaintiffs appeal, supporting the same by a transcript of the testimony and other proceedings of the trial, prepared in accordance with the provisions of section 953a of the Code of Civil Procedure. The general question presented is whether the findings vital to the judgment are supported by the evidence.

The salient facts are undisputed, and briefly they are: In the year 1911 the Fandango Company found itself in financial difficulties, being heavily in debt and without financial means to carry on its lumber business. It owned extensive properties, including extensive timber land holdings. While the board of directors of said company never at any time expressly authorized Duhme, the president, to borrow on behalf of the company the sum of money for which the note and the mortgage in dispute were given, said board did nevertheless, at a special meeting thereof, on August 18, 1911, adopt a resolution which, in general language, vested in the directors the authority to borrow money "of whom they see fit" for the company "to run the business." Transcript, p. 47.

Among those to whom the company was indebted at the time mentioned and whose indebtedness was secured was the Bank of Ft. Bidwell. The company had overdrawn its account at said bank by the sum of approximately \$4,000; the total indebtedness of the company to said bank being over \$9,000. The bank was pressing the company for a settlement, and Duhme, in the year 1911, went to Minneapolis, Minn., for the purpose of making an effort to secure a loan which would be sufficient to liquidate the debt of the company to the said bank. Two of the directors of the company, C. B. and C. D. Eustis, then resided in Minneapolis. After negotiations with the plaintiffs, Duhme and his codirectors, C. B. and C. D. Eustis, succeeded in securing the loan. Before consummating the transaction, however, Duhme telegraphed to the said bank from Minneapolis, asking its consent to mortgage the company's timber lands and plant to secure the proposed loan. The bank, by telegram, replied, under date of December 22, 1911:

"Bank consents to your mortgaging timber and plant, providing you have bank in Minneapolis wire us seven thousand dollars for credit Fandango Lumber Company; overdraft now four thousand dollars. Brown advises two thousand in checks outstanding which we will protest if the money is not wired immediately."

Thereafter, and on the 23d day of December, 1911, the plaintiffs loaned and delivered to Duhme the sum of \$10,000, for which the

note set out in the complaint and the mortgage attached to and made a part of that pleading as security for the payment of said note were executed by Duhme in the name and under the corporate seal of the Fandango Lumber Company.

On the 25th day of June, 1912, in pursuance of a resolution previously adopted by the board of directors of the Fandango Company, the said board executed a trust deed, whereby it conveyed to the defendant, W. R. Wilkinson, as trustee, all the property covered by the mortgage in controversy. The object of said deed of trust was to straighten out the affairs of the company, and to this end the trustee was authorized by said instrument to conduct and manage the business of the company, to pay all current operating expenses, and to pay off, as they fell due, the debts of the concern. This deed provides, among other things:

"The party of the first part (Fandango Company) covenants and agrees that this deed of trust delivered to the trustee shall be a mortgage upon the premises and property affected thereby, subject only to mortgage * * * to Devereaux, Wallace, Doerr, and Bleeker, of Minneapolis," who are the plaintiffs in this action.

The Sunset Lake Lumber Company is a subsidiary corporation which was organized subsequent to the time at which the mortgage in question was given, for the purpose of taking over the properties and business of the Fandango Company, and paying all its debts. On the 26th day of July, 1912, the Fandango Company, by deed, conveyed to the said Sunset Company all its properties and business for the purposes above mentioned. The defendant W. R. Wilkinson was then president of the Fandango Company, and as such officer, and for and under the seal of the said company, executed the said deed of conveyance to the Sunset Company. That deed expressly recites that it is subject to all the debts of the Fandango Company, and subject further " * * * to a second mortgage for the sum of ten thousand (\$10,000.00) dollars in favor of Thomas F. Wallace et al., of Minneapolis, Minnesota. * * * "

On September 10, 1912, a complaint reciting among other facts, the existence of the mortgage in suit and the indebtedness to secure which it was given, and asking for the appointment of a receiver of the Fandango Company was filed in the superior court of Modoc county, by an unsecured creditor of said company. The complaint in said action was verified, and alleged the existence and validity of the mortgage in suit here. Upon the hearing of the application for the appointment of a receiver in said action, the defendant W. R. Wilkinson was named for and appointed by the court to that office, and as such took over the control and management of the properties of the Fandango Company covered by the mortgage involved herein.

On page 36 of the book containing the rec-

ord of the proceedings of the meetings of the board of directors of the Fandango Company there appears on a slip of paper pasted on said page a resolution in typewriting, purporting to have been adopted by the said board on the 24th day of June, 1912, and purporting to ratify the acts of Duhme in borrowing the money from the plaintiffs and in giving the note and the mortgage in question, evidencing and securing said loan.

It appears from the uncontradicted testimony of Duhme that the money obtained from the plaintiffs on the note and the mortgage in question was applied to the extinguishment of the obligations of the Fandango Company, approximately \$9,500 thereof having been paid to the Bank of Ft. Bidwell in satisfaction of the debt due it from the company.

Under the evidence, of which the foregoing statement embraces an accurate résumé, it cannot justly be held that the findings essential to the support of the judgment are warranted.

[1-3] Whether the purported resolution of June 28, 1912, pretending to ratify the transaction involving the making and giving of the note and mortgage in controversy here was regularly or legally adopted by the board of directors is a question. Duhme testified that it was so adopted, while Wilkinson, then a member of the board and president of the corporation, positively declared that he attended all the meetings of the board, and that at none was any such resolution even suggested, much less adopted. But, in view of other facts, it is wholly unimportant whether there was or was not a formal ratification of the transaction. For we agree to the following contentions of counsel for the plaintiffs: (1) That the Fandango Company ratified the mortgage "when it made a deed of trust of all its property to W. R. Wilkinson, and in that deed expressly referred to plaintiff's mortgage and made said deed subject to this mortgage, thereby expressly recognizing the obligation"; (2) that the Fandango Company again ratified said mortgage when its board of directors passed a resolution authorizing a deed of all its property to the Sunset Lake Lumber Company, said conveyance to be subject to the debts of the Fandango Company, and which resolution not only expressly recognized the deed of trust theretofore given to Wilkinson, covering all its properties, but recognized by express reference thereto the mortgage of the plaintiffs as a prior and valid lien upon said properties; (3) that, as to the defendant Fandango Company, it is estopped from denying the validity of the mortgage for the reason that it received, retained, and used for its legitimate purposes the consideration for the mortgage, viz. the sum of \$10,000, with full knowledge of the fact that said sum of money had been borrowed for its use in his business and of the fact that said

mortgage was given to secure the repayment of said sum of money.

[4, §] But it is earnestly contended by the defendants that the trust deed to Wilkinson could not have the effect either of ratifying the act of giving the mortgage or of estopping the Fandango Company from denying the validity of that instrument, inasmuch as the resolution authorizing the making of said trust deed did not expressly vest the board of directors with authority to include in said deed a provision that it should be subject to the prior lien of the mortgage. The resolution, it is true, did not in express terms refer to the indebtedness to the plaintiffs or the mortgage in question, but it did provide that the object of the trust deed was to place the properties and business of the company in the hands of Wilkinson as trustee, for the purpose of operating the business of the concern and paying off its indebtedness. The provision in the trust deed that it was to be subject to the mortgage and the rights of the mortgagees thereunder may be assumed to have been the result of the interpretation by the directors of the language of the resolution providing generally for the satisfaction of the obligations then existing against the company; but, whether such interpretation was justified or not—that is to say, whether, in strictness, the board of directors was authorized or intended by the resolution to be authorized to insert in the trust deed as a condition thereof the provision respecting the mortgage—the very fact that said board did so construe the language of the said resolution in that particular amounted to a recognition of the mortgage as imposing a valid obligation upon the Fandango Company as effectually as if express authority to do so had been by the resolution vested in said board. If, however, this position were unsupported, then upon either one of two other considerations, supported by the record, may it justly and with legal propriety be held that the transaction involving the execution of the note sued on and the mortgage given to secure its payment has been ratified, viz.: (1) That the trust deed has been in existence for a long period of time (executed June 25, 1912), is still in existence, and has never been repudiated by the corporation, nor is there any repudiation of it now. It must therefore be deemed to have been by the corporation acquiesced in and all its covenants and conditions, including any unauthorized conditions or terms, if any, which it contains, thus ratified. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 69-70, 34 Pac. 527. (2) Not only does the resolution authorizing the deed to the Sunset Lake Lumber Company refer to and thus ratify the trust deed and all its conditions, but the deed itself expressly refers to and provides that it shall be subject to the mortgage in question. Here, therefore, we have an express and positive recognition of the obliga-

tion of the mortgage, and this is the equivalent of the ratification of said mortgage. The conclusion thus declared is in accord with all the cases in which the facts bear analogy to those of the present case. Indeed, the proposition that ratification of a contract, the making of which is unauthorized by one of the principals, may be effectuated by a recognition, howsoever informally of the agreement and the obligations arising by virtue thereof, is elementary. A familiar and common application of this doctrine is to be found in those cases where an agent, in making a contract for his principal, transcends the scope of his authority as such, and the principal, after the contract has been made, although not at that time legally bound by its terms, does some act recognizing the validity of the agreement, as, for instance, accepting some of the benefits or assuming some of the burdens thereof. In such case, quite obviously, the principal will be deemed from his acquiescence in the contract to have ratified the unauthorized act of his agent, and will be held to its terms and conditions, notwithstanding that he has not in express language or in a formal manner ratified the contract. The case here comes within the principle thus referred to. The giving of the mortgage was not an ultra vires act, and there is no claim that it was. If the act involved the making of an invalid contract, it was, as shown, merely because of the manner in which it was attempted to perform the act or make the contract, and, like any other contract, it is capable of being ratified by conduct or a recognition in some manner of the obligation, and, as stated, the deed to the Sunset Company, which was executed and delivered by the Fandango Company when the defendant Wilkinson was president thereof, and which, indeed, was executed by him as president for the company, contains language clearly and plainly recognizing the mortgage and the obligations thereof.

We need not refer to all of the many cases holding to the views above expressed. The case of *Porter v. Lassen County, etc., Co.*, 127 Cal. 261, 270-271, 59 Pac. 563, 567, is directly in point here, and it is sufficient for the purposes of this case to reproduce herein an excerpt or two therefrom. It is held in that case, quoting from the syllabi thereof:

"The subsequent action of a full board [of directors] requiring the mortgagee to make additional advances on the security of his mortgage, and recognizing its validity in a resolution authorizing a second mortgage upon the property, is a full ratification of the first mortgage."

In the text the late learned Chief Justice Beatty, who wrote the opinion, said:

"The manner of directing the execution of a corporation mortgage is by resolution of the board of directors, and here by resolution of the board the mortgage is recognized as valid and its benefits claimed in behalf of the corporation. It is not necessary, in order to ratify, to do so in express and formal terms. Any-

thing is sufficient which clearly and necessarily implies a recognition of the obligation."

Besides the foregoing considerations, it is very clear that the defendant Fandango Company, having received, retained, and used for the purposes of its business the money to secure the repayment of which the mortgage was given, is, and upon a familiar equitable principle should be, estopped from denying the validity of the obligation. As shown, it is not disputed that the corporation received the money and used it in the payment of a part of its debts.

[6] As to the defendant Wilkinson, it is to be observed that both as a trustee under the deed of trust and as a receiver under the appointment of the court he accepted the deed of trust and the office of receiver with full knowledge of the existence of the mortgage and upon the express condition that his rights and powers in both instances were expressly made subject to the mortgage. Indeed, as seen, as president of the Fandango Company, he executed for said company, by authority of the directors duly evidenced and vested, the deed to the Sunset Company, and by that act he recognized and admitted not only for the Fandango Company, but for himself as trustee, the validity of the mortgage.

For the reasons herein stated, the judgment is reversed.

We concur: CHIPMAN, P. J.; ELLISON, Judge pro tem.

PEOPLE v. VISCONTI. (Cr. 490.)

(District Court of Appeal, Second District, California. July 27, 1916. Rehearing Denied by Supreme Court Sept. 25, 1916.)

CRIMINAL LAW §829(7) — INSTRUCTION — ALIBI.

In a prosecution for assault with intent to murder, where the complaining witness identified defendant as the one who entered her house with burglarious intent, but the defendant denied he was such person, introducing his wife and another to testify that at the time of the crime he was some distance away from complainant's house, refusal to instruct that in making proof of alibi defendant was not obliged to establish the defense by a preponderance of the evidence or beyond a reasonable doubt but that it was sufficient to entitle him to a verdict of not guilty if the proof raised a reasonable doubt as to defendant's presence at the place of the crime when it was committed was error though the court had instructed generally on reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. §829(7).]

Appeal from Superior Court, Riverside County; Charles Monroe, Judge.

Tony Visconti was convicted of assault with a deadly weapon with intent to murder and from judgment of imprisonment and an order denying the motion for new trial, he appeals. Judgment and order reversed.

See, also, 160 Pac. 411.

Ford & Nelson, of Riverside, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

JAMES, J. Defendant was charged with the crime of assault with a deadly weapon with intent to murder. He was found guilty as charged, and has taken an appeal from a judgment of imprisonment, as well as from an order denying his motion for a new trial.

The complaining witness gave testimony identifying the defendant as being the man who entered her house in the nighttime and who struck her with a gun after she had attempted to shoot him. It appeared that the man with whom the encounter was had entered the house of the prosecutrix with burglarious intent. The prosecuting witness positively identified defendant as being the perpetrator of the crime; she testified that there was some light in the house—perhaps a lantern—but she was not sure about that. The defendant denied that he was the person who had assaulted the prosecutrix, and introduced his wife and another witness who gave testimony in corroboration of his claim that he was not at the house of the prosecutrix on the night charged, but was at another place some distance away. In view of the testimony offered for the purpose of establishing an alibi, the defendant asked the court to give an instruction by which the jury was to be informed that in making the proof of an alibi the defendant was not obliged to establish that defense by a preponderance of evidence or beyond a reasonable doubt, but that it was sufficient to entitle him to a verdict of not guilty if the proof raised in the minds of the jury a reasonable doubt as to the presence of the defendant at the place where the crime was alleged to have been committed and at the time referred to in the information. The court refused to give this instruction, or any instruction upon the matter of the defense of an alibi.

It seems to be conceded, as it must, that the instruction as proposed was pertinent and proper; but the contention is made that, inasmuch as the trial judge did instruct the jury that they must believe beyond a reasonable doubt that defendant committed the crime, no prejudice would arise by reason of the failure to instruct directly upon the matter of the alibi proof. The instruction of the court which was given was general, and stated in substance that before conviction could be had it was incumbent upon the prosecution to prove beyond a reasonable doubt all of the matters alleged in the information. We think that defendant was entitled to have some particular and specific instruction given touching the matter of his defense of an alibi. It is said in our decisions that the matter of alibi proof is not strictly "a defense." However, in the American & English

Encyclopedia of Law, as cited in the case referred to below, this expression is made:

"The true doctrine seems to be that where the state has established a prima facie case, and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt of the guilt of the accused." *People v. Winters*, 125 Cal. 325, 57 Pac. 1067.

It may well have been that the testimony introduced by the prosecution did make out to the minds of the jury and beyond a reasonable doubt prima facie the guilt of the accused. Yet if upon the evidence offered by him, tending to show that at the time in question he was not at the place, nor where he could have committed the crime, a reasonable doubt was created in the minds of the jury, such doubt of course would avail the defendant and entitle him to an acquittal. The quantity and variety of evidence and the quality of proof which would be sufficient to raise such doubt where an alibi was sought to be proven, are proper and pertinent subjects for an instruction to the jury, and we think were within the right of defendant to insist upon. There are no decisions in this state directly upon the point presented, but in a similar state of the law the Oklahoma court has decided in agreement with appellant's contention. *Courtney v. State*, 10 Okl. Cr. 589, 140 Pac. 163. We are of opinion that the error in refusing to give the offered instruction was prejudicial, and that defendant is entitled to a new trial.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

PEOPLE v. VISCONTI. (Cr. 2047.)

(Supreme Court of California. Sept. 25, 1916.)

In Bank. Appeal from Superior Court, Riverside County; Charles Monroe, Judge.

Tony Visconti was convicted of crime, and he appeals to the District Court of Appeals of the Second Appellate Division: Judgment reversed 160 Pac. 410. Application by the State for hearing in the Supreme Court. Application denied.

Ford & Nelson, of Riverside, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dep. Atty. Gen., for the People.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District is denied.

In denying the application we deem it proper to say that we are not to be understood as intimating that the refusal to give such an instruction as was refused in this case would, in all cases, be deemed by us sufficient cause for reversal. Especially is this true in view of the provisions of section 4½, art. 6, of the Constitution.

In denying the application for hearing in this court we assume that the District Court of Appeal concluded, in view of the circumstances of

this particular case as shown by the record, that the refusal of the trial court to permit the requested instruction operated substantially to the prejudice of the defendant.

FRENCH v. COOK et al. (S. F. 7533.)

(Supreme Court of California. July 25, 1916.)

On Rehearing, Aug. 24, 1916.)

1. MUNICIPAL CORPORATIONS — 181 — OFFICERS — POLICE COMMISSIONERS — POWERS — PENSIONS.

San Francisco charter, requiring its police commissioners to pay certain death pensions and authorizing them to examine witnesses and hold hearings for that purpose, confers no judicial powers upon them, but their powers are ministerial only.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 458-465; Dec. Dig. ¶¶ 181.]

2. MANDAMUS — 14(1) — NECESSITY OF DEMAND — PAYMENT.

Under San Francisco charter, requiring its police commissioners to pay certain death pensions and authorizing them to hold hearings for that purpose, mandamus will not lie to compel the granting of a pension prior to a proper demand upon the police commissioners.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 44; Dec. Dig. ¶¶ 14(1).]

3. MANDAMUS — 81 — PUBLIC OFFICERS — MINISTERIAL ACTS — WHEN BASED UPON CONFLICTING EVIDENCE.

The police commissioners' power over death pension applications being purely ministerial, the claimant's right to a judicial determination of the facts is not dependent upon whether the evidence supporting such right was uncontradicted at the hearing before the police commissioners.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 138, 139; Dec. Dig. ¶¶ 81.]

4. MANDAMUS — 168(3) — PROCEEDINGS — ADMISSIBILITY OF EVIDENCE.

In mandamus to compel police commissioners to grant a death pension, evidence is not inadmissible because it had not been introduced at a previous hearing before the commissioners.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 373; Dec. Dig. ¶¶ 168(3).]

5. MANDAMUS — 187(7) — PROCEEDINGS — APPEAL AND ERROR — RESERVING GROUNDS FOR REVIEW.

In a mandamus the admission of testimony cannot be regarded as prejudicial error, where the record does not disclose its nature.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 435; Dec. Dig. ¶¶ 187(7).]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Mandamus proceedings by Ella French against Jesse B. Cook and others, as Board of Trustees of the Police Relief and Pension Fund, and Kay Conway, Secretary of said Board. From a judgment for plaintiff and an order denying a new trial, the defendants appeal. Affirmed.

Percy V. Long and Harry G. McKannay, both of San Francisco, for appellants. J. E. White, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in mandate by the surviving wife of Freder-

ick W. French, deceased, who was at the time of his death a member of the police department of the city and county of San Francisco, against the board of trustees of the police relief and pension fund of said city and county and their secretary, to compel provision for and payment by said board of a monthly pension to plaintiff, on the theory that her husband was injured while in the performance of his duty as a member of the police department and died as a result of such injury within one year from the date thereof.

By the terms of the charter of San Francisco the board of police commissioners constitutes a board of trustees of the police relief and pension fund, from which they provide for the payment of pensions to members of the force retired by them on account of age or disability on account of bodily injury received in the performance of their duties. Provision is also made for a pension to the widow, children, and dependent parents of officers killed in the performance of their duty, section 4, c. 10, art. VIII, of the charter providing:

"The commissioners shall out of the police relief and pension fund provide as follows for the family of any officer, member or employé of the department who may be killed or injured while in the performance of his duty, and who shall have died within one year from the date of such injury: * * * First—should the decedent be married, his widow shall as long as she may remain unmarried be paid a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death."

The trustees of the pension fund possess the powers vested in the board of police commissioners to make rules and regulations, and are required to hold quarter yearly meetings and keep a public record of their proceedings. Such board has the power conferred on every board or commission provided for in the charter to administer oaths and affirmations, to issue subpoenas, and to take and hear testimony concerning any matter or thing pending before it. Section 24, art. XVI, Charter. The charter apparently contains no other provision than those already referred to in any way material to the procedure in the matter of such a pension as the one here sought. There is no provision whatever as to any hearing or finding by the board.

The petition for a writ of mandamus in this proceeding alleged that on November 14, 1910, Officer French, while engaged in breaking a colt for the police department pursuant to orders to that effect, was thrown from the colt and injured to such an extent that he died on January 10, 1911, as the result of the injury. It further alleged that plaintiff on or about October 1, 1911, filed her verified petition with the board of trustees of said pension fund praying that she be awarded the pension to which she would be entitled under such circumstances, and that on October 18, 1911, her application was denied by said board. She further alleged:

"That at said hearing of said application and petition of the plaintiff for said pension the plaintiff introduced evidence fully sustaining each and every allegation therein and herein set forth, without any material evidence of any kind or character being offered in contradiction or opposition to said evidence."

She further alleged that on July 25, 1912, she filed a petition for a rehearing with said board, and that the same was denied on October 7, 1912.

By its answer the board denied that the officer was injured while in the performance of any duty as a member of the department, and affirmatively substantially alleged that he was on duty until December 16, 1910, and perfectly sound in mind and body until that date, when he reported himself ill on account of "la grippe," and that he died on January 10, 1911, solely from the effects of "la grippe" and pneumonia, which were in no way contributed to or superinduced by any injury received by him while in the performance of his duty. The answer contained also an explicit denial of the allegations as to the effect of the evidence given on the hearing, which we have hereinbefore quoted, and affirmatively alleged that the evidence introduced conclusively established in the minds of the members of the board that the death was due solely and directly to "la grippe" and pneumonia, and that no injury received by French in the performance of his duty was a contributing cause of his death.

The findings of the trial court so far as they went were in accord with the allegations of the petition, but the only finding on the issue as to the showing made before the board of trustees was as follows:

"That at said hearing of said application and petition of the plaintiff for said pension the plaintiff introduced testimony to support all of the allegations therein set forth, and that the said board of trustees of the police relief and pension fund then and there on said last-mentioned date denied said application of said plaintiff for said pension."

There was no finding whatever upon the allegation in the petition to the effect that there was no substantial conflict on material questions of fact in the evidence given on the hearing before the board, nor was there any finding on matters affirmatively alleged in the answer.

Upon these findings judgment was given for plaintiff, directing the issuance of a peremptory writ of mandate. We have before us an appeal from this judgment and from the order denying defendants' motion for a new trial; the same having been transferred to this court after decision by the District Court of Appeal for the First Appellate District. The record on appeal does not set forth any of the evidence given upon the trial in the court below.

[1, 2] We are unable to see in the charter provisions bearing on the matter anything which can fairly be held to make the board in relation to such an application as this a tribunal possessing judicial powers whose de-

cision on questions of fact is at all binding. The charter prescribes the contingencies on which such a pension shall be granted by the board. It says substantially that, if a member of the department is killed or injured while in the performance of his duty, and dies within one year from the date of such injury, the board "shall, out of the police relief and pension fund," provide for the payment to his widow, as long as she remains unmarried, of a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death. These facts existing, the plain duty to make the provision exists. It has been held under very similar circumstances that the widow has a vested right from the date of death of her husband (*Kavanagh v. Board, etc.*, 134 Cal. 50, 86 Pac. 36). There is absolutely nothing in the charter purporting to confide to the board the power to finally determine any question of fact in connection with such a pension. The board is apparently in the same position with relation to such a matter as is any officer required by law to do a prescribed act in a certain contingency, where no special method is provided by law for the ascertainment of the facts. Under such circumstances it may often be true that there is uncertainty or dispute as to the facts, but in such a case the only resort of the officer is such investigation as he may be able to himself make for the purpose of determining his own course of action. His determination as to the facts, however, is not effectual for any other purpose. If not satisfied as to the evidence of the essential facts, he may refuse to act until required to do so by the judgment of some tribunal invested with the power to finally determine such controversy, but before such tribunal any conclusion to which he may have come on the facts has no legal force whatever. The sole question there is whether the facts are in reality such as to require the performance of the act, and this altogether regardless of the officer's conclusion as to the facts. The party having a vested right in the performance of the act, if the facts are as claimed by him, has also the right to have his claim as to the facts judicially determined. The functions of the board in such a matter as this are really ministerial only, and come under the same principle as would apply in the case of a county or city auditor, in so far as any finality to its conclusions are concerned. We can attribute no greater force to their conclusions, in view of the condition of the charter provisions. Of course, mandamus would not lie to compel the granting of such a pension in the absence of a prior demand made upon the board by the person beneficially interested. It may be conceded also that the board may prescribe reasonable regulations relative to such demands looking to the presentation to it of a fair showing as to the alleged facts so that it may act intelligently on the demand, and also that a court would

not hold that a party has made a sufficient demand in the absence of a compliance with such regulations. But we have no question of this character on this appeal. Cases cited by counsel for appellants, including *People v. Los Angeles*, 133 Cal. 338, 85 Pac. 749, and *People v. Ontario*, 148 Cal. 634, 84 Pac. 205, have no application here. As we read the charter, it gives no judicial function whatever to the board in such a matter as this, confers upon it no authority to hear and determine a controversy in a judicial sense. It is not a board or tribunal by law vested with authority to decide a question, and herein lies the distinction between this case and the cases cited in which it was substantially held that the statute was to be construed as submitting the question to the decision of the board or officer. To hold in accord with defendants' claim in this connection would be, as we read the charter, to hold that any officer authorized and required by law to do a prescribed act upon a prescribed contingency, where no method is specially provided for the ascertainment of the facts, is invested with the power to judicially determine the facts, and that his conclusion is a judicial determination as to the facts. Such has never been declared to be the law.

[3-5] In view of what we have said on the matter already discussed, there is no force in any of the points made for reversal. The petition for a writ of mandate sufficiently stated a cause of action, and this altogether regardless of the allegation that the evidence adduced by petitioner on the hearing before the board was not contradicted by any other evidence. That allegation was superfluous and immaterial, and no finding thereon was essential. Therefore a failure to find thereon cannot be cause for reversal. The findings in her favor upon the other allegations of her petition are full and complete. As to matters affirmatively alleged by defendants in their answer by way of defense as to which no findings were made, the evidence not being before us, it must be presumed that no evidence was introduced tending to support such allegations. The trial court did not err in receiving evidence as to the facts essential to plaintiff's right to a pension, entirely regardless of whether such evidence so received was introduced on the hearing before the board. Even if this were not so, defendants would not be in a position to insist upon a reversal on account thereof; for the record does not show what any of such evidence was, and consequently it could not be held that the action of the court was in fact prejudicial.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOB, J.; MELVIN, J.

On Rehearing.

PER CURIAM. In denying the application for a rehearing, we deem it proper to say, in

view of certain expressions therein as to the supposed or possible far reaching scope of the opinion, that we were considering the status of the pension board solely with relation to pensions in the event of death of the officer, and what is said is not to be taken as expressing any opinion as to other matters in which the board is required or empowered to act.

ARMSTRONG v. BOARD OF EDUCATION OF CITY OF VALLEJO et al. (Sac. 2234.)

(Supreme Court of California. July 27, 1916.
Rehearing Denied Aug. 25, 1916.)

**SCHOOLS AND SCHOOL DISTRICTS §135(3)—
APPOINTMENT OF SUPERINTENDENT—VALIDITY.**

Where a city school superintendent was appointed for a year's probationary period by the board of education under a misapprehension that such an appointment was within its powers, but claimed a four-year tenure under Pol. Code, § 1792, subd. 2, providing that superintendents should be elected for four years, that the contract, having been made under a mistake, was void for reasons of public policy.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 296; Dec. Dig. §135(3).]

Department 2. Appeal from Superior Court, Solano County; R. H. Latimer, Judge.

Mandamus proceedings by Albert M. Armstrong against the Board of Education of the City of Vallejo and others. Judgment for defendants, and petitioner appeals. Affirmed.

Albert M. Armstrong, of Oakland, in pro. per. Frank R. Devlin, of Fairfield, for respondents.

HENSHAW, J. Petitioner sued in the superior court for mandate requiring the defendants to restore him to the position of city superintendent of schools of the Vallejo City School District, and to pay him the salary attached to the position. Judgment passed for defendants, and petitioner appeals.

The following facts are uncontroverted, and fairly show the nature of the controversy: Prior to the 6th day of July, 1911, petitioner sought from the defendant board of education an election or appointment at its hands as superintendent of schools of the city of Vallejo. The personal defendants, as members of this board, explained to the petitioner that there were many applications for the position filed with the board, and that when they made their selection they would elect city superintendent on probation for the period of one year and no longer. Petitioner was elected with this understanding, and under this agreement qualified and entered upon the performance of his duties as such superintendent. Before the expiration of the year differences had arisen; petitioner's fitness was in question; a hearing was had; testimony was taken, and upon June 26th, be-

fore the expiration of the one year, the board of education declared that they had investigated the matter of the qualifications of the petitioner, and as a result of their investigation were convinced that the public good and the welfare of the public schools demanded the suspension of the school superintendent, and, further, that he should not be reappointed or re-elected to the office for the ensuing year, and, finally, that his entire connection with the school department be terminated. Notwithstanding this, the petitioner was paid the salary of his office for the full first year. Petitioner twice amended his complaint. Under the first two complaints he insisted merely that he had been re-employed for the second year. Upon his third amended complaint he took the position that he had been duly elected superintendent of public schools for the full period of four years by virtue of subdivision 2, § 1793, of the Political Code, which declares that city superintendents of public schools elected by city boards of education "shall be elected for a term of four years," and in this connection he argues that, having thus been chosen for the full term of four years, the attempted removal of him from office by the board of education is without authority in law, which authority is found only under the provisions of sections 758-772 of the Penal Code.

This question, however, with other subsidiary questions in the case, as whether or not the superintendency of schools is an office and the incumbent an officer, whether or not this is in its essence an action to try the title to office, may all, for the purposes of this consideration only, be resolved in favor of petitioner's view, to the end that we may come to the one question in the case, which is both vital and of public moment, and that question may be thus stated: Under the facts shown was petitioner elected or appointed superintendent of schools of the city of Vallejo for the period of four years as contemplated by law? Herein petitioner takes the position that he was duly elected superintendent of schools; that the law itself fixed his term of office, and that it was not within the power of the board of education to shorten that term at all or to deprive him of his office, save under proceedings for his removal legally brought. Of course the cases are numerous which hold that when a term of office is fixed by statute the appointing or the electing power may not change the term, which can be done only by a change in the statute. Thus in *State v. Chapin*, 110 Ind. 272, 11 N. E. 317, it is held that the law having fixed the term of office of a judge, the Governor's commission could not extend that term of office, nor the judge's tenure. To the same effect is *State v. Jeter* (S. C.) 1 McCord, 233, where it is held that the commission of a Governor is only evidence of the appointment of the office, and can have no

effect upon its term, which must depend upon the provisions of the act creating the office itself. In *Shaw v. Mayor and Council of Macon*, 21 Ga. 280, the law fixed the term of marshal of the city for 12 months, and it was held that, notwithstanding a recital in his official bond that he held it at the pleasure of the city council, he did not in fact do so, but held it by virtue of the law creating the term. And so, finally, in *People ex rel. Lane v. Case*, 19 N. Y. Supp. 625,¹ the Supreme Court of New York declared that where the term of office is fixed by statute to be three years, the fact that the ballot used at the election of an officer to fill the office bore the words "two years" could not have the effect of abridging that officer's term. These cases, of course, announce nothing more than familiar principles of law. They have but a remote bearing upon the real question here presented. That question may better be stated under a recapitulation of the essential facts. The board of education of Vallejo, acting for what it conceived to be the best interest of the public and its public schools, was unwilling to select any superintendent for a four-year term of office, manifestly for the reason that the qualifications of the applicants were, the board felt, not sufficiently known to it. The board then proceeded to exercise the power which either it possessed or did not possess. That power took the form of appointing petitioner superintendent for the probationary period of one year, and there can be no doubt but that he accepted the appointment with full knowledge of all these facts. If the board had the power, there is, of course, an end to the question. If it had not the power, then certainly it is a power which might very well be conferred upon such boards. It would manifestly make for the public welfare if boards could do precisely as this board did, name an incumbent to the office for a limited period, in order that at the end of that period they might judge of his qualifications for selection for a full ensuing term. Other cases where this power might properly be exercised will readily present themselves to mind, as where, for example, the services of one known to be admirably qualified for the position are not immediately available, and a temporary appointment is made to bridge the time until the services of the desired man can be obtained. But apart from all this, what should be the conclusion if it be said that the board was without power to do as it did? Only under the strongest compulsion of the law itself would it ever be held that one obtaining nominal title to an office under such circumstances should be held to have been chosen for the full term. Such, clearly, was not the contract or understanding of the parties. What, then, should

be the holding when such a situation is shown, a situation which, it is to be remembered, is not at all identical with that of a mistake in a private contract between individuals? The whole question is controlled by considerations of public welfare, and instead of declaring that under such circumstances and under such a mistake the incumbent has slipped into office for a full term, it will be held that the whole contract, having its origin in misapprehension and mistake, will be set aside under the dictates of public policy as void, leaving the board of education free to exercise its full powers in the matter of a new or successive appointment. And such is the view of the New York Court of Appeals in *People v. Hall*, 104 N. Y. 170, 10 N. E. 135, where, under a similar contention and a like effort to hold an office, the appointment to which was made by mistake, that court said:

"There are certainly very strong reasons founded in public policy against permitting a person to claim and hold a public office in such a case and under circumstances such as are disclosed in this record, against the intention and through the mere mistake of the appointing power as to the existence of extrinsic facts, supposed to exist, and which, if they had existed, would have rendered the appointment valid according to its terms. It might very well be that the public interests would, in the judgment of the mayor and common council, require a different appointment for a full term than for a temporary period."

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

HUMPHRES v. WESTERN PAC. RY. CO. (Sac. 2231.)

(Supreme Court of California. Oct. 6, 1916.
Rehearing Denied Nov. 2, 1916.)

1. APPEAL AND ERROR §980(4) — PRESUMPTIONS—THEORY OF CASE.

In a railroad fireman's action for personal injuries on the theory that he was struck by a signboard near the track and thrown from the step, it must be presumed, after verdict for him, that the jury so concluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3760, 3761; Dec. Dig. § 930(4).]

2. TRIAL §242—INSTRUCTIONS—ASSUMPTION OF RISK.

In a railroad fireman's action for injury, when struck by a sign standing near the track, instruction substantially in the language of Civ. Code, § 1970, that an employe injured by the unsafe condition of any appliances or structures was not barred from recovery, unless he understood and appreciated the dangers incident thereto and continued in their use, was not misleading or prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.]

3. MASTER AND SERVANT §295(3) — ACTION FOR INJURIES—ASSUMPTION OF RISK.

Such instruction was not improper, where it appeared that a signboard in close proximity

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 636.

constituted an inherent and permanent condition of the way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1171; Dec. Dig. ¶ 295(3).]

4. TRIAL ¶ 296(6) — INSTRUCTIONS — CONSTRUCTION.

Such instruction was not objectionable as tending to convey the impression that the plaintiff was not guilty of contributory negligence, or that the jury should not find him negligent, "unless he fully understood, comprehended, and appreciated what the result of his own act would be," when read with other instructions fairly stating the test of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ¶ 296(6).]

5. MASTER AND SERVANT ¶ 240(1) — ACTION FOR INJURIES — CONTRIBUTORY NEGLIGENCE.

The test of a railroad fireman's contributory negligence in leaning outside the tender was whether a prudent man in the exercise of due care would have done so under similar circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 751; Dec. Dig. ¶ 240(1).]

6. MASTER AND SERVANT ¶ 264(14) — ACTION FOR INJURIES — EVIDENCE — WARNING.

In a railroad fireman's action for injury when he was struck by a signboard, wherein the defendant denied his ignorance of the proximity of the signboard and alleged that he knew of its presence, evidence that the fireman had not been warned of the nearness of the signboard or instructed as to its dangerous proximity was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 874; Dec. Dig. ¶ 264(14).]

7. MASTER AND SERVANT ¶ 113(1) — MASTER'S DUTY — RAILROAD — WAY AND APPLIANCES.

A railroad must so construct its roads and structures, and so protect its ways and provide proper appliances, that its employes will have a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224; Dec. Dig. ¶ 113(1).]

8. TRIAL ¶ 191(10) — INSTRUCTIONS — PROVINCE OF JURY.

In a railroad fireman's action for injury, when struck by a signboard, instructions that it was the railroad's duty to use ordinary care to see that its tracks were not so near other structures as necessarily to endanger its employes upon passing trains, that to permit any obstructions so near the track as to injure trainmen engaged in their ordinary duties was actionable, and that a railroad was bound to place signal posts and other structures at a safe distance from the track, were not objectionable as invading the province of the jury by directing it to find that the maintenance of a signboard 55 inches from the tracks was actionable negligence, even though the fireman was not actually injured by the signboard, since it left such question of fact to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 1420; Dec. Dig. ¶ 191(10); Railroads, Cent. Dig. § 1383.]

9. APPEAL AND ERROR ¶ 1064(1) — REVIEW — INSTRUCTIONS.

Instructions that an employer's violation of its own reasonable rule is as much negligent conduct as an employe's violation of the rule, that rules adopted in the operation of a railroad brought to the knowledge of an employe form part of the contract of hiring binding on both the railroad and the employe, and that the rail-

road's violation thereof to the injury of the employe is as negligent as if the employe violates them, if erroneous, were harmless, when considered with the effect of the railroad's knowledge of the violation of the rule that no structures should be allowed nearer than 8 feet of the rail of the main track.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ¶ 1064(1).]

10. MASTER AND SERVANT ¶ 243(2) — INJURIES TO SERVANT — VIOLATION OF RULES.

Where a master adopts reasonable rules which are brought to the knowledge of the servant, such rules constitute an element of the contract of hiring, the disregard of which on the part of the servant will preclude his recovery for resulting injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 760; Dec. Dig. ¶ 243(2).]

11. MASTER AND SERVANT ¶ 205(2) — RULES — CONTRACT OF HIRING — EFFECT.

A railroad's rule that no structure should be allowed nearer than 8 feet of the rail of the main track, if brought to the knowledge of a railroad fireman, became part of the contract of hiring and gave him a right to rely upon the railroad and go about his work with the assurance that no structures were close enough to the track to imperil his safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547; Dec. Dig. ¶ 205(2).]

12. MASTER AND SERVANT ¶ 144 — MASTER'S LIABILITY — VIOLATION OF RULE — NEGLIGENCE.

A railroad knowingly violating a rule as to the distance of structures from the main track promulgated for the protection of its employes and upon which a fireman had a right to rely, resulting in injury to a fireman who had not been warned regarding the dangerous proximity of a signboard, was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 287; Dec. Dig. ¶ 144.]

13. NEGLIGENCE ¶ 141(12) — ACTION FOR INJURIES — INSTRUCTION — DAMAGES — CONTRIBUTORY NEGLIGENCE.

In a railroad fireman's action for injuries from being struck by a signboard near the track, an instruction that his contributory negligence, if any, should not bar his recovery where it was slight and that of the railroad was gross in comparison, but that the damages should be diminished by the jury in proportion to the amount of negligence attributable to such employe, substantially similar to Roseberry Act (St. 1911, p. 796, § 1), was not objectionable as not telling the jury whether the reduction should be in proportion to the negligence of the employer or the total negligence of the employer and employe combined.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 397-399; Dec. Dig. ¶ 141(12).]

14. TRIAL ¶ 296(11) — INSTRUCTIONS — DAMAGES.

An instruction that the plaintiff might recover for all injuries suffered and for all resulting damages, in view of proper instruction on the diminution of damages on account of contributory negligence, was not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 431; Dec. Dig. ¶ 296(11).]

Department 1. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Charles O. Humphres against the Western Pacific Railway Company. Judgment for plaintiff, motion for new trial

denied, and defendant appeals. Judgment and order affirmed.

Warren Olney, Jr., of San Francisco, W. H. Carlin, of Marysville, and Alexander R. Baldwin, of San Francisco, for appellant. E. J. Talbott, of San Francisco, and Wallace Dinsmore, of Marysville, for respondent.

LAWLOR, J. The plaintiff was injured while performing his duties as a fireman on one of the defendant's freight trains, and brought this action to recover damages. His claim for damages is based upon the alleged negligence of the defendant railway company in maintaining a signboard so close to its track that it collided with him while the train was in motion, and caused the injuries complained of. The defendant denied the material allegations of the complaint and pleaded contributory negligence on the part of the plaintiff in that he knew of the location of the signboard, "but notwithstanding such knowledge he carelessly and negligently extended and protruded his body and head out of the locomotive upon which he was riding, * * * and as a result * * * came in contact with said signboard to his injury." The verdict was in plaintiff's favor. The defendant appeals and seeks a reversal of the judgment, and the order denying its motion for a new trial, principally upon the ground of certain alleged erroneous instructions which were given to the jury.

The accident occurred on October 13, 1911, at which time the Roseberry Act (Stats. 1911, p. 796) was in force, but the parties had not elected to come under its compensatory provisions. The record discloses the following facts: While making a run from Stockton to Oroville on one of the defendant railway company's freight trains, plaintiff, who was employed as a fireman, was directed by the engineer to care for a hot box which had developed on the truck of the tank of the locomotive on the left-hand side. In order to cool the hot box a hose was inserted into the box and water allowed to run on the heated bearing or axle. It was plaintiff's duty to keep a lookout to see that the hose remained in position and that the water continued to run upon the axle during the time that the train was in motion. To do this, plaintiff, at times, grasped the handholds of the cab and tender of the engine and leaned out so as to be able to look under the tender, the better to see the box. While he was thus engaged, the train was traveling at about the rate of 30 miles per hour in an easterly direction and approaching a flag station in Yuba county, known as "Oso." There was no station or depot at that point; the defendant's trains stopping there only when it was necessary to take on or let off passengers or load or discharge freight. A signboard, however, had been erected by one of the shippers at that point, with the acquiescence of the defendant, nearly a year prior to the time of the accident for the pur-

pose, as testified, "of familiarizing the trainmen with the place so they would know where Oso was." The signboard consisted of a horizontal board about 18 inches in length, nailed to a perpendicular post or scantling, and bore the name of "Oso." It was located so that its inner edge was just 55 inches from the nearest rail of the track upon which the freight train was approaching—that is, about 24 to 26 inches from the side of a locomotive if standing opposite it upon the track. The train upon which plaintiff was employed had no orders to stop at Oso. As to what took place as the train neared the said station may be inferred from the testimony of plaintiff:

"I looked around and see the hose was down out of the faucet. That was after we got across the bridge. I got down and put the faucet back up, and puts the hose back up to the faucet, and got hold of the handholds, one on the cab and one on the tank, and stretched my head out to look down there at the box, and when I was doing this, this board struck me in the head. What went on after that, I know nothing about."

The engineer testified that at this point he "saw a flash and the fireman was off." The train was brought to a stop, and plaintiff was found lying 20 feet down an embankment in the neighborhood of 120 or 200 feet beyond the signboard. His hat was picked up about 20 feet east thereof, while commencing about 50 feet from the post, a trail of blood and broken weeds marked the course through which he had rolled. The board, itself, was found to be freshly split and twisted out of shape.

[1] It is the theory, in support of the plaintiff's case, that he was struck by this board, and thus received the severe injuries to his skull, spine, and other portions of his body complained of. As the verdict was in his favor, it must be presumed that this was also the conclusion of the jury.

[2] 1. The court instructed the jury that:

"An employé, injured by the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such employer, shall not be barred to recovery for injury or death caused thereby, unless it shall also appear that such employé fully understood, comprehended, and appreciated the dangers incident to the use of such defective machinery, ways, or structures, and therefore consented to use the same or continued in the use thereof."

This instruction is substantially similar to the language of the Civil Code, § 1970. It is contended by the defendant that such an instruction was inapplicable because no allegation had been made that plaintiff had assumed the risk of the hazard, and that, in any event, by the provisions of the Roseberry Act, the doctrine of the assumption of risk was not available as a defense. Stats. 1911, p. 796. But we are unable to see in what way the giving of the instruction was prejudicial to the defendant, for the doctrine of the assumption of risk is a limitation on the right of the injured employé to recover for injuries he may suffer in the course of his employment. The instruction, when con-

sidered in respect to the other instructions, and the facts to which it was to be applied, could not have misled the jury to the prejudice of the defendant.

[3] The defendant also attacks the instruction upon the ground that it was improper for the reason that the proximity of the signboard to the track did not constitute a defective or unsafe character or condition of the track or way. In support of its contention the defendant relies upon the case of *Kansas City, M. & B. Ry. Co. v. Burton*, 97 Ala. 240, 12 South. 88. But in that case the court merely holds that an obstruction temporarily near the track does not constitute a defect in the way. The obstruction here constituted an inherent condition of the way which was essentially of a permanent nature. The Alabama authority is therefore not in point.

[4, 5] Nor do we think the instruction tends to convey the impression that the plaintiff was not guilty of contributory negligence, or that the jury should not find him negligent, "unless he fully understood, comprehended, and appreciated what the result of his own act would be." The instruction does not purport to be a complete statement of the law upon which the plaintiff may recover. When read in connection with the many instructions covering contributory negligence, we find the jury was fairly instructed as to the test of contributory negligence—what a prudent man in the exercise of due care would have done under similar circumstances. *Killelea v. California Horseshoe Co.*, 140 Cal. 602, 74 Pac. 157, and *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700, relied upon by the defendant, are not based upon instructions similar to the one under consideration. The instructions before the court in those cases concluded with a direction to the jury to render a verdict for the plaintiff in the event that the things stated were found to be true.

[6] Evidence was admitted, over the defendant's objection, to the effect that the plaintiff had not been warned of the nearness of the signboard to the track, or instructed as to its dangerous proximity. This evidence was properly admitted. It was material to the issue raised by the defendant in its denial of plaintiff's claim of lack of knowledge of the proximity of the signboard, and the affirmative allegation of the answer that the plaintiff "knew of its presence, its location, and existence as herein alleged," as well as to the defense of contributory negligence.

[7, 8] 2. Instructions Nos. 2, 3, and 4 read as follows:

"(2) The court instructs the jury that it is the duty of a railway company to use ordinary care to see that its tracks are not in such close proximity to other structures as unnecessarily to endanger its servants and the employes who may be engaged in the discharge of their duties upon trains or cars passing along such tracks.

"(3) It is actionable negligence on the part of

a railway company to suffer obstructions to remain so near their tracks that their trainmen, engaged in their ordinary duties, are liable to come in contact with them and be killed or injured while in the exercise of due care.

"(4) A railroad company is in duty bound to place its signal posts, telegraph poles, cattle guard fences and other structures used in connection with the road at a safe distance from the track, to the end that they will not be dangerous to those engaged in operating its trains."

These instructions are founded upon the principle that a railway company must so construct its roads and structures, and so protect the ways and provide proper appliances, that its employes will have a reasonably safe place to do their work. The law, thus covered by the instructions, is supported by numerous authorities. *Chicago & Iowa R. R. Co. v. Russell*, etc., 91 Ill. 298, 33 Am. Rep. 54; *Murphy v. Wabash Ry. Co.*, 115 Mo. 111, 21 S. W. 862; 4 *Thompson on Negligence*, § 4253, 4280; 3 *Elliott on Railroads*, § 1269; 26 *Cyc.* 1112. But the defendant contends that, by these instructions, the court has invaded the province of the jury in the determination of the facts, and has in effect, directed it to find that the maintenance of a signboard 55 inches from the track was actionable negligence, "even though the plaintiff was not actually injured by the signboard." We do not so read the instructions. They seem to us to go no further than to state the principles of law defining the responsibilities of the defendant railroad company in the premises, and declaring the duty which it owed to plaintiff. It was proper for the jury to know and understand the law in this regard, and necessary that it should be so instructed as to enable it to fully determine the issues presented by the plaintiff's case. But, as for the facts to which the instructions were to be applied, the jury was left to draw its own conclusions—that is to say, the jury was bound to determine whether the plaintiff was, as a matter of fact, struck by the board, whether the board was so near the track that trainmen engaged in their ordinary duties and exercising due care were liable to come into contact with it, whether it was a safe distance from the track, whether the failure of the defendant to perform its duty in providing a safe right of way was the proximate cause of plaintiff's injury, and other facts which, under the instructions, were material to his recovery. We find no error in the instructions.

[9-12] 4. By instructions Nos. 7 and 8 the court charged the jury as follows:

"(7) You are hereby instructed that the violation by an employing company of a reasonable rule which it has made, where such violation results in an injury to an employé, is as much negligent conduct as a violation of the rule by the employé would be.

"(8) You are instructed that a system of rules adopted by a master for the conduct of a complicated business, such as operating a railroad, when brought to the knowledge of the employé, forms a part of the contract of hiring, and becomes binding on both master and servant. The violation thereof, to the injury of the servant by

the master, is as much an act of negligence as if the servant violates them."

One of the rules imposed a duty upon the plaintiff to inform himself as to the proximity of the signboard to the track. This rule (No. 366) is as follows:

"Employés are required to look after their own safety and to exercise caution to avoid injury to fellow employés, and must inform themselves respecting the location and clearance of all structures or obstructions (including mail cranes, water cranes, bridges, and tunnels) along the line that will not clear them when on the top of cars or side of cars or engines."

According to rule No. 383, the signboard should not have been as near as 55 inches from the track. The rule reads, in part:

"No building or structure should be allowed nearer than 8 feet of the rail of main track, nor nearer than 6 feet of the rail of any side track. Any violation of this regulation must be at once reported to the superintendent."

It is not contended that either of these rules is unreasonable, but it is claimed that the question whether a violation of a rule by an employer constitutes negligence is solely for the determination of the jury (citing *Smithson v. Chicago G. W. Ry. Co.*, 71 Minn. 216, 73 N. W. 853; *McKernan v. Detroit, etc., Ry. Co.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347; *Fonda v. St. Paul City Railway Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341), and that, likewise, it was the function of the jury and not that of the court to compare the negligence of the parties. The court in other instructions fully covered the rule, which is not questioned by counsel for the defendant, that where an employer adopts reasonable rules which are brought to the knowledge of the employé, such rules constitute an element of the contract of hiring, disregard of which on the part of the employé will preclude his recovery for injuries sustained. *Hodshire v. Corn Products Refining Co.*, 179 Ill. App. 529; 26 Cyc. 1162; 3 Elliott on Railroads, §§ 1280, 1282. As the court puts it in instruction No. 21:

"After having been given a copy of such rules, it was the duty of plaintiff to familiarize himself with the provisions of said section and to comply with and conform to the same. This was a duty owed by him to defendant by virtue of his employment, and if he failed so to do, such failure was a violation of the duty he owed to defendant, and if such violation contributed directly to the accident out of which plaintiff claims to have received his injuries, then plaintiff was guilty of contributory negligence."

But it is not necessary for us to pass upon the general question whether the mere violation by a railroad company of a rule which it has promulgated for the protection of its employés, where the violation results in injury to such employé, constitutes negligence. In the giving of instructions Nos. 7 and 8, no prejudice could possibly have resulted to the defendant company except as the instructions applied to the particular rules of the company which were admitted in evidence. Examining these rules, we find that the jury could not have found against the defendant on the ground that the violation of the rules

was negligence per se, except in the case of rule No. 383. Applying instructions Nos. 7 and 8 to this rule, it must be admitted that the jury was, in effect, instructed that the railroad company was negligent in permitting the signboard to be located just 55 inches from the track, instead of 8 feet, as provided in its rule. It was part of the plaintiff's duty to watch the hot box while the locomotive was in motion. Assuming that the rule was brought to the knowledge of the plaintiff, as the jury was directed to find before it could apply the law embraced in the instructions, it became part of the contract of hiring. See *Louisville, N. A. & C. Ry. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988, 991; *Central Ry. Co. v. Young*, 200 Fed. 359, 118 C. C. A. 465. The plaintiff had a right to rely upon the rule and to go about his work on the locomotive with full assurance that no structures were close enough to the track to imperil his safety. Had the company enforced the provisions of the rule the clearance between the signboard and the sides of a passing locomotive would have been at least 67 inches. The actual distance was 26 inches. Moreover, as testified by Jacob P. Ebert, one of the defendant's witnesses, the signboard had been erected in that position for about a year prior to the accident. The defendant must therefore be charged with knowledge that rule No. 383 was being violated. The situation is then presented of the company not only having knowingly violated a rule which was promulgated and, excepting in this case, presumably enforced for the protection of its employés, and upon which the plaintiff had a right to rely, but such violation actually endangered the lives and safety of its employés and brought harm to the plaintiff, who, according to his uncontradicted testimony, had not been warned regarding the dangerous proximity of the signboard. This, in itself, is sufficient to constitute negligence on the part of the defendant. It is therefore our opinion that whatever error was committed by the instructions, was harmless under the facts of the case.

[13] 5. Instruction No. 10 is also complained of. It was to the effect that:

Plaintiff's contributory negligence, if any, "shall not bar a recovery therein where and if his contributory negligence was slight and that of the employer was gross in comparison; but the damages may be diminished by the jury in proportion to the amount of such negligence attributable to such employé."

This language is substantially similar to section 1 of the *Roseberry Act*. The defendant points out that:

"The court does not tell the jury in proportion to what the damages are to be diminished; that is, whether it is in proportion to the negligence of the employer or the total negligence of the plaintiff and defendant combined."

The latter construction has been adopted in the United States Supreme Court, where a similar provision in the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149,

85 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) was construed. *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172. But that case turned upon the point that the trial court, after stating the general rule, as was done in the instant case, added that the negligence of the plaintiff diminished the damages "in proportion to his negligence as compared with the negligence of the defendant." As the court said in that case:

"But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism."

This case is followed in *Nashville, O., etc., Co. v. Banks*, 156 Ky. 609, 161 S. W. 554, which is cited by the defendant, where the court, however, apparently overlooking the language just quoted, assumes that it is error for the court to fail to add that the damages should be apportioned to the combined amount of negligence attributed to plaintiff and to defendant. We are not disposed to follow this latter authority. The instruction, as given by the trial court, corresponds to the words of the statute, and is, in our opinion, sufficiently definite.

[14] 6. The defendant complains of instruction No. 5 on the ground that it informs the jury that the plaintiff is entitled to recover "for all damages which he has suffered * * * and for all damages for detriment resulting, * * * thus entirely doing away with the diminution of damages on account of contributory negligence." But when read in connection with the other instructions, there is nothing in the language of the instruction by which the jury could have been misled.

Judgment and order affirmed.

We concur: SHAW, J.; SLOSS, J.

MOORE & CO. v. BURLING et al. (No. 13078.)

(Supreme Court of Washington. Oct. 21, 1916.)

1. BILLS AND NOTES ⇐354—BONA FIDE PURCHASER—PURCHASER AT LARGE DISCOUNT.

Purchase of notes at a large discount does not alone constitute bad faith, although it might put the purchaser on inquiry.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 904, 905; Dec. Dig. ⇐354.]

2. BILLS AND NOTES ⇐354—BONA FIDE PURCHASER.

That purchaser for \$5,000 of notes for \$7,500 knew they were given for purchase of mining stock, and knew of the particular mine, held not to show bad faith in the purchase, where he was not shown to have known about the value of the stock, and upon making inquiry of the maker of the notes he was told they were all right.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 904, 905; Dec. Dig. ⇐354.]

3. BILLS AND NOTES ⇐167—NEGOTIABILITY—CONTEMPORANEOUS MORTGAGE.

Provisions respecting insurance, payment of taxes, and attorney's fees on foreclosure, contained in a mortgage securing a contemporaneous note, are not made a part of the note so as to destroy its negotiability, under the rule requiring construction together of contemporaneous instruments relating to the same subject-matter; these provisions merely relating to the preservation of the security.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 418, 419; Dec. Dig. ⇐167.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Suit by Moore & Co., a corporation, against Nettie E. Burling and others. From a decree for defendants, complainant appeals. Reversed and remanded.

Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, for appellant. F. C. Kapp, of Seattle, for respondents.

FULLERTON, J. The Charleston National Mining Company is a corporation organized under the laws of the state of Washington. In 1913 it held a leasehold interest in certain undeveloped mining property situated in the state of Nevada, which it was developing through means obtained by sales of its capital stock. J. P. Clough was the president and manager of the company and had charge of such sales. In October of the year named, he came to Seattle and engaged the assistance of Kay McKay, a broker doing business in Seattle, to sell the stock, agreeing to allow him a 50 per cent. commission on all stock sold by him or through his assistance. McKay introduced Clough to the respondent Nettie E. Burling, and they jointly endeavored to induce her to make an investment in the stock. After a time they succeeded, Mrs. Burling taking \$7,500 worth of the stock at its par value. In payment for the stock Mrs. Burling gave her promissory notes for the amount of the purchase, securing the same by a mortgage upon real property which she owned in the city of Seattle. The notes were six in number, were negotiable in form, and were payable on or before two years after their respective dates, with interest at 8 per cent. per annum, payable semiannually, and contained an accelerating clause making the whole debt due and payable in case of the failure to pay any installment of interest when due.

After procuring the mortgage Clough, with the aid of McKay, sought to sell the same to investors in the city of Seattle, but could obtain for it no satisfactory price. Among the investors to whom it was offered was the appellant Moore & Co., who refused to take it at the price at which it was first offered. After further attempts to sell it to other parties it was brought back to Moore & Co., who purchased it for \$5,000 in cash.

Mrs. Burling paid the first installment of interest when the same became due, but de-

faulted as to the second. Moore & Co. thereupon began this action to foreclose the mortgage, electing to declare the whole sum due and payable. Mrs. Burling answered, setting up fraud in the procurement of the notes. Moore & Co. replied, denying the fraud, and pleading affirmatively that it was a holder in due course. After a trial, the court held with Mrs. Burling, finding that the notes were procured from her through fraud practiced upon her by Clough and McKay, and that Moore & Co. purchased the notes with knowledge of the fraud. Judgment was entered accordingly, from which Moore & Co. appeal.

On the first branch of the case, we have no hesitancy in saying that the findings of the trial court are abundantly supported by the record. The evidence makes it clear that Mrs. Burling was grossly deceived by Clough and McKay and induced to purchase the stock because of such fraud and deceit.

[1, 2] With reference to Moore & Co., however, we have been unable to conclude that the evidence justifies the finding of the trial court. In the transactions leading up to the purchase of the notes the company was represented by J. E. Moore, its manager. A careful reading of the record does not disclose that he in any manner participated in the sale of the stock to Mrs. Burling, or knew of the fraudulent acts or representations of Clough and McKay which induced Mrs. Burling to make the purchase. While it is inferable that he knew that the notes were given for the purchase of mining stock, and knew that Clough and McKay were selling stock in the particular mine, it is not in evidence that he knew anything concerning the value of the stock, or anything more about the mining company or its prospects than did Mrs. Burling herself. It is true he bought the mortgage for his company at a large discount, but this, while it might put the purchaser on inquiry, is not sufficient alone to constitute bad faith. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903; *Citizens' Bank v. Stewart*, 22 Cal. App. 91, 133 Pac. 337; *Ham v. Merritt*, 150 Ky. 11, 149 S. W. 1131.

Here the purchaser did make inquiry. Before purchasing the notes Moore communicated with Mrs. Burling by telephone, telling her that he purposed purchasing the notes, and inquired if the notes and mortgage were "all right," receiving an answer in the affirmative. The record abundantly shows furthermore that the paper was not considered a particularly desirable investment by other dealers in such paper. Prior to the time it was offered to Moore & Co. it had been in the hands of a number of brokers, who had been unable to sell it even at the price it was finally sold to that company.

Other considerations are urged which it is contended show that Moore & Co. is not a purchaser in good faith. These we shall not notice specifically. To our minds they

are insufficient to excite even a suspicion, much less do they establish bad faith with that degree of certainty necessary to be found in order to overcome the presumption of good faith and fair dealing.

It is urged that if recovery be allowed it cannot be for a larger sum than the amount paid by the purchaser for the notes, with interest. The Legislature, however, has willed otherwise. By the Negotiable Instruments Act (section 3448, Remington's Code) it is provided that the holder in due course holds the instrument free from any defects, and "may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

A further contention is made to the effect that the notes are not negotiable. This is founded on the fact that the mortgage given to secure their payment contained provisions respecting insurance, payment of taxes, and attorney's fees on foreclosure, which would have rendered the notes nonnegotiable if incorporated therein. But the rule is that the provisions contained in a mortgage securing a contemporaneous note, which merely relate to the preservation of the security, are not made a part of the note so as to destroy its negotiability under the rule that contemporaneous instruments relating to the same subject-matter must be construed together. *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

MORRIS, C. J., and MOUNT and ELLIS, JJ., concur.

GRUBB et ux. v. HOUSE et al. (No. 13339.) (Supreme Court of Washington. Oct. 20, 1916.)

1. LIMITATION OF ACTIONS—100(5)—COMPUTATION OF PERIOD—DISCOVERY OF FRAUD.

Action for fraud against a lessor for falsely representing that the well on hotel premises contained a perpetual and abundant supply of good pure drinking water, could not be brought by the lessee of the hotel considerably more than three years after his taking possession thereof, since he must have discovered the condition of the well soon after taking possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 484; Dec. Dig. § 100(5).]

2. EVIDENCE—442(6)—PAROL EVIDENCE—COMPLETE WRITTEN INSTRUMENT—CONTEMPORANEOUS WARRANTY.

Where an instrument is complete in itself, evidence of a parol or contemporaneous warranty is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1877, 1886, 1887; Dec. Dig. § 442(6).]

3. EVIDENCE—419(9)—PAROL EVIDENCE—MODIFYING WRITTEN AGREEMENT—ADDITIONAL CONSIDERATION.

Evidence of a different consideration from that mentioned in a lease, such as an agreement to build up the business of the hotel, is inadmissible where such proof would modify or

change the legal operation and effect of the lease which was complete in itself.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1920; Dec. Dig. § 419(9).]

4. FRAUDS, STATUTE OF § 129(3)—LEASE—PERMANENT IMPROVEMENT—GOOD WILL OF HOTEL.

Building up the good will of a leased hotel is not such permanent improvement of the freehold by the lessee as will remove his lease, invalid because not acknowledged, from the operation of the statute of frauds, since the very nature of the good will is such that it cannot well be considered permanent.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 289-291; Dec. Dig. § 129(3).]

Department 2. Appeal from Superior Court, Okanogan County; E. K. Pendergast, Judge.

Action by E. N. Grubb and wife against C. P. House and another. From judgment for defendants, plaintiffs appeal. Affirmed.

C. H. Neal, of Oroville, and Smith & Gresham, of Okanogan, for appellants. J. W. Faulkner and Chas. A. Johnson, both of Okanogan, for respondents.

MAIN, J. This action was brought by the plaintiffs, as lessees of a certain hotel, for the purpose of recovering damages alleged to be due to a wrongful eviction. In the third amended complaint it is sought to state separately two causes of action. To the first, a demurrer was interposed and sustained. To the second, a motion to strike certain paragraphs of the complaint was made, and this motion was sustained by the trial court. The motion seems to have been treated by the trial court as a demurrer, and the parties now treat it the same. While in form a motion, it will be here treated as a demurrer. After the demurrer had been sustained, and the motion to strike granted, the plaintiffs refused to plead further, and elected to stand upon the complaint. Judgment was entered, dismissing the action. From this judgment, the appeal is prosecuted.

On the 31st day of October, 1908, a certain hotel building located in the town of Oroville, Wash., was leased to the appellants for a term of five years beginning on the 1st day of January, 1909, and terminating on the 1st day of January, 1914. This lease is complete and formal in every respect, except that it was not acknowledged. Appellants went into the possession of the hotel under the terms of the lease, and occupied the same until the 31st day of December, 1912, at which time they vacated the premises in response to a notice to quit, served upon them by the owners. The lease, being unacknowledged, it is recognized by the appellants as invalid for the five-year term, unless the facts alleged are sufficient to remove the bar of the statute of frauds.

The first cause of action is based upon an oral representation alleged to have been made at the time the lease was entered into. This

representation is to the effect that the well upon the premises which supplied water to the hotel contained a perpetual and abundant supply of good pure water, fit and suitable for drinking and other purposes. These representations are alleged to be false and untrue, and known to be such by the owners, but unknown to the appellants. The appellants treat the allegations of this cause of action as a charge of fraud. The respondent treats them as an attempt to allege a prior or contemporaneous oral warranty.

[1] If, in this cause of action, there is an attempt to charge fraud, then no cause of action is stated because the action is not begun in time. Possession of the property was taken under the lease on the 1st day of January, 1909. The present action was not instituted for more than three years thereafter. At the time possession was taken or very soon thereafter, the appellants must have known, if such be the fact, that the well did not contain a supply of pure and wholesome water.

[2] If the allegations are intended to show the breach of a prior or contemporaneous oral warranty as to the water in the well, no cause of action is stated. On this question, the rule is that where the instrument is complete in itself, evidence of a prior or contemporaneous warranty is inadmissible. *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023; *Pacific Aviation Company v. Philbrick*, 67 Wash. 414, 121 Pac. 864.

By the allegations in the second cause of action, there is apparently an attempt to remove the case from the operation of the statute of frauds, either by showing a consideration that goes to the entire term, or a permanent improvement during the time of the occupancy of the hotel.

It is alleged that, at the time the lease was executed, the appellants were efficient and popular hotel keepers, and, as such, enjoyed a splendid reputation throughout the state; that the hotel, at the time and prior thereto, was vacant and producing no revenue; that in order to build up the name of the hotel and make it popular and revenue producing, the owners sought the appellants as tenants; that it was known to both parties to the contract, at the time the lease was executed, that it would take months, if not years, to obtain sufficient patronage to pay running expenses; that profits could not be expected until the latter part of the five-year lease; and that all the parties understood that the sole inducement to the appellants for entering into the lease was that it should continue for five years. It is further alleged that after the appellants took charge of the hotel, it was operated at a loss for a time; that at the time the house was vacated, it was being operated at a profit, and had been given a lasting and valuable reputation as a first-class house.

In support of this cause of action, the case of *Matzger v. Arcade Building & Realty Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915A, 288, is cited, but that case is distinguishable. There A., the tenant at the time of making the lease, paid a consideration which went to the entire term in addition to the rental to be paid at stated periods throughout the term; B. put in a new front in the store-room upon the faith of the lease; and C., the manager of defendant company, recognized the lease as valid within one year prior to its expiration. In this case, no consideration was paid for the lease which went to the entire term; no recognition of the lease as valid was made within one year prior to its expiration; and no permanent improvement was made by the lessee.

[3] If the oral understanding of the parties, as alleged, can be shown under the guise of proving a different consideration than that mentioned in the written instrument, it would modify or change the legal operation and effect of the lease which is complete in itself. While it is a familiar rule that a consideration additional to that mentioned in a written contract may be proved by parol evidence, it is also well settled that this may not be done where the proof of such additional consideration by parol evidence would change or alter the legal operation and effect of the written contract, or add new matter to a stipulation of the contract complete on its face. *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163; *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183; *Erfurth v. Erfurth*, 90 Wash. 521, 156 Pac. 523.

[4] No authority had been presented which would sustain the proposition that the good will of a business may operate as a permanent improvement to the freehold so as to remove the bar of the statute of frauds. The very nature of the good will is such that it could not well be considered permanent.

The judgment will be affirmed.

MORRIS, C. J., and HOLCOMB, and PARKER, JJ., concur.

KESSLER v. CITY OF SEATTLE et al. (No. 13004.)

(Supreme Court of Washington. Oct. 17, 1916.)

1. MUNICIPAL CORPORATIONS — 218(1) — EMPLOYEES — CHANGE OF CHARTER — CIVIL SERVICE RULES.

Certain "district sanitary inspectors" were appointed, without civil service examination, under the former Seattle charter, which did not require such examination. On March 3, 1908, the charter was amended to make the appointing officer's power merely one to appoint to fill vacancies and new positions employees subject to civil service rules, but not otherwise affecting the positions or past appointments of these inspectors. Thereafter another such inspector was appointed under civil service rules. Upon reduction of the number of such inspectors by

ordinance, he was suspended, and sued for reinstatement, claiming he could not lawfully be suspended so long as any of the inspectors appointed without civil service examinations were retained. *Held*, that the appointment of these senior inspectors was legal when made and was not affected by change in the charter, and that it was not an injustice to complainant, requiring correction by the courts, for the appointing power, in making the selection made necessary by the reducing ordinance, to retain those longest in service.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 578; Dec. Dig. ¶ 216(1).]

2. MUNICIPAL CORPORATIONS — 218(6) — EMPLOYEES — REDUCING NUMBER OF POSITIONS.

A city council has power to reduce the number of city employees in the interest of economy.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 589; Dec. Dig. ¶ 218(6).]

3. JUDGMENT — 715(3) — RES ADJUDICATA — RIGHT TO MUNICIPAL POSITION — DIFFERENT FACTS INVOLVED.

A judgment reinstating a city employee on the ground that unqualified employees were retained in the service while the plaintiff employee was dismissed although qualified, *held* not res judicata as to his rights in a later suit for reinstatement where it appeared that all the employees were qualified, and that on reduction of the force by ordinance he was selected for suspension because of his shorter service.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1246; Dec. Dig. ¶ 715(3).]

Department 1. Appeal from Superior Court, King County; M. L. Clifford, Judge.

Suit by D. C. Kessler against the City of Seattle and others. From judgment for defendants, plaintiff appeals. Affirmed.

Julius Baldwin, of Seattle, for appellant. Jas. E. Bradford and William B. Allison, both of Seattle, for respondents.

FULLERTON, J. [1] In December, 1909, the appellant was employed by the city in its health department, being later appointed district sanitary inspector. On August 11, 1913, he was temporarily discharged by the commissioner of health, whereupon he instituted proceedings in the superior court of King county against the commissioner of health and the civil service commission to compel his reinstatement. He was successful in the proceedings and thereafter resumed his duties. Subsequently the city of Seattle enacted an ordinance relating to the health department which reduced the number of district sanitary inspectors to six. This required the suspension of certain of the persons so employed, and the appellant among others was separated from the work and placed on the preferred waiting list. He thereupon instituted the present proceeding against the commissioner of health, the civil service commissioners, and the several sanitary inspectors remaining in office, seeking reinstatement, and an injunction against his further discharge from the position. A trial was had on the merits of the cause, resulting

in a judgment dismissing the proceedings. This appeal followed.

The appellant was appointed to a position in the health department after having taken and passed the city's civil service examination. Certain of the inspectors retained after his second suspension were appointed without such examination. All of them, however, are older in service than is the appellant. It is the appellant's principal contention that the inspectors holding office without taking the civil service examination are holding in violation of the city charter, and hence he could not lawfully be suspended so long as any one of such persons retained his position.

The question presented hinges for its determination upon the charter provisions of the city of Seattle. Prior to March 3, 1908, the charter provided for a board of health, consisting of three physicians to be appointed by the mayor. The board was empowered to appoint and remove at pleasure a health officer, and such other subordinate officers as might from time to time be deemed necessary by the city council. There was no requirement that any of the persons so appointed be subject to the civil service rules. On the date given the city amended the charter; the principal change being the abolishment of the board of health and vesting its powers in a commissioner of health. By the amendment the commissioner was given supervision and control of all matters pertaining to the "health and sanitation affairs of the city," with power to appoint medical assistants and nurses and fill such vacancies as may "occur in other positions now existing in said department and any additional employes hereafter appointed; * * * such vacancies to be filled and additional employes appointed by the commissioner subject to civil service rules and regulations," taking away the power to remove at pleasure the employe of the department.

The employes of whom the appellant complains were appointed to their positions prior to the change in the charter. They were continued after the change without further appointment, and are now performing the same duties they were originally appointed to perform, although they were not at first given the specific title of district sanitary inspectors.

It is our opinion that they were legally appointed and are now lawfully in office. It is clear that under the charter as it existed at the time of their appointment they were not subject to the civil service regulations. Being lawfully in the service, their position was not affected by the change in the charter. The amendment neither by express words nor necessary implication declared the positions vacant. On the contrary, the inference arising from the language used tends to the opposite conclusion. The commissioner was only empowered to fill vacancies occurring in

the department and appoint additional employes when such should be required, such new appointees only to be selected subject to civil service rules and regulations.

[2] The power of the city council to reduce the number of city employes in the interest of economy cannot be successfully questioned. Where such a reduction is made requiring a dismissal or suspension of some employe, it is not a matter of injustice, requiring correction by the courts, for the appointing power in making a selection among those equally efficient to retain those longest in service.

[3] The appellant further urges that the judgment in the former case is *res judicata* of the question here involved. But without setting out the facts giving rise to the former proceeding, we think it manifest that the two causes are not the same. While the judgment seems to have been rested on the principle that unqualified employes were retained in positions in the service, and the appellant, a qualified person, dismissed from a similar service, there is no such showing in this record. Here all of the employes were qualified, the number was reduced by ordinance, and the appellant selected for suspension because of his shorter period of service. No prior judgment of the court not embodying the same facts could be *res judicata* of the question.

The order is affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and CHADWICK, JJ., concur.

DE LOR et ux. v. SYMONS et ux. (No. 13445.)
(Supreme Court of Washington. Oct. 21, 1916.)

1. MUNICIPAL CORPORATIONS §808(3)—CON-DITION OF SIDEWALK—TRAPDOORS.

One who maintains trapdoors in the sidewalk in front of his premises in such a condition that when one of them is stepped on it will give sufficiently to permit a person's toe to catch in the crack between the doors, is negligent, and liable for an injury resulting therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1684; Dec. Dig. § 808(3).]

2. TRIAL §133(6)—ARGUMENT OF COUNSEL.

Statements of facts not in the record, by counsel in his argument, which statements were not of a character to prejudice the jury against the other party, and which the jury were instructed to disregard, do not require the reversal of a judgment, the amount of which does not indicate passion or prejudice on the part of the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 316; Dec. Dig. § 133(6).]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by W. H. De Lor and wife against Thomas W. Symons and wife. Judgment for the plaintiffs, and defendants appeal. Affirmed.

M. T. Hartson, of Seattle, Geo. D. Lantz, Thomas W. Symons, Jr., and Danson, Williams & Danson, all of Spokane, for appellants. Guy B. Groff and O. E. Pardee, both of Spokane, for respondents.

MOUNT, J This action was brought to recover damages for personal injuries sustained by Mrs. De Lor as a result of falling upon a trapdoor in the sidewalk in front of defendants' premises. Defendants denied that Mrs. De Lor received her injuries from the trapdoor or that the door was unsafe. These questions were submitted to a jury, which returned a verdict of \$1,300 in favor of the plaintiffs. At the close of the plaintiffs' evidence and again at the close of all the evidence the defendants moved the court for a nonsuit, for directed verdict, and for a judgment notwithstanding the verdict. These motions were denied, and a judgment was entered upon the verdict. Defendants have appealed.

Appellants seek a reversal upon two grounds: First, that the evidence is insufficient to show negligence; second, misconduct of counsel for respondents in argument to the jury.

[1] It is contended by the appellants that the evidence shows that the trapdoor was constructed of two iron doors in an iron frame, that these doors were the kind commonly used, and that they were in perfect repair. The evidence on behalf of respondents was to the effect that the trapdoors were not solid by reason of the fact that when a person stepped upon one of the doors it gave down from one-half to three-quarters of an inch so as to permit a person's toe to catch under it; that Mrs. De Lor, while walking upon the sidewalk, stepped upon this trapdoor, her weight caused it to sag down so that her toe caught under the projection of the joint between the two doors, and caused her to fall and break her leg. There was other evidence to the same effect. We think it is plain that the evidence made a question for the jury whether the trapdoors were maintained as an ordinarily careful person would maintain such structures in a busy section of a city. If the appellants maintained the trapdoor, so that when stepped upon it would give down so as to permit a person's toe to catch therein, they would be negligent and liable in damages to a person using the street in the ordinary manner and stepping upon the trapdoor without notice of the defect. *Seattle v. Puget Sound Improvement Co.*, 47 Wash. 22, 91 Pac. 255, 12 L. R. A. (N. S.) 949, 125 Am. St. Rep. 884, 14 Ann. Cas. 1045; *Smith v. Tacoma*, 51 Wash. 101, 98 Pac. 91, 21 L. R. A. (N. S.) 1018. We are satisfied that the trial court did not err in submitting the question of negligence to the jury.

[2] It is contended by appellants that coun-

sel for the respondents in arguing the case to the jury went outside of the record, made statements which were not supported by the evidence, and that on account of such misconduct a new trial should have been granted. The record before us shows that counsel for the respondents did make statements to the jury which were outside the record and no part thereof. These statements were not legitimate arguments from the facts, but the trial court in instructing the jury told them in substance to disregard statements of counsel which were not supported by the evidence and was of the opinion upon motion for new trial that these statements were not of such a character as to prejudice the jury against the appellants, and that the size of the verdict did not indicate any passion or prejudice on the part of the jury. The trial court for these reasons was of the opinion that a new trial should not be granted. We are inclined to agree with the trial court that these statements were not so prejudicial as to warrant a reversal of the case.

The judgment is therefore affirmed.

MORRIS, C. J., and FULLERTON, CHADWICK, and ELLIS, JJ., concur.

EGGLESTON et al. v. PANTAGES et al. (No. 13226.)

(Supreme Court of Washington. Oct. 21, 1916.)

1. CORPORATIONS — 190—ISSUANCE OF STOCK — FRAUD—LACHES

Stockholders in a corporation, who had been such for seven years, during which they had full access to the books of the corporation, one of them being the vice president and a trustee, cannot recover for fraud in the original issuance of some of the stock before they became stockholders for the good will and booking rights of the theatrical circuit instead of for cash.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 723-731; Dec. Dig. ¶ 190.]

2. EVIDENCE — 419(11)—PAROL EVIDENCE—CONSIDERATION.

Where the consideration in a written stock subscription agreement was the promise of the head of the corporation to complete and equip a theater building in accordance with certain plans and specifications and turn it over to the corporation, parol evidence is not admissible to show that part of the consideration was a representation that the work would cost twice as much as it did cost.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1922; Dec. Dig. ¶ 419(11).]

3. CORPORATIONS — 107—ISSUANCE OF STOCK — RIGHT TO OBJECT — SUBSEQUENT STOCKHOLDERS.

Subsequent purchasers of corporate stock, who obtained full value in the purchase of their stock, cannot question the manner in which prior stockholders obtained their stock; no rights of creditors being involved.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 456; Dec. Dig. ¶ 107.]

4. CORPORATIONS — 190—ACTIONS BY STOCKHOLDERS—LACHES—RECEIVERSHIP PROCEEDINGS.

Stockholders of a corporation who had full knowledge of the appointment of a receiver and

of his transfer of the corporation's assets to a creditor, who assumed its liabilities, and who made no objection thereto so long as the business continued to show a loss, cannot recover for fraud in the receivership proceedings after the business has again begun to realize a profit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 723-731; Dec. Dig. § 190.]

Department 1. Appeal from Superior Court, Spokane County; Wm. H. Huneke, Judge.

Action by M. H. Eggleston and others against Alex Pantages and others. Judgment for the defendants, and plaintiffs appeal. Affirmed.

Merritt, Oswald & Merritt, of Spokane, for appellants. Cannon & Ferris, of Spokane, and Ryan & Desmond, of Seattle, for respondents.

ELLIS, J. This is an action for an accounting grounded upon alleged fraud.

For several years prior to 1907 defendants Alex Pantages, Lois A. Pantages, his wife, and Elvira Mendenhall, his mother-in-law, were, and still are, the only stockholders in defendant corporation, Pantages Theater Company. That corporation has been and still is operating in various cities throughout the Pacific Northwest a circuit of theaters known as the Pantages Theaters. It had and has well-established connections, called in the record franchises and booking privileges, throughout the United States and Europe to enable it to supply a continuous succession of attractions at its various houses. Spokane was not upon the Pantages circuit. Defendant E. Clark Walker, a resident of Spokane, had long been a friend of Alex Pantages and suggested the idea of including that city in the circuit. This was desirable in order to shorten the jumps of the different attractions from one house to another, and thus reduce transportation charges. The plan was finally consummated by the organization of a separate corporation, the Pantages Amusement Company, with a capital stock of \$75,000 in 750 shares of a par value of \$100 each, to operate a theater in Spokane in connection with the Pantages circuit. The stock of this corporation was, on May 24, 1907, subscribed as follows: Alex Pantages, 1 share; M. H. Eggleston, 1 share; E. C. Walker, 1 share; Melvin G. Winstock, 1 share; Lois A. Pantages, 1 share; and Elvira Mendenhall, 745 shares. It seems to be admitted that these 745 shares were in fact subscribed for Alex Pantages, who claims to have paid for this stock by furnishing the theater building and turning over to the Pantages Amusement Company the use of his name and good will and the franchises and booking rights of the Pantages Theater circuit. On the same day a meeting of these stockholders was held, by-laws were adopted, and Alex Pantages, M. H. Eggleston, E. C. Walker, Lois A. Pantages, and Melvin G. Winstock were elected and qualified as trus-

tees. These trustees at once met and elected officers as follows: Alex Pantages, president, M. H. Eggleston, vice president, Lois A. Pantages, secretary, and E. C. Walker, treasurer. These trustees and officers were re-elected at the next and succeeding annual meetings of the stockholders and trustees, and held these respective offices throughout the active life of the corporation. Through Walker plaintiffs and several other residents of Spokane became interested in the corporation, and on June 15, 1907, agreed to purchase \$25,000 of its stock by a written contract of that date which, so far as here material was as follows:

"That whereas, the Pantages Amusement Company has been incorporated with a capital stock of \$75,000 under the laws of the state of Washington, for the purpose of conducting a general theatrical business; whereas, the said Alex Pantages, and his appointees, have practically subscribed for the entire issue of stock; and whereas, it is desired that —, of Spokane, Washington, shall purchase at par \$25,000 worth of stock in said corporation: Now, therefore, it is agreed, that said \$25,000 worth of stock shall be paid for as follows: 50% upon the signing of these presents; 25% on August 1, 1907; and the further 25% when the Spokane Theater shall be fully completed and ready for occupation and use, as and for a theater, at which time, to wit, upon the final payment for said stock, the certificates for the same shall be duly issued to the respective parties hereto, in the amounts to which they are entitled.

"In consideration of the above the party of the first part, the said Alex Pantages, agrees to alter the said Holley, Mason, Marks building, located in the city of Spokane, on Howard street, between Riverside avenue and Main avenue, into a completely equipped up-to-date theater, ready and in all respects in a workmanlike manner, fitted, furnished, lighted, heated, in accordance with plans and specifications furnished and prepared by Architects Cutter & Malmgren, and to complete the said theater and turn it over to the Pantages Amusement Company at as early a date as is possible.

"And the said Alex Pantages further agrees to pay all rents and charges individually until such time as he turns over to said corporation, the said theater as aforesaid. * * *

"In witness whereof, the said parties hereunto have affixed their hands and seals the day and year first above written.

"Alex Pantages.

"I. Van Winkle.

"Thomas T. Thomson.

"F. J. Lorenz.

"Robert Keller."

Walter Keller.

M. H. Eggleston.

E. C. Walker.

Alex Nelson.

Pursuant to this contract Eggleston purchased 50 shares, Thomson, 25 shares, Rodenbach, 50 shares, Walker, 50 shares, and the other parties to the contract an aggregate of 125 shares, making in all 300 shares of a par-value of \$30,000. All of this stock was taken and paid for at par in money as provided in the contract. For his services in securing this contract and in superintending the remodeling and equipment of the building, Walker received from Pantages 50 additional shares.

The building had already been leased by Pantages Theater Company from its owners for a period of fifteen years from April 1, 1907, at a monthly rental of \$1,000, payable each month in advance. The lease provided

that the building should be fitted for a theater at the expense of the theater company in accordance with specifications prepared by certain architects; that the alterations and fixtures should become a part of the freehold, and on termination of the lease should pass to the owners of the premises; that the theater company should pay all taxes and assessments against the premises for the full term, and furnish insurance against fire and accident in an aggregate of \$72,000; and that a failure in any of these particulars at the option of the owners of the premises should work a forfeiture of the lease.

The building was remodeled and equipped, and on January 22, 1908, the premises were turned over by the Pantages Theater Company to the Pantages Amusement Company under a sublease for a period of 14 years at the same rental of \$1,000 a month, and containing substantially the same provisions as the original lease. From that time for about 3 years the theater was operated in connection with the Pantages circuit at great profit, paying dividends amounting to 136 per cent. of the entire capital stock of the Pantages Amusement Company. Business then fell off and a loss developed. The stock was nonassessable, but the stockholders all voluntarily paid back 5 per cent. of the face of their stock to meet expenses. The loss continued and Pantages, Eggleston, Rodenbach, and possibly one other stockholder paid another 5 per cent. on their stock, the other stockholders refusing to pay anything further. The loss continuing, all save Pantages refused to make any further payments, and he alone continued to advance money to meet expenses.

In December, 1911, Eggleston brought an action for the appointment of a receiver, alleging that the corporation was deeply in debt and insolvent, and was being mismanaged by Pantages in the interest of the Pantages Theater Company. This action was dismissed in consideration of Pantages' agreeing in writing to pay Eggleston \$2,189. Eggleston thereupon reported by letter to the other stockholders, to the effect that the business was being honestly managed, and advising them to "stay with the ship" in the hope of better times or a sale of their stock.

On March 21, 1912, Lois A. Pantages brought an action in the superior court of King county (that being the legal domicile of the corporation) against the Pantages Amusement Company on a number of its notes, some made to her personally, others to Pantages Theater Company and assigned to her, aggregating about \$9,000, and asking for the appointment of a receiver to wind up the affairs of the company. Walker as manager accepted service, and signed and filed an answer on behalf of the Pantages Amusement Company, confessing the debt and consenting to the appointment of a receiver. The court entered judgment for \$9,712.51 and interest,

and \$250 attorney's fee, and appointed William Wray, an attorney of Seattle, as receiver. The receiver, after visiting Spokane and making certain investigations, reported that the business was being operated at a heavy loss; that the monthly rental of \$1,000 was due, and that the company had no means by which to pay it; that the lease was subject to forfeiture, which would carry with it all the fixtures and equipment; that the lease could not be sold at a profit, and in fact was a liability rather than an asset, in that the premises could not then be rented for more than \$750 a month; that there was only \$400 cash on hand; that the company was indebted to Pantages Theater Company in the sum of \$10,000 and to the Exchange National Bank of Spokane \$5,000, as evidenced by demand promissory notes. The receiver recommended that an offer of Pantages Theater Company to take over the premises, including the fixtures and equipment, and relieve the Amusement Company from its liability on the lease be accepted. The report was approved, and the transfer ordered. The transfer was accordingly made, the receiver made his final report thereof, which was by the court approved, and the receiver was discharged on April 23, 1912. Thereafter the Pantages Theater Company continued to operate the theater as a part of its circuit, for a time at a continued loss, aggregating by August, 1913, approximately \$13,000. Since that time the Spokane house has apparently shown a profit.

On March 18, 1914, plaintiffs brought this action. The charges of fraud are, in substance: (1) Failure of Pantages to pay for his stock in the Pantages Amusement Company; (2) that Pantages and the other defendants conspired to procure the receiver, falsely representing that the corporation was insolvent; (3) that defendants suppressed the true facts, and thereby caused the receiver to turn over to Pantages Theater Company without adequate consideration the assets of the Amusement Company. It is alleged that Pantages is indebted to the corporation in the sum of \$29,500 for stock not paid for by him, and in the sum of \$37,170 received by him as dividends on this unpaid stock.

Defendants answered denying all of the charges of fraud and setting up as affirmative defenses: (1) The statute of limitations; (2) insolvency of the corporation when the receiver was appointed, full knowledge of plaintiffs of all the proceedings and of the appointment and doings of the receiver without objection by any of them; (3) the facts hereinbefore set out touching the organization of the amusement company, full knowledge of plaintiffs as to how the stock was subscribed and paid for, the contract with plaintiffs and others for the purchase of stock, defendants' performance of that contract, and pleaded laches on plaintiffs' part as an estoppel to the maintenance of

this action. The reply traversed the affirmative matter in the answer.

The cause was tried to the court without a jury. Judgment was entered, dismissing the action, with costs. Plaintiffs appeal.

[1] The first and main charge of appellants is fraud on respondents' part in launching this corporation, in that Pantages paid no money for his stock. This is an action by stockholders who have been such since about two months after the stock was fully subscribed. No rights of creditors are involved. These appellants at all times during the active life of the corporation have had the right of full and complete access to the books of the corporation. One of them at all times has been vice president and trustee. There is no evidence that respondents, either by force, artifice, or otherwise, have ever prevented appellants from acquiring the fullest knowledge as to how this stock was paid for. That the use of Pantages' name and good will and his franchises and booking privileges, with the right to operate as a member of the Pantages circuit, were assets of great value to the new theater cannot be seriously questioned. It is fairly apparent from the evidence that without these elements the new venture as an independent theater would have had little chance of success. There is no evidence that they were not then in fact worth the sum for which Pantages claimed to have turned them over to this corporation. The very fact that with no other assets save the lease of the theater premises and the building the corporation for the first 3 years paid dividends amounting to 136 per cent. on the entire capital stock at its par value is strong evidence of the value of these rights as an earning asset.

[2] Appellants offered to prove that, in the negotiations leading up to the contract under which they purchased their stock, Pantages represented that it would cost \$75,000 to remodel the building, that he would furnish the remainder of that sum above what they paid for their stock, and that there was no understanding that he was to have any stock for the use of his name, or for anything else but cash. But the trial court was of the opinion, and so are we, that in the face of their unambiguous written contract purchasing this stock this evidence was inadmissible. That contract recites, as the only consideration for their purchase and payment for the stock in money, that Pantages would turn over to the company the theater building fully equipped according to certain specifications, and pay the rent until it was so turned over. It is not questioned that he has performed that agreement. It is elementary that all prior negotiations were merged in this writing. The fact that it cost him only \$36,379 to meet this contract is immaterial. There was no offer of proof that appellants were induced to sign the contract and purchase the stock by the belief that the

building would cost \$75,000. Had the remodeling of the building actually cost \$75,000, or even a greater sum, and had Pantages failed to pay it or had he paid for it from the earnings of the theater a different question would be presented. There was no evidence nor offer of evidence that Pantages represented that he had paid cash for his stock. The doctrine that the capital stock of a corporation is a trust fund for the creditors, and that all stock must be paid for in money or money's worth (*Lantz v. Moeller*, 76 Wash. 429, 136 Pac. 687, 50 L. R. A. [N. S.] 68), in the absence of fraud or misrepresentation, has no application as between the stockholders themselves, where the rights of creditors are not involved. *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499. Even if it appeared that Pantages' name, good will, franchises, and booking rights were not of the value at which he claims to have turned them over to this corporation in payment for his stock, the fact still remains that during the whole business life of this corporation these appellants as stockholders had every means of knowledge of what the building cost and what money or other assets the company possessed.

[3] Moreover, they were subsequent stockholders. They obtained full value in the purchase of their stock. The dividends which they received during the first 3 years furnish ample evidence of that fact. In such a case, where the rights of creditors are not involved, it is immaterial in what or how prior stockholders paid for their stock. *Inland Nursery & Floral Co. v. Rice*, supra. We are clear that appellants at this late day cannot be heard to say that they did not know that all of the stock was not paid for in cash, and cannot, in any event, claim injury through the purchase of stock which was then worth at least what they paid for it.

[4] So far as this action rests upon the charges of fraud and conspiracy in the receivership proceedings and inadequacy of the consideration for the receiver's transfer of the assets to Pantages Theater Company, it seems plain that the defense of laches must be sustained. While the fact is disputed by one of the appellants, the evidence is convincing that all of the stockholders of Pantages Amusement Company were notified of the receivership proceedings either at about the time of the application or soon after the transfer. Eggleston admitted that he had notice, and soon afterwards investigated the proceedings and took the matter up with other stockholders. That the corporation was insolvent cannot be doubted. It had been running behind for months, and Pantages alone had been meeting the losses. As early as December, 1911, Eggleston had commenced proceedings alleging insolvency. Appellants when the thing was done had every means of knowledge as to the manner in which the receiver was appointed and as to the considera-

tion for the transfer that they now possess. Apparently so long as the operation of the theater continued at a loss, they were content to recognize the receiver's transfer as a valid transaction. Soon after it began to show a profit this action was begun. If, as charged, the receivership was conceived in fraud and conspiracy and the transfer was approved by the court through suppression of the facts, these things were as easily discoverable then as now. Even as a direct attack to set aside the transfer, this action would be too late. *Wright v. Tacoma Gas, etc., Co.*, 53 Wash. 262, 101 Pac. 865; *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088. Viewed as an action for fraud, it is elementary that such an action must be brought as soon as the party alleging fraud is charged with knowledge of it.

A most careful consideration of the entire record has convinced us that the trial court reached the correct result.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

ALDREAD v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. Oct. 21, 1916.)

1. COMMERCE §27 — EMPLOYERS' LIABILITY ACTS—"INTERSTATE COMMERCE."

Iceing a refrigerator car to receive shipment of fruit for another state is an initial movement after which, even in switching, the car is engaged in interstate commerce, so as to permit an injured brakeman to recover under federal Employers' Liability Act (Act Cong. April 22, 1906, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. §27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. MASTER AND SERVANT §286(33)—INJURIES TO SERVANT—PLACE OF WORK—QUESTION FOR JURY.

Evidence held to present jury question whether, in switching cars, due and reasonable care for safety of employes demanded that the air brakes to the cars be coupled.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. §286(33).]

3. MASTER AND SERVANT §111—INJURIES TO SERVANT—APPLICABILITY OF STATUTES—INTERSTATE COMMERCE—NEGLIGENCE.

Since federal Employers' Liability Act governs rights of the parties employed in interstate commerce, a servant so injured is entitled to benefit of a showing of the master's negligence without showing violation of the federal Safety Appliance Act (U. S. Comp. St. 1913, §§ 8606-8650).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 255; Dec. Dig. §111.]

4. MASTER AND SERVANT §270(14) — INJURIES TO SERVANT—INTERSTATE COMMERCE—MOVEMENT OF TRAINS—EVIDENCE—ADMISSIBILITY.

It was error to admit plaintiff's evidence, on the issue whether cars were in a train movement

or switching movement, that company rules required green flags on rear of trains, and that they were not displayed at the time of plaintiff's injury, such evidence tending to show an act of negligence independent of that charged as causing the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 924; Dec. Dig. §270(14).]

5. MASTER AND SERVANT §278(19) — INJURIES TO SERVANT—INTERSTATE COMMERCE—MOVEMENT OF TRAINS—EVIDENCE—ADMISSIBILITY.

It was error to admit train bulletin on another division, requiring cars moving on main track to be coupled with air, the manner of moving trains on another division having no bearing on the issue whether the servant's injury resulted from failure to couple with air.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 969; Dec. Dig. §278(19).]

6. MASTER AND SERVANT §270(14) — INJURIES TO SERVANT—INTERSTATE COMMERCE—MOVEMENT OF TRAINS—EVIDENCE—ADMISSIBILITY.

It being admitted that cars were not coupled with air when plaintiff brakeman was injured, proof of rule requiring such coupling is not admissible; the only inquiry being whether failure to couple caused the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 924; Dec. Dig. §270(14).]

7. EVIDENCE §539—OPINIONS—INJURIES TO SERVANT—MOVEMENT OF TRAINS.

The injured servant having offered testimony that injury resulted from release of air brake, and the employer having offered testimony to show that it did not so result, and that the air could not have been released instantly so as to have caused the injury, it was error to permit plaintiff to testify whether it could have resulted from release of throttle, no qualification being shown, and such testimony being speculative, and no negligence save release of air being alleged.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349-2352; Dec. Dig. §539.]

Department 1. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by Al Aldread against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

C. H. Winders, of Seattle, for appellant. Griffin & Griffin, of Seattle, for respondent.

CHADWICK, J. Respondent was engaged as a brakeman in a switching crew. The crew was regularly assigned to do the switching in and between Puyallup and Sumner during the berry season. The distance between Puyallup yards and Sumner yards is about a mile. Over this intervening space, switching is done on the main track. At the time plaintiff was injured, the crew was moving two cars, a flat car loaded with wood consigned to Sumner and a refrigerator car, with passenger equipment, which had been iced at the icehouse at Puyallup and was being moved to the Fruit Growers' Association warehouse at Sumner for loading. The car

was there loaded and thereafter consigned to Grand Forks in North Dakota. The engine was backing and pulling the two cars. There was a step or footboard on the tender. Switch engines are usually so equipped, for the convenience of the switchmen. The air was not coupled between the engine and the cars. The train was controlled by a direct application of the air upon the engine.

The conductor, the swing brakeman, and respondent rode on the footboard from Meeker junction to Sumner. As the train slowed down and was about to stop at the station, the conductor and the swing brakeman stepped off the footboard. Respondent says that just as the train was about to stop he gave the signal to the fireman to stop; that the engine did stop; that he stepped off, and instantly the engineer released the air, and the momentum of the cars was such that they struck or pushed the engine, moving it forward about three feet; that the footboard caught him on the back of the foot or ankle, and doubled his leg over his foot, crushing and bruising it so that he has suffered permanent injuries. Other facts will be mentioned in our discussion of the law. The appeal is prosecuted from a verdict and judgment in favor of the respondent.

[1] The first question is whether the federal Employers' Liability Act applies in this case. We have recently examined that act and reviewed the cases. The icing of the car was an initial movement incident to its loading and billing to a point outside of the state, and we hold, under the authority of *Bolch v. Chicago, Milwaukee, etc., Ry. Co.*, 90 Wash. 47, 155 Pac. 422, that it was engaged in interstate commerce at the time respondent was injured.

[2] Whatever the movement may be called, under the testimony of respondent the question whether due and reasonable care for the safety of its employes demanded of appellant a coupling of the air is for the jury.

[3] The most material inquiry upon the trial was whether the movement of the cars from Puyallup yards over the intervening space into Sumner yards was a train movement or a switching movement, respondent contending that, inasmuch as there were two cars and an engine moving over the track between the two yards, it was a train movement, and that the cars should have been coupled with the air. To sustain his theory, respondent sought to show that the train was moved without complying with the Safety Appliance Act. It is possible that counsel were of opinion that it was necessary to show a violation of the Safety Appliance Act in order to avail themselves of the right to a recovery, notwithstanding a finding of negligence on the part of the respondent. Respondent is entitled to that benefit under our holding that appellant was engaged in interstate commerce.

The Employers' Liability Act of April 22,

1908, 35 Statutes at Large, p. 65, defines the right of the employe in such cases, and the rights of the parties depend upon it and not on the Safety Appliance Act.

[4] Counsel was permitted, over the strenuous objection of counsel for appellant, to prove a rule and custom requiring all trains to carry markers or green flags upon the rear of a train, and that such markers were not displayed upon the rear car at the time respondent was hurt. While the presence of the markers might tend to prove that appellant was engaged in a train movement, the absence of such markers could have no relevancy whatever. The presence or absence of the markers had nothing to do with the accident. They are used to give notice to other trains of the movement and character of a train running with or opposite to them, to avoid collisions and to indicate rights of way. The error of the court in admitting such testimony is apparent. Its presence in the record is not accounted for upon any reasonable or legal grounds. Counsel's argument is no more than this: If markers had been displayed, it would have been a train. They were not displayed, and it was a train anyway. It neither proves nor tends to prove any fact material to the issue. Its tendency was to convict appellant of an independent act of negligence—a disregard of its rules which in no way contributed to the injury.

Subject to the well-settled doctrine that notice of a defect may be proved by other accidents occurring at a given place, it has been repeatedly held that evidence of an independent act of negligence is not material or relevant. *Dickey v. N. P. R. Co.*, 19 Wash. 850, 53 Pac. 347; *Henne v. Steeb, etc., Co.*, 37 Wash. 331, 333, 79 Pac. 938. More especially when the act complained of in no way contributed to the injury. 1 *Greenleaf on Evidence* (14th Ed.) § 52.

[5] The court permitted respondent to introduce a train bulletin, issued by the division superintendent after the accident to plaintiff, requiring all cars moved between Sedro Woolley and Clear Lake, Wash., to be coupled with air. This seems to have been relied upon as an admission that the movement of cars along a main track constituted a train movement, and not a switching movement, and to show inferentially an admission on the part of the company of a negligent practice. The admission of this testimony was error. The manner of moving trains upon another division could have no bearing on the question in this case. In *Bell v. Washington Cedar Shingle Co.*, 8 Wash. 27, 35 Pac. 405, the court cited and relied upon the case of *Columbia, etc., R. R. Co. v. Hawthorne*, 144 U. S. 202-207, 12 Sup. Ct. 591, 593 (36 L. Ed. 405):

"The evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency

to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendants."

See, also, *Carter v. Seattle*, 21 Wash. 585, 59 Pac. 500.

[6] Respondent was permitted, over the objection of plaintiff, to introduce a book of rules containing, among others, the following: "Train pipe must be connected to permit of operation throughout the train." This too, was error. Granting that the inquiry, whether the movement was a train movement or switching movement, was material, the offer of the rule did not tend to prove or disprove the fact. It is admitted that the air was not coupled, and the only inquiry then is did the accident occur because it was not coupled, not whether the rule required it to be so. To illustrate, appellant could not have offered the rule, the cars not being coupled with air, to prove that it was engaged in a switching movement, although the construction put upon such rules by those who operate under them is often given great weight in determining a disputed fact. If it were admitted or were proved by independent evidence that the engine and cars made up a train within the meaning of the Safety Appliance Act, and the order of the Interstate Commerce Commission, the rule might then be admitted to make a prima facie case of negligence.

[7] After respondent had developed his case upon the issues made by the complaint and answer, that is, that the engineer had negligently released the air at the very moment that the engine stopped, and appellant had produced a number of witnesses whose testimony tended to disprove this theory, and to affirmatively show that the air had not been released at all, and, further, that the air could not have been instantly released, but that the operation would require from 8 to 11 seconds, respondent was put upon the stand in rebuttal. He was interrogated as follows:

"In answer to a question of Mr. Winders' you stated that it was the action of the cars in pressing and bumping against the engine that caused the tank or the footboard to back over you? * * * That that was what caused the tank to back over you; I want to ask you whether you know whether it was that or whether it was steam applied to the cylinder from the locomotive?"

"Mr. Winders: I object to that on the ground that it is leading and suggestive.

"Mr. Griffin: The witness, if your honor please, should always have an opportunity to explain his answers. He has made an answer to a question which he did not thoroughly understand, and he should be given an opportunity to correct it.

"Mr. Winders: It is for the jury to say whether he understood it.

"Mr. Griffin: I call the witness' attention to that one answer, and I desire the witness to have an opportunity to explain it.

"Mr. Winders: He said the reason he got hurt was because the engineer released the air on the engine.

"Mr. Griffin: We still insist that was the reason he was hurt.

"Mr. Winders: Then why are you trying to inject it here that it was because of something else?"

"Q. (Mr. Griffin). Was there any answer which you make to Mr. Winders' question which you wanted to correct?"

"Mr. Winders: I object to that on the ground it is incompetent.

"Mr. Winders: I object to that question, if your honor please, and there is nothing before the court.

"Mr. Griffin: Just explain the answer, if you wish to.

"A. I answered Mr. Winders' question last Friday as I understood his question. There might have been steam—the throttle might have been leaking steam, or there might have been other causes, whereas, as he released his straight air that it might have forced the engine back. I answered Mr. Winders' question the way I understood him to ask me. I could not say but what this was a defective throttle at the time, but if the engineer had held on his brakes they would not have come back."

Mr. Winders moved to strike the answer, and Mr. Griffin said:

"I am perfectly willing that that portion of the answer should be stricken."

While the record is confused, it is likely that the court ordered it stricken. Mr. Griffin asked the further question:

"Q. Was there any further explanations which you wish to make, Mr. Aldread?"

Witness was allowed to answer over objection:

"Well, I simply want the jury to understand that I answered Mr. Winders' question last Friday as I understood his question. I made the remark that, had the engineer held on to his straight air the instant he came to this stop, that these causes would not have occurred. There might have been something else happened then—there might have been a leaky throttle, or there might have been other power which would cause that engine to come back and catch me, that is all—"

Mr. Winders again moved to strike. Mr. Griffin said, "I consent that the leaky throttle may be thrown out," but followed it by the question: .

"What I wanted to ask was this, if your honor please, to find out whether or not when the brake was released the engine might have been pushed ahead by reason of the throttle not having been completely shut off—by steam applied in the cylinders.

"Q. (Mr. Griffin). Don't refer to any leaky throttle or anything of the kind, but might the train have been propelled backward by the action of steam as well as by the bump?"

"A. Yes.

"Mr. Winders: I object to that on the same ground, as not any issue in this case.

"Mr. Griffin: It is an issue. We allege that the train was backed up wrongfully, carelessly, and negligently.

"The Court: I will overrule the objection and allow you an exception."

The admission of this testimony is so obviously prejudicial that it needs no discussion. But counsel insists that it was within the issues as tendered in his complaint. We are not disposed to hold that any negligence other than the misuse of the air was charged in the complaint, but, if so, it was an abuse of discretion on the part of the court to receive such testimony. It was speculative.

The opinion of respondent had no foundation of fact to sustain it, nor was it shown that he was capable of expressing an opinion. Furthermore, the issue had been waived if tendered. The only testimony respondent was free to offer in rebuttal was such as tendered to rebut the affirmative testimony of the appellant.

For all these reasons, a new trial must be had. The issues will be greatly simplified. The only issue is whether the air was released, and, if so, whether the cars would not have pushed the engine—if they did push it—if the engine and cars had been coupled with the air.

Reversed and remanded.

MOUNT and ELLIS, JJ., concur. MORRIS, C. J., concurs in the result.

PETERMAN v. GOSS et al. (No. 12753.)
(Supreme Court of Washington. Oct. 17, 1916.)

1. CONTRACTS §299(1)—BUILDING CONTRACTS —“OTHER CONTRACTORS.”

A general contract for the construction of a building, the contracts for the excavation, heating, plumbing, electric work, and painting of which were let to other contractors, which required any contractor or subcontractor claiming damages on account of delay, etc., of “other contractors” to make written claim within 48 hours, does not apply to disputes between any of these contractors and their own materialmen or subcontractors; the latter not being parties to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372-1381; Dec. Dig. §299(1).]

2. DAMAGES §45 — BUILDING CONTRACTS — OFFSET FOR DEFECTIVE MATERIAL.

Where inspectors for a school building refused a quantity of material furnished by the subcontractor of a general contractor, because of lack of finish, and the general contractor was compelled to handle and refinish the defective material, he could offset this expense in suit by the subcontractor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 92-98; Dec. Dig. §45.]

3. DAMAGES §45 — BUILDING CONTRACTS — DAMAGES FOR DELAY—OVERHEAD EXPENSES.

In suit by subcontractor to recover on his contract, loss of overhead expense caused by his delay was not allowable as an offset against him, where the item consisted of salaries paid the superintendent, manager, and general bookkeeper of the general contractor during time when the building was not completed in other particulars, which required the continuance of these general employes in their duties, irrespective of the subcontractor's delay.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 92-98; Dec. Dig. §45.]

4. DAMAGES §30 — BUILDING CONTRACTS — DAMAGES FOR DELAY—LOSS IN ERECTION EFFICIENCY.

In suit by subcontractor to recover on his contract, loss in efficiency of carpenters employed, caused by his delay, was not allowable as an offset against him, where the percentage of such loss was conjectural and rested on conclusions of witnesses which appeared too high.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 222; Dec. Dig. §30.]

5. DAMAGES §86 — BUILDING CONTRACTS — LOSS BY DELAY—INTEREST ON MONEY BORROWED.

In suit by subcontractor to recover on his contract, the general contractor was entitled to counterclaim for interest paid on money necessarily borrowed to carry on the work because his estimates were held up by delay of the subcontractor in furnishing material.

[Ed. Note.—For other cases, see Damages, Dec. Dig. §36.]

Department 1. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by T. F. Peterman against Anna Maria Goss and others. From a judgment for plaintiff, defendants appeal. Reversed, with instructions.

Fogg & Fogg, of Tacoma, for appellants. John E. Gallagher, of Tacoma, for respondent.

PER CURIAM. Tacoma School District No. 10, on September 9, 1912, let to F. H. Goss, the general contract for the construction of the Central School building in the city of Tacoma. This contract required the building to be completed by July 15, 1913. The contracts for excavation, heating, plumbing, electric work, and painting were let to other contractors. Goss' contract contained the following provisions:

“(1) *Contractor.* The contractor is to provide all materials and labor necessary for the complete and substantial execution of everything described, shown or reasonably implied in the drawings and specifications for his part of the work, including all transportation, scaffolding, apparatus and tools necessary for the same. All materials shall be the best of their respective kind, and all workmanship shall be of the best quality.

“(2) *Other Contractors.* The general contractor shall allow the contractors for parts of the work not included in his contract proper room for the storage of their materials and the execution of their work. The contractors shall work in harmony. The architects and superintendent will settle all differences arising, and their advice and orders shall be binding and final. Each contractor is to carefully read all of the specifications, so as to better understand his part of the work. The contractors are to carry on their work at all times with the greatest reasonable rapidity under the direction and to the satisfaction of the architects, superintendent and owner.

“(3) *Interpretation of Drawings.* In the event of any doubt or question arising respecting the true meaning of the drawings or specifications, reference shall be made to the architects, whose decision shall be final and conclusive.

“(4) *Damages Claimed for Delays by Other Contractors.* Should any contractor or subcontractor claim damages on account of the delay, negligence or carelessness of other contractors, or for any other cause, he must declare the amount of such damages and make claim for same in writing at the time the damage is incurred. He shall deliver such written claim to the architects or superintendent and to the party at fault, within 48 hours of the occurrence, that such claim may be adjusted by the architects or superintendent. Failure to act as provided above will render such claim null and void.

“(5) The heating, plumbing, electric work, painting and general excavation will be let in separate contracts, and are not included in the general contract.”

On November 4, 1912, Goss entered into a subcontract with the Peterman Manufacturing Company to supply the necessary millwork for the building. This contract was as follows:

"Contract for Millwork for Central School.

"Tacoma, Washington, Nov. 4th, 1912.

"We propose to furnish you all the millwork to be used in the construction of the new Central school building situated on South G. street between South 7th and South 8th, in the city of Tacoma, according to plans, specifications and details prepared by the architects, Heath & Gove, for the sum of eight thousand seven hundred dollars (\$8,700), delivered to the building site.

"Delivery.

"We agree to keep in touch with the contractor of this building and furnish said millwork when needed and in such a manner so as not to detain the progress of the building.

"Terms.

"Eighty per cent. to be paid upon delivery of material, on or before the 10th of each month for all material delivered during the preceding month, and the remaining 20 per cent. to be paid when building is completed and millwork accepted by architects. (Said 80 per cent. to be paid upon approval of millwork by the architects.)

"We agree to make good any defects in material or workmanship for a period of six months after final acceptance by the architects as required by the specifications.

"It is further understood that we have read all the general conditions of the architects' specifications, and the specifications connected with our portion of the work, and this bid and agreement is made in accordance therewith."

The subcontractor began furnishing millwork on December 5, 1912, and continued to do so until November 8, 1913. The building was ready for the interior finish on April 30, 1913, and the subcontractor began supplying material therefor on May 1, 1913. From this date until September 11, 1913, constant protests were made by the contractor against the delay in furnishing millwork. On February 10, 1913, the Peterman Company was paid \$938 on account, and on June 28, 1913, was paid \$2,000 on a bill rendered for \$4,000. F. H. Goss having died, his widow was appointed executrix, and proceeded with the contract. On her refusal to pay the balance of the contract price in the sum of \$5,762, together with a claim of \$721 for extras, the Peterman Manufacturing Company brought suit for \$6,483 against the executrix and the sureties upon the contractor's bond. The defendants set up a counterclaim for damages in the sum of \$549.83 for material the plaintiff had neglected to supply, and which was procured at the contractor's expense; \$913 for expense of handling and refinishing defective millwork; \$1,120 for overhead expenses for 70 days' delay; \$1,412.50 for 25 per cent. loss in erection efficiency and expense, due to delay on the part of the subcontractor; and \$122.50 for interest paid on money borrowed by reason of the plaintiff's delay. The action was tried by the court, which reduced plaintiff's claim for extras to \$389.50, and reduced de-

fendants' set-off for plaintiff's failure to furnish items called for by the contract to \$440.83. The balance of plaintiff's contract price was allowed in full and judgment given for plaintiff in the sum of \$5,710.67. The defendants appeal.

The only question involved on this appeal is the right of appellants to set off the items of \$913, \$1,120, \$1,412.50, and \$122.50 set out above.

[1] In its memorandum decision the trial court recited that:

"Defendant claims items amounting to \$913 for working over imperfect millwork. The court finds that defendant is not entitled to credit for these. No notice of any such claim was given at the time as required by specifications on page 7."

"Defendant claims that they were damaged by delay on the part of plaintiff in furnishing materials. Items amounting to \$2,854.50. The court finds that plaintiff did occasion considerable delay by not furnishing the millwork as required. However, defendants never gave notice of their claim in this respect as required by the specifications on page 7."

The provision referred to by the court as being on page 7 of the specifications is the paragraph numbered 4 which we have quoted from the contract.

Construing the different sections of the specifications together, we think it is plain that the term "other contractors," as used in this section, does not have reference to the subcontractors, or materialmen, under the general contractor. There were several other contracts on this building "not included in the general contract," such as those for putting in the heating plant, plumbing, electric work, painting, and the general excavation. One provision of the specifications is to the effect that:

"The general contractor shall allow the contractors for parts of the work not included in his contract proper room for the storage of their materials and the execution of their work."

Among several contractors on different parts of the work, it is but natural that some conflicts may arise, and with that in view it was provided that any claims for damages on account of the delay or negligence of any of them must be promptly referred to the architects or superintendent for the purpose of adjustment. Controversies between any of these contractors and their materialmen or laborers were subsidiary matters for which no arbitration was provided in the specifications. If the troubles of any of the contractors with their own materialmen should occasion delay in the work of the other contractors, the offending contractor could be brought to book by the arbitrators; but there is nothing in the specifications to indicate an intent that the arbitrators should go beyond the contractors themselves to settle disputes which they might have with materialmen who were in no sense parties to the contracts with the school district. The school district would have no right of action against the materialmen or subcontractors

of a contractor. If the contracting parties had intended to refer these subsidiary disputes to the arbitration of the school district's representatives, the specifications should have so declared in express terms, and not left the matter to be implied from the chance signification of some term employed. That this was the interpretation of the architect is shown by the fact that he refused to interfere between appellants and respondent, or, as he testified, "between the general contractor and his subcontractors."

We think the trial court was in error in applying this paragraph of the specifications to the subject-matter of the dispute between appellants and respondent. Since it is without application, it was not necessary for appellants to present any written claim declaring the amount of their damages to the architects or superintendent or to the respondent, within 48 hours of the occurrence, or at all.

[2] The relations of the appellants and respondent not being governed by the foregoing section of the specifications, it remains to inquire whether appellants' counterclaim is substantiated by the evidence. The appellants make no claim for the \$109.83 worth of material furnished by them and rejected by the court as not properly chargeable against respondent. As to the item of \$913, charged against respondent for the expense of culling, loading, and unloading lumber, and of labor in resanding and finishing imperfect millwork, the evidence of appellants stands without contradiction that the inspectors for the school district refused a quantity of material furnished by respondent because of lack of finish; that respondent refused to take most of it back; that appellants were compelled to have it sanded by hand instead of machine sanded as the specifications required; and that, from the actual time book kept on that work, the expense of resanding was \$700, of culling the lumber, \$150, and of loading and unloading culled lumber, \$63. We think that appellants are entitled to offset the expense of handling and refinishing defective material in these sums which aggregate \$913.

[3] As to the items of \$1,120 for overhead expense, 25 per cent. loss in erection efficiency amounting to \$1,412.50, and interest in the sum of \$122.50, which appellants were required to pay on borrowed money, the evidence is not so satisfactory. While it clearly shows wrongful delay on the respondent's part, the determination of the amount of damages to be allowed therefor presents the difficulty. The item of \$1,120 for overhead charges is made up from the salaries paid the superintendent, manager, and general bookkeeper of appellants from July 16 to September 24, 1913, inclusive; the latter being the day on which the building was accepted by the school district. The evidence shows that the brickwork was not completed

on July 16th, and that the plastering was not fully completed until some time in November. These were matters requiring the continuance of those general employes in the discharge of their duties, irrespective of the delay in furnishing the millwork, and we do not think it was clearly proved that their continued employment was due to the delay of respondent. The latest complaint of delay in furnishing materials is dated July 19, 1913, with the exception of one on September 11, 1913, concerning glass to be put in the tower, which respondent refused to supply on the theory it was not within his contract. We hold that the item of overhead charges is not a proper subject of set-off against respondent's claim.

[4] The item of \$1,412.50, constituting 25 per cent. of loss in erection efficiency, is claimed as excess of cost of installing the finish, due to the necessity of shifting carpenters from one piece of work to another because of the lack of material for finishing off one room before proceeding to another. The only evidence as to this was the testimony of the Teeters, father and son, who occupied the positions respectively of superintendent and carpenter foreman, and seems to have been more in the nature of conclusions of the witnesses. The foreman testified that carpenters were laid off when there was no work; from 10 to 15 being laid off three or four times. The bookkeeper also testified that as many as 10 carpenters were laid off at a time, and that carpenters were discharged half a dozen times. The superintendent testified that he could have worked 25 carpenters at a time, if he had had the material, but that on account of delay in receiving it he worked but 6 carpenters. It appears from this evidence that appellants were not put to the expense of carrying the carpenters when there was no work. There was doubtless some loss in the efficiency of the force from being shifted back and forth between the rooms because of the lack of material. But there is no satisfactory evidence as to the amount of such loss. The conclusions of the witnesses are certainly high when they declare that it was one-fourth of the expense of installing the finish. The school district waived its demurrage claim of \$100 per day against the contractor, necessitating the exclusion of that item from consideration.

[5] Respecting the counterclaim of \$122.50 for interest, H. F. Goss testified that it was necessary to borrow money to carry on the work, because his estimates were held up by reason of lack of millwork for the building; that he borrowed \$5,000 on July 26, 1913, and \$4,000 on August 13, 1913, on which interest was paid in the total amount of \$122.50. This evidence is direct and positive, and was not contradicted. The evidence further shows that the last estimate allowed and paid prior to final acceptance of the building was on July 4, 1913. The necessity for bor-

rowing this money was due to delay in getting millwork for the interior finish. The contract provided for payment of estimates every two weeks, and the failure to make any estimates between July 4 and September 24, 1913, was due to inability to finish up the interior on account of lack of millwork. We think this interest was a proper element of damage, and should have been allowed to appellants.

The judgment will be reversed, with instructions to reduce the judgment in favor of respondent by deducting therefrom the items of \$913 and \$122.50, totaling \$1,035.50. The appellants will recover costs of appeal.

LEE et al. v. PASCO THEATER CO. et al.
(No. 13380.)

(Supreme Court of Washington. Oct. 20, 1916.)

1. JUDGMENT \S 668(1) — CONCLUSIVENESS — PERSONS BOUND.

Where, in action to foreclose mechanic's lien on theater building, the lot owners intervened, claiming title to building and fixtures, and a chattel mortgagee of the furniture and equipment intervened, asking foreclosure, and the purchase-money mortgagees of such furniture and equipment, when brought in, disclaimed interest, the judgment, awarding the property to various claimants, not appealed from by the purchase-money mortgagees, could not be questioned in their subsequent action of foreclosure, even though the copy of the chattel mortgage served on them in the first action was incorrect, or such mortgage was in fact void as to them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1181, 1188; Dec. Dig. \S 668(1).]

2. CHATTEL MORTGAGES \S 278—FORECLOSURE—DEFICIENCY JUDGMENTS.

Where foreclosure of chattel mortgage for purchase money failed, owing to holder's disclaimer in former suit by chattel mortgagee, evidence held not to authorize deficiency judgment against the individual defendants.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 567; Dec. Dig. \S 278.]

Department 2. Appeal from Superior Court, Franklin County; Edward C. Mills, Judge.

Suit by L. L. Lee and another against the Pasco Theater Company and others. From a judgment against the trustee in bankruptcy for the company, and denying relief as to other defendants, plaintiff appeals. Affirmed.

Chas. W. Johnson, of Pasco, for appellant. Gerard Ryzek and Driscoll & Leonard, all of Pasco, for respondents.

MAIN, J. The purpose of this action was to foreclose a chattel mortgage as against the defendant Pasco Theater Company, a corporation, and for a deficiency judgment against the other defendants. The trial resulted in a judgment against the trustee in bankruptcy appointed by the federal District Court for the Pasco Theater Company for the amount demanded in the complaint. As against the other defendants relief was de-

nied. From this judgment the plaintiff prosecutes the appeal.

The controlling facts are these: Some time during the early part of the year 1914, the Pasco Theater Company was organized for the purpose of taking over, completing, and operating an incomplete theater in Pasco, Wash., known as the Cord Theater Company property. After assuming control of the property the Pasco Theater Company purchased from the appellants certain chairs, draperies, carpets and other articles of personal property for the purpose of furnishing and equipping the theater. In payment for these articles two notes were given, one for \$555.86, which represented the price of the chairs, and the other for \$504.75, which represented the purchase price of the other articles. For the purpose of securing the payment of the \$555.86 note a chattel mortgage was given upon all the property which had been sold by the appellants to the theater company. This included the chairs, draperies, and carpets. The note and mortgage were executed by the corporation and not by the other defendants as individuals. Throughout the briefs frequent reference is made to the note not secured by the mortgage, but as that note is not involved in this action, no further reference will here be made to it.

On January 25, 1915, the present action was instituted. Prior to the time this action was begun, an action in the same court, entitled Barr v. Ryzek et al., was pending. In that action the plaintiff had furnished material and performed labor upon the theater building, and was seeking to foreclose a lien. There were a number of other lien claimants in the action either as defendants or as interveners. John Ryzek and wife, who claimed to be the owners of the theater property, were parties defendant, and J. A. Ryzek, a mortgagee, was also a party defendant. John Ryzek and wife appeared in the action by answer and cross-complaint. In their cross-complaint they claimed title to the building and the lot upon which it was located, and also claimed the fixtures and equipment in the building, including the curtains, floor coverings, and draperies. By this cross-complaint the appellants here, Lee and Perry, were made parties and brought into the action. J. A. Ryzek appeared by answer and cross-complaint, and sought the foreclosure of a mortgage held by him, which mortgage was drawn both as a real estate and a chattel mortgage. The chattel mortgage clause covered "all personal property, chairs, fixtures, furniture and equipment in the theater building on said premises or hereafter placed in said building." This mortgage was executed on the 18th day of August, 1914. The chattel mortgage, foreclosure of which is sought in this action, was executed on the 14th day of October, 1914. The property covered by the chattel mortgage had been

placed in the building prior to its execution and subsequent to the execution of the J. A. Ryzek mortgage.

Lee and Perry, on March 29, 1915, filed an answer to the cross-complaints of John Ryzek and wife, and J. A. Ryzek. The first paragraph of this answer recites: "That at no time did the said Lee and Perry have or claim any interest in or to the property involved in the above-entitled cause, and do not now claim any interest or title in or to said property."

The answer concluded with a demand that the answering defendants be dismissed from the action. Thereafter J. A. Ryzek moved for judgment on the pleadings against Lee and Perry. The motion was based upon the disclaimer contained in the answer. On April 13, 1915, an order was entered by which the motion was granted, and it was adjudged that the lien of J. A. Ryzek, "is prior and superior to any claims of L. L. Lee and F. L. Perry, and that the defendants, L. L. Lee and F. L. Perry, had no interest or title in or to any of that property mentioned in the cross-complaint of J. A. Ryzek."

Thereafter the Barr action proceeded to trial and judgment without Lee and Perry. and on July 21, 1915, a judgment was entered therein. In this judgment John Ryzek and wife were given the real estate, consisting of the building and the lot upon which it was rected, "together with the appurtenances and equipment thereunto belonging, including the draperies and all fixtures permanently affixed and attached to the building located on said premises, excepting, however, the Sea Grass chairs and carpets now located in said building." J. A. Ryzek was given a judgment for \$3,000 and interest against the Pasco Theater Company and the trustee in bankruptcy of that company, and, the judgment recites, "is also hereby awarded a judgment of foreclosure of the chattel mortgage of said J. A. Ryzek upon the Sea Grass chairs, being of the approximate number of ninety, and upon the carpets." The judgment contained a direction that this property should be sold in the manner provided by law, and the proceeds thereof should be applied on the chattel mortgage and the notes secured thereby. On September 23, 1915, Lee and Perry appeared in the Barr action by motion to modify the judgment so as to foreclose the J. A. Ryzek mortgage only against the real property and personal property owned by the Pasco Theater Company at the time of the execution of that mortgage. This motion was based on the claim that the copy of the mortgage served upon Lee and Perry as a part of the cross-complaint of J. A. Ryzek did not contain the clause "or hereafter placed in said building." On the 9th day of November, 1915, an order was entered, denying the motion to modify the judgment. So far as this record shows, no appeal was ever prosecuted from the judg-

ment in the Barr action, or from the order denying the modification.

[1] The controlling question upon this appeal is whether Lee and Perry, in view of the record in the Barr Case, can now maintain an action to foreclose their mortgage. To this question it would seem there could be but one answer. The property now sought to be foreclosed upon, including the chairs, floor coverings, and draperies, were involved in the Barr action. By the judgment in that action the draperies and other fixtures attached to the building were awarded to John Ryzek and wife, the owners of the real estate. J. A. Ryzek was given a judgment of foreclosure upon the chairs and floor coverings. To that action the appellants had been made parties and disclaimed any interest in the property there involved, and were dismissed out of the action. From the judgment no appeal was prosecuted. That judgment became final and conclusive upon the parties. Whether the rights of Lee and Perry under their mortgage are superior to those of John Ryzek and wife or to J. A. Ryzek cannot now be inquired into. If the copy of the mortgage served upon the appellants was incorrect, or even if that mortgage was void as against the appellants, that question cannot now be reviewed. Lee and Perry were properly made parties in the Barr action. The same property which is involved in this action was claimed by parties to that action, and their claims were confirmed by the judgment of the court from which no appeal was prosecuted.

[2] As to the deficiency judgment, it need only be said that since the foreclosure failed, the evidence would not authorize a deficiency judgment against the other defendants. Whether there could have been such judgment if there had been a foreclosure and sale and a deficiency resulted need not here be determined. The deficiency judgment was sought because it was claimed that the individual defendants had misrepresented the financial ability of the corporation.

The judgment is affirmed.

MORRIS, C. J., and PARKER and HOLCOMB, JJ., concur.

GRAVES v. COLUMBIA UNDERWRITERS. (No. 13488.)

(Supreme Court of Washington. Oct. 17, 1916.)

1. HUSBAND AND WIFE § 255 — COMMUNITY PROPERTY — IMPROVEMENTS ON SEPARATE PROPERTY.

Under Rem. & Bal. Code, §§ 5915-5917, defining separate property of husband and wife and community property, money borrowed on the joint note of husband and wife on the security of her separate property, and devoted to and designed solely for the protection and improvement of such property, as by preserving such property from loss under tax foreclosure, does not acquire the status of community prop-

erty by the joinder of the husband in the note and mortgage given for the loan; such joinder being unnecessary under the law.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 900-902; Dec. Dig. ¶¶ 255.]

2. HUSBAND AND WIFE ¶262(1) — COMMUNITY PROPERTY—EVIDENCE—PRESUMPTIONS.

While there is a presumption that property acquired during the marital relation is community property, the presumption is rebuttable.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 913; Dec. Dig. ¶¶ 262(1).]

3. HUSBAND AND WIFE ¶248½ — WIFE'S SEPARATE PROPERTY—CHANGE OF STATUS.

Where the property belonged to a woman at the time of her marriage it remained her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 888; Dec. Dig. ¶¶ 248½.]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by Jay P. Graves against the Columbia Underwriters, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Kenneth Durham, of Spokane, for appellant. P. F. Quinn, of Spokane, for respondent.

FULLERTON, J. Bessie Lynch Fife, at the time of her marriage to James H. Fife, was the separate owner of lot 4, block 4, Havermale's addition to Spokane, which property she had inherited from a former husband. On March 1, 1914, the Columbia Underwriters, a corporation, obtained a judgment for \$172.60, with interest and costs, against the community composed of James H. and Bessie Lynch Fife, upon which execution was issued and returned unsatisfied. On February 23, 1915, Bessie Lynch Fife borrowed \$2,100 for the purpose of paying off some \$1,747.39 delinquent and current taxes on lot 4, block 4, Havermale's addition, the property being unproductive and incapable of meeting its tax burdens. The balance of the loan was used in connection with other separate property of the wife. A mortgage was given upon the foregoing described lot, husband and wife both joining in the note and mortgage at the request of the person making the loan. On June 14, 1915, Mr. and Mrs. Fife joined in a warranty deed, conveying such mortgaged lot to J. P. Graves for a consideration of \$10,000. The purchaser retained \$250 out of the sale price, pending the bringing of an action to quiet title against defendant's judgment, which at the time of sale amounted to about \$240. The action to quiet title was brought in the name of the purchaser, J. P. Graves, at the expense of James H. and Bessie Lynch Fife, who were stipulated to be the real parties in interest. From a judgment quieting title in J. P. Graves, the Columbia Underwriters appeal. The appellant contends that the \$2,100

obtained on the note jointly executed by James H. Fife and Bessie Lynch Fife became community property, and the payment of the tax liens with such borrowed money vested the community with an interest in the lot in question which could be subjected to the rights of an existing judgment creditor. In other words, it is contended that money borrowed on the joint note of husband and wife on the security of her separate property, and designed solely for the protection or improvement of such property, acquires the status of community property by reason of the joinder of the husband in the note and mortgage given for the loan, even though his joinder were unnecessary under the law, and that its investment in the separate property of one spouse is the commingling of a community interest in such property to the extent of subjecting it to liability on the claims of existing judgment creditors of the community.

[1] The separate property of a wife is defined by Rem. & Bal. Code, § 5916, as follows:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, incur or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

The preceding section of the Code (section 5915) after defining the husband's separate property, provides that he may manage and incur it without the joinder of his wife as fully and to the same extent as if he were unmarried. Id. § 5917, provides that:

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property."

Under these sections we have held that the proceeds of a loan to husband and wife, and property purchased therewith, though the money was borrowed on the security of the separate property of one spouse, would constitute community property. *Yesler v. Hochstetler*, 4 Wash. 349, 30 Pac. 398; *Main v. Scholl*, 20 Wash. 205, 54 Pac. 1125; *Heints v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. Rep. 937.

[2, 3] It will be noticed in these cases that the decision is rested on the ground that additional property was acquired with the borrowed money, or that such money was put to other uses for the benefit of the community. The present case is readily distinguishable by reason of the fact that the money was borrowed solely for the purpose of preserving the wife's separate property from loss under tax foreclosure. The statutes give the right to married persons to manage and incur their separate property as fully as though they were unmarried. It certainly falls within the proper management of one's

separate property to take measures against its sequestration for taxes, and the incumbering of one's property to raise money for such a purpose amounts to nothing more. If the money is not devoted to any community purpose, it retains its status as separate property. The joinder of the husband in the note and mortgage on his wife's separate property, an act exacted by the person making the loan in an excess of precaution, would not convert the money acquired thereby into a community fund, if it was in no way applied to community uses. We have held, in the case of *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088, that the joinder by a husband with his wife in a note and mortgage upon her separate property would not make the property nor the proceeds therefrom community property. While the presumption naturally arises that property acquired during the marital relation is community property, the presumption is a rebuttable one. *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109. In the present case the facts indisputably show that the borrowed money was in no way devoted to a community use, but solely for the benefit of the separate property on which it was raised. The status of Mrs. Fife's separate property, having been fixed as such at the time of its acquisition, would remain so fixed unless changed by deed, due process of law, or by the working of some form of estoppel. *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673; *In re Deschamps' Estate*, 77 Wash. 514, 137 Pac. 1009; *Morse v. Johnson*, 88 Wash. 57, 152 Pac. 677.

The money arising from the mortgage upon Mrs. Fife's separate property, never having become community property, under the facts and the law, there was of course, no commingling of community with separate property, as contended by appellant. Hence no question of the right of a community creditor to follow community funds commingled with separate property is presented.

The judgment of the lower court is affirmed.

MORRIS, C. J., and CHADWICK, ELLIS, and MOUNT, JJ., concur.

SHARP v. OGDEN RAPID TRANSIT CO. (No. 2917.)

(Supreme Court of Utah. Oct. 2, 1916.)

1. APPEAL AND ERROR ⇐1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a passenger's action against a street railroad for personal injury, where a witness for the plaintiff described her conduct both in her testimony in chief and upon cross-examination, error, if any, in excluding a question as to whether the witness noticed anything in plaintiff's condition that indicated that she was hurt, calling for a conclusion, was not prejudicial, where the defendant developed all that the

witness heard and observed concerning the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⇐1058(2).]

2. APPEAL AND ERROR ⇐1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—EVIDENCE AFTERWARDS ADMITTED.

Error, if any, in excluding the statement of the conductor, who had observed plaintiff, that the morning after she seemed to be cheerful and she and others went along, not noticing that there was anything wrong with plaintiff, was harmless, where the defendant was permitted to fully develop all that the witness observed concerning plaintiff and her acts and conduct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⇐1058(2).]

3. EVIDENCE ⇐528(1)—OPINION EVIDENCE—EXPERT—CONSEQUENCE OF INJURY.

In an action for injury to a girl of about 17, while a passenger on defendant's car, where her injuries consisted of bruises visible only on the surface of the body, that after the accident she became an invalid, and that her menstruation became irregular, physicians called as experts were properly permitted to state their opinion that the injury suffered could and probably did produce such ailments, and in such case the ultimate question whether the injury was the proximate cause of such ailment was for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335, 2336; Dec. Dig. ⇐528(1).]

4. DAMAGES ⇐206(1)—PHYSICAL EXAMINATION—POWER OF COURT.

In a passenger's action for injury, where it appeared that most of her symptoms were subjective, the court, after the plaintiff had rested, had no power to order a physical examination by physicians selected by defendant, in the presence of plaintiff's physician and father.†

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 531; Dec. Dig. ⇐206(1).]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Ethel Sharp, a minor, by Milo R. Sharp, as guardian ad litem, against the Ogden Rapid Transit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyd, De Vine & Eccles, of Ogden, for appellant. John G. Willis, of Ogden, for respondent.

FRICK, J. Ethel Sharp, a minor, by her father as guardian ad litem, brought this action against the defendant, a corporation, which owns and operates a street railway in Ogden City, Utah, to recover damages for personal injuries, which, it is alleged, were suffered in a collision occasioned by the negligence of the defendant in operating its cars while she was a passenger on one of them. After alleging the necessary matters of inducement, and that two cars operated by the defendant running in opposite directions were caused to collide through defendant's negligence, she alleged she had sustained personal injuries "in and about her head, left ear, abdomen, body, and internal organs; and suffered a great and irreparable

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

† *Larson v. Salt Lake City*, 34 Utah, 313, 97 Pac. 453, 23 L. R. A. (N. S.) 461.

shock and injury to her nervous system, from which she was made sick and sore, and her hearing impaired, and was confined to her bed; and she has suffered great and continual pain as the results thereof, and, as she is informed and believes, will continue so for a long period of time, probably for the remainder of her life." It is then alleged how the injuries have affected plaintiff and have prevented her from attending school and from following her usual vocation. Damages were prayed for.

The defendant in its answer denied negligence on its part, and further alleged that if plaintiff was injured and damaged by such collision both were greatly enhanced by reason of her own negligence in failing to secure proper medical attention and in failing to exercise ordinary care in caring for her injuries.

According to defendant's abstract of the evidence the father of the plaintiff testified that she, at the time of trial, was about 17 years of age; that she was injured in a collision on the morning of the 12th day of January, 1914, while a passenger on one of defendant's street cars; that since her injuries she had been "very sickly and an invalid nearly all of the time"; that she was confined to her bed about 10 months, beginning the day after the accident; that she, ever since the accident, had "been almost entirely incapacitated for work"; that before the injuries she was strong and healthy and had always helped her mother in doing the ordinary household work. The witness, in the language of a layman, also described the injuries and bruises as he saw them on the body of the plaintiff after she came home in the evening after school, the accident having occurred in the morning while she was on her way to school. The witness said that he examined plaintiff's body and that he "saw a slight bruise * * * immediately below the ribs on the right side" of her body. He further said "she was lame in her right leg, and this continued for 6 or 8 months; she has complained of headaches ever since; she seemed unable to sleep soundly at all for many months and seemed nervous and unstrung."

On cross-examination the witness a little more fully described what he had observed on plaintiff's body on the evening of the day of the accident, and that he did not discover anything, except two slight bruises on her body and a discoloration of the right side, and some injury to the ear; that the family physician was called in to see plaintiff; that he visited her a number of times and prescribed some remedies; that plaintiff did not take a great deal of medicine. Other witnesses were called who testified to the accident and of seeing plaintiff on the morning when it occurred and immediately thereafter; that she went to school as usual on the day of the accident, and from her actions and conduct she did not seem to be greatly

injured, if at all. The family physician and another doctor also testified to plaintiff's physical condition as they observed it immediately before the trial.

It is not necessary to state the evidence further, and we have given the foregoing, not as a synopsis of the whole evidence, but merely as indicative of the trend of plaintiff's evidence, and for the purpose of aiding the reader to better understand the alleged errors which we shall hereafter discuss.

The jury returned a verdict in favor of plaintiff for \$4,000 upon which judgment was duly entered, from which the defendant appeals. While numerous errors are assigned, yet appellant's counsel, in their brief, limit the propositions or errors relied on to four only. Giving their position in their own language, it is this:

"Our position is, that the court erred, first, in excluding testimony as to the conduct of the plaintiff during the two days following the accident; second, that it erred in permitting and allowing the physicians for the plaintiff to testify that the collision in question produced the injuries complained of; and, third, that the court erred in refusing the physical examination under the record in this case; and, fourth, that it therefore erred in refusing a new trial."

[1] The first alleged error arose as follows: A Miss Thomas, who was on the car with the plaintiff at the time of the accident, was called by plaintiff, and she testified fully what she observed, and described plaintiff's conduct both in her testimony in chief and upon cross-examination. In concluding her cross-examination, however, defendant's counsel put this general question to the witness:

"Did you notice anything in her (plaintiff's) condition that indicated that she was hurt?"

The question was objected to as incompetent and immaterial. The court sustained the objection, and the defendant duly excepted, and now insists that the ruling was prejudicial to the defendant's rights. Counsel, in their brief, arguing the alleged error, say:

"The question was on cross-examination and was a general summary aside from the direct questions of her observations of the plaintiff."

The record shows this statement to be correct. We think that, in and of itself, is sufficient ground for holding the ruling, if erroneous at all, not to have been prejudicial to the defendant's rights. The witness had fully stated her observations concerning plaintiff's actions and conduct. The answer to the question would, therefore, merely have been in the nature of a conclusion on her part or a "summary," as counsel describe it. While no doubt it would not have constituted error, under the circumstances of this case, if the court had allowed the witness to answer the question, yet, upon the other hand, it is very clear that in view that the defendant was permitted to develop all the witness heard and observed concerning the plaintiff and her conduct no prejudice could have re-

sulted to the defendant from the ruling of the court.

[2] In connection with the foregoing counsel also complain that the court erred in excluding one of the answers of one of defendant's witnesses who was the conductor on the car in which plaintiff was riding on the morning of the accident. The witness, after stating that he had observed the plaintiff and some others after the accident, in answer to the direct question, said:

"Following the accident, the morning after, all seemed to be cheerful; all had a little laugh together with each other, and went along not noticing there was anything wrong with this girl whatever."

This answer was stricken on motion of plaintiff's counsel, and the defendant excepted. It is insisted that its exclusion constituted prejudicial error. While, like in the matter just discussed, the court might, without prejudice, have permitted the answer to stand, yet, in view that here again the defendant was permitted to fully develop all of the facts and all that the witness observed concerning plaintiff and her acts and conduct with others who were on the car, no injury could have resulted to the defendant from the court's ruling.

[3] The second proposition argued by counsel, namely, the alleged error in permitting the physicians to be called on behalf of plaintiff to testify to certain matters, is, in our judgment, also without merit. It was made to appear that the injuries sustained by plaintiff consisted of bruises visible only on the surface of the body. It also appeared that after the accident she became an invalid and that the functions of her sexual organs were affected in that menstruation became irregular and obstructed. Complaint is now made that the doctors were permitted to state that in their opinion the injuries testified to that plaintiff suffered could, and probably did, produce the alleged ailments, including the obstructed menstruation. Counsel, therefore, insist that the doctors thus invaded the province of the jury whose duty it was to say what caused plaintiff's ailments and how she had received them. True it is, that the ultimate facts respecting the extent of the alleged injuries and damages which it is alleged plaintiff suffered and what caused them were for the jury. It is, however, also true that in case the injuries that are suffered by an individual, as in this case, where the extent thereof cannot be observed in the ordinary way, and it is shown that certain invisible organs of the body are affected, a physician who testifies as an expert may give his opinion concerning the effect that a certain injury on the body may produce upon such organs. Certainly the jurors, who are merely laymen, and who are wholly inexperienced in such matters, could only guess at what effect certain injuries to the body might have upon certain sexual organs of an injured

female. While it may be true that even a physician may not absolutely know, or be able to say with positiveness (since it is largely a matter of diagnosis), just what may have caused or produced the ailment in question, yet, as an expert, he may give his opinion. The jury, as a matter of course, must ultimately determine whether the accident was the proximate cause of the injuries and damages complained of. The experts' opinions are, however, proper as evidence, and it is for the jury to say what, if any, weight or effect they will give to such evidence. The second proposition can therefore not be sustained.

[4] The third assignment arises as follows: At the trial both the father and the plaintiff described as nearly as they could her injuries, and in doing that referred to the several parts of the body where it was claimed she was injured. As already indicated, most of plaintiff's symptoms were subjective rather than objective. At the trial, and after plaintiff had rested, defendant's counsel asked the court to make an order that the plaintiff be required to submit to a physical examination to be made by certain physicians selected by the defendant, and in the presence of plaintiff's physician, and in the presence of her father. Counsel for the plaintiff objected to such an order upon the ground that the court was powerless to make it. The court declined to make the order upon the sole ground, however, that it was without power to do so in view of the ruling of this court in the case of *Larson v. Salt Lake City*, 34 Utah, 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462. Counsel for the defendant seek to distinguish this case from the *Larson Case* for the reason that in that case the application was made before or in advance of the trial, while in this case it was made at the trial and after plaintiff and her witnesses had fully described her injuries and symptoms. It is now urged that all that was decided in the *Larson Case* was, that the court was powerless to compel the plaintiff to submit to a physical examination where the application therefor was made before trial. While it is true that in the *Larson Case* the application for the physical examination was made some time before the trial, and we there held that the court was without power to compel the plaintiff to submit to such an examination, yet the decision is not limited to such a case. If the court is without power to compel a plaintiff to submit to an examination of his or her body before trial it is as powerless to do it upon the trial, except as such an examination may be proper as a part of the cross-examination, as explained in the *Larson Case*. What we held in the *Larson Case* was, that the court was powerless to compel the plaintiff to submit to a physical examination with the exceptions there stated; and not that it was powerless to do so only at a particular time. We considered the question there in all of its phases, and it is not necessary to add any-

thing to what we there said. This contention, therefore, must likewise fail.

In view of the foregoing it is not necessary to discuss the fourth proposition, namely, that the court erred in refusing a new trial.

The judgment is affirmed, with costs to respondent.

McCARTY, J., concurs.

STRAUP, C. J. (concurring). Since, as in the Larson Case, the court was powerless to make the order, notwithstanding the application was timely, for stronger reasons was the court powerless on such a belated application as here was made. Even in jurisdictions where the power is recognized, yet courts generally refuse to exercise it on untimely applications.

I think the testimony of the conductor referred to was properly stricken. What he, on the morning after the accident, observed concerning the physical or mental condition of the plaintiff, or whatever she may have said or done against interest, would have been proper to put in evidence. But that her schoolmates or others were cheerful, or referred to the accident in jocular terms, and seemed to act as though they noticed nothing wrong with the plaintiff, was just as incompetent and irrelevant as would have been testimony that they were depressed or that they said or did something to indicate that the plaintiff was seriously injured.

MARTIN v. SAXTON. (No. 2871.)

(Supreme Court of Utah. Oct. 5, 1916.)

EXECUTORS AND ADMINISTRATORS §431(3)—CLAIMS AGAINST—PRESENTATION.

Where an executor by order and authority of court mortgaged lands of decedent long after the time for presentation of creditors' claims, the mortgagee need not to obtain on foreclosure judgment for any deficiency and attorney's fees, show that he had presented his claim in accordance with Comp. Laws 1907, § 3858, and that all recourse against property of the estate other than that covered by the mortgage was waived, for the statute does not apply to transactions or claims against an executor, but only to claims arising out of contracts or transactions with deceased.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 765, 1679; Dec. Dig. §431(3).]

Appeal from District Court, Salt Lake County; F. C. Loofbourov, Judge.

Action by John Martin against George Saxton, executor of the last will and testament of George Shearn, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

C. S. Patterson, of Salt Lake City, for appellant. Cheney, Jensen & Holman, of Salt Lake City, for respondent.

STRAUP, C. J. This is an action brought by the plaintiff against the executor of the

estate of George Shearn, deceased, to foreclose a mortgage, and for a deficiency judgment. The mortgage was not executed by the deceased, but by the executor on behalf of the estate and by order and authority of the court in the course of administration of the estate and long after the time for presentation of creditors' claims. Judgment was rendered for the plaintiff, the mortgaged premises ordered sold, the plaintiff allowed an attorney's fee, and provision made for a deficiency judgment.

The only point made is that the action was not maintainable because it was not alleged nor found that the claim sued on was presented to the executor as provided by Comp. Laws 1907, § 3858; and because it was not alleged in the complaint that all recourse against property of the estate other than that covered by the mortgage was waived; and especially, that the plaintiff, without presentation of the claim, was not entitled to an attorney's fee nor to a deficiency judgment.

We think the demands and claims referred to in the statute requiring presentation are those arising out of contracts or transactions with the decedent, and not to claims or transactions had with the executor or administrator. 8 A. & E. Enc. L. (2d Ed.) 1064; 18 Cyc. 454; Garver v. Thoman, 15 Ariz. 38, 135 Pac. 724; Miller & Lux v. Katz, 10 Cal. App. 576, 102 Pac. 946. The cases cited by appellant (Bank v. Charles, 86 Cal. 322, 24 Pac. 1019; Bank v. Connell, 65 Cal. 574, 4 Pac. 580; Scammon v. Ward, 1 Wash. 179, 23 Pac. 489; Dreyfuss v. Giles, 79 Cal. 409, 21 Pac. 840; Anglo-Nev. Assur. Corp. v. Nadeau, 90 Cal. 393, 27 Pac. 302; Loan Co. v. Fisher, 92 Cal. 502, 23 Pac. 591; Teel v. Winston, 22 Or. 489, 29 Pac. 142; In re Turner's Estate, 128 Cal. 388, 60 Pac. 967) do not make against this. They are cases relating to claims and demands growing out of contracts or transactions had with the deceased.

The judgment of the court below is affirmed, with costs.

FRICK and McCARTY, JJ., concur.

WHITE v. SHIPLEY et al. (No. 2879.)

(Supreme Court of Utah. Oct. 7, 1916.)

1. CORPORATIONS §518(2)—PLEADING EXISTENCE—NECESSITY OF PROOF.

The averment in the complaint that defendant is a corporation is an issuable averment, and when put in issue must be proved.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2028, 2086, 2087; Dec. Dig. §518(2).]

2. JOINT-STOCK COMPANIES §19—SUING COMPANY AS CORPORATION—PLEADING.

Comp. Laws 1907, § 2927, as amended by Laws 1911, c. 53, providing that persons associated in business as a joint-stock company, a partnership or other association not a corpo-

ration, under a common name, may be sued by such common name, does not relieve plaintiff, suing defendant as a corporation, of the necessity of proving its corporate existence, though the answer allege it to be a joint-stock company.

[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. §§ 21-27; Dec. Dig. ¶ 19.]

3. PLEADING ¶403(2)—CURE OF COMPLAINT BY ANSWER—CORPORATE EXISTENCE.

Averment in the complaint, of corporate existence of defendant, is not a misnomer, which is cured by the answer alleging it to be a joint-stock company, under the rule that incomplete or defective averments in a complaint of corporate existence are cured by admissions or averments in the answer of corporate existence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344-1347; Dec. Dig. ¶403(2).]

4. TRIAL ¶252(20)—INSTRUCTIONS—CONFORMITY TO EVIDENCE—DAMAGES.

Under the rule that an element of damages on which there is no evidence to support it should not be submitted to the jury, the children of deceased being all adults, from 31 to 48 years old, married and maintaining separate homes, apart from deceased, loss of comfort, society, and companionship of deceased by them should not be submitted; damages for such loss being awarded only in a pecuniary sense, and not as a solatium, and such pecuniary loss by them being at most only nominal.¹

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. ¶252(20).]

5. MUNICIPAL CORPORATIONS ¶706(1)—ANSWER—NEW OR AFFIRMATIVE MATTER.

That because of excavations in the middle of the street, in which defendants drove into a person, they drove to the left to deliver a package to a building in the block on that side, is not new or affirmative matter, required to be alleged in the answer, but may be shown under the general issue.²

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ¶706(1); Pleading, Cent. Dig. § 128.]

6. MUNICIPAL CORPORATIONS ¶706(6)—PERSONAL INJURY—DRIVING ON WRONG SIDE OF STREET.

One merely driving a team on the wrong side of the road in violation of an ordinance is not negligent as matter of law; but whether doing so constitutes negligence depends on the facts and circumstances, and generally is a question of fact and not of law.³

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ¶706(6); Pleading, Cent. Dig. § 128.]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Caroline White, administratrix of William White, deceased, against James Shipley and another. Judgment for plaintiff, and defendants appeal. Reversed.

Williams & Williams, of Salt Lake City, for appellants. Joseph Chez, A. W. Agee, and David L. Stine, all of Ogden, for respondent.

STRAUP, C. J. This action was brought to recover damages for alleged negligence causing the death of plaintiff's intestate. She had judgment against both defendants, from which both appeal.

[1-3] In the complaint it is alleged:

"That the defendant the American Express Company is a corporation doing business in the state of Utah under and by virtue of the laws of said state and was at all times herein alleged."

Each of the defendants, in separate verified answers, denied:

"That the American Express Company is a corporation doing business in the state of Utah, but alleges that it is an unincorporated stock association organized under and by virtue of the laws of the state of New York."

Upon this, among other issues, the case proceeded to trial and judgment. No proof whatever was made or offered that the express company was a corporation. Notwithstanding the defendants, timely and at their first appearance in the case, and seven months prior to the time of trial, specifically and under oath denied that the express company was a corporation and specifically averred that it was an unincorporated stock association, and at the close of the evidence the express company separately moving for a directed verdict in its favor upon the specific ground, among others, for want of proof to support the allegation that the express company was a corporation, the plaintiff, nevertheless, paid no attention to this issue and proceeded to judgment as though the allegation in the complaint of corporate existence had been admitted. The averment is an issuable averment and must be proved when properly raised by the pleadings. Sutherland's Code Pleading, § 551; 5 Standard Ency. Pro. 645; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151. It here was properly put in issue. C. L. 1907, § 3000. To prevail the burden was on the plaintiff to prove the corporate existence. The distinction between a corporation and an unincorporated stock association organized under the laws of New York is shown by the following cases: Matter of Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. Supp. 353, 190 N. Y. 167, 82 N. E. 1108. The respondent says that because of C. L. 1907, § 2927, and as amended by Laws of Utah, 1911, c. 58, she was not required to prove the averment, but was entitled to rely, as she did, upon the averment in the answer that the express company was an unincorporated stock company and to proceed to judgment accordingly. That section provides that when two or more persons associated in business, either as a joint-stock company, a partnership or other association not a corporation transacting business under a common name, they may be sued by such common name. But the plaintiff did not sue the express company as a joint-stock company, a partnership, or other association not

¹ Candland v. Mellen, 151 Pac. 341.

² Smith v. Ogden & N. W. R. Co., 33 Utah, 129, 93 Pac. 183.

³ Smith v. Mining, etc., Co., 33 Utah, 21, 93 Pac. 683; Rogers v. Railroad, 32 Utah, 376, 90 Pac. 1076, 126 Am. St. Rep. 876; Jensen v. Utah Light & Ry. Co., 42 Utah, 415, 122 Pac. 8.

a corporation. She sued it as a corporation. She does not help herself by pointing to something she might have done, but did not do. Then she further says that her averment of corporate existence was a misnomer, which was cured by the answer. That position, likewise, is untenable. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162. The cases cited by her (*St. Louis & S. F. Ry. Co. v. Wilhelm*, 49 Tex. Civ. App. 639, 108 S. W. 1194; *First Nat'l Bank v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479; *Pearce v. Butte El. Co.*, 41 Mont. 304, 109 Pac. 275; *Storer v. Graham*, 43 Mont. 344, 116 Pac. 1011; *Davidson v. La Clede Land & Imp. Co.*, 253 Mo. 223, 161 S. W. 686) do not support her contention. They are to the effect that incomplete or defective averments in a complaint of corporate existence are cured by admissions or averments in an answer of corporate existence. But that is another question, and does not reach the one in hand.

[4] The only beneficiary alleged in the complaint is the administratrix, the widow of the deceased. The defendants, however, on cross-examination of the widow, showed that the deceased left children, but that they were all adults and married, and for a long time prior to the death of the deceased had lived separate and apart from him, who, at the time of his death, was 72 years of age. Among other things the court, on damages, charged:

"In determining the amount to be awarded to the plaintiff, in case you find a verdict in her favor, you may also take into consideration the loss of comfort, society, and companionship of said deceased, if any, which the plaintiff, his widow and his children have sustained by reason of his death."

Complaint is made of this. It is conceded that as an abstract proposition the charge is not a misstatement of the law. It, however, is contended that it is here erroneous because it was not alleged in the complaint that the deceased left any children, and, further, because not applicable to the evidence. It was indisputably shown that the children, two sons, one 40, the other 46, years of age, and five daughters, the youngest 31, and the eldest 48, years of age, were all married and had lived separate and apart from the deceased, some in Los Angeles, Cal., some in Salt Lake City, and some in Ogden city where the deceased resided. In an action brought by an administrator to recover damages for the wrongful death of another it is essential to aver that there are beneficiaries or persons entitled under the statute to the benefit of the recovery. Such a person (the widow) was alleged. Since, without objection and by the defendants themselves, it was shown that the deceased also left children, it is not necessary now to decide where some such beneficiaries are alleged whether others not alleged may, without an amendment to the complaint, also be shown and their loss considered and damages awarded for it. So, in determining the damages which the administra-

trix in her representative capacity was entitled to recover, we, under the circumstances, shall assume that she was entitled to recover for all of the beneficiaries shown by the evidence to have sustained pecuniary loss. But in so considering the matter we are of the opinion error was committed in directing the jury, as was done, that in determining the loss or damage which the children sustained the jury could consider the loss of comfort, society, and companionship. There is no doubt that under the holdings of this court such a charge is proper in a case where there is evidence to show such loss. But here there is no evidence, so far as the children are concerned, to show it. As already shown, the children were all adults from 31 to 48 years of age, married and maintaining separate homes, and for a long time had lived separate and apart from the deceased. The law awards damages for loss of comfort, society, and companionship only in a pecuniary sense and not as a solatium. Under the circumstances such pecuniary loss sustained by the children at most was but nominal. Indeed, except mere nominal, it is not made to appear that the children sustained any pecuniary loss whatsoever. They received none of the deceased's earnings, nor did he otherwise maintain them or in any way contribute towards their support. Nor is there anything made to appear that, had he lived his expectancy, they would have received any enhanced inheritance. As to them the court ought to have directed the jury that nothing but nominal damages could be awarded. The charge permitted the jury to award them actual damages. That was wrong. *St. Louis & San Francisco Ry. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *North Chicago Street Ry. Co. v. Irwin*, 202 Ill. 345, 66 N. E. 1077; *Portsmouth Street Ry. Co. v. Peed's Administrator*, 102 Va. 662, 47 S. E. 850; *In re California Nav. & Imp. Co. (D. C.)* 110 Fed. 670. This is but applying the familiar rule that an element of damage upon which there is no evidence to support it should not be submitted to the jury. *Candland v. Mellen*, 151 Pac. 341.

[5] The deceased was a street cleaner working on one of the streets in Ogden city. It is alleged that the defendants, driving a team and an express wagon, negligently ran over him, inflicting injuries from which he died. An ordinance was put in evidence, which provides that:

"Every person using any vehicle on any street in the city of Ogden shall operate, drive or ride such vehicle on the portion of the right of the center of the street, except where the right side of the street is in such condition as to be impassable."

In the block where the accident occurred excavations had been made in the center of the street for double street car tracks which rendered the street impassable by team from one side to the other. On the left side were also mortar boxes in the street used in the construction of a building. The defendants, as they entered the block, drove the team

along the left of the center of the street and where the deceased was at work near the mortar boxes. The defendants offered to show that because of the excavations in the center of the street they drove to the left to deliver a package in a building in that block on that side and which could not have been carried from the right side across the excavation. The court did not permit the defendants to show that, on the ground that such matters were not alleged in the answer. We think the court erred. Such matters were not affirmative nor new matter, but were proper to be shown under the general issue. *Smith v. Ogden & N. W. R. Co.*, 33 Utah, 129, 93 Pac. 185.

[6] Notwithstanding the excavations in the street and its torn-up condition, the court, nevertheless, charged that the defendants driving to the left of the center of the street were guilty of negligence as matter of law. In that we think the court also erred. We have held that:

"When a standard of duty or care is fixed by law or ordinance, and such law or ordinance has reference to the safety of life, limb, or property, then, as a matter of necessity, a violation of such law or ordinance constitutes negligence."

We applied that to depositing and maintaining dynamite in a city in violation of an ordinance (*Smith v. Mining, etc., Co.*, 32 Utah, 21, 83 Pac. 683), to the operation of a steam railway (*Rogers v. Railroad*, 32 Utah, 378, 90 Pac. 1075, 125 Am. St. Rep. 876), and of a street railway (*Jensen v. Utah Light & Ry. Co.*, 42 Utah, 415, 182 Pac. 8). These were all dangerous instrumentalities, the maintenance or operation of which involved safety of life, limb, and property. But that doctrine has no application to one merely driving a team or other vehicle not itself a dangerous instrumentality on the wrong side of a street in violation of an ordinance. Whether to do so constitutes negligence is dependent upon the facts and circumstances of the case and, generally, is a question of fact and not of law. It, let it be conceded, ordinarily is evidence of negligence for the consideration of the jury, but cannot as such be declared by the court as here was done. And then the charge was here especially erroneous because of the excavations and torn-up condition of the street. It may be that in view of all the circumstances, due care, as matter of fact, required the defendants, as is contended by the respondent, to have driven around or down the block and then back on the side of the street where the package was to be delivered; but the court was not justified in saying that as matter of law. The determination of it was peculiarly within the province of the jury.

For these reasons the judgment is reversed and the case remanded for a new trial. Costs to the appellants.

FRICK and McCARTY, JJ., concur.

RASMUSSEN v. SEVIER VALLEY CANAL CO. et al. (No 2891.)

(Supreme Court of Utah. Oct. 5, 1916.)

1. CORPORATIONS §171 — STOCK — PRESUMPTIONS.

It will be presumed that corporate stock registered in the name of deceased belonged to him and descended to his heirs, there being no evidence that defendant who claimed the stock exercised any dominion over it until after the death of deceased.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 638-636; Dec. Dig. §171.]

2. TENANCY IN COMMON §15(1) — ADVERSE POSSESSION—WHAT CONSTITUTES.

The owner of stock in an irrigation company died, and it descended to his children equally, the children becoming tenants in common. After the death of the owner, defendant, one of the children, exclusively used the water represented by the stock, paid assessments, and voted the stock, having it transferred on the books of the company to his own name shortly after the death of the original owner. About one year before commencement of the action, a certificate for the stock was issued to defendant. Held that, as defendant was a tenant in common with the other children, and that his possession must be regarded as the possession and for the benefit of all until he unequivocally repudiated the interests of his cotenants, defendant's voting of the stock, transfer of it to his name, together with exclusive use of the water, etc., did not operate as an ouster and repudiation, so that limitations began to run in defendant's favor (citing *McCready v. Frederickson*, 41 Utah, 388, 126 Pac. 316; *Hatch v. Hatch*, 148 Pac. 1096).

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42, 43; Dec. Dig. §15(1).]

Appeal from District Court, Sevier County; A. H. Christensen, Judge.

Action by A. P. Rasmussen, as administrator of the estate of Hans O. H. Ramlose, against the Sevier Valley Canal Company and Holger W. Ramlose. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

W. I. Snyder, of Salt Lake City, for appellant. E. E. Hoffmann and John F. Chidester, both of Richfield, for respondents.

STRAUP, C. J. The plaintiff claimed that his intestate was the owner of 102.97 shares of the capital stock of the defendant, the Sevier Valley Canal Company, and to recover them brought this action against the company and the defendant Holger W. Ramlose, who also claims to be the owner of the stock. The defendants also pleaded the statute of limitations and an estoppel. The court found:

"That at the time of the death of said Hans O. H. Ramlose there stood in his name on the books of the Sevier Valley Canal Company, a corporation, 102.97 shares of the capital stock of said company.

"That after the death of said Hans O. H. Ramlose and prior to the year 1904, without the knowledge and consent of the administrator of the said estate or any person authorized to act for said estate, the defendant Holger W. Ramlose procured J. M. Lauritsen, who was then

secretary of the defendant Sevier Valley Canal Company, to transfer the said stock from the name of Hans C. H. Ramlose to that of the defendant Holger W. Ramlose, and that later, on the 18th day of February, 1908, the defendant corporation, by its secretary, upon the request of Holger W. Ramlose, issued and delivered to the defendant Holger W. Ramlose a certificate for the said 102.97 shares of stock in his own name.

"That the said Holger W. Ramlose has, for about 15 years next preceding the commencement of this action, under a claim of right so to do, and under a claim of ownership of the same, paid the taxes and assessments levied against the stock in said complaint mentioned, which assessments amounted to more than the par value of the said stock; has voted the same at all stockholders' meetings without objection from the plaintiff, the said Hans C. H. Ramlose, during his lifetime or his heirs, executors, or administrators after his death; has used the water distributed to said stock during said period without objection from the said Hans C. H. Ramlose, his heirs, executors, or administrators.

"That the said acts of said Holger W. Ramlose were known to the plaintiff and to the heirs, executors, and administrators of the said Hans C. H. Ramlose and to the said Hans C. H. Ramlose during his lifetime, and said acts and the possession of the said stock were open, notorious, exclusive, peaceable, uninterrupted under a claim of right and ownership of the title to said stock, and were adverse to any person or persons whatsoever during the whole of said 15 years.

"That the defendant Sevier Valley Canal Company does not issue certificates of stock unless requested so to do, and the said Holger W. Ramlose was permitted to vote said stock, use said water, and to do the act aforesaid and represent said stock in stockholders' meetings, and paid the assessments thereon during the lifetime of the said Hans C. H. Ramlose, and has continued to represent said stock and handle the same as his own during all the times mentioned in the amended complaint of the plaintiff and the answer of the defendant to the same, and still continues to hold said stock as his own."

On these findings the court held that under Comp. Laws 1907, §§ 2877-2890, the action was barred, and decreed Holger W. Ramlose the owner of the stock. The plaintiff appeals.

He urges that the findings are not supported by the evidence. We find no evidence to support the finding that Holger W. Ramlose, at any time during the lifetime of the deceased, paid any taxes or assessments on the stock, or used any of the water represented by it, or voted the stock, or otherwise exercised any control or dominion over it. But the finding that he did all that after the death of the deceased, and for a period of about 11 years before this action was commenced against the company, about 14 years before Holger was made a party to the action, and for more than 5 years after an administrator was appointed and before any action was commenced is supported by the evidence. Whether Holger's possession of the stock was hostile and adverse is the determinative factor.

The company was organized in 1887. Until 1901, although doing business, distributing water for its stockholders, it had not issued any certificates of stock, and thereafter but a few to those requesting them. The

stockholders, however, were indicated on its books, together with the number of shares that each was entitled to. It was the custom of the company, on written or mere oral orders, to transfer on its books stock from one person to another. The deceased died in 1898, and left surviving him as his heirs, two sons and three daughters residing in St. Louis, Mo., the defendant Holger W. Ramlose, also a son, and a daughter residing at Richfield, Utah, where the deceased resided, a daughter residing at Levan, Utah, and unknown heirs of a deceased son, residing in Australia.

As found by the court, the shares of stock in dispute, on the books of the company, stood in the name of the deceased at the time of his death. Holger claimed that his father, shortly before his death, gave him a written order for a transfer of the stock on the books from the name of the deceased to Holger, and that Holger, after the deceased's death, presented the order to a Mr. Baker, the then secretary of the company. But no proof was made to support such claim. It may be that Holger was unfortunate in such respect, for, under the statute (Comp. Laws 1907, § 3413), he was disqualified from testifying on such subject, the order relating to a transaction had with the deceased or to a fact equally within the deceased's knowledge, and because of Baker's death long prior to the trial. It was not shown, either by the books or otherwise, that any transfer of the stock was then made or entered on the company's books. To the contrary it was shown that the entry was made by a subsequent secretary between the years 1902 and 1904, that secretary testifying that it was made "early during my term of office," which began in 1902. The secretary making it, on appellant's objection, was not allowed to testify how he came to make the entry.

[1, 2] The court found that Holger, without the knowledge or consent of the administrator, procured the then secretary to make it. But there is nothing to support that. In February, 1908, the company, who recognized Holger as the owner of the stock issued and delivered a certificate thereof to him. That was the first certificate that had been issued for that stock. That was a little more than a year before this action was commenced against the company. Thus, upon the evidence and the record, the stock, when the deceased died, stood in his name on the company's books. Presumptively it then was his stock. This presumption is not overthrown, for it is not made to appear that Holger, during the lifetime of the deceased, exercised any control or dominion whatever over the stock, or used any of the water represented by it, or that the deceased had transferred the stock to him. Hence, on the record, the deceased must be regarded as the owner of the stock at the time of his death. It thus descended to his heirs, his children, in equal shares, who, with respect to it, became ten-

ants in common. But after the deceased's death Holger took possession of it, paid all the taxes and assessments, voted the stock, and exclusively used the water represented by it, and in such respect exercised dominion and ownership over it. However, being a tenant in common with the other heirs, Holger's possession and management must be regarded as the possession and for the benefit of all the tenants, until he, by some act or declaration, repudiated the interests of his cotenants. To repudiate such interest it, of course, was not necessary that Holger should have given actual notice of ouster or disseisin. A hostile claim of exclusive right to the whole of the property and a repudiation of the interest of his cotenants may be shown by acts and conduct. Except as to one of the cotenants there is no evidence of any express notice of ouster or repudiation. If at all, notice of ouster or repudiation must be inferred from the shown facts that after the death of the deceased, and for 11 years prior to the commencement of the action against the company and 14 years prior to the time Holger was made a party defendant, Holger had the exclusive use of the water, paid all the taxes and assessments on the stock, voted it at stockholders' meetings, and in so doing was recognized by the company as the owner. We do not think that is sufficient to establish an ouster and repudiation by one cotenant against other cotenants. *McCready v. Fredericksen*, 41 Utah, 388, 126 Pac. 316; *Hatch v. Hatch*, 148 Pac. 1096; 38 Cyc. 18 to 27; *Aguirre v. Alexander*, 58 Cal. 23; *Peabody v. Burri*, 255 Ill. 592, 99 N. E. 690; *Klumpke v. Henley*, 24 Cal. App. 35, 140 Pac. 289, 313; *Klumpke v. Moreno et al.*, 24 Cal. App. 35, 140 Pac. 313.

The possession, though exclusive, yet was not so overt, hostile and adverse as to constitute notice in itself of ouster or repudiation. The case of *Mathews v. Baker*, 155 Pac. 427, in which we held an ouster and repudiation shown, does not make against this. That case and the one in hand are dissimilar in facts. Since on the theory of an ouster and repudiation, and on no other ground, Holger W. Ramlose was adjudged the owner of the stock, it follows that the judgment must be reversed, and the case remanded for a new trial. Such is the order. Costs to the appellant.

MCCARTY, J., concurs.

FRICK, J. (concurring). The question regarding the statute of limitations, to my mind, is not entirely free from doubt. While the respondent Holger W. Ramlose had exclusive possession and control of the stock in question for 14 years prior to the time he was made a party to the action, and while during all of that time he apparently exercised the same dominion and made the same use thereof as any owner of similar property

usually does, yet it is beyond dispute that during all of that time he was also a tenant in common with his brothers and sisters of the stock in question. All of his acts of dominion and control may therefore have been those of a tenant in common rather than that of an absolute owner. His possession, under the circumstances disclosed by the evidence, is presumed to be that of tenant in common, and until that presumption is overcome by sufficient direct or inferential evidence, it must prevail. The evidence respecting exclusive ownership is merely inferential, and, in view that inferences may be deduced both for and against exclusive ownership I am not able to say that the presumption has been overcome. I, therefore, yield my judgment to that of my Associates. I have less hesitancy in arriving at this conclusion for the reason that in case *Holger W. Ramlose* has paid assessments, taxes, etc., to preserve the stock in excess of the value of its use, he may, as between himself and his cotenants, as pointed out in *McCready v. Fredericksen*, supra, be reimbursed therefor. Upon the other hand, if we should err in giving him exclusive title, his cotenants would be without any redress whatever.

ARDIZZONNE et al. v. ARCHER. (No. 7438.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD §113—LEASES—MODIFICATION.

A guardian who has executed an oil and gas mining lease under order of and with the approval of the county court has no power to thereafter modify the terms of the lease by his act alone, without the approval of the county court, nor will the guardian's statement, to the effect that the lease is modified, bind the minor.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 405, 406; Dec. Dig. § 113.]

2. MINES AND MINERALS §74—OIL AND GAS LEASES—STIPULATIONS.

An assignee of an oil and gas mining lease, which contains a stipulation to the effect that all covenants and conditions therein made shall be binding on the assignees of both parties, is liable for the rental payments prescribed in said lease so long as he retains the same.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 202; Dec. Dig. § 74.]

3. MINES AND MINERALS §77—OIL AND GAS LEASES—SURRENDER.

A voluntary surrender of an oil and gas mining lease, where the mode of effecting such surrender is prescribed therein, can only be made in the manner so prescribed, unless the consent of all parties thereto be given to a surrender in some other manner, and if such lease be that of a guardian for his ward, the consent of the county court having jurisdiction of the estate is necessary to render valid any mode of surrender other than that prescribed in the lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. § 77.]

Commissioners' Opinion, Division No. 2. Appeal from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Action by Leroy Archer, by his guardian, against Joseph Ardizzone and another, to recover certain rentals under an oil and gas mining lease. Judgment for plaintiff. Defendants appeal. Affirmed.

Philip Kates, of Tulsa, for plaintiffs in error. Martin & Moss, of Tulsa, for defendant in error.

BURFORD, C. This was an action instituted by Leroy Archer, a minor, by John W. Archer, his legal guardian, to recover from the defendants certain rentals claimed to be due under an oil and gas mining lease. It was alleged in the petition, and appeared from the undisputed evidence, that John W. Archer, as guardian, under order of the county court of Tulsa county, sold an oil and gas mining lease covering the lands of his minor ward; that at said sale one Braun was the purchaser; that the form of lease was submitted to the county court, and the sale and the lease approved by the court, after both parties had declared themselves satisfied with it. Certain pertinent provisions of the lease are:

"The party of the second part agrees to commence a well on said premises within thirty days from the date hereof or pay at the rate of \$100 in advance for each additional month commencement is delayed from the time above mentioned, for the commencement of such well until a well is commenced."

"Party of the second part, his heirs or assigns, shall have the right at any time, on the payment of \$10.00, to the party of the first part, his successors or assigns, to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine. * * *

"All covenants and agreements herein set forth between the parties hereto shall extend to their successors or assigns."

It was further alleged that this lease passed by various assignments to the defendants, Ardizzone and Ossenbeck, that a well had not been commenced, and that the rentals were due and unpaid. The defendants answered, denying that the lease set out was the true lease, but set up that it was the real intent of the parties that the contract should read \$2 per acre, payable quarterly, as rental. It further set up that prior to the time the lease was assigned to them, the guardian had accepted from the lessee as rental for one quarter the sum of \$40, and had executed and acknowledged an instrument, in which the following language occurred:

"It is understood and agreed that the provision in the above-named lease, providing that the rentals should be '\$100.00 per month, payable in advance, until a well should be commenced,' was and is an error, that the same should read, in order to express the intention of the parties, '\$2.00 an acre per year, payable quarterly in advance.'"

That they had paid the rental at \$2 per acre per year up until a certain date, at

which time they surrendered the lease. They prayed that the plaintiff take nothing by his suit, and that the contract be reformed so as to set out the intention of the parties, as evidenced by the instrument executed by the guardian above quoted. A reply in the form of a general denial was filed and upon these pleadings the cause was tried to the court, without the intervention of a jury.

[1, 2] The evidence established clearly that the lease was executed in consideration of the sum of \$10; that none of the transactions of the guardian, after the execution and delivery of the lease, had been submitted to the county court or received the approval of such court. The alleged surrender was attempted to be proved by the testimony of one of the defendants, to the effect that the guardian came to him and told him that he wanted to surrender, and he told the guardian that he would sign anything the guardian wanted. It was undisputed that the \$10 had never been offered or paid, as provided in the clause for the surrender. It was likewise undisputed that the guardian had executed the paper from which we have quoted, and that the defendants relied upon it in taking the assignment of the lease. At the close of the testimony the trial court allowed the plaintiff to make an amendment, whereby the rentals up to the date of trial were included in the amount sought to be recovered. On behalf of the plaintiffs it was further shown by the testimony of the guardian that the lease had never been surrendered, no release thereof executed, and no payment of the \$10 offered or made. Under these circumstances what are the respective rights of the parties?

It was established in this jurisdiction, by *Duff v. Keaton*, 33 Okl. 97, 124 Pac. 291, 42 L. R. A. (N. S.) 472, that the guardian of a minor was without power to make an oil and gas mining lease, covering the ward's property, without the approval of the county court having jurisdiction of the estate of the minor. This being true, we think it clearly appears that, having made the lease and the county court having approved it, the guardian alone is absolutely without power to change or modify the terms of the lease, or bind the ward by his statements in regard to what the terms of the lease were or should be. Whether it be taken that the county court or the guardian is the true party to such a contract, is cannot be denied that the assent of the county court is an essential element to the validity thereof. The county court might never have approved the lease at \$2 per acre per year. In view of the small bonus paid it must be assumed that the value to the ward arose out of the drilling of a well or the payment of the rentals. If guardians could be allowed to submit one lease to the county court, and thereafter bind their ward by statement, either oral or written, that the terms of such lease were a mis-

take, the door would, indeed, be wide open to fraud and theft of the estates of these minors. If the district court is bound to reform a lease executed by a guardian with the approval of the county court upon the guardian's mere statement that the terms of the lease were entirely different from the one approved, and without any action of the county court subsequent to the approval of the lease, then the same result must necessarily follow. If defendant's contention be sustained, the guardian would be able to accomplish indirectly, by laying a basis for a reformation of the instrument in the district court, what he could not do directly by consenting in writing to a change in the lease itself.

[3] The same argument applies to the alleged surrender. The lease prescribed the manner in which it might be surrendered by the lessee. This being true, we think no other mode could be adopted, except by the consent of all the parties thereto, and that the court was so much a party to the lease; that if the rights of the minor to these rentals were to be given up in the manner not prescribed in the lease, the approval of the county court was a necessary requisite thereto. His consent is as necessary to a change in the mode of surrender prescribed in the lease as it is to the amount of the rentals therein covenanted to be paid.

It is strongly urged that the guardian is taking advantage of his own fraud, in that his statements induced the defendants to enter into the contract. This may be true. The guardian may be personally responsible to the defendants for any fraud he may have perpetrated, but the plaintiff here is the ward, and it was beyond the power of the guardian, without the consent of the county court, as we have heretofore stated, to bind the ward to a change in the instrument which the county court had approved.

It is also alleged that there was no meeting of the minds between the defendants and their assignors, inasmuch as the defendants thought they were accepting the terms of a lease which called for \$2 per acre per year rental, whereas, if our construction be the true one, the lease called for and they were bound to pay \$100 per month. The original lease was on record. They knew what it provided, and they were charged by law with the knowledge of the limitations of the power of the guardian. There seem to be two answers to their contention; one is that the mistake made, if any, appears to be a mistake of law as to the effect of the instrument executed by the guardian; secondly, that if there were any lack of meeting of the minds between themselves and their assignor, such fact might, in proper cases, have been ground for a cancellation of the assignment, but this they did not ask. What they sought was the reformation of the

lease. This we think, for the reasons above given, the trial judge properly denied.

Finally it is urged that there was error in allowing the amendment to the petition. With this contention we cannot agree. The facts upon which a recovery of the amount accruing after the filing of the petition, and before the trial, were exactly the same as would authorize a recovery of the amount due before the filing of the petition. This amendment was only in effect a supplemental pleading, asking for a recovery of the amount which had accrued since the filing of the petition. Under sections 4795 and 4790, Rev. Laws 1910, we think the allowance of the amendment was justified. It is insisted, however, that there was no proof that the defendants were in possession of the lease at the time of the trials, as they had testified that they had surrendered. We have already determined that they could not lawfully surrender it in the manner they claim such surrender was effected. The testimony showed, and their answer admitted, the execution of the assignment of the lease to them. The guardian testified on the trial that it had not been surrendered, and that the \$10 had never been paid. This testimony, aside from any presumption arising from the recording and retention of the assignment, and the failure to execute a release, we think clearly justified the trial court in finding that they still retained the rights and were bound by the liabilities accruing to them by virtue of the assignment.

We find no error in the record, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

SINOPOULO OIL CO. et al. v. BELL et al.
(No. 7561.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL \S 102(2) — GROUNDS — NEWLY DISCOVERED EVIDENCE — DILIGENCE.

A motion for a new trial will not be granted upon the ground of newly discovered evidence where the same is cumulative in its nature, and the parties offering the same have not diligently endeavored to procure the evidence for the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 211; Dec. Dig. \S 102(2).]

2. APPEAL AND ERROR \S 977(5) — REVIEW — DISCRETION OF TRIAL COURT — REFUSAL OF NEW TRIAL.

The judgment of the trial court denying a motion for a new trial will not be disturbed, unless it clearly appears that the trial court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3864, 3865; Dec. Dig. \S 977(5).]

Commissioners' Opinion, Division No. 8. Error from District Court, Muskogee County; R. P. de Graffenried, Judge.

Action by Thomas A. Bell against the

Sinopoulo Oil Company and others. Judgment for plaintiff, and defendant Sinopoulo Oil Company and another bring error. Affirmed.

Noffsinger & Broome, of Muskogee, and Keaton, Wells & Johnston, of Oklahoma City, for plaintiffs in error. Zevely, Givens & Stoutz, of Muskogee, for defendant in error Thomas A. Bell.

HOOKER, C. On the 25th day of July, 1913, Thomas A. Bell made and entered into a contract with the other parties to this action whereby an oil well for said parties was to be drilled to a depth of 1,600 feet, unless oil or gas was found in paying quantities, or Muskogee or Mississippi limestone was reached at a lesser depth, for which he was to receive the sum of \$3,200.

The plaintiff alleges in his petition the execution of this contract, and a full compliance with all of its terms by him, and that he had drilled said well to the Mississippi limestone, as was contemplated by the contract, and that the depth to which he had drilled said well was 1,388 feet, and that by the terms of said contract there was due to him the sum of \$3,200, less \$212, being the reduction to be made by him for the difference between the depth said well was drilled and 1,600 feet. It was contended by the defendant below that said well was not drilled to the Mississippi limestone, and that the said Bell had not complied with the terms of his contract, but had abandoned the well by reason of a failure upon his part to drill the same properly whereby the drill became fastened and lost in said well.

The plaintiffs in error have assigned two reasons why this judgment should be reversed: First, error of the court in giving instructions Nos. 4 and 6; second, error of the court in overruling a motion for a new trial filed by the plaintiffs in error in the court below, which motion was based largely upon newly discovered evidence, as appears from the affidavits on file in this action.

It will be seen from an examination of the contract here that when Bell drilled this well until he had reached the Mississippi limestone, that he had complied fully with the terms of his contract. He obligated himself first to drill this well 1,600 feet, unless oil or gas was found in paying quantities, or unless the Mississippi limestone was reached at a lesser depth, and for this he was to be paid \$3,200; but if the Mississippi limestone was reached before the depth of 1,600 feet and oil or gas were not produced in paying quantities, then a reduction was to be made of \$1 per foot for the difference between the depth drilled and 1,600 feet, and in the event oil or gas was not found and the Mississippi limestone was not reached when the well was drilled 1,600 feet, then he obligated himself upon the request of other par-

ties to continue to drill until the Mississippi limestone was reached or oil or gas found.

It is thus apparent from the terms of this contract that when the Mississippi limestone was reached this contract was performed by Bell. He alleged in his petition that the Mississippi limestone was reached in the drilling of this well. His witnesses corroborated his assertion, and the issue was submitted to the jury, and the jury by the verdict rendered herein sustained his theory that the well had been drilled to the Mississippi limestone.

In fact the main issue in this case was whether the well in question was drilled until the Mississippi limestone was reached. The court in his instructions fairly submitted this case to the jury.

We have carefully considered the two instructions complained of, and when we considered these two instructions in connection with the other instruction given by the trial court we can see no reversible error here. The vice urged against instruction No. 4 is that it eliminates from the consideration of the jury the depth of the well, and that it is a direction upon the part of the trial court for the jury to find that the well had been drilled 1,388 feet. When we consider the evidence in this case, the plaintiffs in error were not prejudiced by the giving of this instruction. Every witness here who testified as to the depth of the well fixed the same at 1,388 feet. And not a single witness testified to the contrary. And inasmuch as all the evidence upon that question was to the effect that the well was 1,388 feet, and that fact not being disputed, the trial court did not commit any error in assuming that fact sustained by the evidence and instructing the jury, as set out in instruction No. 4.

Instruction No. 6 is not subject to the objection urged by the plaintiffs in error, for it was the sole issue in this case whether Bell had drilled the well to the Mississippi limestone, and under the terms of the contract here when he had drilled the well until the Mississippi limestone was reached, he was obligated to drill no farther, and, as stated hereinbefore, it was his contention that he had reached the Mississippi limestone, and this was denied by the defendants below, and this issue was clearly submitted by instruction No. 6 to the jury, and it is perfectly clear from an examination of the contract that if he reached the Mississippi limestone, he was entitled to his money, and had the right to quit and demand payment.

[1, 2] It is further asserted by the plaintiffs in error that the trial court should have granted them a new trial, on account of the newly discovered evidence set up in the affidavits filed in this action. We have carefully considered these affidavits. They all go to the main issue in this case whether the Mississippi limestone was reached by Bell in drilling this well.

The plaintiffs in error from the time of the filing of this action in the court below on the 26th day of September, 1913, up to November, 1914, knew or should have known that the issue in this case was whether Bell had reached the Mississippi limestone in drilling this well.

It appears here that within three days after the verdict in this case was rendered this evidence was had, as shown by the affidavits attached to the motion for a new trial, all of which tended to substantiate the theory of the plaintiffs in error, that Bell had not reached the Mississippi limestone. This evidence could readily have been procured by the plaintiffs in error, had they exercised any diligence whatever in preparing their case for trial. The well had been drilled upon their property; the cuttings taken therefrom was on their grounds. They had every opportunity for which they could reasonably ask to have made examinations or to have applied any test known to science to determine this question, yet they did not avail themselves thereof. Upon the trial below they did introduce a bottle of cuttings said by one of the plaintiffs in error to have been taken from this well. The contents of this bottle was subjected to a test by a chemist in the presence of the jury, and his testimony was, that it was not Mississippi limestone, and other witnesses were introduced by the plaintiffs in error to that effect; yet the jury, after hearing this evidence, found adversely to the plaintiffs in error. When we consider the cumulative character of this evidence and the lack of diligence used by the plaintiffs in error, we cannot say that the trial court abused its discretion in refusing to grant a new trial in this case, nor can we say that if this evidence had been submitted to the jury, that there is any probability that the jury would have rendered any different verdict from the one rendered in this case.

Finding no error in this record, the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

**MODEL CLOTHING CO. v. FIRST NAT.
BANK OF CUSHING. (No. 8255.)**

(Supreme Court of Oklahoma. Oct. 10, 1918.)

(Syllabus by the Court.)

1. COURTS — JURISDICTION.

Jurisdiction is the power of courts and judicial officers to take cognizance of and to hear and determine the subject-matter in controversy between parties to a proceeding pending, and to adjust or exercise judicial power over them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 10, 21; Dec. Dig. —4.]

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

2. COURTS — JURISDICTION — WAIVER.

Parties cannot by consent or by stipulation invest a court with jurisdiction or power not authorized by law, and this rule applies to causes wherein the necessary jurisdictional amount is involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. —24.]

Commissioners' Opinion, Division No. 4. Error from County Court, Payne County; W. R. Jones, Judge.

Action by the First National Bank of Cushing against the Model Clothing Company and another. Judgment for plaintiff, and the defendant Model Clothing Company brings error. Reversed and remanded, with instructions to dismiss action.

Thomas A. Higgins and Sylvester J. Barton, both of Cushing, for plaintiff in error. John R. Hadley and Walter Mathews, both of Cushing, for defendant in error.

EDWARDS, C. This action was instituted in the county court of Payne county, by the First National Bank of Cushing, to recover the sum of \$50, paid by said bank upon a forged check drawn upon said plaintiff bank and purchased by the defendant the Model Clothing Company, and by the Model Clothing Company cashed through the Farmers' National Bank of Cushing, the other defendant to the action. In the lower court judgment was rendered in favor of the plaintiff and against defendant Model Clothing Company, from which judgment appeal has been prosecuted to this court.

Several interesting questions are presented and discussed at length in the briefs of both the plaintiff and the defendant in error. The record, however, discloses that the suit was instituted in the county court of Payne county on the 4th day of November, 1914, and is for the sum of only \$50. In this situation the county court, under the provisions of section 1816, Revised Laws 1910, did not have jurisdiction of the subject-matter of this cause. That part of the section limiting jurisdiction is as follows:

"The county court, coextensive with the county, shall have original jurisdiction in all probate matters and bastardy proceedings, and shall have concurrent jurisdiction with the district court in civil cases in any amount over two hundred dollars and not exceeding one thousand dollars, exclusive of interest."

This section was recently construed by this court in the case of *Musser v. Baker*, 153 Pac. 442, No. 7484 (not yet officially reported), in which it is held that the county court has no jurisdiction of actions where the amount involved is \$200, or less, and, although both the plaintiff and the defendant in error have consented that this court may hear and determine the issues involved, jurisdiction for that purpose cannot be conferred by consent.

[1] Jurisdiction is defined to be the power of courts and judicial officers to take cogni-

zance of and to hear and determine the subject-matter in controversy between parties to a proceeding pending, and to adjust or exercise judicial power over them. *Twine v. Carey*, 2 Okl. 249, 37 Pac. 1098; *Parker v. Lynch*, 7 Okl. 631, 56 Pac. 1062; *Bockfinger v. Foster et al.*, 10 Okl. 488, 62 Pac. 799; *Antene v. Jensen et al.*, 148 Pac. 727.

[2] In 11 Cyc. 673, the rule is stated as follows:

"Parties cannot by consent or by stipulation invest a court with jurisdiction or power not authorized by law or conferred upon it by the Constitution. This rule applies to jurisdiction of the cause of action or subject-matter, to causes wherein the necessary jurisdictional amount is involved * * *"—citing authorities.

See, also, *Myers v. Berry*, 3 Okl. 612, 41 Pac. 580, *Beach v. Beach*, 4 Okl. 359, 46 Pac. 514, wherein it is expressly held that jurisdiction of the subject-matter cannot be conferred by consent.

In the case of *Kennan v. Chastain*, 157 Pac. 326 (not yet officially reported), this court held (syllabus):

"The question of jurisdiction is primary and fundamental in every case, and cannot be waived by the parties or overlooked by the court. It is the bounden duty of the court to examine into its jurisdiction, whether raised by any party or not, and sua sponte to determine its own jurisdiction."

The cause is therefore reversed and remanded, with instructions to the lower court to dismiss the action for want of jurisdiction.

PER CURIAM. Adopted in whole.

KANSAS CITY SOUTHERN RY. CO. v. LANGLEY. (No. 7955.)

(Supreme Court of Oklahoma. Dec. 14, 1916.)

(Syllabus by the Court.)

1. RAILROADS — 389(1), 396(1) — OPERATION — INJURIES TO PERSONS ON TRACK — BURDEN OF PROOF.

While it is gross negligence to run a railroad train at night without a headlight, there can be no recovery for a death caused by being struck by such train unless such negligence was the proximate cause of the death, and in an action to recover for such death, the burden is upon the plaintiff of proving that such negligence was the proximate cause of the death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1319, 1341-1343; Dec. Dig. 389(1), 396(1).]

2. APPEAL AND ERROR — 1001(3) — REVIEW — QUESTIONS OF FACT — VERDICT.

A verdict, unsupported by evidence, and based upon conjecture, cannot be upheld.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3928-3933; Dec. Dig. 1001(3).]

(Additional Syllabus by Editorial Staff.)

3. NEGLIGENCE — 1 — "ACTIONABLE NEGLIGENCE."

Three elements are essential to constitute "actionable negligence": The existence of a

duty; failure to perform that duty; injury proximately resulting from such failure.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 1; Dec. Dig. 1.

For other definitions, see *Words and Phrases*, First and Second Series, *Actionable Negligence*.]

Commissioners' Opinion, Division No. 1. Error from District Court, Adair County; John H. Pitchford, Judge.

Action by William F. Langley, administrator of the estate of Mike G. Keys against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. Sam Wood and Read & McDonough, all of Ft. Smith, Ark., for plaintiff in error. W. W. Hastings and J. Berry King, both of Tahlequah, and G. O. Grant, of Stilwell, for defendant in error.

COLLIER, C. This is an action by W. F. Langley, as administrator of the estate of Mike G. Keys, deceased, to recover damages for the negligent killing of the plaintiff's intestate. Hereinafter the parties will be referred to as they were in the trial court. The undisputed evidence is that the defendant was a railroad corporation, and operated a line of railway in the state of Oklahoma, and on March 4, 1915, the deceased was in the town of Stilwell; that his home was about two miles north of said town; that the deceased was run over by a train of the defendant; that the train was a passenger train of the defendant, and was known as train No. 4; that the train left Stilwell about 10 p. m.; that the said locomotive drawing said train did not have a headlight at the time it left Stilwell and until after it passed where the deceased was killed. The evidence further tends to show that the deceased was struck by the train at about 10 p. m., but that no one saw the accident; that the body of the deceased was not found until about 6 or 7 o'clock the next morning, and, when found, the body was dismembered to such an extent as to show conclusively that the deceased was run over by said train, but there is no evidence in the case showing any negligence on the part of the defendant other than the fact that the engine of said train did not carry a headlight. It is also shown in evidence that the night plaintiff's intestate was killed it was dark and stormy, and that there were two crossings which were about one-third of a mile apart, and the body of plaintiff's intestate was found at about an equal distance between the two crossings; that along the right of way from Stilwell to the point where plaintiff's intestate was killed was, to some extent, used by the public as a traveled way, but it is not alleged in the petition nor proved that such use of said traveled way was with the consent or knowledge of the defendant, or that the deceased was injured while

on said traveled way, or that the deceased was an invitee or licensee upon the track of the defendant. There was evidence that deceased had a dependent wife and several children; was 48 years of age; had a life expectancy of ——— years, and had an earning capacity of from \$50 to \$75 per month. Upon the conclusion of the evidence the defendant demurred thereto, which demurrer was overruled and duly excepted to. The jury returned a verdict in favor of plaintiff in the sum of \$2,975. Within the statutory period motion for new trial was duly filed, overruled, and excepted to, and judgment entered in accord with the verdict of the jury. To reverse the judgment rendered this appeal is prosecuted.

There are many assignments of error, but we deem it unnecessary to review any of them except as to the demurrer to the evidence.

[1-3] The negligence counted upon is that the headlight upon the locomotive drawing the train which run over the plaintiff's intestate "was defective, and the light extinguished." It is a well-settled principle of law that negligence alone does not constitute a cause of action, but that the negligence must be such as to have causal connection with the injury suffered. In every case involving negligence three elements are essential to constitute actionable negligence: (1) The existence of a duty; (2) a failure to perform that duty; (3) injury proximately resulting from such failure. The absence of either of these elements renders evidence insufficient to support a judgment. *St. L. & S. F. R. Co. v. Snowden*, 149 Pac. 1083. There must be causal connection between the negligence averred and the injury suffered to entitle plaintiff to recover, and this rule is so well established that it is unnecessary to support it by authorities. In *McNeill v. Atlantic Coast Line Railway Co.*, 167 N. C. 390, 83 S. E. 704, it is held:

"While it is negligence to run a train at night without a headlight, there can be no recovery for the death of a person struck by a train having no headlight, unless the negligence was the proximate cause of the accident, and the plaintiff suing for the death has the burden of proving that the negligence was the proximate cause."

The Supreme Court of Missouri, in *Frye v. St. L., I. M. & S. Ry. Co.*, 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069, said:

"It will be noticed that the absence of a headlight is pleaded in the petition as a negligent act toward plaintiff. We need not inquire whether such act would be negligent if injury came to passengers therefrom, or if injury came to persons at crossings therefrom. The question is whether plaintiff, a trespasser, can complain of the absence of such headlight. The answer to this is self-evident. The headlight was not intended for trespassers on the track. It was intended for the safety of the trainmen, of passengers, and of those having a right to be on the track. The rule is that a general duty of a railroad company to run its trains with care becomes a particular duty to no one

until he is in a position to have a right to complain of the negligence. * * *"

If there was a general traveled way along the right of way of defendant from Stillwell, Okl., to the point where plaintiff's intestate was found dead, and such traveled way was known to and acquiesced in by the defendant, the plaintiff's intestate was a licensee when upon such traveled way. There is no evidence whatever that the defendant was guilty of negligence in connection with such traveled way, which contributed to the injuries received by plaintiff's intestate, or that plaintiff's intestate was upon such traveled way when he received the injuries which resulted in his death. If the plaintiff's intestate, as may be clearly inferred from the evidence, at the time he was run over was upon the tracks of the defendant, he was a trespasser, and the defendant did not owe him any duty, other than not to willfully, wantonly, or by gross negligence injure him.

It is a general rule that a railroad company is not liable for injuries to a trespasser on its property, in the absence of willfulness, wantonness, or gross negligence. *Gulf, C. & S. F. R. Co. v. Dees*, 44 Okl. 118, 143 Pac. 852; *Midland Valley R. Co. v. Littlejohn*, 44 Okl. 8, 145 Pac. 1; *C., R. I. & P. R. Co. v. Stone*, 34 Okl. 364, 125 Pac. 1122, L. R. A. 1915A, 142.

Of course, if the plaintiff's intestate was a licensee upon the property of the defendant at the time he received the injuries which resulted in his death, the defendant, regardless of the fact that plaintiff's intestate was a bare licensee, was "bound to exercise that degree of care and watchfulness to protect human life that is commensurate with the probability that persons may be upon its track at any given point." *Wilhelm v. M. O. & G. R. R. Co.*, 152 Pac. 1088. Upon a dark night, the failure to have a headlight might have been the proximate cause of the injury received by plaintiff's intestate; but such proximate cause cannot be determined upon conjecture.

"A verdict based upon conjectures, * * * should be set aside." *Spaulding Mfg. Co. v. Holiday*, 32 Okl. 823 [124 Pac. 35].

"Where there is no evidence reasonably tending to establish a material issue submitted to the jury under the instructions of the court, which the jury must have found in favor of the prevailing party in order to have returned the verdict returned, the verdict will be set aside." *Terry v. Creed*, 28 Okl. 857, 115 Pac. 1022.

"Where, on inspection of the record, it is apparent that the evidence does not reasonably sustain the verdict of the jury, the verdict will be set aside by this court." *Hassell v. Morgan et al.*, 27 Okl. 453, 112 Pac. 969.

"Where there is an entire lack of evidence to sustain material issues found by * * * the jury, this court will set aside the verdict and grant a new trial." *L. Puls v. Robt. Casey*, 18 Okl. 142, 92 Pac. 388; *Ingram and Weaver v. Dunning*, 159 Pac. 927 (No. 4852) not yet officially reported.

We are unable to see from the evidence that the failure to have a headlight was negligence on the part of the defendant which

was the proximate cause of the death of plaintiff's intestate.

We are of the opinion that the demurrer to the evidence was well taken, and should have been sustained, and that in overruling said demurrer the court committed prejudicial error.

This cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

GRISSE v. CRUMP et al. (No. 7675.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT ¶163 — ACTION FOR COMPENSATION—NEW PARTY.

On motion by defendant to make additional party, *held* not error to overrule same where pleading does not show party necessary.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 364; Dec. Dig. ¶163.]

2. TRIAL ¶250 — INSTRUCTIONS — APPLICABILITY TO CASE.

Defendant requested special instruction, which was refused by the court. *Held* not error; as the answer of defendant and his evidence does not raise the question involved in the instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ¶250.]

Commissioners' Opinion, Division No. 4. Error from County Court, Seminole County; A. S. Norvell, Judge.

Action by George C. Crump and another, partners doing business under the style of Crump & Skinner, against W. E. Grisse. Judgment for plaintiffs, and defendant brings error. Affirmed.

Davis & Patterson, of Wewoka, for plaintiff in error. Pryor & Stokes, of Wewoka, and J. L. Skinner, of Holdenville, for defendants in error.

DE GRAFFENRIED, C. Defendant in error will be denominated plaintiffs, and plaintiff in error defendant. Plaintiffs filed their petition in the county court of Seminole county alleging that the defendant was indebted to them in the sum of \$250 for legal services rendered under an oral contract with defendant, which services as such attorneys were to institute in the district court of Seminole county, a civil action for defendant against J. Vanbuskirk, for recovery of certain land, which suit was finally determined in favor of the defendant, Grisse.

Defendant filed his amended answer, and specifically denied having entered into an oral contract of employment with plaintiffs, and denied that he agreed to pay plaintiffs any sum for their services, that defendant took John Rentie to the office of plaintiffs, and that said Rentie did employ plaintiffs in another matter, but he did not agree to

pay for said services. For a second defense defendant contends that he had a written contract of employment by the year with Crump, Fowler & Skinner, a firm located at Wewoka, in Seminole county, to attend to all his business and try all suits in said county, and that said firm had been fully paid.

Upon the issues thus joined the cause proceeded to trial to a jury, resulting in a verdict for plaintiffs. Defendant filed motion for new trial, which was overruled, and exceptions saved by defendant, and he now prosecutes error to this court by filing petition in error with original case-made attached.

Counsel for defendant in their petition in error set out five assignments of error: First, error in overruling motion for new trial; second, error in overruling motion to make A. M. Fowler party defendant; third, error in refusing special instruction asked for by defendant; fourth, verdict not supported by evidence; fifth, verdict contrary to law.

In substance the testimony tended to show that plaintiffs were attorneys and partners in the practice of law, and were living in Holdenville, Hughes county, and had their office in said place; that plaintiffs also connected themselves with A. M. Fowler, an attorney at Wewoka, in Seminole county, under the partnership name of Crump, Fowler & Skinner, to engage in the practice of law in Seminole county, thus constituting two separate and distinct firms.

It is shown by written contract that the firm of Crump, Fowler and Skinner had agreed to represent defendant in all legal matters and represent him in all suits in Seminole county at an agreed price for two years, which amount was fully paid by defendant, and this contract was in force at the time the suit was instituted for defendant in the district court of Seminole county. The petition which was filed in the district court for defendant was signed by Crump & Skinner, and not by the firm of which Mr. Fowler was a member.

The testimony of plaintiffs was, in substance, that the defendant came to their office in Holdenville and consulted them in regard to instituting the suit in Seminole county, and that defendant stated that he did not want Mr. Fowler to try the case, but that he wanted Mr. Crump to try it, and that he was willing to pay him a fee. Mr. Crump told defendant that he would not institute the suit under the contract which defendant had with the Wewoka firm, but would do so as the Holdenville firm for \$250, which amount the defendant agreed to pay. All of this testimony is positively denied by defendant, and that he never entered into a contract to pay the Holdenville firm \$250, or any other sum.

It is further shown that on same day the alleged oral contract was made that the de-

defendant took John Rentie (who sold the land to defendant) to the office of Crump & Skinner in Holdenville, and they talked over the matter as to whether Rentie wanted Mr. Crump to collect some money due him in a guardianship case, and at the same time Rentie executed a note to Crump & Skinner for \$250, which defendant alleges in his answer was for services in a probate case. Defendant testified on cross-examination as follows:

"Q. Now, you saw John Rentie sign this note? A. Yes, sir. Q. And he was paying Mr. Crump \$250 just to look after a probate matter? A. Yes, sir."

[1] The second assignment of error is the court erred in overruling defendant's motion to make Mr. Fowler a party. The court properly overruled this motion, for the reason that plaintiffs sought to recover under an oral contract made with plaintiffs, and they must stand or fall on this allegation. If the evidence showed an oral contract with the Holdenville firm, the plaintiffs would recover; if not, then the plaintiffs would fail. Consequently Mr. Fowler was not a proper party, and there was no error in overruling this motion. Section 4696, Stats. 1910; Goodrich v. Williamson, 10 Okl. 588, 63 Pac. 974, and cases there cited.

[2] The defendant assigns as error the refusal of the court to give requested instruction as follows:

"You are instructed that one person is not liable for the debts of another, unless he promises in writing to pay the same. Therefore, if you find from the evidence that John Rentie employed the firm of Crump & Skinner to prosecute a suit, and gave therefor his note, you are instructed that the defendant, Grisso, is not liable unless he promises in writing to pay the same."

As an abstract proposition of law this is a correct statement, but it is not applicable to this case, for the reason that defendant in his answer alleges:

"That on or about the date mentioned in plaintiffs' petition he accompanied one John Rentie to the office of Crump & Skinner in the city of Holdenville, and that he told plaintiffs that he had brought the said Rentie to their office for the purpose of having the said Rentie employ them to represent Rentie in obtaining the money due the said Rentie in the estate of his deceased granddaughter, and the said John Rentie did so employ plaintiffs to represent him in said cause, and the defendant did not undertake to pay any part of the fee, and did not agree to stand as surety for said Rentie in said case."

And defendant testified that the \$250 note executed by Rentie to plaintiffs was in payment of a fee to plaintiffs in a probate case. It will be seen that the Rentie note was an entirely different transaction and had no connection whatever with the fee sued for in this case.

Now, if the answer had alleged, and the defendant had testified, that the note executed by Rentie to plaintiff for \$250 was for the fee in the land case in the district court, then the instruction would have been proper.

Plaintiffs did not sue to collect the note of \$250 executed by Rentie, but to collect \$250 from the defendant under an oral contract. Therefore the court properly refused the instruction. Kingfisher Nat. Bank v. Johnson et al., 22 Okl. 228, 98 Pac. 343; Mo. Pac. Ry. v. Pierce, 33 Kan. 61, 5 Pac. 378; Meyer v. Reimer, 85 Kan. 823, 70 Pac. 869. See, also, City of Lawton v. McAdams, 15 Okl. 412, 83 Pac. 429; Ft. Smith & W. Ry. Co. v. Benson, 26 Okl. 246, 109 Pac. 77; Ft. Smith & W. Ry. Co. v. Collins, 26 Okl. 82, 108 Pac. 550; Murphey v. Hood, 12 Okl. 593, 73 Pac. 261; Citizens' Bank v. Garnett, 21 Okl. 200, 95 Pac. 755.

We have examined the record carefully, and find that the lower court properly submitted the issues to the jury, and the jury returned verdict for the plaintiffs.

We find no error in the record, and the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

STATE ex rel. TUTTLE v. CRUMP, District Judge. (No. 8216.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

MANDAMUS ~~¶~~16(1) — PROCEEDINGS — DISMISSAL.

Where plaintiff filed an original petition in the Supreme Court for a writ of mandamus directing the defendant, as judge of the district court of H. county, to render judgment in certain litigation then pending, to which plaintiff was a party, and after issue joined in this court plaintiff dismissed her action in the district court of H. county, with prejudice, plaintiff's action for mandamus will be dismissed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 48; Dec. Dig. ~~¶~~16(1).]

Original application by the State, on relation of Lillie May Tuttle, for mandamus to George C. Crump, Judge of the District Court of Hughes County, Okl. Dismissed.

Lewis C. Lawson, of Holdenville, for plaintiff. J. L. Skinner, of Holdenville, for defendant.

HARDY, J. On April 20, 1916, plaintiff filed in this court an original petition for a writ of mandamus directed to defendant, as judge of the district court of Hughes county, upon the filing of which an alternative writ was issued commanding defendant, in case said court should be in session, to immediately render and enter a final order, judgment, or decree in certain litigation pending in said court wherein plaintiff herein was plaintiff, and, in case said district court be not in session at the time said writ was served upon him, that he, as judge of said court, hear and determine said cause and render a final order, judgment, or decree therein as soon as said district court be in session, and

in any event not later than the first day of the next term of said district court. After issue joined in this court defendant filed motion to dismiss this cause, and as grounds therefor alleges that since the issuance and service of the alternative writ herein plaintiff has dismissed with prejudice the litigation pending in the district court of Hughes county in which it was sought by this proceeding to require defendant, as judge of said court, to render judgment therein, and attaches thereto copies of the motion to dismiss that cause, together with journal entry of judgment rendered therein showing same to have been dismissed on motion of plaintiff, with prejudice. The allegations of the motion to dismiss are not controverted, and therefore will be taken as true.

Upon this showing the motion to dismiss should be, and the same is hereby, sustained, and this case dismissed at the costs of plaintiff. All the Justices concur, except KANE, C. J., absent.

O. K. BUS & BAGGAGE CO. et al. v. COX.
(No. 7100.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR §545 — "RECORD" — SCOPE AND CONTENTS — MOTION TO REINSTATE APPEAL.

A motion filed in the county court to reinstate an appeal from a judgment of a justice of the peace which had been dismissed upon motion does not constitute a part of the record proper and therefore the action of the county court thereon cannot be reviewed by the Supreme Court upon a proceeding in error instituted by filing with this court a petition in error with a purported transcript of the record attached thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2416; Dec. Dig. §545.]

For other definitions, see Words and Phrases, First and Second Series, Record.]

Error from County Court, Oklahoma County; John W. Hayson, Judge.

Action between the O. K. Bus & Baggage Company and others and Mrs. T. L. Cox. From the judgment, the O. K. Bus & Baggage Company and others bring error. Dismissed.

Blake & Boys, of Oklahoma City, for plaintiffs in error. J. C. Helms, C. M. Thorp, and H. A. Wilkinson, all of Oklahoma City, for defendant in error.

KANE, C. J. This cause comes on to be heard upon a motion to dismiss the proceeding in error, upon the ground that the only error complained of in the petition in error filed by the plaintiffs in error is not such an error as may be reviewed upon a transcript of the record. The motion seems to be well taken. This action was originally commenced by the defendant in error against the plaintiffs in error before a justice of the peace, where judgment was rendered in

favor of the plaintiff. Thereafter defendants attempted to appeal to the county court from the judgment rendered against them by the justice of the peace. Thereafter a motion to dismiss the appeal was sustained by the county court. Thereafter defendants filed their motion in the county court to reinstate said appeal, which motion was by the county court overruled. Whereupon this proceeding in error was commenced by filing in this court a petition in error, with a transcript of the record of the trial court attached thereto, for the purpose of reviewing the ruling of the trial court upon the motion to reinstate the appeal.

It has been held by this court in a long line of cases that motions of this sort do not constitute a part of the record proper, and therefore the action of the trial court thereon cannot be reviewed by this court upon a transcript of the record. A few of the cases so holding are *Fisher v. United States*, 1 Okl. 252, 31 Pac. 195; *City of Kingfisher v. Pratt*, 4 Okl. 284, 43 Pac. 1068; *Devault et al. v. Merchants' Exch. Co.*, 22 Okl. 624, 98 Pac. 342; *Green et al. v. Town of Yeager*, 23 Okl. 128, 99 Pac. 906. In the following cases to the same effect the motions involved were motions to dismiss appeals: *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *Black v. Kuhn*, 6 Okl. 87, 50 Pac. 80; *Singleton v. Kennamer*, 27 Okl. 564, 112 Pac. 1026. And in the following cases the motions involved were motions to reinstate causes which had been dismissed: *Swope v. Smith*, 1 Okl. 283, 33 Pac. 504; *Hicks et al. v. Gay et al.*, 31 Okl. 150, 120 Pac. 636.

Upon the authority of these cases the motion to dismiss the appeal must be sustained. It is so ordered. All the Justices concur.

FIRST NAT. BANK OF WELLSTON v.
SENSEBAUGH. (No. 5939.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. USURY §141—RECOVERY OF USURY PAID—ACTION—PARTIES.

Where a note containing usurious interest is transferred and indorsed to a third party by the nominal payee, and the borrower pays the note in full to such third party, his right of action to recover double the amount of interest paid, as provided by section 5198, Rev. St. U. S. (U. S. Comp. St. 1913, § 9759), is against the party who took and received such interest, and the payee is not a necessary party defendant.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 427; Dec. Dig. §141.]

2. USURY §142(3) — RECOVERY OF USURY PAID—PLEADING.

In an action to recover twice the amount of interest paid on a usurious note, where a copy of the note is attached to the petition, and the date thereof, amount of interest charged, and consideration both on its face and in fact, are shown, and it is further alleged that the interest charged was in excess of the le-

gal rate, and that the defendant well knew that said interest charged was in excess of the legal rate, and that defendant well knew that said interest so charged by defendant and paid by plaintiff was corrupt and unlawful, notwithstanding which defendant knowingly and unlawfully received the same of the plaintiff, a cause of action is sufficiently stated, as against a demurrer thereto.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 432; Dec. Dig. ¶142(3).]

3. APPEAL AND ERROR ¶1067 — HARMLESS ERROR — RECOVERY OF USURY PAID — INSTRUCTION.

The trial court did not err in refusing to give an instruction that the action was controlled by the federal statute, and not by the laws of the state of Oklahoma, relating to usury, where the requirements of the federal statute, applicable to the issues, were fully and correctly given in the instructions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. ¶1067.]

Error from County Court, Lincoln County; H. M. Jarrett, Judge.

Action by J. M. Sensebaugh against the First National Bank of Wellston. Judgment for plaintiff, and defendant brings error. Affirmed.

Ira E. Billingslea, of Wellston, for plaintiff in error. W. L. Johnson and S. A. Cordell, both of Chandler, for defendant in error.

SHARP, J. Plaintiff's action was to recover the statutory penalty for usury alleged to have been collected from him by defendant, on a promissory note in the sum of \$233.75, dated December 15, 1911, and due October 15, 1912. J. M. Rhodes, named as the payee in the note, indorsed the note to the defendant subsequent to its execution. It seems, however, that the loan was made to plaintiff by defendant, and that Rhodes was only nominal payee. In consideration of the execution of said note, plaintiff received \$198, and the difference between this sum and the face of the note leaves the amount of interest paid, namely \$35.75. Additional interest in the sum of \$2.45 was paid by plaintiff to defendant, the note being paid in full November 14, 1912. Thus we have the total amount of interest paid by plaintiff as \$38.20, and plaintiff by his action seeks to recover double this sum, or \$76.40, as provided by section 5198, U. S. Rev. Stat. (U. S. Comp. Stat. 1913, § 9759). To plaintiff's petition defendant demurred, and, the same being overruled, filed its answer, denying generally the allegations of the petition, other than that defendant was a banking corporation organized and existing under and by virtue of the laws of the United States of America pertaining to national banks.

[1] At the time plaintiff filed his action, he made both J. M. Rhodes and the First National Bank of Wellston defendants; but subsequently, on motion of plaintiff, the action was dismissed as to Rhodes. It is now urged that Rhodes, being the payee named in

the note, was a necessary party to the action, and that the court erred in dismissing as to him. While a part of the note was paid by plaintiff to Rhodes, it was with the understanding that it would be by him paid to the bank, and this in fact was done, so that we find that plaintiff nowhere claimed that Rhodes received any of the usurious interest. In *Anderson v. Tatro*, 44 Okl. 219, 144 Pac. 360, we held that where the payee indorsed the usurious note, and the indorsee alone took and received the usurious interest, such indorsee was alone liable for the penalty, citing *Webb v. Galveston & H. Inv. Co.*, 32 Tex. Civ. App. 515, 75 S. W. 355, and *Western Bank & Trust Co. v. Ogden*, 42 Tex. Civ. App. 485, 93 S. W. 1102. While the above case was an action under the usury provision of the Oklahoma Constitution, yet, the federal act being very similar thereto, the opinion furnishes a controlling authority for our conclusion that Rhodes was an unnecessary party. See, also, *Schlesinger v. Lehmaier*, 117 App. Div. 428, 102 N. Y. Supp. 630; *Snyder v. Crutcher*, 137 Mo. App. 121, 118 S. W. 489.

[2] The next question was raised by defendant's demurrer, and is whether plaintiff by his amended petition sufficiently stated a cause of action. The petition set out the note, showed its date, amount, consideration on its face and in fact, the amount of interest paid to defendant, and that such interest was in excess of the legal rate, and alleged:

"That the defendants and each of them well knew that said interest so charged by defendants and paid by plaintiff was in excess of the rate allowed by law, and that said contract was corrupt and unlawful, notwithstanding which the defendants knowingly, corruptly, and unlawfully received the same of the defendant as aforesaid."

We have heretofore held that, where such facts are alleged in plaintiff's petition, they sufficiently state a cause of action. First Nat. Bank of Mill Creek v. Langston, 32 Okl. 795, 124 Pac. 308; *Farmers' Nat. Bank of Wewoka v. McCoy*, 42 Okl. 420, 141 Pac. 792. Plaintiff's evidence stands uncontradicted, and sufficiently supports the petition, so that there was no error in the action of the court in overruling defendant's demurrer thereto.

[3] Finally, it is urged that the trial court erred in refusing to give an instruction to the effect that the action was controlled by the federal act, and not by the laws of the state of Oklahoma, relating to usury. In the abstract this is correct (*Pauls Valley Nat. Bank v. Mitchell*, 154 Pac. 1188); but in the instructions given we find that the requirements of the federal act, in order for plaintiff to prevail, were fully set out, and we cannot understand where any prejudice would result to defendant from the refusal

of the court to denominate such requirements a part of the federal statute, especially in view of the fact that the two laws are so nearly identical. It is not required that the court in its instructions shall state either the source of the applicatory law, the jurisdiction, whether state or federal, from which obtained, or its history. It is important only that the law governing the case be correctly given and be applicable to the issues in controversy.

There being no error in the record, the judgment is affirmed. All the Justices concur, except KANE, C. J., absent and not participating.

KAPP v. LEVYSON. (No. 6804.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1001(1)—REVIEW—QUESTIONS OF FACT—VERDICT.

Where the evidence reasonably tends to support the verdict of the jury, the same will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 8928-3933; Dec. Dig. \S 1001(1).]

2. ALTERATION OF INSTRUMENTS \S 27(2)—ACTIONS—BURDEN OF PROOF.

Where the defendant in an action upon a promissory note defends upon the ground that the note has been materially altered without his consent and subsequent to its delivery, the law imposes the burden upon him to prove such defense by a preponderance of the testimony. The question whether or not such change has been made in the note is for the jury, as triers of the facts.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. \S 240, 241, 243-247; Dec. Dig. \S 27(2).]

Error from County Court, Oklahoma County: John W. Hayson, Judge.

Action by B. Levyson against H. Kapp. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Walter, A. L. Hilpirt, and Geo. M. Callihan, all of Oklahoma City, for plaintiff in error. McLaury & Hopps, of Oklahoma City, for defendant in error.

PER CURIAM. On September 8, 1913, B. Levyson, defendant in error, in the county court of Oklahoma county, sued H. Kapp, plaintiff in error, as maker on a promissory note, dated Jacksborough, Tex., July 7, 1910, whereby the defendant promised to pay to the order of the Jacksborough National Bank in the city of Jacksborough, Tex., \$863 three years after date, "negotiable and payable without defalcation or discount with interest at the rate of ten per cent. upon principal and interest then due as attorney's fees if sued upon or placed in the hands of an attorney for collection." Although the note fails to show an indorsement from the payee to plaintiff, he alleged that he was the owner

and holder thereof and such he was by defendant conceded to be; the consideration for the same being money loaned by plaintiff to defendant. To escape liability defendant pleaded no defense other than that the note, while in the hands of plaintiff, had been materially altered by him in erasing the prefix "non" before the word "negotiable" appearing in the note so as to make the same appear negotiable and preclude "him from pleading thereto failure of consideration or other equitable defenses existing against said note in favor of defendant," all of which he does not pretend to do.

[1, 2] After plaintiff had introduced the note in evidence and rested, defendant, assuming the burden of proof, leveled his proof to show an alteration as alleged, which in rebuttal plaintiff denied, and the cause was submitted to the jury upon this issue and found for the plaintiff. Assuming the issue to be material, there being evidence reasonably tending to support the verdict, the judgment will not be disturbed. The burden of proof was upon the defendant. Cavitt v. Robertson, 42 Okl. 619, 142 Pac. 290.

Affirmed.

FRIEND v. SOUTHERN STATES LIFE INS. CO. (No. 4672.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. INSURANCE \S 631—ACTION ON POLICY—PLEADING—EXHIBITS.

Where an action is brought on a policy of life insurance, and a copy of the policy is attached to the petition and made a part thereof, such copy should be considered as a part of the petition when construing the allegations thereof on demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1588, 1589; Dec. Dig. \S 631.]

2. INSURANCE \S 349(1)—CONTRACT—NATURE.

A policy of life insurance, without any qualifying provisions, is not a contract of insurance for a single year, with a privilege of renewal from year to year by paying the annual premiums. It is an indivisible and continuous contract of insurance for life, subject, when so stipulated, to discontinuance and forfeiture for nonpayment of any installment of premium. Such premium installments are not intended as the consideration for the respective years for which they are paid, but each installment is part consideration of the entire insurance for life.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 891; Dec. Dig. \S 349(1).]

3. INSURANCE \S 349(1)—PREMIUMS—EFFECT OF DEFAULT.

The consequence of a default in payment of one annual premium, due under an indivisible and continuous contract of insurance, is determined by common-law principles, where the contract does not otherwise provide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 891; Dec. Dig. \S 349(1).]

4. INSURANCE \S 349(1)—PREMIUMS—EFFECT OF DEFAULT.

Ordinarily the payment of an annual premium on a policy of life insurance, after the policy has become effective by payment of the

first year's premium, is not a condition precedent to the continuance of the policy, but, on the contrary, is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy, or may not, according to the circumstances.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 891; Dec. Dig. § 349(1).]

5. INSURANCE § 310(2)—PREMIUMS—EFFECT OF DEFAULT.

A clause in a policy of life insurance which provides only that "this policy is incontestable after one year from date of the breach of any of the provisions thereof, except failure to pay premiums as required," and which further provides that upon payment of the policy the company may deduct any sum or sums due the company, does not forfeit the policy for failure to pay the annual premium when due; but the insurance continues in force, subject to the right of the company to terminate it, if after due notice the insured shall fail to pay the premium in arrears with interest, and the further right to retain out of any settlement arising under the policy the unpaid premium and interest thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 904; Dec. Dig. § 310(2).]

6. INSURANCE § 146(3)—CONTRACT—CONSTRUCTION.

Forfeitures are looked upon by the courts with ill favor, and will be enforced only when the strict letter of the contract requires it. On the question of forfeiture of a life insurance policy, which is so framed as to be fairly open to construction, the view should be adopted, if possible, which will sustain rather than forfeit the contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146(3).]

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by Julia A. Friend against the Southern States Life Insurance Company. From a judgment sustaining a demurrer to the petition and dismissing the cause of action, plaintiff brings error. Reversed and remanded, with instructions to overrule the demurrer and set aside the order of dismissal with leave to defendant to answer.

Everest, Smith & Campbell, of Oklahoma City, and Hunt C. Hill, of San Francisco, Cal., for plaintiff in error. Wilson & Tomerlin and E. E. Buckholts, all of Oklahoma City, for defendant in error.

SHARP, J. This case presents error from the district court of Oklahoma county, and involves the sufficiency upon demurrer of plaintiff's petition, charging liability to her of the Southern States Life Insurance Company upon a policy of insurance issued by it on the life of Joseph A. Friend September 7, 1907. The policy provides that in consideration of \$483.90, and the annual payment of a like sum at or before noon on or before the 7th day of September in every year during its continuance, the company covenants to pay at its general office in the city of Atlanta, Ga., \$10,000, less any sum or sums due it, to Julia A. Friend, wife of the insured, immediately upon receipt and approval of proofs of death of the insured, Joseph A. Friend,

of Tulsa, Ind. T., while said policy was in full force, provided, however, that if no beneficiary should survive the insured, then such payment should be made to the executors, administrators, or assigns of said insured. It was provided that the policy should be incontestable after one year from the date of the breach of any of the provisions thereof, except failure to pay premiums as required. A clause of the policy provided that it should be automatically nonforfeitable; that, if any premium thereon should not be paid when due, any withdrawable surplus should first be applied to pay the same, and the remainder of the premium, if any, should be charged against the policy as a loan if the respective loan value be sufficient to enable such advance after providing for the existing loans and accrued interest, provided that, if not sufficient to cover the entire remainder, a premium for a shorter period, but not less than a monthly premium, should be provided for, if the available loan value be sufficient; that notice of such application of surplus and advance should be mailed to the insured, and at any time while the policy was thus sustained in force the payment of premiums might be resumed. Another clause made the benefits, privileges, or provisions written or printed on other pages of the policy a part thereof. These benefits, privileges, and provisions found on the additional pages of the policy concern different subjects pertaining to said insurance policy, under appropriate headings as follows: (1) Account with policy holder; (2) policy paid up by surplus; (3) policy matured as an endowment by surplus; (4) policy paid up with sum insured; (5) withdrawal of surplus; (6) change of beneficiary; (7) assignment of policy; (8) errors of age; (9) time and place of payment of premiums; (10) occupation, travel, residence, mode, and place of death; (11) authority of agents; (12) distribution of surplus; (13) loans and surrender privileges; (13a) surrender; (13b) table of cash loans, paid-up insurance, and periods of extension, at different anniversaries of said policy, referred to in the policy and in sections 13 and 13a.

The petition charged that, notwithstanding the failure of the insured to pay the second year's premium, still the policy by its terms was in full force on March 1, 1909, the date of the death of the insured. A copy of the policy was attached to the petition as an exhibit, and made a part thereof by reference. The judgment of the trial court was that the petition failed to state facts sufficient to constitute a cause of action. The limit of our inquiry therefore is: Did the court err in sustaining the demurrer?

[1] At the outset it may be said that, where suit is brought on an instrument in writing for the payment of money, and a copy of such instrument is attached to the

petition and made a part thereof, such instrument should be considered as a part of the petition when construing the allegations thereof on demurrer. *Grimes v. Cullison*, 3 Okl. 268, 41 Pac. 855; *Whiteacre v. Nichols*, 17 Okl. 387, 87 Pac. 865; *Long v. Shepard*, 35 Okl. 489, 130 Pac. 131; *Davis et al. v. Board of County Com'rs*, 158 Pac. 294.

[2-4] As the court's action in sustaining the demurrer is defended upon the ground that the nonpayment of the premium for the second year automatically worked a forfeiture of the policy, it is proper that we consider the nature and character of a policy of insurance made payable at the death of the insured, as is the policy before us. The leading case wherein the rule defining the character of a contract of insurance is stated is *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, where the court said, speaking through Mr. Justice Bradley:

"We agree with the court below that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual installments. Such installments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance."

The doctrine of the *Statham Case* was reaffirmed in *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765, and *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. In the former case it is announced that the court did not accept the position that the payment of the annual premium was a condition precedent to the continuance of the policy, but, on the contrary, said that the payment constituted a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is also said that, while prompt payment and regular interest constitute the life and soul of the life insurance business, and that the sentiment long

prevailed that it could not be carried on without the ability to impose stringent conditions for delinquencies, more liberal views had obtained on this subject in recent years, and that a wise policy now often provides express modes for avoiding the odious result of forfeitures.

In the latter opinion, citing both of the earlier opinions, it was said:

"The contracts were not assurances for a single year, with a privilege of renewal from year to year on payment of stipulated premiums, but were entire contracts for life, subject to forfeiture by failure to perform the condition subsequent of payment as provided."

The initial premium having been paid, and the policy therefore having become effective, and being for the life of the insured, it remains to inquire whether it has been forfeited. As there was at the time no statute controlling the rights of the parties, the policy has not been forfeited unless by virtue of some express provision contained in it, providing for forfeiture, for without a forfeiture clause the policy is not terminated merely for nonpayment of the premium when due. A well-considered case upon this question, and in which many authorities are reviewed, is *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 121 N. W. 996, 26 L. R. A. (N. S.) 747, 19 Ann. Cas. 58, where the rule is announced in the syllabus as follows:

"A life insurance policy, when once it takes effect by payment of the first year's premium and delivery of the policy, does not terminate at the end of the year, but it is a contract for the life of the assured. If the policy contains no provision for a forfeiture thereof by reason of a failure of the assured to pay subsequent premiums annually, a failure to pay such premiums on the day named will not constitute a forfeiture of such policy. All that the company can demand in such case is the right to set off against the amount of indemnity it has bound itself to pay the amount of the premiums remaining unpaid, with interest thereon."

In the note to the above case it is said by the annotator that the rule that a failure to pay the premium on a life insurance policy does not of itself avoid the policy, unless the policy so provides, finds support in almost all of the authorities. Such has been the result of our own investigation.

In *Equitable Life Assur. Soc. v. Golson*, 159 Ala. 508, 48 South. 1034, it was held that, while the policy may contain a valid condition that it may be terminated or forfeited upon a failure to pay any premium or installment at the time specified in the contract, which would be a condition subsequent, and the nonperformance of which would avoid the policy, unless waived by the insurer, yet such a condition, being for the benefit of the company, is to be strictly construed, and a forfeiture will be enforced only when it appears that such is the plain intent and meaning of the contract; and, if there are repugnant conditions, the court will enforce such as are in favor of the insured, and will prevent a forfeiture. *Titlow v. Reliance Life Ins. Co.*, 246 Pa. 503, 92 Atl. 747, is another

recent case in point. There it was said that, the contract of insurance having provided for no forfeiture, the law visited no such penalty; that, where the policy contained no such provision (forfeiture for nonpayment of premium), though the charter and by-laws required the payment of annual premiums, the failure to pay the annual premium when due did not work a forfeiture; that such a policy insured for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid. The syllabus reads:

"A contract of life insurance providing for the payment of a definite sum to the insured at a definite period, or to his legal representatives at his decease before the end of the period, in consideration of certain annual premiums to be paid by the insured during the continuance of the policy, without qualifying provision of any kind whatever, is not a contract of insurance for one year in consideration of an advance payment with the right of the insured to continue it from year to year upon payment of the stipulated premium, but a contract indivisible and continuous, and the consequence of a default in the payment of one of the premiums is to be determined by common-law principles, the parties themselves having failed to provide otherwise."

In *Union Central Life Ins. Co. v. Morrow*, 7 Ohio Dec. 118, it was said that, where a policy of life insurance contained no condition of forfeiture or lapse for nonpayment of premiums, the payment of the first premium was a condition precedent to the validity of the policy, but the payment of subsequent premiums were not, and that default did not forfeit the policy in the absence of notice by the company of the maturity of the notes, or demand of payment, or notice that upon nonpayment the company would elect to forfeit the policy. In *Sanford v. California Farmers' Fire Ins. Ass'n*, 63 Cal. 547, it was held that a policy of insurance issued to a member of a mutual insurance company was not forfeited or suspended by failure of the insured to pay an assessment thus levied, unless such forfeiture or suspension was provided for as a part of the contract of insurance. Another well-considered case is *Nederland Life Ins. Co. v. Meinert*, 127 Fed. 651, 62 C. C. A. 377, where the conclusion was reached that the policy had not been forfeited unless it was by virtue of an express provision contained therein providing for forfeiture. It is said in the course of the opinion:

"Without a clause providing for a forfeiture, the policy is not forfeited for nonpayment of the premium, any more than a land contract is forfeited by nonpayment of principal or interest when due. The rule is laid down in 19 Am. & Eng. Enc. of Law (2d Ed.) 44, as follows: 'Since forfeitures are odious in the eyes of the law, a default in the payment of a premium on life insurance does not forfeit the policy where there is no stipulation to that effect in the policy.' This is the well-settled rule. The reason why forfeitures are odious in the eyes of the law, and are said to be abhorred is that they are not equitable. Nevertheless, if a policy of insurance provides in express terms for forfeiture for nonpayment of the premium when due, the law will enforce it. But before the court

will declare a forfeiture, the conditions of the policy upon which a forfeiture is founded must be strictly complied with."

See, also, *Woodfin v. Asheville Mut. Life Ins. Co.*, 51 N. C. 558; *Perry v. Bankers' Life Ins. Co.*, 47 App. Div. 567, 62 N. Y. Supp. 553; *Gruwell v. National Council of K. & L. of Sec.*, 126 Mo. App. 496, 104 S. W. 884; *Keeton v. National Union (Mo. App.)* 182 S. W. 798.

In 25 Cyc. 824, the rule pertaining to the nonpayment of premiums or assessments and the effect thereof upon the policy is thus stated:

"A condition in the policy that it shall terminate or be avoided on failure to pay any premium or installment thereof at the time specified in the contract is valid, and constitutes a condition subsequent, the nonperformance of which avoids the policy, in the absence of waiver or estoppel on the part of the company. * * * But where there is in the policy no stipulation or condition for forfeiture on account of nonpayment of premiums, a default in payment will not operate in itself as a forfeiture, nor can it be insisted upon by the company as constituting a forfeiture in the absence of any notice."

Speaking of forfeitures in policies of life insurance, it is said in *May on Insurance* (4th Ed.) § 343:

"If, however, the policy contains no such proviso, though the charter and by-laws require the payment of annual premiums, the nonpayment of the annual premium when due does not work a forfeiture. Such a policy of insurance is for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid."

Other authorities in point are *Cooley's Briefs on Insurance*, 2259, 2260; *Vance on Insurance*, p. 212; 19 Am. & Eng. Enc. Law, 44.

[5, 6] Turning to the policy, we fail to find any express provision of forfeiture for the nonpayment of the annual premium. There is, as already shown, the clause making the policy incontestable after one year from the date of the breach thereof, except failure to pay premiums as required. There is the further provision making the premiums payable either annually or in semiannual or quarterly installments, according to the company's rule, with the right in the company, in the settlement of the policy, to deduct out of the sums due any unpaid portion of the year's premium, or any sum or sums due the company. Unless it be that the clause making the policy incontestable be held to constitute an express forfeiture, clearly the policy is without such a provision, for no other clause or part of the policy, except by possible inference, would authorize us in holding that the policy was forfeited on account of nonpayment of premiums. Forfeitures in law, not being favored, will not be sustained upon mere inference. *Joliffe v. Madison Mut. Ins. Co.*, 39 Wis. 111, 20 Am. Rep. 36; *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689. Be-

ing looked upon by the courts with ill favor, they will be enforced only where the strict letter of the contract requires it. Hence, even though the contract contains a stipulation of forfeiture, it will not be aided or given effect by construction, unless the plain meaning of the language used requires it. It has become a well-recognized rule in the construction of contracts of insurance that they will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy. In *Ingersoll v. Mutual Life Ins. Co.*, 156 Ill. App. 569, it was provided in the policy:

"If this policy shall become void by nonpayment of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided."

The court, in referring to the common practice of insurance companies, in providing that policies shall be null and void, and all premiums forfeited, subject only to surrender rights or reinstatement if default be made in the payment of any premium, held that the provision was insufficient to cause a forfeiture, and said:

"To sustain defendant's contention that the failure to pay the ninth premium absolutely and automatically nullified the insurance, subject only to the right to secure a paid-up policy, would compel us to hold, as the Nebraska court says (*Haas v. Mutual Life Ins. Co.*, supra), 'that a forfeiture of an insurance contract may be created by construction, and need not be provided for by the strict terms of the contract. Such is not the law.'"

In *Swander v. Northern Central Life Ins. Co.*, 25 Ohio Cir. Ct. R. 3, 11, the policy contained no provision that if the payment of premium was not made when due the policy should become void and terminate. It was observed, however, that there were some expressions in the policy which, it was urged, indicated that the nonpayment of dues might be regarded as a forfeiture of the policy, and that the policy might under certain circumstances lapse; but there was no express provision of forfeiture, and it was said that, in view of the authorities holding that, where there is a provision of absolute forfeiture, it is to be construed strictly in favor of the insured, and may be waived by the insurance company by its conduct, it would seem as though a court ought not to import into an insurance policy a contract which does not there exist. And in *Webster v. Insurance Co.*, 58 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658, it was held that provisions for forfeiture are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced. Another case of the same kind is *Hull et al. v. Northwestern Mut. Life Ins. Co.*, 39 Wis. 397, where it was said that forfeitures are only enforced when it appears that such is the plain intent and meaning of the contract, and that words of a policy

must be construed most strongly against the insurer, and if the policy contains repugnant conditions, the court must enforce those which are in favor of the insured and will prevent a forfeiture. In *Ferguson v. Union Mut. Life Ins. Co.*, 187 Mass. 8, 72 N. E. 358, it was held that a provision for forfeiture in a policy of life insurance, being inserted for the benefit of an insurer, is not to be extended by implication, and, if it is susceptible of more than one meaning, that which is most favorable to the insured should be adopted.

As the insurance company in its policy failed to specifically provide and declare that a failure to meet the annual payments when due should forfeit all claims under the policy, and as we cannot by construction create a forfeiture, even though such may have been intended, or may be inferred from the language used, it follows that the failure to pay the second year's premium at maturity, the policy not being a divisible contract, did not of itself end and terminate the policy.

What we have said is apart from any rights that may have attached under the provisions of the policy declaring it, in capital letters, to be automatically nonforfeitable; for, if we are correct in our conclusion that the failure to pay the premium did not forfeit the policy, then it becomes immaterial whether in point of fact the policy at the end of the first year had either a withdrawable surplus or a cash loan value, within the meaning of said provisions of the policy. The automatically nonforfeitable provision of the policy would not serve to take the case out of the general rule respecting forfeitures, but must, on the other hand, be strictly construed against the insurer. Such was the holding of the court in *Chase v. Phoenix Mut. Life Ins. Co.*, 67 Me. 85, in a case containing a "nonforfeiting" policy, where the insured neglected to surrender the policy and apply for a reduced paid-up policy, and where it was said: "Stipulations for a forfeiture in a policy thus labeled should be strictly construed." In *Franklin Life Ins. Co. v. Wallace, Adm'r*, 93 Ind. 7, as in the case at bar, at a prominent place in the policy, and in large type, were printed the words, "Nonforfeiting policy." In the opinion attention is called to this fact, and it is said that the contracting parties did not intend that the failure to pay premium note should work a total forfeiture, as was manifested by the statement that the policy was a nonforfeiting one.

The well-nigh universal rule that, if the wording of a policy of insurance is such as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract of insurance, has been accepted as a canon of construction in this branch of our jurisprudence, as evidenced by the opinions in *Taylor v. Insurance Co. of North America*, 25 Okl.

92, 105 Pac. 354, 188 Am. St. Rep. 906; Capital Fire Ins. Co. v. Carroll, 28 Okl. 286, 109 Pac. 535; Southern Surety Co. v. Tyler & Simpson, 30 Okl. 116, 120 Pac. 936; Standard Acc. Ins. Co. v. Hite, Adm'r, 37 Okl. 305, 132 Pac. 333, 46 L. R. A. (N. S.) 986; Union Acc. Co. v. Willis, 44 Okl. 578, 145 Pac. 812, L. R. A. 1915D, 358; Oklahoma Nat. Life Ins. Co. v. Norton, 44 Okl. 783, 145 Pac. 1188, L. R. A. 1915E, 695.

From what has been said it is obvious that the learned trial court erred in sustaining the defendant's demurrer and dismissing plaintiff's cause of action, for which the judgment is reversed, and the cause remanded, with instructions to overrule the defendant's demurrer, and set aside the order of dismissal, with leave to defendant to answer.

All the Justices concur, except KANE, C. J., absent and not participating.

OKLAHOMA STATE BANK OF CUSHING v. BUZZARD et al. (No. 7110.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. JUDGMENT \S 107—DEFAULT — PENDENCY OF PLEADING.

There can be no judgment by default where there is on file an answer or other pleading raising an issue of law or fact.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. \S 107.]

2. JUDGMENT \S 107—DEFAULT—PENDENCY OF PLEADING.

Before a default judgment can be properly entered the answer or other plea must be disposed of in an orderly way by motion, demurrer, or in some other manner.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. \S 107.]

3. JUDGMENT \S 107—DEFAULT—PENDENCY OF PLEADING—VACATION OF JUDGMENT.

Where by order of court a defendant was granted time within which to plead without jurisdiction as to the character of pleading, and conformably to such order the defendant files a proper pleading presenting the question of jurisdiction of the court over the person of the defendant, a judgment by default against such defendant prior to the disposal of such pleading was prematurely rendered and a motion to vacate the same filed at the same term should have been sustained. In such case it is unnecessary that such party should affirmatively allege a defense to the cause of action stated in the petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. \S 107.]

Commissioners' Opinion, Division No. 3. Error from District Court, Garfield County; James W. Steen, Judge.

Action by F. B. Buzzard and another against the Oklahoma State Bank of Cushing. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions.

John F. Curran, of Enid, for plaintiff in error. Parker & Simons, of Enid, for defendants in error.

HOOKER, C. On the 23d day of January, 1914, F. B. Buzzard instituted suit in the district court of Garfield county, Okl., against the Oklahoma State Bank, of Cushing, located in Payne county, Okl., and one E. H. Howell, and caused summons to be issued to said bank directed to the sheriff of Payne county, which was subsequently served upon said bank in Payne county, Okl., and service of summons was made upon Howell in Garfield county, Okl., the county of his residence.

It is alleged in said petition that on the 23d day of October, 1913, the said Buzzard entered into a written contract with the Jones Oil & Gas Company, a corporation, and other parties named therein, whereby pursuant to said contract the plaintiff deposited in the Oklahoma State Bank of Cushing the sum of \$1,000, and that E. H. Howell was named as one of the parties in said contract, but that he was only a nominal party and that no part of the \$1,000 thus deposited by plaintiff with said bank belonged to the said Howell, but that all of said money was advanced by the plaintiff and other parties associated with him; that by the terms of said contract, it was provided that said \$1,000 should be forfeited and turned over to first parties in the event plaintiff failed to comply with his contract, and that this provision was null and void and gave said parties of the first part no right to demand or to receive said money as a forfeiture for his failure to perform said contract.

It was further alleged in the petition that the Oklahoma State Bank aforesaid, without right or authority, paid said \$1,000 to the Jones Oil & Gas Company, and thereby said bank converted said money to its own use and benefit and became liable therefor to the plaintiff, and that the bank turned said money over to said company by the direction of the defendant E. H. Howell, and that if the said Howell consented thereto the same was unauthorized, and without authority of the plaintiff, and that the said Howell was acting in collusion with the defendant and the oil company for the purpose of defrauding plaintiff out of said money; that the said Howell refused to join with the plaintiff in this action, and for that reason and the facts above stated is made a party defendant herein. Wherefore the plaintiff sought to recover judgment against the bank and Howell for the sum of \$1,000, with interest.

Thereafter on the 20th day of February, 1914, the Oklahoma State Bank filed the following motion in said cause in said court (omitting caption):

"Comes now the Oklahoma State Bank, defendant herein, appearing specially and solely for the purpose of pleading to the jurisdiction of

this court in the action brought by the plaintiff, F. B. Buzzard, denies that this court has any jurisdiction of the person of the Oklahoma State Bank of Cushing, Oklahoma, for the reason that said Oklahoma State Bank of Cushing, Oklahoma, is a corporation duly organized under and doing business under the laws of the state of Oklahoma, and is a nonresident of this, Garfield county, and is a legal resident and entitled to be sued only in Payne county, state of Oklahoma; and for the further reason that the complaint in this cause discloses that the person by the plaintiff made codefendant herein, E. H. Howell, is not a proper party defendant and was so made a defendant in order to try to establish the venue in another county than that in which the defendant, the Oklahoma State Bank of Cushing, is authorized to be sued. That the complaint does not show any joint cause of action by plaintiff against the Oklahoma State Bank of Cushing, Oklahoma, and E. H. Howell, and that the summons for this defendant in this cause was illegally served and for the further reason that this court has no jurisdiction of the subject-matter of this action.

"Wherefore said defendant the Oklahoma State Bank of Cushing, Oklahoma, asks that this action be dismissed as to this defendant and for his cost."

On February 9, 1914, E. H. Howell filed a demurrer for himself to said petition, and thereafter, on the 15th day of June, 1914, the court heard the motion of the bank, and, being fully advised in the premises, overruled and denied the same to which ruling the bank excepted, and thereupon on the same day the plaintiff made application to amend his petition and was allowed 10 days in which to do so, and the bank was allowed 20 days in which to plead to said amended petition.

On the 22d day of June, 1914, the plaintiff filed an amended petition, which alleged conspiracy upon the part of the bank and Howell and the oil company in detail, the purpose of which was to defraud the plaintiff, and to appropriate the \$1,000 deposited by plaintiff with said bank.

Thereafter on the 9th day of July, 1914, the Oklahoma State Bank of Cushing filed virtually the same motion which it had formerly filed to the original petition in this cause. This motion was never acted upon by the court.

On the 5th day of September, the resident defendant E. H. Howell filed a separate answer to said amended petition. And on the 5th day of September a judgment by default was rendered in said action in favor of the plaintiff and against the Oklahoma State Bank.

Thereafter on the 29th day of September, 1914, and at the same term of the court, the Oklahoma State Bank of Cushing filed its motion to vacate and set aside said judgment for the reason that its plea to the jurisdiction of the court had not been passed upon by the court, and therefore it was not in default. And for the further reason that no judgment had been rendered in said cause against the resident defendant E. H. Howell. This motion to vacate said judgment was on the 26th day of October, 1914, overruled by

the court, to which ruling of the court the said bank excepted.

[1, 2] It is contended by the bank that this judgment was prematurely rendered for the reason that at the time of its rendition it had on file a plea to the jurisdiction of the court, and that until this plea to the jurisdiction was passed upon by the court it was not in default as claimed by the plaintiff below.

The defendant in error, however, asserts that when the bank filed its motion attacking the jurisdiction of the court, that inasmuch as it raised nonjurisdictional as well as jurisdictional questions therein, it entered its appearance to said action for all purposes and could not thereafter be heard to say that it was not properly served therein; and they further assert that inasmuch as this question of jurisdiction had been passed upon adversely to the bank, that when it filed its said motion attacking the jurisdiction of the court it did so without authority or permission of the court, and although its plea to the jurisdiction was on file, the same was equivalent to no pleading, and that it was therefore in default at the time of the rendition of said judgment; and it is further asserted by the defendant in error that when the bank filed its motion to vacate said judgment, for the reason stated above, it entered a general appearance to this action which had the effect to validate the judgment that had been rendered against it, and that thereafter it could not be heard to say that summons was improperly served in said action against it.

Section 4706, Revised Laws of 1910, provides as follows:

"Where the action is rightly brought in any county, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request."

It was claimed here by the bank that it could not lawfully be served with summons issued in this action, for the reason that under the facts of the case, Howell, its codefendant, in said petition, had no substantial interest in the subject-matter of the action, and that joining him as a party defendant was for the sole and exclusive purpose of getting jurisdiction in said cause of the plaintiff in error in the district court of Garfield county. So at the threshold of this suit the bank raised this question by a motion properly filed in this action, and throughout this proceeding it has constantly objected to the jurisdiction of the court over it for this reason. Yet it is asserted here that because the bank asserted nonjurisdictional matter in its motion, it therefore waived the jurisdictional question involved and voluntarily entered its appearance to said action for all purposes.

It cannot be said that the bank did not have the right to raise this jurisdictional question to the petition as amended, for the amended petition might have shown upon its

face that it was improperly summoned in said cause, or it might, as it did, have stated a state of facts which would have required virtually a trial upon the merits of the cause before the court could determine whether the codefendant of the bank was rightfully sued in the county where this action was brought.

The court made the order granting permission to the bank to plead, and this order does not limit or prescribe the character of pleading, which the bank should have filed to this amended complaint.

In 23 Cyc. 750, it is said:

"When an answer or other pleading of a defendant, raising an issue of law or fact, is properly on file in the case, no judgment by default can be entered against him; to authorize a default, the answer or other pleading must be disposed of by motion, demurrer, or in some other manner. Even though the plea filed by the defendant is bad in form or substance, yet, if it does not admit the plaintiff's case the latter cannot have judgment for want of a plea." See authorities cited at page 750.

In *Crossan v. Cooper*, 41 Okl. 281, 137 Pac. 354, this court said:

"(1) There can be no judgment by default where there is on file an answer or other pleading raising an issue of law or fact.

"(2) Before a default judgment can be properly entered, the answer or other plea must be disposed of in an orderly way by motion, demurrer, or in some other manner."

Also in *St. Louis & S. F. Ry. Co. v. Young*, 35 Okl. 521, 130 Pac. 911, this court said:

"The first, and only, question of any seriousness in the case is: Was the order of the court, '30 days in which to plead,' broad enough to authorize the defendant to file a motion to make more definite and certain within the time to plead granted by the court? Our former opinion was based upon the theory that by the leave granted the defendant was restricted to filing an answer, demurrer, or a pleading of the class set out in section 5626, Comp. Laws 1909, which provides: 'The only pleadings allowed are: First. The petition by the plaintiff. Second. The answer or demurrer by the defendant. Third. The demurrer or reply by the plaintiff. Fourth. The demurrer by the defendant to the reply of the plaintiff.'

"Upon further reflection, that is too narrow a construction to place upon the words 'to plead,' as used in the order of the court. It has been the general understanding among the lawyers of this jurisdiction for a great many years that, when leave to plead out of time is granted in the general language of the order herein, it is sufficient to authorize the party securing the leave to file within the extension any of the motions or pleadings provided for by law. That counsel for defendant in error do not form the exception to the general rule above stated is apparent from the following excerpt taken from their brief: 'We admit that the defendant below had a right to file that motion and have it acted upon within the 30 days, and, before it was in default, file the pleading it took leave to file.' * * *

"The form approved by the text certainly contemplates that leave 'to plead' embraces leave to file all other pleas or motions except those embraced within leave 'to answer or demur.'

"Section 5659, Comp. Laws 1909, provides: 'If redundant or irrelevant matter be inserted in any pleading, it may be stricken out, on motion of the party prejudiced thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require

the pleading to be made definite and certain by amendment.

"The foregoing statute clearly provides for a motion to make more definite and certain, but neither the statute nor any rule of court fixes any definite time in which the motion must be made.

"In *A. T. & S. F. Ry. Co. v. Lambert*, 31 Okl. 300, 121 Pac. 654 [Ann. Cas. 1913E, 329], it was held that the proper time to file a motion to quash a summons is 'within the time to plead.' * * *

"Having reached the conclusion that the defendant, under the leave granted, was entitled to file a motion to make more definite and certain, the authorities uniformly support the proposition that where a motion to make a petition more definite and certain, not frivolous, has been filed by a party within the time to plead, and is pending undisposed of and not waived, a judgment upon the pleadings against the defendant cannot be taken." See authorities cited in this opinion.

"A judgment may be set aside where it is shown to have been entered by the clerk without any authority therefor, whether his entry thereof was the result of a mistake inadvertently or wrongful intent; and the same is true where the entry was ordered by the court improvidently or under mistake. A similar rule obtains where the entry of judgment was premature, either because made before the return day or the day fixed by law for entering judgments, or before the time for answering had expired, or while there was an answer or demurrer on file not disposed of, or because, for any other reason, it was made before the case was ripe for trial or regularly came up for hearing."

[3] Therefore under the authorities above cited we must hold that the bank in this case under the order of the court given had the right and authority to file this motion attaching the jurisdiction of the court over it, and that as long as this motion was before the court undisposed of, the said bank was not in default in said action, and that the judgment rendered therein against it in favor of the plaintiff below was prematurely rendered. The defendant in error here insists that when the bank came into court after judgment had been rendered against it and filed the application that it did to vacate and set aside the judgment which if unsuccessful related back to the original pleadings in the case, gave the court full jurisdiction, validating the judgment and precluded the defendant from any further attack upon it.

We have read the authorities cited by the defendant in error, but we regard the opinion of this court in the case of *Griffin et al. v. Jones et al.*, 45 Okl. 305, 147 Pac. 1024, as more applicable to the case at bar. And in this case this court said:

"We are of the opinion from the foregoing authorities that the rule supported by reason is that, when a motion to vacate a judgment under section 5274, of the Revised Laws of 1910 is filed, and the party's motion alleges jurisdictional as well as nonjurisdictional grounds, he thereby makes a general appearance and waives jurisdiction over his person. Notwithstanding this fact, it is the duty of the court to investigate and ascertain whether or not the proceedings resulting in the judgment and the judgment itself are so irregular that they would be held to be fatal upon appeal direct from the judgment, and that in case injustice has been done, and it is clear the

judgment is inequitable, it should be vacated, to the end that the controversy may be heard upon the merits in the interest of justice. Upon a petition in error to this court from the action of the trial court denying such motion to vacate, if it clearly appears that the proceedings of the trial court and the judgment are irregular to the extent that the defects would be held to be fatal upon an appeal from such judgment, or that the judgment is clearly unjust and inequitable by reason of such irregularities, the order of the trial court denying such motion will be held reversible error, and the cause reversed." See authorities cited in this opinion.

The case of *Griffin et al. v. Jones et al.*, supra, and *Richardson v. Howard*, 151 Pac. 887, sustain the view that this judgment should have been vacated upon the motion filed by the plaintiff in error in the court below, and it was unnecessary for the plaintiff in error to have alleged in its motion that it had a defense to this action. See, also, *A. T. & S. F. Ry. Co. v. Schultz*, 24 Okl. 365, 103 Pac. 756; *Leforce et al. v. Haymes*, 25 Okl. 190, 105 Pac. 644; section 5267, subd. 3, Revised Laws 1910; section 5268, Revised Laws 1910; section 5269, Revised Laws 1910.

From the foregoing authorities we are of the opinion that the judgment rendered in this action was premature, and that the trial court abused its discretion in refusing to set aside judgment upon the motion filed by the plaintiff in error therein, and this action is therefore reversed, and the cause remanded, with directions to the trial court to vacate and set aside said judgment, and to proceed further in keeping with this opinion.

PER CURIAM. Adopted in whole.

CURTIS & GARTSIDE CO. v. ÆTNA LIFE INS. CO. (No. 5962.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. INSURANCE — 514 — EMPLOYERS' LIABILITY — NATURE OF CONTRACT.

A clause in a policy undertaking to indemnify assured against loss by reason of liability on account of injuries to employes, by which the insurer undertakes to defend proceedings against the assured, unless it should elect to settle the same or pay the assured the indemnity provided for, does not make the contract one guaranteeing payment of an obligation of the assured, rather than one of indemnity, where another clause of the policy provides that no action shall be brought against the insurer unless by the assured himself to reimburse him for loss actually sustained and paid; the former clause being merely an additional privilege for the protection of the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298; Dec. Dig. — 514.]

2. INDEMNITY — 3 — NATURE OF CONTRACT — DISTINCTION FROM GUARANTY.

Contracts to pay legal liabilities differ from contracts of indemnity, in this, that, upon the latter, action cannot be maintained and recovery had until the liability is discharged, while upon the former the right of action is complete when the liability attaches.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 2-6; Dec. Dig. — 3.]

3. INSURANCE — 598 — EXTENT OF LIABILITY — INTEREST.

Under a policy indemnifying an employer against loss, not exceeding \$5,000, by reason of liability incurred from injuries to employes, the insurer is not liable for interest on a judgment for \$5,000 pending an appeal taken by the insurer, who, by the terms of the policy, conducts the litigation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1494; Dec. Dig. — 598.]

4. INSURANCE — 598 — EXTENT OF LIABILITY — INTEREST.

The extent of the company's liability under such policy is governed by the terms of the contract, and is thereby limited to \$5,000, and the expense of defending the action against the assured, if the company elects to defend, and the interest accruing on the judgment recovered in such action, pending an appeal therefrom, is not a part of such expense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1494; Dec. Dig. — 598.]

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES — "EXPENSE OF LITIGATION" — "EXPENSE OR COST OF DEFENSE."

"Expense of litigation," as commonly understood, does not include interest, though interest may accumulate as the result of the litigation. An agreement to pay the "expense or cost of making a defense" to an action at law, in the common and well-understood acceptance of the term, fairly and reasonably contemplates the attorney fees, the court costs, stenographer fees, and other expenditures necessary and directly required to present the defense, and does not include the collateral and indirect results of doing so.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Expense.]

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by the Curtis & Gartside Company against the Ætna Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. Everest & Campbell, of Oklahoma City, for defendant in error.

SHARP, J. September 6, 1908, the Ætna Life Insurance Company executed an accident policy to the Curtis & Gartside Company, by which it insured the latter against loss or expense arising or resulting from claims upon the assured for damages, on account of bodily injuries suffered by its employes on account of the operation of its business as a manufacturer of sashes and doors at Oklahoma City, Okl. On the 19th day of October following, one James Pribyl, an employe of the assured, received injuries to his person, on account of which suit was afterwards brought against his employer, the manufacturing company. March 19, 1910, in a trial had in the superior court of Oklahoma county, judgment was awarded in favor of Pribyl and against the manufacturing company in the sum of \$5,000. On appeal to this court, the judgment of the trial court was affirmed on July 22, 1913. Curtis &

Gartside Co. v. Pribyl, 38 Okl. 511, 134 Pac. 71, 49 L. R. A. (N. S.) 471. From the time that the judgment was rendered in the trial court, and until the mandate from this court was filed in the lower court, interest thereon amounting to \$1,025 had accrued. The insurance company thereafter paid the assured \$5,000, and also paid all court costs, but denied its liability for interest on the judgment from the date of its rendition until the final decision on appeal, and refused payment thereof. This amount the assured was compelled to pay Pribyl on his judgment, and thereafter brought its action to recover said sum of the insurer. The policy provides that:

The insurer "does hereby insure * * * against loss or expense arising or resulting from claims upon the insured for damages on account of bodily injuries or death accidentally suffered by reason of the operation of the trade or business described herein."

And it also contains certain conditions, including the following:

"(A) The company's liability for loss on account of an accident resulting in bodily injuries to or in the death of one person is limited to five thousand dollars (\$5,000.00); and subject to the same limit for each person, the company's total liability for loss on account of any one accident resulting in bodily injuries to or in the death of more than one person, is limited to ten thousand dollars (\$10,000.00). The company will, however, as provided in conditions D and E hereof, pay the expense of litigation in addition to the sum herein limited, provided, that if the company shall elect to pay the assured the sum as herein limited, it shall not be liable for further expenses of litigation after such payment shall have been made."

Other provisions, lettered C, D, and E, of the policy, provided that upon the occurrence of an accident the assured should give immediate written notice thereof, with fullest information obtainable, to the home office of the company, or its duly authorized agent, and that if a claim was made on account of such action the assured should give like notice thereof with full particulars; and, further, that the assured should at all times render the company all co-operation and assistance in its power; that if thereafter any suit was brought against the insured to enforce a claim for damages on account of an accident covered by the policy, the assured should immediately forward to the company's home office every summons or other process, immediately after service thereof; and that the company would, at its own cost, defend such suit in the name and behalf of the assured, unless it should elect to settle the same or pay the assured the indemnity provided for in the policy; that the assured, whenever requested by the company, should aid in effecting settlement, securing information and evidence, or attendance of witnesses, and prosecuting appeals, but should not voluntarily assume any liability, or interfere in any negotiations for settlement, or in any legal proceedings, or incur any expense, or settle any claim, except at its own cost, with-

out the written consent of the insurer previously given, except under certain circumstances not involved in the present action. Section F of the conditions, to which the policy was subject, provided:

"No action shall lie against the company to recover for any loss or expenses under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within 90 days after payment of such loss or expense."

[1, 2] In construing the policy, proper consideration must be given to all of its provisions. The clause of the policy insuring against loss or expense arising or resulting from the claims upon the assured for damages, construed in connection with the condition that no action should lie against the company to recover for any loss or expense under the policy, unless it should be brought by the assured for loss or expense actually sustained and paid in money by him after trial, clearly constitutes the policy one of indemnity, and not of liability merely. It was not because of the injury to Pribyl, or of the action by him against the assured, that the insurer became liable on its policy. It was the fact that the assured had actually paid the judgment. Until the assured paid in money the judgment rendered against it, no claim, cognizable in a court of law, accrued to it under the terms of the policy. Not until such time had a loss accrued to the assured, though its liability was fixed by the final judgment. The payment of the judgment was a condition precedent to plaintiff's cause of action, and until that was done it was not damaged within the meaning of the policy; hence was not entitled to be indemnified. Our views find support in many reported cases, including: American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; Finley v. United States Casualty Co., 113 Tenn. 592, 83 S. W. 2, 8 Ann. Cas. 962; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; Allen v. Aetna Life Ins. Co., 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958; Maryland Casualty Co. v. Omaha El. L. & P. Co., 157 Fed. 514, 85 C. O. A. 106.

The contract of insurance was not obtained by the assured for the benefit of its employees, but for its own benefit exclusively; to reimburse it for any sum, within the limits fixed, that said company might be obliged to pay on account of injuries sustained by an employee. Frye v. Bath Gas & Elec. Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; Carter v. Aetna Life Ins. Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155.

[3-5] The liability of the insurance company under the policy must be measured by its terms. Under the policy the maximum recovery on account of an accident resulting in bodily injuries to, or in the death of, one person, was \$5,000. There was, however, a provision that if the insurer elected, on be-

half of the assured, to contest a recovery on the part of the injured employé, or those standing in his right, the insured would pay "the expense of litigation" in addition to the maximum amount recoverable on the policy. It will be remembered that the judgment was for \$5,000, and that this, together with the expense of litigation, so far as the same involved court costs, was promptly paid. In such circumstances it would seem that the insurer has fully discharged its obligations. "Expense of litigation," as commonly understood, does not include interest, though interest may accumulate as the result of the litigation. An agreement to pay the "expense or cost of making a defense" to an action at law, in the common and well-understood acceptance of the term, fairly and reasonably contemplates the attorney fees, the court costs, stenographer fees, and other expenditures necessary and directly required to present the defense, and does not include the collateral and indirect results of doing so. *Maryland Casualty Co. v. Omaha El. L. & P. Co.*, 157 Fed. 514, 85 C. C. A. 106; *Saratoga Trap Rock Co. v. Standard Accident Ins. Co.*, 143 App. Div. 852, 128 N. Y. Supp. 822; *Brewster v. Empire State Ins. Co.*, 145 App. Div. 678, 130 N. Y. Supp. 439.

While there is some conflict in the authorities, as to the right of the assured to recover interest pending a decision on appeal, the great weight of authority we believe to be against the rule contended for, as shown by the following cases: *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686, 3 Ann. Cas. 478; *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 152 Mo. App. 332, 133 S. W. 156; *Little Cahaba Coal Co. v. Aetna Life Ins. Co.*, 192 Ala. 42, 68 South. 317; *Puget Sound Imp. Co. v. Frankfort Marine, A. & P. G. Ins. Co.*, 52 Wash. 124, 100 Pac. 190; *Coast Lbr. Co. v. Aetna Life Ins. Co.*, 22 Idaho, 264, 125 Pac. 185; *National & P. W. Mills v. Frankfort Marine, A. & P. G. Ins. Co.*, 23 R. I. 126, 66 Atl. 58; *Davison v. Maryland Casualty Co.*, 197 Mass. 167, 83 N. E. 407; *Cannon Mfg. Co. v. Employers' Indemnity Co.*, 161 N. C. 19, 76 S. E. 536, Ann. Cas. 1914D, 1095. The foregoing cases involve either the same form of policy, or very similar policies, to that at hand; and in all of which a recovery for interest was denied. If by reason of the loss to the assured it has been injured, it is the result of the failure of the policy to make sufficient provisions for its full protection. The rights of both the assured and the insurer depend upon the terms of their engagement, and are not to be measured by the equities arising out of the loss, or the fact that payment of the claim was delayed by the action of the insurer. The latter was a right provided for and forming a part of the consideration of the policy. It would not be contended that, had the judgment against the insured been for \$6,000, the

insurer would be liable beyond the maximum amount of the policy. In such case the assured would, upon a settlement of the judgment, be loser to the extent of the difference, the consequence of inadequate indemnity.

The insurance company having paid the maximum sum for which it was liable, and having in the policy reserved the right to contest a recovery by the injured employé, it is not liable on account of interest accruing prior to payment of the judgment by the assured. *Maryland Cas. Co. v. Peppard*, 157 Pac. 106.

The right of the assured to recover on its policy of indemnity, not attaching until payment of the judgment, and there being no provision of the policy, fairly construed, allowing a recovery for interest prior to such time, it follows that the judgment of the trial court, sustaining a demurrer to plaintiff's petition, should be and is sustained. All the Justices concur, except KANE, C. J., absent and not participating.

LONG v. BEARDEN et al.

UNITED STATES FIDELITY & GUARANTY CO. v. LONG et al.

(Nos. 8242, 8305.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 323(3) — PARTIES — JOINT JUDGMENT.

Syllabus same as in *Michael v. Isom*, 43 Okl. 708, 143 Pac. 1063.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1802; Dec. Dig. \S 323(3).]

Error from District Court, Okfuskee County; Geo. C. Crump, Judge.

Action between Israel Long and J. S. Bearden and others. From the judgment, Long brings error. Action between the United States Fidelity & Guaranty Company and Israel Long and others. From the judgment, the Fidelity & Guaranty Company bring error. Causes consolidated in Supreme Court. Heard on motions to dismiss. Order consolidating causes set aside, and motion to dismiss overruled in the latter cause, and sustained in the former.

John Caruthers, of Okemah, and Alex Johnston, of Okmulgee, for Israel Long. C. T. Huddleston and J. B. Patterson, both of Okemah, for J. S. Bearden. R. A. Hockensmith, of Okemah, for United States Fidelity & Guaranty Co.

PER CURIAM. Motion to dismiss appeal, which is from a money judgment for \$1,785, is based upon the grounds: (1) That the judgment rendered in the lower court was a joint judgment against the United States Fidelity & Guaranty Company and H. G. Malot, and that Malot has not been made a party to the proceedings in error; (2) that

no case-made was ever served on Malot. After this motion to dismiss had been filed, these causes were consolidated by order of this court upon motion filed.

The case-made in No. 8242 was served upon Malot's attorney, and Malot has been made a party defendant in error. It will therefore be seen that the objections urged for dismissal of cause No. 8242 are untenable. But in case No. 8305 said Malot was not made a party to this appeal, and, since the judgment was a joint judgment against Malot and the surety company, he should have been joined in the appeal. *Michael v. Isom*, 43 Okl. 708, 143 Pac. 1053.

It would therefore seem that the motion to dismiss should be overruled in case No. 8242, and it is so ordered; and that the order consolidating these causes be set aside and cause No. 8305 be dismissed pursuant to the motion.

NIBLO v. DRAINAGE DIST. NO. 3 et al. (No. 6941.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. DRAINS \S 57—DRAINAGE DISTRICTS—ACTIONS—PARTIES.

Plaintiff sued drainage district No. 3 and board of county commissioners of Oklahoma county for damages alleged to have occurred by the construction of a drainage ditch through plaintiff's land without notice to her or an opportunity to be heard. The drainage commissioner of said district was not made a party to the proceedings as required by section 2976, Rev. Laws 1910. *Held*, a demurrer to the petition on the ground of defect of parties defendant should be sustained.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. \S 67, 69; Dec. Dig. \S 57.]

2. PARTIES \S 75(7)—OBJECTIONS—DEMURRER—“DEFECT OF PARTIES”—“MISJOINDER OF PARTIES.”

“Defect of parties” means too few and not too many parties, and hence is not synonymous with “misjoinder of parties,” which means an excess of parties.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. \S 115; Dec. Dig. \S 75(7).]

For other definitions, see *Words and Phrases*, First and Second Series, *Defect of Parties*.]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Sarah E. Niblo against Drainage District No. 3 and the Board of County Commissioners of Oklahoma County. Judgment for defendants, and plaintiff brings error. Affirmed.

Giddings & Giddings, of Oklahoma City, for plaintiff in error. Grant Stanley, of Oklahoma City, for defendants in error.

TURNER, J. On April 10, 1914, Sarah E. Niblo, plaintiff in error, sued drainage district No. 3 and board of county commissioners of Oklahoma county to recover damages for the construction of a drainage ditch through her land. She alleged that her lands

had been rendered practically valueless by the construction of a ditch through same; that she had no notice of the construction of such ditch, or an opportunity to be heard, etc. On the 5th day of June thereafter she filed her amended petition against same parties, and alleged practically the same grounds, except she further alleged that no drainage commissioner had been appointed as required by law. A demurrer was filed to said amended petition by defendants upon the grounds that “(1) there is a defect of parties defendant, and (2) that the petition does not state facts sufficient to constitute a cause of action,” which demurrer was sustained and judgment rendered against plaintiff; and from which judgment plaintiff prosecutes this appeal, alleging that the court erred in sustaining the demurrer to her amended petition.

[1] The court did not err in sustaining the demurrer on the ground of defect of parties. Section 2976, Rev. Laws 1910, in part provides:

“In all suits in the district courts for condemnation or other proceedings, whether brought for or against such drainage district, the same shall be brought in the name and under the direction of said drainage commissioner.”

This proceeding is attempted to be brought against the drainage district No. 3 and the board of county commissioners of Oklahoma county. While it is admitted by the demurrer that no drainage commissioner was appointed as required by law, yet, said section 2976 being mandatory, no suit can be brought for “condemnation or other proceedings” with reference to drainage districts unless “brought in the name and under the direction of the drainage commissioner.”

[2] “Defect of parties,” under our statute, is a ground for demurrer. “Defect of parties” means too few and not too many parties, and hence is not synonymous with “misjoinder of parties,” which means an excess of parties.” 31 Cyc. 204. Therefore the defect in the instant case was failure to join the drainage commissioner as defendant, without which plaintiff could not prosecute her action.

We deem it unnecessary to decide the question of the sufficiency of the petition to state a cause of action.

The judgment of the trial court is therefore affirmed. All the Justices concur.

SOUTHERN SURETY CO. v. TURNHAM et al. (No. 8486.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 518(1)—“RECORD”—SCOPE AND CONTENTS.

The “record” proper in a civil action consists of the petition, answer, reply, demurrers, proceedings, rulings, orders, and judgments; and, where an appeal is attempted by transcript

of the record and the pleadings upon which the case was tried are not included in the transcript, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342, 2343, 2351, 2353, 2354; Dec. Dig. § 518(1).]

For other definitions, see Words and Phrases, First and Second Series, Record.]

2. APPEAL AND ERROR § 519—"RECORD"—SCOPE AND CONTENTS.

The agreed statement of facts, not being a part of the record unless made so by bill of exceptions, cannot be considered on appeal by transcript of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2356, 2403; Dec. Dig. § 519.]

Error from District Court, Wagoner County; R. P. de Graffenried, Judge.

Action between the Southern Surety Company and J. M. Turnham and others. From the judgment, the Surety Company brings error. Dismissed.

William T. Hutchings, of Muskogee, for plaintiff in error. Thomas & Thomas, of Wagoner, for defendants in error.

PER CURIAM. [1] Motion to dismiss is based upon the ground that the assignments of error by plaintiff in error are such as can only be presented and reviewed by this court upon a case-made or bill of exceptions. The appeal is brought here by petition in error with transcript of the record. The case was originally tried in the county court of Wagoner county, after which it was appealed to the district court and tried upon an agreed statement of facts. The pleadings upon which the case was tried are not incorporated in the transcript. Since the appeal is attempted by transcript of the record, and said transcript does not include the pleadings upon which the case was tried, and the agreed statement of facts constitutes no part of the record proper, nothing is presented here for review.

In Brown et al. v. Capital Townsite Co., 21 Okl. 586, 96 Pac. 587, it is said:

"The agreed statement of facts, not being a part of the record, unless made so by bill of exceptions, cannot be considered on error, though a copy of it is attached to the transcript of the record."

[2] It is also contended that the errors relied on by plaintiff in error are such as require a consideration of the evidence, and that, since the evidence is not properly before the court, none of the errors can be considered. This contention must likewise be sustained. The errors assigned are:

"(1) Said court erred in not rendering judgment for the plaintiff in error on the agreed statement of facts; (2) said court erred in affirming the judgment of the county court of Wagoner county rendered the 14th day of September, 1914; (3) said court erred in finding that J. M. Turnham, former guardian of Riley W. Turnham, a minor, was indebted to said minor as such guardian in the sum of \$1,024; (4) said court erred in rendering judgment against the Southern Surety Company in the sum of \$1,024 and interest."

A consideration of any of the above errors would require an examination of the evidence; and, since the evidence has not been preserved by bill of exceptions or case-made, none of them can be considered.

The appeal is, accordingly, dismissed.

In re ASSESSMENT OF FIRST NAT. BANK OF CHICKASHA. (No. 7912.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. TAXATION § 191—PROPERTY SUBJECT—EXEMPTIONS—POWER OF LEGISLATURE.

The power to exempt from taxation, as well as that of taxation, is an essential attribute of sovereignty. Generally, the power to make exemptions is included or involved in the right to apportion taxes, and exists in the supreme legislative power, unless expressly forbidden by constitutional limitation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 307, 308; Dec. Dig. § 191.]

2. TAXATION § 195—PROPERTY SUBJECT—EXEMPTIONS—"PROPERTY."

Section 50, art. 5, of the Constitution, prohibiting the Legislature from passing laws exempting any property within the state from taxation, except such as is named in section 6, art. 10, was not intended to prohibit the Legislature from exempting from taxation the bonds of the state, issued in aid of its governmental functions. Such bonds being instrumentalities of government, do not constitute property within the meaning of the constitutional limitation against exempting property from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 312, 313; Dec. Dig. § 195.]

For other definitions, see Words and Phrases, First and Second Series, Property.]

3. TAXATION § 193—EXEMPTIONS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

There being no constitutional obstruction forbidding the Legislature from exempting from taxation the bonded indebtedness of the state, in the form of the state public building bonds, it follows, necessarily, that the act exempting said bonds from taxation is not, in that respect, unconstitutional.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. § 193.]

4. TAXATION § 11 — PROPERTY SUBJECT — STOCK IN NATIONAL BANKS.

The taxation of shares of stock in national banks is permitted by Act Cong. June 3, 1864, c. 106, 18 Stat. 111, as amended by Act Feb. 10, 1868, c. 7, 15 Stat. 34 (Rev. St. U. S. § 5219 [U. S. Comp. St. 1913, § 9784]), provided they are taxed in the city or town where the bank is located, and at no greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 27-29; Dec. Dig. § 11.]

5. TAXATION § 191—EXEMPTIONS—POWER OF LEGISLATURE.

The statutory rule that the rate of taxation upon the shares in a national bank should be the same or not greater than upon the moneyed capital of the individual citizen which is liable to taxation, was not intended to cut off the power of the Legislature to exempt bonds of the state from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 307, 308; Dec. Dig. § 191.]

6. TAXATION \Leftrightarrow 191—EXEMPTIONS—POWER OF LEGISLATURE.

The issuance and sale of state public building bonds, authorized by chapter 89 of the act of the Legislature approved March 15, 1911 (Sess. Laws 1911, pp. 194-199), by which the state was enabled to raise money to accomplish and carry out a governmental purpose, and to the payment of which the good faith of the state was solemnly pledged, was an exercise of sovereignty, of the borrowing power, a use of the state's credit. And the bonds issued to enable the state to discharge its public functions are instrumentalities of government. They constitute the means resorted to by the state to effectuate the powers of government.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 307, 308; Dec. Dig. \Leftrightarrow 191.]

7. TAXATION \Leftrightarrow 218 — EXEMPTIONS — STATE BUILDING BONDS.

The intention of the Legislature to exempt the bonds from taxation being indubitable, the right to tax such bonds, whether directly or in legal effect, can be exercised under no circumstances, and is not therefore dependent upon the character of the owner or the statute under which the tax is assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 357; Dec. Dig. \Leftrightarrow 218.]

8. CONSTITUTIONAL LAW \Leftrightarrow 137 — IMPAIRING OBLIGATION OF CONTRACT—STATE BUILDING BONDS.

State public building bonds issued and sold pursuant to the act of March 15, 1911, and which by the terms of the act, as well as by express recital in the bonds, are made nontaxable, constitute a binding contract between the holder of such bonds and the state, which the latter under the guise of taxation may not constitutionally impair.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 354; Dec. Dig. \Leftrightarrow 137.]

9. CONSTITUTIONAL LAW \Leftrightarrow 137 — IMPAIRING OBLIGATION OF CONTRACT—TAXATION.

The constitutional inhibitions, both state and federal, against impairing contract obligations, is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 354; Dec. Dig. \Leftrightarrow 137.]

10. TAXATION \Leftrightarrow 218 — PROPERTY SUBJECT — EXEMPTIONS—STATE BUILDING BONDS.

The contract between the state and the bank, in respect to the exemption of the bonds from taxation, extends to its shares of stock in the hands of individual shareholders, and entitles them to the right to deduct from the value of their shares that proportion of the value invested in the bonds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 357; Dec. Dig. \Leftrightarrow 218.]

11. TAXATION \Leftrightarrow 386(2)—PROPERTY SUBJECT—EXEMPTIONS—STATE BUILDING BONDS.

The bonds being nontaxable for any purpose, and the state not having the power to tax the capital and surplus of a national bank, the shareholders, taxable on their shares, are entitled to proper reductions on account of the bank's ownership of said bonds, as any other view would ignore the covenant making the bonds nontaxable, and permit the state, in effect, to do that which it had contracted not to do.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 644-647; Dec. Dig. \Leftrightarrow 386(2).]

Error from District Court, Grady County; Will Linn, Judge.

In the matter of the assessment of the First National Bank of Chickasha. From a

judgment of the district court, on appeal from an order of the County Board of Equalization of Grady County, such County Board and Board of County Commissioners of Grady County and the State bring error. Affirmed.

S. P. Freeling, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and John H. Venable, Co. Atty., and Allen K. Swan, Asst. Co. Atty., both of Chickasha, for plaintiffs in error. Bond, Melton & Melton, of Chickasha, for defendant in error. Stuart, Cruce & Cruce, of Oklahoma City, and Hatchett & Ferguson, of Durant, amici curiae.

SHARP, J. February 18, 1910, the Legislature passed an act providing for the creation and management of what was designated the "Public Building Fund." Chapter 16, Sess. Laws 1910, pp. 21-25. Said act was by act of the Legislature amended March 15, 1911 (Sess. Laws 1910-11, pp. 194-199). The latter act provided that all moneys theretofore or thereafter received from the sale or rentals of section 33 of the public lands of the state, and lands granted in lieu thereof, the same being lands granted to the state of Oklahoma for charitable and penal institutions and public buildings, should constitute and be known as "The Public Building Fund"; that bonds of different denominations bearing interest at the rate of 5 per centum per annum, payable semiannually, should be issued against said fund, and that the state auditor should on or before the 1st day of April, 1911, issue public building bonds to the amount of \$750,000, made payable to bearer, and place them in the hands of the state treasurer for sale. The aggregate amount of bonds authorized was not to exceed the sum of \$3,000,000, of which sum \$2,451,500 was actually issued. The act provided that all outstanding warrants issued under the provisions of chapter 16 of the Session Laws of 1910 should become a valid lien against said building fund, and that the state treasurer should receive sealed bids for the purchase of said bonds, or any part thereof at a time fixed, but that none of the bonds should be sold for less than par and accrued interest. The act further provided that the officers of the state, or of any municipality thereof, having charge of any sinking fund, could purchase said bonds from the state treasurer at par. The proceeds of the sale of all bonds authorized was to be paid into the state treasury and used for the payment of the construction of charitable and penal institutions and public buildings. It was provided in section 7 that:

"Any bank, trust or insurance company, organized under the laws of this state, may invest its capital and surplus in bonds issued under the provisions of this act. The officers having charge of any sinking fund of the state or of any county, city, town, township or school district thereof, may invest the sinking fund of the state or

of such county, town, township or school district in bonds issued under the provisions of this act, maturing prior to the date of the bonded indebtedness for the payment of which any such sinking fund is created. Said bonds shall also be approved collateral as security for the deposit of any public funds and for the investment of trust funds. Said bonds shall be nontaxable for any purpose."

By section 9 it was provided that:

"All bonds and interest thereon, when issued as provided for in this act, shall become payable out of the public building fund, arising from the sale or rental of section 33, and lands granted to the state in lieu thereof, until all of said bonds and interest thereon are fully paid. And the good faith of the state is solemnly pledged to administer the trust created by the terms of the Enabling Act and the Constitution of Oklahoma, to apportion and dispose of all lands granted to the state for charitable and penal institutions and public buildings, as the Legislature may prescribe, and safely keep and preserve the proceeds of the rental and sale thereof, and apply same to the payment of the bonds authorized by this act, and the interest thereon, as the same falls due, and to use such funds, constituting the Public Building Fund, for no other purpose or purposes. * * *"

July 19, 1913, the First National Bank of Chickasha purchased of the state treasurer, with the approval and consent of the comptroller of the currency, public building bonds of the par value of \$200,000. Said bank afterwards sold to the First National Bank of Minco, out of its purchase from the state treasurer, bonds of the par value of \$20,000. In the month of May, 1915, said bank made a return to the county assessor of its property subject to taxation for the year 1915, from which it deducted the assessed valuation of its real estate in the state of Oklahoma, separately listed in the name of the bank, and the public building bonds owned by it. The return as made by said bank was accepted by the county assessor, and was afterwards approved by the county board of equalization. July 20, 1915, the state board of equalization raised the valuation of national banks in Grady county, having state building bonds deducted from their assessment, in the sum of \$200,000; and the assessment of Grady county was referred back to the county assessor and board of equalization of Grady county for the purpose of correction, equalization, and adjustment. On August 16, 1915, the county board of equalization, together with the county assessor, pursuant to the order and direction of the state board of equalization, met, and after hearing the protest of said bank and others affected, raised the assessed valuation of said bank in a sum equal to the par value of said public building bonds, namely, \$180,000, and ordered the county assessor to extend such raise upon the tax rolls for the year 1915. From said order, under authority of section 2 of subdivision B, c. 107, Sess. Laws 1915, the bank prosecuted its appeal to the district court of Grady county, where the action of the county board was reversed, and said board was directed to deduct from the valuation of the bank the amount invested by it in

public building bonds. From the order and judgment of the district court, the county board of equalization, and the board of county commissioners of Grady county, and the state of Oklahoma, have appealed to this court.

Primarily, the controversy involves the taxability of the public building bonds of the state, issued under the act of March 15, 1911. If said bonds are taxable, then the controversy is at an end. If not, the further inquiry is involved: That of the right of the shareholders in a national bank, whose capital and surplus is invested in nontaxable state bonds, to a deduction upon the valuation of their shares, on account of the nontaxable bonds owned by the bank. The question is one in which the state, the banks, both national and state, trust and insurance companies organized under the laws of the state, and public officers having charge of any sinking fund of the state, or of any county, city, town, township, or school district thereof, as well as the public generally, are vitally interested. For these reasons, and because of the fact that numerous suits are pending in the various courts of the state, involving the power of the state taxing authorities to assess for taxation the public building bonds of the state, it is important that our opinion should go to the merits of the controversy, laying aside all questions of the regularity of the proceedings, not of a jurisdictional character, had before the taxing authorities or in the trial court.

The statute, pursuant to which the bonds were issued, in terms provides that, "said bonds shall be nontaxable for any purpose." It is urged by the state, and its affected subdivisions, that the act is in conflict with section 50, art. 5, of the Constitution, providing that:

"The Legislature shall pass no law exempting any property within this state from taxation, except as otherwise provided in this Constitution."

And that as section 6 of article 10 of the Constitution, prescribing what is exempt from taxation, does not include state and municipal bonds, or either, and as such bonds in the hands of the owner constitute property, it follows that the bonds are taxable.

[1] The sovereignty of a state, it was said by Chief Justice Marshall, extends to everything which exists by its own authority, or is introduced by its permission. *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. Ed. 579, 607. While in section 36, art. 5, of our Constitution, it is broadly stated that:

"The authority of the Legislature shall extend to all rightful subjects of legislation."

The taxing power is one of the highest attributes of sovereignty, and its authority to tax all subjects over which its sovereign power extends, is undeniable. In *Gross Production Tax of Wolverine Oil Co.*, 154 Pac. 362. The power to tax rests on necessity, and is inherent in sovereignty. It is vital to our form of government. With equal

force it may be said that the power of exemption, as well as the power of taxation, is an essential attribute of sovereignty; that the power to tax includes the power to exempt, unless specially denied by the Constitution. The general right to make exemptions is involved in the right to apportion taxes, and exists in the supreme legislative power, unless expressly forbidden. Of this right it is said by an eminent authority:

"The general rule on the subject is familiar and has been too often declared to be open to question. The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power, wherever it has not in terms been taken away. * * * Exemptions, when properly made, must be determined in the legislative discretion, which is not, however, arbitrary; there must underlie its exercise some principle of public policy that can support a presumption that the public interest will be subserved by the exemptions allowed." Cooley on Taxation, 842, 848.

[4, 5] Section 7318, Rev. Laws 1910, as amended by the act of March 11, 1915, pp. 172, 173, in respect to the taxation of shares of stock in a national bank, conforms, it seems, to the requirements of section 5219 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 9784), authorizing the assessment for taxation of the shares of national banking associations located within the state. *National Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701; *First Nat. Bank of Aberdeen v. County of Chehalis*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069. While it is true that the old section of the statute appears at the beginning of the amended section, changed only in respect to date of taxation, said former statute is followed immediately, and in the same section, by the amendment, which sufficiently directs the taxation of the shares as distinguished from the net value of their "moneyed capital, surplus and undivided profits," attempted to be taxed under the old statute. The right of the state to tax the shares of stock in a national bank rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation, and that the tax on an individual in respect to his shares in a national bank is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, where in the opinion, declaring a tax upon a branch bank of the United States beyond the power of the state of Maryland, it was said:

That the opinion did not extend "to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

The distinction appears, however, to have first been made the basis of decision in *Van Allen v. Assessors*, sub nom. *Churchill v. Utica*, 3 Wall. 573, 18 L. Ed. 229, in which, un-

der the act of 1864, as originally enacted, it was held that the tax on the shares was not a tax on the capital stock of the bank, but upon a distinct, independent interest or property held by the shareholder. The *Van Allen Case*, followed by a long line of decisions of the Supreme Court of the United States, has settled the law that a tax may be assessed by the state upon the owners of shares of stock in a national bank located therein. The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as a debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid for their shareholders, either under some express statutory authority for their recovery, or under the general principles of law that one who pays the debt of another, at his request, can recover the amount from him. *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; *Cleveland Trust Co. v. Lander*, 184 U. S. 411, 22 Sup. Ct. 394, 46 L. Ed. 456. Hence we say that whatever may have been the law in this state respecting the taxation of national banks prior to 1915, and regardless of its validity, the act of March 11th of that year, in so far as the right to tax is concerned, is sufficient to authorize an assessment of the shares of stock of a national bank located within the state. The act of Congress (section 5219, Rev. Stat.) was not intended to curtail the power of the state on the subject of taxation. It simply required that the capital invested in national banks should not be taxed at a greater rate than like property similarly invested, and that the shares of any national banking association, owned by nonresidents of the state, should be taxed in the city or town where the bank is located, and not elsewhere. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so. The discretionary power of the Legislature remained as it was before the act. *New York v. Commissioners*, 2 Black (67 U. S.) 620, 17 L. Ed. 451; *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369. The assessment list meets the greater part, if not all, the requirements of the amended statute, particularly in respect to furnishing the list of names and residences of all stockholders of the bank, with the number and assessed value of the shares held by each of the stockholders. It is not claimed that the bank should not pay on account of its stockholders taxes on their shares of stock, but that proper deductions on account of interest in nontaxable bonds should be allowed. For the purposes of the case we shall therefore consider the shares of stock of bank to have been properly assessed.

[2, 3, 4] The proceeds of the sale of the

bonds, authorized by the act, were to be used by the state for the payment of the construction of needed charitable and penal institutions, and public buildings. Such was the governmental object sought to be effected by the issuance and sale of said bonds. To its accomplishment the good faith of the state was solemnly pledged to safely keep and preserve the proceeds of the sale and rental of the public lands of the state, named in the act, and to apply said proceeds to the payment of the bonds issued, with interest thereon, as the same matured. It was necessary, or at least so considered, that the credit of the state be employed in order that it might promptly and faithfully discharge the obligations assumed by and resting upon it. The issuance of bonds secured in the manner provided for was a method usual and ordinary of using the state's credit. When a state issues its bonds in conformity to law in order to raise money to accomplish and carry out a governmental purpose, the instruments issued by it for that purpose are instrumentalities of government. Such obligations constitute the means resorted to by the state to effectuate the powers of government. In the hands of the purchasers such credits may be the subject of taxation, unless because of some superior intervening right, providing the intention to tax is manifest. Cases involving the liability of state or municipal bonds to taxation very generally hold that laws providing for the imposition of taxes will not be construed to authorize the collection of a tax upon such bonds, unless there is in the law clear language that such was the legislative intent. The statute authorizing the issuance of the bonds, it must be remembered, in terms provided that they should be nontaxable. The pledged immunity on the part of the state attached in the act, so that at no period of time were the bonds subject to taxation. Not only was such the case, but the very act under which the present assessment was made exempts the bonds of the state from taxation. Originally, it was provided by section 7302, Rev. Laws 1910, that:

"All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

This section of the statute was amended by the act of March 11, 1915, by inserting therein the words:

"Except bonds of this state, and its counties, cities, towns, school districts and other municipalities of this state."

It is a rule firmly established in our jurisprudence that the bonds of the United States government cannot be taxed by the states, and that bonds of the states cannot be taxed by the United States government, for the reason that such bonds are but instrumentalities of government; that the power of the federal government to tax the bonds of the state, as well as the power of the state gov-

ernment to tax the bonds of the general government, would be a power to embarrass each sovereignty in the exercise of its governmental functions. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *New York ex rel. Bank of Commerce v. Commissioners*, 2 Black, 620, 17 L. Ed. 451; *Buffington v. Day*, 11 Wall. 113, 20 L. Ed. 122. A sovereign state may, at its election, when not restrained by its Constitution, permit its own property to be taxed, as well as its agencies of government, including evidences of indebtedness issued on the basis of the credit of the state, in the exercise of its power to borrow money. *State, Chancellor, v. Elizabeth*, 65 N. J. Law, 479, 47 Atl. 454; *People v. Home Ins. Co.*, 29 Cal. 533; *Norfolk v. Perry County*, 108 Va. 28, 61 S. E. 887, 35 L. R. A. (N. S.) 167, 128 Am. St. Rep. 940; *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760.

While it is true the obligations of the state, in the form of its bonds, are not specifically named in the Constitution as exempt from taxation, we do not believe that the framers of the Constitution, fully cognizant of the many necessities of the state upon its admission into the Union, intended, by denying to the Legislature the power to discriminate between taxpayers, to thereby curtail its power to provide in the most efficient way possible, and in such method as its judgment and patriotism might suggest, for the preservation of the credit and good faith of the people of the state. Fairly construed, the Constitution, denying the Legislature the right to exempt property from taxation, reflects the wisdom of the times. By this limitation an effectual curb was placed upon abuses that had crept into the legislation of many of the sister states. Favoritism, involving exemption from taxation, was thereby made impossible, or at least unenforceable, save in the limited and exceptional instances provided for in section 6, art. 10, of the Constitution. By the provision against exemption from taxation, it was not intended to deny to the state an exercise of sovereignty so necessary and essential to the due and orderly administration of its affairs. It was not intended thereby to deny to the state the power to go upon the open money markets of the world and compete for money upon equal terms with other sovereign states; or to deny to the state the power to provide a security of equal attractiveness to its own citizens, with that of other state governments of no better credit. Neither was it the purpose to place the state in the ungenerous attitude of asking the public to advance money upon its securities, which it was thereafter bound to render unprofitable by enforced taxation. Thus interpreted, the state building bonds, constituting as they do obligations of the state for the payment of money, and being an exercise of the borrowing power, and a use of the state's credit, do not

constitute property within the meaning of section 50, art. 5, of the Constitution; and hence the statutes exempting such bonds from taxation do not contravene the constitutional limitation against exemption from taxation. Our conclusions we believe to be supported both by sound principle and the weight of authority. Discussing the subject of taxation of agencies and instrumentalities of state governments, 37 Cyc. 883, announces the following rule:

"Nor, as in the case of public property generally, will the state itself impose taxes upon its own public or governmental agencies or instrumentalities, or those of its own municipal corporations, or a municipality tax such agencies or instrumentalities of a state. The bonds and other securities of a state, or of its municipalities, are generally exempt from all taxation by the state itself and its municipal corporations, either by express provisions of law or by implication."

In the well-considered opinion of *Louisiana ex rel. Da Ponte v. Assessors*, 35 La. Ann. 651, the Supreme Court of Louisiana held that a law directing the taxation of all property would not, for that reason, include public property, or any of the means, appliances, or instruments of government; that municipal bonds or contracts for the payment of money was an exercise of the borrowing power and the use of the public credit; and that the taxation of such bonds in the hands of a private person was a taxation of the public credit, and a burden on the borrowing power. Again, in the later case of *State ex rel. Louisiana Improvement Co. v. Assessors*, 111 La. 982, 36 South. 91, it was held that a general law, in terms directing that all property be taxed, including "bonds," "credits," did not include public property, as property to be taxed, nor "public securities," due by the municipality by which they were issued; nor did it include within its terms public credits of the municipality by which the tax was demanded.

In *Miller v. Wilson et al.*, 60 Ga. 505 it was said that in the absence of explicit language clearly expressing the will of the Legislature to tax the bonds of the state, the General Assembly will not be presumed to have passed on so grave a question of public policy, from the use of general words, especially when like words had been employed in former acts, and the executive department has never construed them to embrace state bonds. In *Penick, Tax Collector, v. Foster*, Ex'r, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. (N. S.) 1159, 12 Ann. Cas. 346, after declaring that nothing was better settled than that securities issued by the government are as much the instrumentalities of the government as other means adopted by it to perform its functions, and that it was immaterial whether the security be issued by the state, or by a county, or by a municipality, as it was in all cases an instrumentality, issued for the purpose of effectuating those objects for which government exists; the rule was announced that bonds issued by a municipal

corporation, as evidence of a loan made to it, were instrumentalities of the government which created the municipal corporation, and that laws providing for the collection of taxes will not be so construed as to authorize the collection of a tax upon such instrumentalities of the government, unless there is in the law clear language declaring that such was the intention of the lawmaking power. Also that the word "property," in that clause of the Constitution of the state of Georgia (art. 7, § 2, par. 1) which declares, "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax," correctly construed, did not require the taxing of public property, or any of the lawful instrumentalities of government. That there was not, in the tax law of that state, any terms which expressly declared that the bonds of the state, or its various political subdivisions, were subject to tax, nor any language in such laws which clearly indicated that it was the intention of the General Assembly to subject those instrumentalities of government to taxation, either by the state or any county thereof.

To the foregoing authorities we may add that of *Mercantile Nat. Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895, in which it was said:

"The amount of the exemption in this case is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation, not large enough, we think, to make a material difference in the rate assessed upon national bank shares; but, independently of that consideration, we think the exemption is immaterial. Bonds issued by the state of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares."

Keeping in mind the close relation that ever exists between the right to tax and the power to exempt from taxation, the principle upon which the foregoing cases rest is the same as in the case under consideration. There being nothing in the Constitution that expressly forbids the Legislature to exempt the bonded indebtedness of the state from taxation, the consequence is that the power to do so exists, and may be called into action at the legislative will.

[7] The power of the Legislature to exempt the bonds from taxation being, we think, clearly established, was it the purpose and intent so to do? The language of the statute is broad and comprehensive. The intention was indubitable. As plainly expressed, the bonds were made nontaxable for any purpose. Not only did the statute authoriz-

ing the issuance of the bonds provide for their nontaxability, but printed in the face of the bonds was the provision, "This bond is nontaxable under the laws of the state of Oklahoma." And to which was added the usual certificate of the Attorney General and ex officio bond commissioner of the state. From the foregoing, as well as from the subsequent acts of the Legislature, there is no room to doubt that the Legislature intended to exempt the bonds from all form of taxation, on any account, or for any purpose.

[8, 9] While the bonds of a state, held by the residents of the state by which they are issued, may be taxed by the state or by its lawful authority, such may not be done if there be a valid contract with the holder exempting them from taxation. Dillon on Municipal Corporations, pars. 1399, 1401; Gray, Limitations of Taxing Power, pars. 1049, 1051. As stated by Cooley on Taxation, pp. 355, 356:

"A state sometimes makes the bonds or other evidences of indebtedness issued by itself nontaxable. When this is done before the indebtedness is incurred, a contract is established between the state and those who become its creditors, which precludes withdrawing the exemption."

It is a rule well supported by authority that a Legislature has the power, when not restricted by some constitutional provision, to contract with a corporation for its immunity from taxation. *State v. Baltimore & O. R. Co.*, 48 Md. 49; *Mobile & S. H. R. Co. v. Kennerly*, 74 Ala. 566; *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509; *Commonwealth v. Richmond & P. R. Co.*, 81 Va. 355.

The petition of the bank alleges, and the uncontradicted evidence shows, that the bank, through its officers and directors, and representing its stockholders, purchased the bonds upon the advice and under the belief that they were nontaxable; and that such was the construction placed upon the law by the then Attorney General, Governor, state treasurer, and the state taxing authorities. The transaction between the state and the purchasers of its bonds amounted to a contract that the bonds should be nontaxable. *Humphrey et al. v. Pegues*, 16 Wall. 244, 21 L. Ed. 326; *Pacific R. Co. v. Maguire*, 87 U. S. (20 Wall.) 36, 22 L. Ed. 282; *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760; Gray, Limitations of Taxing Power, pars. 998, 998a.

It has been said that a compact lies at the foundation of all national life; that contracts mark the progress of communities in civilization and prosperity. They guard, as far as possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow men. They are springs of business, trade and commerce. Without them society could not go

on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting in the body politic, the process of descent has begun, and the lower plane will be speedily reached. To the extent to which the defect exists among individuals, there is decay and degeneracy. As are the integral parts, so is the aggregated mass. Under the monarchy or aristocracy order may be upheld and rights enforced by the strong arm of power. But a republican government can have no foundation other than the virtue of its citizens. When that is largely impaired, all is imperiled. *Burke, Ex'r, v. Child*, 21 Wall. 441, 22 L. Ed. 623; *Farrington v. Tennessee et al.*, 95 U. S. 679, 24 L. Ed. 558; 1 Montesquieu's *Spirit of Laws*, 17-25.

By the statute any bank, trust, or insurance company, organized under the laws of this state, was authorized and invited to invest its capital and surplus in said bonds. By the sale of the bonds the state was enabled to discharge a great public duty in the erection and furnishing of charitable and penal institutions and public buildings of the state. Inducements in the way of making the bonds approved collateral as security for the deposit of any public funds, and for the investment of trust funds, were offered investors; and the good faith of the state was solemnly pledged to administer the trust created by the terms of the Enabling Act and the Constitution of Oklahoma, to apportion and dispose of all lands granted to the state for charitable and penal institutions and public buildings, as the Legislature might prescribe, and safely keep and preserve the proceeds of the rental and sale thereof, and apply the same to the payment of the bonds authorized by the statute, and the interest thereon, as the same fell due at maturity, and to use such funds constituting the public building funds for no other purpose or purposes.

[10, 11] As the capital and surplus of a national bank cannot be taxed by a state, but the shareholders, both resident and nonresident, may, no benefit could accrue either to the bank or its shareholders if deductions on account of the ownership of said bonds are not allowed the latter. This it is claimed by the Attorney General cannot be done, on the authority of *Van Allen v. Assessors*, sub nom. *Churchill v. Utica*, 3 Wall. 573, 18 L. Ed. 229; *New York v. Commissioners of Taxes*, 4 Wall. 244, 18 L. Ed. 345; *Tennessee v. Whitworth, Trustee*, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901.

But the question decided in the foregoing cases is not decisive of that at hand. We are concerned, not alone in the power of the state to tax the shareholder, or his right to exemptions on account of ownership by the bank of nontaxable government bonds, but

in a proper application of the local statute, making certain of the bonds of the state non-taxable for any purpose, and the rights of the shareholders in a national bank, arising out of a contract between the state and the officers and directors of the bank in the purchase of its bonds. It is not, as already seen, a question of power in the Legislature, but of the rights of the shareholders springing out of the purchase of the bonds under the circumstances appearing from the record, and of which we may take notice. It is said in *Gray on Limitation of the Taxing Power*, par. 997, that the cases where a state has made a direct contract for exemption or commutation of taxes, not contained in the corporate charter, are few compared to the number of those where corporate charters have contained the corporate contract. Among the former class is *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. Ed. 282, where it seems that the state of Missouri, which had previously chartered the Pacific Railroad Company, granted to it by legislative act certain lands owned by the state, and provided for the issuance of bonds for which the state had a lien on the road. The lands and the proceeds of the bonds were to be used in the construction of a new branch road, and the railroad was to pay the principal and interest of the bonds, and to secure subscriptions to them. The act also provided for an acceptance by the company of the grant, and contained an exemption from taxation until the road should be completed, in operation, and should declare a dividend. The company accepted the act. Both the state and the road defaulted in the interest on the bonds, and after a device in the nature of a legislative receivership had been tried, the state levied a "tax," and the proceeds of which it enacted should be devoted to the payment of the bonds and the interest, which were the common obligations of the state and the company. The stipulated event had not occurred, upon which the property of the company should become taxable. It was held that the circumstances constituted a contract between the state and the company, and the tax was void.

In *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352, the language of the act, which it was held constituted a contract between the railroad company and the state, in respect to its taxation, provided:

"Which tax (one-half of 1 per cent.) shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this state, or any law thereof."

And it was said, in denying the right of the state to levy a further tax:

"Is there here to be implied 'except such laws as may hereinafter be enacted?' Such a provision would be to nullify the whole contract. How could the tax be in lieu and satisfaction of all other taxation, if other taxes might be imposed next day? Or how can it be said to be in satisfaction of all taxes whatsoever under au-

thority of the state, if the state could immediately impose another and more burdensome tax?"

Full force was given by the court to the doctrine that when it is asserted that a state has bargained away her right of taxation in a given case, the contract must be clear and cannot be made out by dubious implications. And it was said that of the existence of a contract, there was no doubt. That its meaning and terms were clear enough, and, taken alone, constituted a contract which would be protected by the Constitution of the United States.

In *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760, it was held that a municipality of a state could not by its ordinances, under the guise of taxation, relieve itself from performing to the letter all that it expressly promised to its creditors. It was argued on behalf of the defendant that the state of South Carolina and the city council of Charleston possessed the power of taxation when the contracts were made; that by the contracts the city did not surrender this power; that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. It was said that the power of a state to impose taxes upon subjects within its jurisdiction was unlimited (with some few exceptions), and that it extended to everything that exists by its authority, or is introduced by its permission. Hence it was to be inferred that the contracts with the city of Charleston were made with reference to this power, and in subordination to it. All this, it was said by the court, may be admitted, but that it did not meet the case of the defendant. That the court did not question the existence of a state power to levy taxes, as claimed, nor the subordination of contract to it, so far as unrestrained by constitutional limitation. But the power was not without limits, and one of its limitations was found in the clause of the federal Constitution, that no state shall pass a law impairing the obligation of contracts. The opinion in part reads:

"A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a state Legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition."

Proceeding further, the court said:

"What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the state, and in subordination to it? Is it meant that when a person lends money to a state, or to a municipal division of the state having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid before payment? That cannot be, because if it could, the contract (in

the language of Alexander Hamilton) would involve two contradictory things: An obligation to do, and a right not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it."

A review of a number of cases where the contract for exemption of taxes is found in the corporate charters may properly be considered in this connection. The case at hand is not unlike, in some of its material aspects, that involved in *Gordon v. Appeal Tax Court*, 8 How. 133, 11 L. Ed. 529. The inquiry raised in that case, by the agreed statement of facts, was: Did the Act of Maryland of 1841, c. 23, so far as it imposed a tax upon shares of stock held by stockholders in the Union Bank of Maryland, and other banks mentioned in the statement, impair the obligation of a contract? The banks were classified in the statement as old and new banks. The old were those which were chartered previous to the year 1821; the new, those which were chartered after the year 1830. Their exemption from the tax imposed by the act of 1841 was claimed under the Acts of Maryland of 1821, c. 131, and that of March, 1835, c. 274, called the act of the session of 1834. In the opinion it is said:

"Has such an exemption been given to the old banks? The language of the eleventh section of the act of 1821 is: 'And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.' This is the language of grave deliberation, pledging the faith of the state for some purpose—some effectual purpose. Was that purpose the protection of the banks from what that Legislature and succeeding Legislatures could not do, if the banks accepted the act, or from what they might do, in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price for the prolongation of their franchise of banking. The power of the state to lay any further tax upon the franchise was exhausted. That is the contract between the state and the banks. * * * Having determined that the clause in question was not meant as a pledge against further taxation upon the franchises of the banks, but that it was a pledge against additional taxation, what is the extent of exemption given by it, or to what does it apply? Does it exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts that a tax upon the parts would have upon the whole. Besides, the Legislature, in proposing the terms and conditions of the act, use the word 'banks' with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charters. * * * True it is, when accepted and recognized, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character, or by whose assent it was to become a contract with the state, to ascertain the intention of the Legislature in making the pledge, 'that upon any of the aforesaid

banks accepting of and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'"

It was further said that the Legislatures of 1813 and 1821 were anxious to have a certain highway constructed, which they thought the convenience and intercourse of the citizens of Maryland required; and they were also anxious to raise an adequate school fund for every county in the state. They determined that both should be accomplished by incorporating certain banks, with the obligation upon them to make the roads, and to make all the banks in the state pay an annual tax upon their capital as a condition upon which their charters were to be extended. Referring to the Acts of 1813 and 1821, the court observed:

"In whatever way we examine the Acts of 1813 and 1821, we are of opinion that it appears from the eleventh sections in those acts, to have been the intention of the Legislatures which passed them, to exempt the stockholders from taxation as persons on account of the stock which they owned in the banks. This exemption, however, is limited to the old banks in Baltimore which were chartered before 1821, during the continuance of their charter under the act of 1821. It is founded upon the eleventh section of that act, and it is our opinion that the act of 1841, c. 23, in so far as it imposes a tax upon the stockholders in those banks, on account of their stock, does impair the obligations of a contract, and is void by the tenth section of the first article of the Constitution of the United States."

In *Piqua Branch of State Bank of Ohio v. Knoop*, 16 How. 369, 14 L. Ed. 977, quoting from the opinion of the court in *State of Ohio v. Commercial Bank of Cincinnati*, 10 Ohio, 535, Mr. Justice McLean said:

"* * * The Supreme Court of Ohio say, we take it to be well settled that the charter of a private corporation is in the nature of a contract between the state and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the Supreme Court of the United States, in the case of *Woodward v. Dartmouth College*. And the court remark, 'The General Assembly say to such persons as may take the stock, you may enjoy the privileges of banking, if you will consent to pay to the state of Ohio, for this privilege, 4 per cent. on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays, or is willing to pay, the consideration stipulated, to wit, the 4 per cent.' And the court say, 'Here is a contract, specific in its terms, and easy to be understood.' 'A contract between the state and individuals is as obligatory as any other contract. Until a state is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfillment by the opposite contracting party.' This opinion commends itself to the judgment, both on account of its sound constitutional views and its elevated morality. * * * That decision was calculated to give confidence to those who were desirous to make investments in banking operations, or otherwise, in the state of Ohio."

Again, in the course of the opinion, it is said:

"A state, in granting privileges to a bank, with a view of affording a sound currency, or of

advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent Legislature than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the Legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these is to take away state sovereignty."

In *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. Ed. 173, the rule was announced that state Legislatures, unless prohibited by state Constitutions, may contract by legislation to release from taxation a particular thing, corporation, or person.

In *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558, it was said that the charter of a bank which declares, "that the bank shall pay to the state an annual tax of one-half of 1 per cent. on each share of capital stock subscribed, which shall be in lieu of all other taxes," is a contract between the state and the bank, and any other tax than that therein specified is expressly forbidden. Many authorities are cited or reviewed in the opinion of the court, and the doctrine announced in *Gordon v. Appeal Tax Court* is reaffirmed. After referring to the power of the Legislature granting the charter, the opinion reads:

"There is no question before us as to the tax imposed on the shares by the charter. But the state has by her revenue law imposed another and an additional tax on these same shares. This is one of those 'other taxes' which it had stipulated to forego. The identity of the thing doubly taxed is not affected by the fact that in one case the tax is to be paid vicariously by the bank, and in the other by the owner of the share himself. The thing thus taxed is still the same, and the second tax is expressly forbidden by the contract of the parties. After the most careful consideration, we can come to no other conclusion. Such, we think, must have been the understanding and intent of the parties when the charter was granted and the bank organized. Any other view would ignore the covenant that the tax specified should be 'in lieu of all other taxes.' It would blot those terms from the context, and construe it as though they were not a part of it."

In *Tennessee v. Whitworth, Trustee*, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830, the charter exemption from taxation of the capital stock of the Nashville, Chattanooga & St. L. R. Co. was held to apply to its shares of stock in the hands of individual stockholders. In the course of the opinion it was announced that in construing statutes which were binding on states as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In that respect, it was said, there is no difference between a contract of a state and a contract of a natural person. That if the words employed are capable

of more than one meaning, that meaning is to be given them which, taking the whole statute together, it is apparent the parties intended they should have. In conclusion, it was said:

"The charter exempted the stock from taxation clearly because the property which represented the stock had been put in its place as a taxable thing. The exemption is of the thing called 'capital stock' divided into shares. As the whole is exempt, so must necessarily be its several parts or shares."

In *Powers v. Detroit, G. H. & M. R. Co.*, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. Ed. 860, it was held that a contract between a state and a railway company which prevented the subjection of the property of the company to any other than the tax prescribed in Michigan Laws 1855, p. 305, § 9, was created by the provisions of that section, that the company shall pay an annual tax of 1 per cent. of the capital stock of said company, paid in, which tax should be in lieu of all other taxes except for penalties imposed on said company, and should be estimated upon its last annual report, the statute being a special one having reference only to the company in question, which formally accepted the taxation provision, and made large expenditures and completed an unfinished railroad, to induce which was the motive of the enactment.

In *Penrose, Treasurer, v. Chaffraix*, 106 La. 250, 30 South. 718, it appears that when the Legislature of Louisiana in 1833 (Laws 1833, p. 172) exempted the capital of the Citizens' Bank of Louisiana from taxation, it meant, according to the opinion, to include in the exemption, that which represented the capital—the shares in the hands of those who had subscribed to the capital stock. And it was said that where there is an exempting clause in the charter, the question is one of the legislative intent as to the scope and extent of the exemption, rather than one of the legislative power. The act incorporating the bank, in consideration of certain benefits therein stipulated the state, declared the corporation exempt from taxation. The thirtieth section thereof provided:

"The said corporation shall, during its existence, be exempt in its capital and property, * * * from all taxes to the state, or to any parish or corporation created by the law of this state."

A subsequent act passed in 1836 (Laws 1836, p. 16) greatly enlarged the scope of the bank's purpose and the extent of its power. It pledged the faith of the state as security for a sum as large as \$12,000,000, and bonds of the state, predicated upon this pledged faith, to the extent of \$7,000,000 were issued, and by means thereof the capital needed for the enlarged purpose of the bank was secured. There was an exemption of the bank from taxation, superseding the previous exemption in these words:

"And the capital of said bank shall be exempt from any tax laid by the state, or by any parish or body politic under the authority of the state during the continuance of its charter."

Construing the exemption feature of the statute, it was observed:

"When the Legislature exempted the capital of the bank from taxation it meant to include in the exemption that which represented the capital, which was the tangible evidence of the capital—the shares in the hands of those who had subscribed to the fund which went to make up the capital. That was the usual meaning, the ordinary significance, of the terms employed. It was so taken and understood at the time and long subsequent thereto, as is shown by the fact that down to the present time neither the capital of the bank nor the shares of its capital stock have ever been amenable to taxation."

It was further said, discussing the subsequent effort to tax the shares:

"What, invite private subscriptions to a fund designed to form in part the capital of a bank which is to become an instrument of the state, formally exempt this capital from taxation and yet latently reserve the right, secretly entertain the intention, of some day taxing the certificates which show that A., B., C. D., and others had supplied the money which constituted the capital! To so hold would be to impugn the justice, fairness and good faith of the Legislature which enacted, and the executive who approved the act. It is a question of intention and we cannot hold that the lawmakers of that early period meant to ensnare the then subscribers to the capital stock by exempting the capital itself, yet reserving the right to succeeding generations to tax the shares representing that capital in the hands of the heirs and assigns of those who subscribed."

It was said that the subscribers dealt with the bank upon the public faith of the state, as declared in its statutes; that the exemption was granted for a consideration, and formed a contract between the state and the corporation. Citing *Gordon v. Appeal Tax Court*, supra, it was said that the contract with the bank was a contract with the stockholders of the bank. Further, in this respect, the opinion reads:

"It can hardly be doubted that if the original subscribers to the capital stock had been informed the offer of the state to exempt the capital was not intended to exempt the shares in their hands, the consequence would have been they would not, in many instances, have subscribed to the stock. There would have been no sufficient inducement for them to do so, on that score. Whether the tax came out of their pockets directly, or whether it came out of the bank, to be deducted from their dividends, or to affect the value of their shares, there was not to them the shadow of a difference."

In conclusion, it was noted that when the state contracts, it places itself on an equality with other contracting parties, and thus becomes liable to the application of the rule of *contra proferentem*.

In *Richardson v. City of St. Albans*, 72 Vt. 1, 47 Atl. 100, it was held that under the Vermont Statutes, § 365, providing that certain manufacturing establishments, and all capital and personal property used in their business, may be exempt from taxation for a term of years, if the town so votes; and section 411 of the statutes, declaring that in determining the list of a taxpayer, the amount of his stocks and bonds which were exempt from taxation should be deducted from the appraised value of his personal es-

tate—where the stock of a manufacturing corporation had been exempted from taxation by vote of the city in which it was located, its shares of stock in the hands of the shareholders were exempt.

In *State v. Baltimore & O. R. Co.*, 48 Md. 49, 73, 74, the Baltimore & Ohio Railroad Company, incorporated in 1826 (being the first railroad ever chartered in this country for the transportation of freight and passengers), proposed to construct a railroad from Baltimore to the Ohio river, a distance of 379 miles, involving in its construction an expenditure of an enormous sum of money, and was therefore justly considered not only as a gigantic, but in a pecuniary sense a hazardous, enterprise. Under these circumstances the Legislature was willing to confer on it every privilege and immunity which could be reasonably required, and which would tend to the completion of the road. In the charter it was provided:

"And the shares of the capital stock of the said company * * * shall be exempt from the imposition of any tax or burthen."

It was said by the court, in construing the exemption provision:

"As used in this connection, we understand the Legislature to mean that the shares of stock, representing the property and profits of the company, shall be exempt from the imposition of any tax or burthen. The Legislature, beyond all question, intended to confer a substantial benefit on the company, and thereby to induce capitalists and others to invest their means in the construction of a road, which every one deemed of so much importance to the state. And to say they meant to exempt the shares only, and to reserve the right to tax the property and franchises, is a construction that would render the privilege thus granted of no practical benefit to the appellee."

And it was held that the exemption from taxation, granted in the charter of the company, was a contract between the state and the corporators, within the protection of the Constitution of the United States, and therefore beyond the power of a subsequent Legislature to repeal or in any manner impair.

In *Commonwealth v. Richmond & P. R. Co.*, 81 Va. 355, the charter of the Richmond and Petersburg Railroad Company provided that:

"All machines, wagons, vehicles and carriages purchased with the funds of the company, and all other works constructed under the authority of this act," of the Legislature, "and all profits which shall accrue from the same, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever."

And it was held that all the property and profits of the company, and also all the shares of the respective shareholders, were exempt from taxation, whether state, county, or municipal.

Where the tax is in fact laid upon the franchise of a corporation, although measured by the amount of its capital stock, the manner in which the capital is invested is not material. But if the tax is really upon the property or assets of the corporation, as rep-

resented by its capital, allowance must be made for such portion of the capital as is invested in nontaxable property. *New York v. New York Tax Com'rs*, 2 Wall. 200, 17 L. Ed. 793; *German-American Sav. Bank v. Burlington*, 54 Iowa, 609, 7 N. W. 105; *State ex rel. Davis v. Rogers*, 79 Mo. 283; *Whitney v. Madison*, 23 Ind. 331; *Newark City Bank v. Assessor*, 30 N. J. Law, 18, 28; *City of New Orleans v. New Orleans Canal & Banking Co.*, 29 La. Ann. 851; 27 Cyc. 820.

In the present case, of the invested capital of the bank, including surplus fund and undivided profits, \$180,000 was invested in nontaxable state bonds. This money, the proceeds arising from the sale of said bonds, had been paid into the state treasury to the credit of the state building fund. Had the purchase been made by a private individual, it is obvious that the tax would not lie. In such case the state would in effect be levying a tax upon the bonds. The purchaser having parted with his money, could not be taxed thereon; not until the redemption of the bonds by the state and the money paid on account thereof was again in his hands. There being a contract between the state and the officers of the bank, acting both on account of the bank and in behalf of the shareholders, and the statute making the bonds nontaxable for any purpose, effect cannot be given the promised immunity, and upon which the bank acted, unless by allowing shareholders the right to deduct from the value of their shares that proportion of the value invested in nontaxable state bonds. Not to do so would be to fail to give to the statute making the bonds nontaxable all practical value and effect, and make the exemption from taxation of the bonds held by national banks as investments of capital wholly unreal and illusory. Pledging the faith of the state, we have seen, is an act evidencing "grave deliberation," intended to accomplish some "effectual purpose." An end not intended, but on the other hand forbidden, would result if the shares are taxed without a proportionate reduction in value on account of the bank's investment in the bonds. That the bonds are not taxed *eo nomine* cannot affect the rule. The consequence would be the same in either case.

It is as essential that the public faith should be preserved as that individual grants and contracts should be maintained and enforced. A state must always preserve unsullied its good faith whenever it has been pledged and its officers should never, by any nice refinement, open a way by which it may be violated. Those of our citizens who at the state's invitation purchased the state building bonds, and thereby enabled the state, at a time when, according to the evidence, there was little or no market for its obligations at par, to discharge its public functions by furnishing shelter and comfort to its unfortunates, and prisons for its criminals, and

other necessary public buildings, should not, and will not, be required to pay, even though in the form of taxation, that from which by solemn compact, lawfully entered into, they are exempt. To do so would be to impair the obligations of their contract with the state, and upon the inviolability of which the purchasers of the bonds had full right to rely. *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760. Legislative contracts are to be read in the light of the public policy entered into and the purposes sought to be accomplished at the time they were made, rather than at a later period, when different ideas and theories may prevail. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793. The wisdom of the Legislature in exempting the bonds from taxation involves a question of legislative policy, over which the courts have no right of review. In that respect its judgment is conclusive and binding upon all branches of the state government.

Aside from what we have said was the legislative purpose in respect to the taxation of said bonds, a well-founded doubt may exist as to the right of the state to tax the shareholders of a national banking association, owning state building bonds, without, according to such shareholders, the right ratably to deduct from the valuation thereof the amount of the capital and surplus invested in such bonds, in view of section 5219, Rev. Stat., requiring that the taxation of such shares "shall not be at a greater rate than is assessed upon other moneyed capital, in the hands of individual citizens of such state." A somewhat similar question was involved in *New York ex rel. Williams v. Weaver et al.*, 100 U. S. 539, 25 L. Ed. 705, where it was held that the prohibition against the taxation of national bank shares at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens could not be evaded by the assessment of equal rates of taxation upon unequal valuations; and that consequently where the state statute authorized individuals to deduct the amount of debts owing by them from the assessed value of their personal property, and moneyed capital subject to taxation, the owners of shares of national banks were entitled to the same deduction. The cases of *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052, *Evansville Bank v. Briton*, 105 U. S. 322, 26 L. Ed. 1053, *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903, *American National Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895, are applications of the same principle. See, also, *McHenry et al. v. Downer*, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 787.

It would seem that the rule announced in the foregoing cases must hold true in the case at bar, else a condition would exist whereby the taxability of the bonds would

be made to depend upon the personality of their owners, or the statute under which the tax was sought to be collected. That is to say, that bonds belonging to individuals and to corporations, taxable upon the net value of their moneyed capital and undivided profits, would not be taxable, while those belonging to national, if not state, banks would in legal effect be taxable. We do not consider it necessary, however, to a decision of the case to decide this point, preferring to rest our conclusion upon the ground that the bonds being nontaxable for any purpose, the right of the shareholders to a proper credit on account thereof is sufficiently made to appear.

We have seen that the statute permitting the exemption of state bonds from taxation violates no provision of our Constitution. That it was not the purpose of the Legislature to tax the state building bonds issued under authority of the act of March 15, 1911, as evidenced both by the act itself and the subsequent act of March 11, 1915, is obvious. It was so recognized by the Governor, Attorney General, and state treasurer, in office when the bonds were issued and sold. Until 1915 the law was so understood and administered by the state taxing authorities. Fully informed of the foregoing, and relying thereon, the First National Bank of Chickasha purchased the bonds subsequently indirectly sought to be taxed.

From what we have said it follows the action of the state board of equalization, of August 4, 1915, and the subsequent action of the county board of equalization of Grady county, was violative of the rights of the bank and its shareholders, which had theretofore attached under its contract with the state; and that the judgment of the district court of Grady county, on appeal from the action of the county board of equalization, should be and is in all things affirmed. All the Justices concur, except KANE, C. J., absent, and not participating.

SIMPSON v. MAULDIN. (No. 7283.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 237(3)—PRESENTING QUESTION IN TRIAL COURT—SUFFICIENCY OF EVIDENCE.

In the absence of demurrer to the evidence or motion for directed verdict, the insufficiency of the evidence to sustain the verdict is not presented to this court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 237(3).]

2. APPEAL AND ERROR \S 274(4)—PRESENTING QUESTION IN TRIAL COURT—SUFFICIENCY OF EVIDENCE.

An exception taken to the instructions given by the court does not challenge the sufficiency

of the evidence, but only the correctness of the law laid down in such instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1591, 1592, 1642; Dec. Dig. \S 274(4); Trial, Cent. Dig. \S 691-693.]

3. REPLEVIN \S 91 — TRIAL \S 260(1) — INSTRUCTIONS — REQUESTS — INSTRUCTIONS ALREADY GIVEN.

Instructions examined, and held to be properly given, and the instructions requested properly refused.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 354-359; Dec. Dig. \S 91; Trial, Cent. Dig. \S 651; Dec. Dig. \S 260(1).]

Commissioners' Opinion, Division No. 1. Error from County Court, Hughes County; J. Ross Bailey, Judge.

Action by B. J. Simpson against Denton Mauldin. Judgment for defendant, and plaintiff brings error. Affirmed.

Arnote & Anderson, of McAlester, for plaintiff in error. W. T. Anglin, of Holdenville, for defendant in error.

RUMMONS, C. This is an action in replevin for the possession of one black sow with white feet and nose, about three years old, branded "7" on left shoulder, marked underbit and split in each ear, alleged to be of the value of \$25. The cause was tried on appeal from the court of a justice of the peace, in the county court of Hughes county, resulting in a verdict for the defendant in error. The plaintiff in error, having unsuccessfully filed a motion for a new trial, prosecutes this proceeding in error, to reverse the judgment of the court below. The parties will be hereinafter designated as they appeared in the court below.

[1] The first assignment of error argued in the brief of plaintiff is that the verdict and judgment are not sustained by the evidence and are contrary to law. The plaintiff neither demurred to the evidence of defendant nor moved the court to direct a verdict in his favor. Upon the authority of *Muskegee Electric Traction Co. v. Reed*, 35 Okl. 334, 130 Pac. 157, and *Reed v. Scott*, 151 Pac. 484, in the absence of demurrer to the evidence, or motion for directed verdict, this assignment presents nothing to this court for review.

[2] It is, however, contended by plaintiff that, inasmuch as he excepted to two of the instructions given by the court, submitting the issues to the jury, such exceptions were sufficient to challenge the attention of the trial court to the insufficiency of the evidence of the defendants. This position is not well taken, for the reason that exception to the giving of an instruction only challenges the attention of the trial court to the correctness of the law laid down in such instruction. We therefore conclude that this assignment of error was not well taken.

[3] Plaintiff's third, fourth, and fifth assignments of error, which are the second, third, and fourth assignments argued in the

brief, complain of the giving of two instructions by the court, and of the refusal to give instructions requested by plaintiff. These assignments may be considered together. The instructions, of the giving and refusal of which is complained, are as follows:

No. 2. "Gentlemen of the jury, as to the law in this case you are instructed that the plaintiff must recover on the strength of his own title, and that in case you find he was the owner of one black sow with white feet and nose, branded '7' on left shoulder, and about three years old, marked underbit and split in each ear and crop off each ear, then you will find for the plaintiff in the sum \$25, or such other amount as you may find that said sow was worth less than \$25.

"If, on the contrary, you believe that Denton Mauldin, in pursuance of instructions from one T. W. Bell, found the sow with white feet and nose, branded '7' on left shoulder and about three years old, marked underbit and split in each ear and crop off each ear, and that said sow was the property of Mr. Bell, then you will find for the defendant."

No. 3. "You are further instructed, gentlemen of the jury, that one black sow with white feet and nose, branded '7' on the left shoulder, about three years old, marked underbit and split in each ear and crop off each ear, may have been the property of either Mr. Simpson or Mr. Bell. However, if you find that Mr. Simpson purchased the sow herein from one Mr. Smith and placed his brand on the left shoulder, then you will find for the plaintiff. However, if you find that the brand '7' was placed on the left shoulder when said animal was in truth and in fact the property of Mr. Bell, then you will find for the defendant.

"That the matter in controversy in this suit is the ownership of this sow in controversy, and that it is for the jury to determine from all the facts and circumstances in the evidence who is the owner of the sow, and if they find from a fair preponderance of the evidence that the sow is the property of Mr. Simpson, their verdict should be for him. If they do not find he is the owner of the sow, then their verdict should be for the defendant."

"(By the court refused on the ground that it is covered by instructions. Plaintiff excepts. Exceptions allowed. J. Ross Bailey, County Judge.)"

The first two instructions given by the court are, perhaps, not very aptly drawn, but they state correctly the issues to be determined by the jury, and more favorably to the plaintiff than he was entitled, since in this action plaintiff's right to recovery rested on the ownership of the animal in question, and unless plaintiff was the owner thereof, he was not entitled to recover, regardless of whether the defendant Bell owned the animal in question or not. The only complaint of these instructions made by plaintiff is that they confine the jury too strictly to the description of the sow, contained in the bill of particulars and affidavit in replevin of plaintiff. It seems from the evidence that, while the sow in controversy is alleged to be three years old, she had escaped the vicissitudes of porcine life for even a longer period, and up to the time of the starting of this suit arrived at the age of five years. We think, however, that no prejudice resulted to the plaintiff from these

instructions, since both parties at the trial rested the contest upon their ownership of the animal in question, who seems from the record to have been submitted to the examination of the jury, and no question was made or was raised by the defendant as to her age. We therefore conclude that the court committed no prejudicial error in giving the two instructions complained of. The last instruction above quoted, requested by the plaintiff, merely stated the issues theretofore presented to the jury by instructions of the court in another form; and it is well settled that where the court has by its own instructions fully covered the ground covered by instruction requested, it is not error to refuse such instruction.

We find no reversible error in this record, and the judgment of the court should therefore be affirmed.

PER CURIAM. Adopted in whole.

EARLEY et al. v. JOHNSON. (No. 7211.)
(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1001(3)—REVIEW—QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

Where a verdict cannot be justified upon any hypothesis presented by the evidence, it will not be allowed to stand. The jury are not permitted to disregard the law and the evidence and decide a case merely upon their own whim or according to what their notion of equity between the parties may be.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3934; Dec. Dig. \S 1001(3).]

2. APPEAL AND ERROR \S 1001(3)—REVIEW—QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

It is only where the verdict cannot be justified upon any hypothesis presented by the evidence that it should be set aside on the ground that it is a compromise verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3934; Dec. Dig. \S 1001(3).]

3. SALES \S 359(1)—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held to support the verdict.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1056, 1057; Dec. Dig. \S 359(1).]

Error to County Court, Grady County; N. M. Williams, Judge.

Action by H. B. Johnson against Oscar Earley and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Riddle & Hammerly, of Chickasha, for plaintiffs in error. Bond, Melton & Melton, of Chickasha, for defendant in error.

HARDY, J. Johnson sued Earley and Brown to recover the purchase price of four head of cattle, amounting to \$180, or \$45 per head. The jury awarded plaintiff a verdict for \$90, and defendants appeal.

All the assignments of error may be considered under the one proposition that there is no evidence to support a recovery on behalf of plaintiff for the value of two head of cattle, and that the verdict is the result of a compromise by the jury, to the prejudice of the defendants. Defendants claim that under the evidence the verdict should have been either for the full amount, the value of four head, or for defendants, and that there was no evidence upon which the verdict could be based.

[1] Where a verdict cannot be justified upon any hypothesis presented by the evidence, it would be unjust to permit it to stand. The jury are not permitted to disregard the law and the evidence and arbitrate the matters submitted to them according to their own theories of what may be right between the parties, which is in reality deciding it merely according to their own whim, and in disregard of the evidence given at the trial. 2 Thompson on Trials, § 2606; Thompson v. Burtis et al., 65 Kan. 674, 70 Pac. 603; Whitney v. Milwaukee, 65 Wis. 409, 27 N. W. 39; Gartner v. Saxon, 19 R. I. 461, 36 Atl. 1132; Schrader v. Hoover, 87 Iowa, 654, 54 N. W. 463.

[2] However, it is only where the verdict of the jury cannot be justified upon any hypothesis presented by the evidence that it should be set aside on the ground that it is a compromise verdict. Woolsey v. Ziegler, 32 Okl. 715, 123 Pac. 164.

[3] Plaintiff's bill of particulars alleged that plaintiff had sold defendants 234 head of cattle at an agreed price of \$45 per head, with the understanding that, in case plaintiff owned and delivered more than that amount, defendants would pay \$45 per head for each additional head. Plaintiff's evidence showed that about April 1, 1914, he delivered to defendants 212 head, 210 of which were gathered and delivered at a certain pasture where they were counted by both parties; all agreeing that the count of 210 was correct. Two other head were at a farmhouse in the neighborhood, and were accepted by defendants.

El Anderson, a witness on behalf of plaintiff, testified: That he was acquainted with the ranch where the cattle were located and with the cattle in question. That he assisted in gathering them when they were delivered, and that said cattle were driven through a hog lot and tallied into a grass pasture separate from the pasture in which they were gathered; the two pastures being separated by a wire fence which was in good repair. Some time after the delivery, witness rode through the pasture where the cattle had been gathered and found four head of cattle therein, which he drove into a hog lot adjacent to the pasture and reported the fact to plaintiff. That in his best judgment these

four cattle had not been gathered or delivered to defendant.

J. E. Brown, one of the defendants, testified that he and the plaintiff counted the cattle at the time they were delivered, and both counted 210 head; that when advised that Anderson had gathered 4 additional head he immediately went to the ranch and saw them. He identified one of the four as having been counted and delivered the day before.

Defendant Earley testified that he saw the four cattle that Anderson gathered, and he knows that one of these cattle had been counted the day before. The one claimed by Brown and Earley to have been counted at the time of the first delivery was a roan heifer.

Charles Hobbs, a witness for defendants, testified that he was present at the time the cattle were counted and delivered, and that he afterwards saw the four head for which plaintiff seeks a recovery, and that among the four was a yellow yearling which had been gathered the day before.

The issue was whether the four head for which plaintiff sued were included in the 210 head at the time they were counted and delivered, or whether they were subsequently rounded up, and the evidence of plaintiff tended to show that none of the four head were in the first lot, and, had the jury taken plaintiff's theory and believed the evidence offered in his behalf, they would have been justified in returning a verdict for the full amount claimed. On the other hand, the evidence of defendants was to the effect that, of the four, a roan heifer and a yellow yearling had been previously gathered and delivered. The jury had a right to believe this evidence, and, so believing, it was their duty to return a verdict in favor of plaintiff for two head only.

The sole question in this case being whether there was sufficient testimony to sustain the verdict, it appears from the foregoing that there was, and, this being true, the judgment rendered on the verdict is correct, and the case should be, and is, hereby affirmed. All the Justices concur, except KANE, C. J., absent.

MAINE et al. v. EDMONDS. (No. 5248.)
(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. NAMES ↔3—MIDDLE NAME.

The law does not generally recognize a middle name, but looks rather to the identity of the individual, and when this identity is established, this is all that the law requires.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 2; Dec. Dig. ↔3.]

2. NAMES ↔6—INITIALS.

The omission of or a mistake in the use of an initial does not affect the jurisdiction of the

court, where the right party is actually served with process and has appeared in court.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 5; Dec. Dig. ¶6.]

3. NAMES ¶16(1, 2)—IDEM SONANS.

By the doctrine of idem sonans, two names, though spelled differently, if they sound alike are regarded as the same. Even slight difference in their pronunciation is unimportant. If the attentive ear finds difficulty in distinguishing the two names when they are pronounced, they are within the rule.

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 12, 13; Dec. Dig. ¶16(1, 2).]

4. LIMITATION OF ACTIONS ¶2(4) — LIMITATIONS APPLICABLE—WHAT LAW GOVERNS.

An action brought in the courts of this state, upon a judgment rendered in a United States commissioner's court in the Indian territory, is governed as to the time in which an action thereon will be barred by the laws in force at the time the judgment was rendered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 8; Dec. Dig. ¶2(4).]

Error from County Court, Hughes County; J. Ross Bailey, Judge.

Action by M. F. Maine and another, doing business as the Equitable Manufacturing Company, against C. R. Edmonds. Judgment for defendant, and plaintiffs bring error. Reversed and remanded, with directions.

Milton Brown, of Oklahoma City, and L. S. Fawcett, of Holdenville, for plaintiffs in error. Crump & Skinner, of Holdenville, for defendant in error.

HARDY, J. Plaintiffs in error as plaintiffs commenced an action in a justice court of Hughes county, against the defendant in error, to recover upon a judgment rendered against him in favor of plaintiffs in the United States commissioner's court at South McAlester, Ind. T. The parties occupy the same position here which they occupied in the trial court, and will be referred to accordingly. The defendant demurred to plaintiffs' bill of particulars, which demurrer was overruled, and the defendant declined to plead further, whereupon judgment was rendered against him and he appealed to the county court. He again insisted upon his demurrer in the county court, and same was sustained. Plaintiffs declined to plead further, whereupon judgment was rendered, dismissing the action at their cost, from which they prosecute error.

The only question presented is whether plaintiffs' bill of particulars states a cause of action. They alleged the beginning of the original action in the United States commissioner's court at South McAlester, Ind. T., the issuance and service of summons upon defendant, and the rendition of the judgment on November 12, 1903. A certified copy of the transcript of said judgment is attached to the bill of particulars. Plaintiffs also alleged a state of facts showing jurisdiction of the commissioner's court to render said judgment, and then plead section 4487, Mans-

field's Digest of the Laws of Arkansas (Ind. T. Ann. Stat. § 2954), limiting the time in which actions may be brought upon judgments. They then allege that said section was in force at the time this suit was begun, and that it governed as to the limitation of time in which a suit might be brought on said judgment. They further allege the amount due thereon, and that same was unpaid. No execution was issued upon said judgment, neither was there a transcript of the same filed in the United States Court for the Indian Territory at South McAlester, or elsewhere in said Indian Territory.

[1, 2] The present action is against C. R. Edmonds. The transcript of the proceedings in the commissioner's court shows the proceedings there to have been against C. E. Edmonds, and one of the principal questions raised by the demurrer to the bill of particulars was the identity of the defendant in the case at bar with that of the defendant in the judgment rendered in the United States commissioner's court; it being claimed that there is no such similarity of names as would warrant the rendition of judgment herein against the defendant. If we concede that this question can be raised by demurrer, the court would not be justified in sustaining it on that ground. The bill of particulars alleged that plaintiff commenced an action in the United States commissioner's court against defendant, and that summons was served upon him and judgment rendered against him therein. These allegations were admitted by the demurrer. One of the objections was based upon the fact that the middle letter or initial of defendant's name, as contained in the transcript of the judgment, was different from that by which he was sued in the present proceeding, and it is claimed that this error in the middle letter or initial of defendant's name was fatal to a recovery herein. It is generally held that the law does not recognize a middle name, but looks to the identity of the individual, and when this identity is clearly established, that is all that the law requires, and an omission of or a mistake in an initial does not affect the jurisdiction of the court where the right party is actually served with process and appeared in court. 21 A. & E. Ency. Law (2d Ed.) 307; 29 Cyc. 265; D'Autremont et al. v. Anderson Iron Co. et al., 15 Ann. Cas. 114, note; 1 Am. Rul. Cases, 1; Franklin et al. v. Talmadge, 5 Johns. (N. Y.) 84, 1 Am. Rul. Cas. 36; Edmundson v. State, 17 Ala. 179, 52 Am. Dec. 169.

[3] Neither is there any merit in the contention that because the defendant's surname is spelled differently the demurrer should be sustained. The law does not regard the spelling of names so much as their sound. By the doctrine of idem sonans if two names, both spelled differently, sound alike, they are to be regarded as the same. No definite

rules exist for the spelling and pronunciation of the names of persons, and great latitude is allowed therein, and in all legal proceedings if two names as commonly pronounced in the English language, though spelled differently, sound alike, a variance in their spelling is immaterial. Even slight difference in their pronunciation is unimportant. If the attentive ear finds difficulty in distinguishing the two names when they are pronounced, they are *idem sonans*. 29 Cyc. 272; 21 A. & E. Ency. Law (2d Ed.) 313. In *Edmundson v. State*, supra, the plaintiff was indicted by the name of Edmindson and it was said that the difference in the sound of the two names, if any, was too refined to be ordinarily observed. Here there is no perceptible difference in the pronunciation of the names Edmonds and Edmunds, and, though spelled differently, when pronounced according to commonly accepted methods and rules, convey to the ear sounds identical with each other and are clearly within the rule stated.

[4] The other question urged upon the demurrer is that the cause of action upon said judgment was barred by the statute of limitations, and this contention is based upon the proposition that the statutes of limitation of the state of Oklahoma extended over and put in force throughout the state by the Schedule to the Constitution apply, and that by said statutes a judgment becomes dormant at the expiration of five years from its rendition, where no execution is issued thereon, and that an action to revive same should be brought within one year after it became dormant. Sections 5153 and 5300, Rev. Laws 1910. Section 1 of the Schedule to the Constitution (Wm. Ann. § 365), provides:

"No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place. * * *"

This section of the Schedule was considered in *Patterson v. Rousney*, 159 Pac. 636 (not yet officially reported). That was an action upon a promissory note executed and made payable in the Indian Territory, which had matured prior to the admission of the state, and had been subjected to the running of the statute of limitations, as contained in section 4485, Mansfield's Digest of the Laws of Arkansas. Action was commenced after statehood, and the question was whether the action was governed as to the time in which it should be commenced by the statutes of limitations of the state of Arkansas or by the laws of Oklahoma Territory extended over the state by the Schedule to the Constitution; and it was held that section 4485, Mansfield's Digest was applicable thereto. In the course of the opinion it was said:

"It appears that the purpose of adopting the provisions of the Schedule is, as expressed therein, to declare that existing rights, contracts, and claims shall continue as if no change in the form

of government had taken place; that is, they shall continue to exist and be capable of enforcement without being liable to be defeated by the plea of limitation for the same period of time they would have thus continued under the laws in force at the time the cause of action accrued."

Following the decision in that case, the statutes of limitations in force upon the date of the admission of the state into the Union would continue in force as to such judgment, and the time in which action might be brought thereon would be regulated thereby. Section 4487, Mansfield's Digest, which was specifically pleaded and relied upon, was in force at the time, and is as follows:

"Actions on all judgments and decrees shall be commenced within ten years after the cause of action shall accrue, and not afterward."

Under this section plaintiffs had ten years from the date of the rendition of said judgment in which to commence an action upon the same, and the fact that no execution was issued thereon within five years from the date of said judgment would not render it dormant. *Reaves v. Turner*, 20 Okl. 492, 94 Pac. 543. This action was commenced on January 9, 1912, which was less than ten years from the date of the judgment, and therefore was not barred.

It follows that the court erred in sustaining the demurrer to the bill of particulars, and its action thereon is reversed, and this case is remanded, with directions to reinstate same and for further proceedings in accordance herewith. All the Justices concur, except KANE, C. J., absent.

PURCELL MILL & ELEVATOR CO. v.
CANADIAN VALLEY CONST. CO.
et al. (No. 7151.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** ⇨106—**VALIDITY—LEGALITY OF CONSIDERATION.**

A note given to a construction company made and delivered in the Indian Territory, to aid in the construction of a line of railroad into a certain town, on condition that said road be completed and in operation into said place by a date specified in said note, is not illegal or against public policy.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225-232; Dec. Dig. ⇨106.]

2. **BILLS AND NOTES** ⇨92(1) — **VALIDITY — CONSIDERATION.**

Such note may be accepted and enforced by the construction company even though it be engaged in the construction of said road at the time the note was executed and delivered, and payment thereof cannot be defeated on the plea of want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 166; Dec. Dig. ⇨92(1).]

3. **PARTIES** ⇨59(2)—**CHANGE OF PARTIES—TRANSFER OF INTEREST.**

Where the interest of a party in the subject-matter of an action is transferred, it is not error for the court to permit the person to whom

such interest is transferred to be substituted for the original party to the action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 91, 92; Dec. Dig. § 59(2).]

4. BILLS AND NOTES § 443(3) — ACTIONS — RIGHT OF ACTION—INTEREST IN NOTE.

Where a bonus note to aid in the construction of a line of railroad was executed and delivered to a construction company, and said line of railroad was completed by the construction company according to the conditions of said note, and thereafter the construction company was placed in the hands of a receiver, who, upon order of the court in which such receivership proceedings were pending, assigned and delivered said note to the receiver of the railway company, and thereafter by order of the court the assets of the railway company, including said bonus note, were sold to one Q., who purchased on behalf of, and afterwards conveyed and delivered to, plaintiff railroad company, which sale was confirmed by the court ordering same, *held*, that plaintiff railroad company was entitled to maintain an action on said note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1390; Dec. Dig. § 443(3).]

5. APPEAL AND ERROR § 757(3) — BRIEFS — REQUISITES.

Assignments of error based upon the admission of testimony will not be considered, where the full substance of the testimony the admission of which is complained of, with the specific objections thereto, is not set out in the briefs of plaintiff in error in compliance with rule 25 of this court (137 Pac. xi).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757(3).]

Error from District Court, McClain County; R. McMillan, Judge.

Action by the Canadian Valley Construction Company against the Purcell Mill & Elevator Company. The Oklahoma Central Railroad Company was substituted as plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Hocker, of Los Angeles, Cal.; for plaintiff in error. J. B. Dudley, of Norman, for defendant in error.

HARDY, J. The Canadian Valley Construction Company, a corporation, which will be hereinafter referred to as the "construction company," commenced this action in the district court of McClain county, against the Purcell Mill & Elevator Company, a corporation, hereinafter referred to as the "defendant," to recover upon a certain bonus note executed and delivered to it by defendant on January 15, 1906, in words and figures as follows:

"182. Purcell, I. T., Jany. 15, 1906.

"In consideration of the Canadian Valley Construction Company building, or causing to be built from or near Lehigh, Indian Territory, into the city of Purcell, Indian Territory, a standard gauge railroad, I hereby promise to pay to said Canadian Valley Construction Company, or its assigns, as soon as said railroad is built into Purcell, the sum of two thousand and no/100 dollars.

"Unless said road is constructed and operated into Purcell, I. T., on or before June 1, 1907, this obligation of payment to be void.

"The Purcell Mill & Ele. Co.,
"By O. J. Wolaver, Mgr."

Thereafter the Oklahoma Central Railroad Company was substituted as plaintiff, and upon trial recovered judgment against defendant for the amount due upon said bonus note, and defendant prosecutes error.

[1] The note is said to be void because the giving thereof was against public policy. Having been executed and delivered in the Indian Territory, prior to statehood, its validity must be determined by the laws in force in that jurisdiction at the time of its execution. The note by its terms was made payable to the construction company in consideration of said company building, or causing to be built, from or near Lehigh, into the city of Purcell, a standard gauge railroad. The railroad was built by the construction company under a contract with the Oklahoma Central Railway Company, and was completed and in operation between Lehigh and Purcell by the time specified in said note. The construction company borrowed money, using the note as collateral, and used same in the construction of said railroad, and it is shown that no officer or stockholder of the company received any personal benefit therefrom, nor was the road deflected from the original survey; and the trial court found that said note was executed for a valuable consideration and without any fraud or misrepresentation upon the part of the original payee, and that the terms and conditions of said note were fully complied with.

In *Farrington v. Stuckey*, 7 Ind. T. 364, 104 S. W. 647, the Court of Appeals of the Indian Territory held valid a note of the character here involved, and in the syllabus of that case it is said:

"A contract of a railroad company to construct its railroad through a town in consideration of a bonus is not void as against public policy, so as to render the note given for the bonus unenforceable."

In the opinion by Mr. Justice Townsend, it was said:

"If this bonus was contributed to the William Kenefick Company, who were constructing this road, or the railroad company, in order to get a road constructed through the town of Henrietta, and the same was an open transaction, free from any corrupt purpose on the part of the stockholders, officers, or agents of said railroad company, and that in pursuance of said bonus so provided said road was constructed according to the terms of the contract, why should the same not be upheld and be a valid and binding contract upon appellant and other parties so contracting?"

This case was appealed to the Circuit Court of Appeals for the Eighth Circuit, and was there affirmed, in *Farrington v. Stuckey*, 165 Fed. 325, 91 C. C. A. 311, where it was said in the syllabus:

"A voluntary contract by individuals for the payment to a railroad company of a bonus to secure the construction of its line on a particular route is not illegal or against public policy, even though the line is thereby deflected from its most natural and cheapest route."

In the opinion it is said:

"If the construction company was a mere agency devised and employed by the railroad company for the construction of its line, and in soliciting and receiving the bonus the former was acting on behalf of the latter, we are clearly of the opinion that the transaction was valid."

The same question was involved in *Cobb v. William Kenefick Co.*, 23 Okl. 440, 100 Pac. 545. After citing the case of *Farrington v. Stuckey*, and quoting from the opinion both of the Court of Appeals of the Indian Territory and the Circuit Court of Appeals for the Eighth Circuit, this court said:

"In other words, as will be seen from the quotation just made, if the evidence in this case on the trial shows that the William Kenefick Company was a principal in the building of this railway, constructing it as is conceded with its own funds, and had the right within itself to place the location as in its judgment was wise, or if the bonus in fact went to the railroad company or to both, if all parties were fully apprised of it and the same was, as is said by Judge Townsend, 'an open transaction free from corrupt purpose on the part of the stockholders, officers, or agents of said railroad company,' then there is no reason why the contract made with it to secure the location of the road at Wagoner was not valid and enforceable."

The note in question, being free from fraud or misrepresentation in the procurement thereof and being given to aid in the construction of said railroad, was not void as against public policy.

[2] Neither can the objection that said contract is unilateral and unenforceable be sustained. A note of this character, given in aid of the construction of a line of railroad on condition that the road be built to a certain point or completed by a certain date, may be enforced when said railroad is completed according to the stipulations in said note, in the absence of fraud in the procurement thereof or circumstances that would make the same contrary to public policy. *Piper v. Choctaw N. T. & I. Co.*, 16 Okl. 436, 85 Pac. 965; *Guss v. Fed. Trust Co.*, 19 Okl. 138, 91 Pac. 1045; *Guthrie & Western R. R. Co. v. Rhodes*, 19 Okl. 21, 91 Pac. 1119, 21 L. R. A. (N. S.) 490; *Cooper v. Ft. S. & W. Ry. Co.*, 23 Okl. 139, 99 Pac. 785; *Southard v. A. V. & W. Ry. Co.*, 24 Okl. 408, 103 Pac. 750; *Cobb v. Wm. Kenefick Co.*, 23 Okl. 440, 100 Pac. 545; *Ward v. M. K. & O. Ry. Co.*, 157 Pac. 775.

Neither can it be maintained that the contract is wholly without consideration, in that the construction company was already under obligation to build said line of railroad to the city of Purcell. Admitting this to be true would not defeat plaintiff's right to recover. The purpose of executing said note was to aid in the construction of said railroad, and the fact that the company contemplated building its line into Purcell did not prevent it from accepting contributions from citizens along the proposed route to aid in the construction thereof. In addition, it was a condition of said note that the rail-

road be completed into Purcell and in operation by a certain time named therein, and this condition was complied with.

In *Piper v. Choctaw N. T. & I. Co.*, 16 Okl. 436, 85 Pac. 965, in an action upon a similar note, it was said:

"The first objection urged is that the trial court erred in overruling defendant's demurrer to plaintiff's amended petition, and this for the reason that it averred the railroad mentioned in the contract was in process of construction at the time the contract was executed, and therefrom infers a variance between the contract and the terms of the petition. We find nothing in the contract which determines whether the railroad was then in process of construction or was not. Neither are we able to say how the defendant could be prejudiced by the fact that the railroad, which he undertakes to aid in the construction of, was already in process of building."

And again in *Guss v. Federal Trust Co.*, 19 Okl. 138, 91 Pac. 1045, where a similar objection was made to the collection of a note of like character, the court said:

"It is also contended by appellant in his brief, as well as alleged in his pleading, that there was no consideration for the note in question, for the reason that the railroad company had concluded to build the line to Guthrie before the proposition was made by the company's officials that it would do so if the citizens of Guthrie would give notes of the value of \$50,000. Even if this were true, it would not defeat recovery, unless representations were made which deceived the appellant, and without which representations he would not have given the note in controversy. We have read appellant's evidence carefully, and are fully satisfied that he was not deceived. In fact, he does not claim that he was deceived."

The uncontroverted evidence shows that the railroad was in fact built by the construction company, and operated by it, and that before it was delivered to the railway company both the construction company and the railway company were placed in the hands of a receiver. There is no merit in the contention that plaintiff is not entitled to recover because the road was built by the railway company instead of the construction company.

[3,4] It is also urged that plaintiff Oklahoma Central Railroad Company is not entitled to prosecute this suit, for the reason it is incapable in law of taking title to and enforcing payment of a promissory note. The trial court found that plaintiff was the owner of the note in suit, and the evidence clearly supports this finding. The construction company was placed in the hands of a receiver, as was also the Oklahoma Central Railway Company, for which it was constructing the road, and by order of the United States District Court for the Eastern District of Oklahoma, in which court said receivership proceedings was pending, the receiver of the construction company was ordered to assign and deliver to the receiver of the railway company said note, which he did. Thereafter an order was made by said United States court directing a sale of all the assets of the Oklahoma Central Railway Company, and on July 31, 1914, pursuant to

said order, all the assets of the Oklahoma Central Railway Company, including said note, were sold to one Francis X. Quinn, which sale was confirmed by said court.

The purchase by Quinn was for and on behalf of the plaintiff Oklahoma Central Railroad Company, and the property so purchased was conveyed to plaintiff.

We are not cited to any statute or decision which would prevent the plaintiff acquiring said note and enforcing collection thereof under the circumstances disclosed by the evidence, nor do we know of any; and, in the absence of a controlling statute or a decision announcing such a rule of law, we are unable to see how defendant can urge this question or be prejudiced by allowing plaintiff to maintain the action. Under section 4695, Revised Laws 1910, where the interest of a party or parties in the subject-matter of a pending suit are transferred, it is proper for the court to permit the person to whom said interest is transferred to be substituted for the original party to the action, or the action may be continued in the name of the original party, and the court committed no error in permitting plaintiff to be substituted in lieu of the construction company. *Anderson v. Ferguson et al.*, 12 Okl. 307, 71 Pac. 225.

There are many assignments of error based upon the admission of evidence, but defendant's brief fails to comply with rule 25 of this court (137 Pac. xi), requiring the full substance of the testimony to be set out therein, with the specific objection thereto, and we will not consider these assignments. *Avants v. Bruner*, 39 Okl. 730, 136 Pac. 593; *New Vinita Hdw. Co. v. Porter*, 45 Okl. 470, 146 Pac. 14.

The judgment is affirmed. All the Justices concur, except SHARP, J., disqualified

MIDLAND SAVINGS & LOAN CO. v. SUMMERS et al. (No. 7150.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

BUILDING AND LOAN ASSOCIATIONS ¶46(9)—**LOANS—PREMIUMS—USURY.**

Cause remanded, with directions to the trial court to modify judgment in harmony with the rule approved in the case of *Midland Savings & Loan Co. v. Deaton et al.*, 157 Pac. 285.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. §§ 6, 69; Dec. Dig. ¶46(9).]

Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by the Midland Savings & Loan Company against Roxie H. Summers and another. Judgment for defendants, and plaintiff brings error. Remanded, with directions to modify.

Smith & Walker, of Sapulpa, and A. J. Bryant, of Denver, Colo., for plaintiff in error. J. R. Miller, of Sapulpa (T. R. Dean, of Sapulpa, of counsel), for defendants in error.

KANE, C. J. This was a suit to foreclose a real estate mortgage, commenced by the Midland Savings & Loan Company, a Colorado corporation, as plaintiff, against Roxie H. Summers and John B. Summers, who were residents of Oklahoma. Roxie H. Summers, it seems, was the owner by purchase of 60 shares of the capital stock of plaintiff, which is a foreign building and loan association, and she negotiated the loan from the company, to secure which she executed a mortgage upon certain real estate belonging to her, situated in Creek county, Okl.

The petition for foreclosure was in the usual form. The answer contained a general denial, pleaded payment, and by way of cross-petition further alleged, in substance, that at the time of said action complained of in plaintiff's petition said plaintiff knowingly reserved, charged, and received of and from these answering defendants a greater rate of interest than 10 per cent. per annum; that these answering defendants have paid to said plaintiff such usurious and unlawful interest in the sum of \$300, whereby the said plaintiff has become indebted to said defendants in a sum equal to twice the amount of such usurious and unlawful interest, etc.

Upon trial to a jury the plaintiff introduced evidence to the effect that it collected interest at the rate of 10 per cent. per annum and a premium of 2 per cent. per annum upon the loan made to the defendants in accordance with the terms of its contract; that its contract with the defendants was made with reference to the building and loan laws of the territory of Oklahoma for the year 1905, which, it contends, were extended over and put in force in the state by the Schedule to the Constitution. The witness also produced and introduced a correct and tabulated statement of all payments made upon the loan. The witness also identified the application for stock, the shares of stock, the application for the loan, and the bond and mortgage sued on, and testified that the balance due and unpaid at the time the suit was commenced, after allowing all credits, including the withdrawal value of the shares of stock, was the sum of \$693.75, and to this should be added the sum of \$150 attorney's fees, as stipulated for in the bond and mortgage, making a total amount of \$843.75. The witness also testified that \$14.76, which was paid as fines, was paid pursuant to the building and loan statutes of Oklahoma, which allow 6 per cent. dividends on stock payments, less 2 per cent. of the par value, and that the fines were charged within this statute. It was also shown that the company did not comply with section 1490, Comp. Laws 1909 (section

1297, Rev. Laws 1910), which requires bids for the preference in obtaining loans in domestic building and loan associations.

The foregoing is a sufficient epitome of the record for the purposes of this opinion. Upon the close of the evidence the trial court instructed the jury that:

"The plaintiff in this case admits that the rate of 12 per cent. was charged, and therefore, under the laws of this state, you are instructed that said rate was usurious and illegal; and, it being admitted further that more than the original loan has been paid, your verdict therefore must be for the defendants. The only question for you to consider is the amount, if any, which the defendants are entitled to recover of the plaintiff. In reaching your verdict on this point you will return a verdict for the defendants in double such sum as you may believe from all the evidence the defendants have paid to the plaintiff over and above such amount as the plaintiff may have advanced to the defendants, less such sum, if any, as the defendants may have paid to the plaintiff for the examination of the defendants' title to the lots in controversy. But in no event will your verdict be for more than double \$300, the amount prayed for by defendants."

Thereafter the jury returned their verdict into court, as follows:

"We, the jury impealed and sworn in the above-entitled cause, do, upon our oaths, find for the defendants and fix the amount of recovery at \$462.80."

Thereafter the court overruled the motion for new trial filed by the plaintiff, and entered judgment upon the verdict, to reverse which this proceeding in error was commenced.

Subsequent to the trial of this cause in the court below the opinion in Midland Savings & Loan Co. v. Alonzo J. Deaton et al., 157 Pac. 285, not yet officially reported, involving similar contracts of the same company, has been handed down, and both parties agree that it is controlling here. In the principal case it was held that:

"Where a foreign building and loan association lends money without requiring bids for the preference in obtaining the loan, as provided in section 1490, Comp. Laws 1909 (section 1297, R. L. 1910), it has no right to charge premiums; and premiums, dues upon stock, and fines paid under a loan agreement so made will be applied to the satisfaction of the loan."

It was also held that such a contract was not usurious, and, being only repugnant to our Constitution and laws as to the premium charged, and as to the application of the premiums made upon the stock, the plaintiff was entitled to the interest provided for in the contract. It is obvious that the instruction given herein by the trial court is in conflict with the holding in the principal case, and therefore it will be necessary to modify the judgment rendered. In the case at bar, as in the principal case, there is absolutely no evidence tending to show that the contract was entered into corruptly with the intent of receiving a greater rate of interest than that provided by law. In the principal case it was held that:

"Where a loan made by a building and loan association is held not to be usurious, but loses the protection of a building and loan contract because of failure to comply with the law governing the letting of loans as to premiums, and therefore becomes a simple loan, the association is entitled to interest at the contract rate, the same being within the legal contract rate of interest."

Upon the authority of Midland Savings & Loan Co. v. Deaton et al., supra, this cause is remanded to the trial court, with directions to modify its judgment, in accordance with the views herein expressed. All the Justices concur.

STATE ex rel. WEST, Atty. Gen., v. CITY OF SAPULPA et al. (No. 7679.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 921(1) — BONDS—SALE—OFFER AND ACCEPTANCE.

A proposition to buy a series of municipal bonds aggregating \$260,000, for \$260,000, not including coupons for accrued interest, which proposition is construed by the city as an offer to purchase said bonds at par and accepted as such, constitutes a complete contract leaving nothing open for future negotiations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1932, 1935; Dec. Dig. \S 921(1).]

2. CONTRACTS \S 237(1) — VALIDITY—CONSIDERATION—SUPPLEMENTAL AGREEMENT.

Where an original contract does not contemplate the making of a subsequent supplemental agreement, the original consideration will not support such subsequent agreement, and a subsequent supplemental agreement not forming a part of the original contract or supported by the original consideration thereof, or a new consideration, is void as between the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1119; Dec. Dig. \S 237(1).]

3. CONTRACTS \S 155 — CONSTRUCTION — UNCERTAINTY.

By section 964, Revised Laws of 1910, it is provided that in contracts between a public officer or body as such and a private party, where uncertainty exists, it is presumed that such uncertainty was caused by, and the language of the contract should be most strongly interpreted against, the private party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 736; Dec. Dig. \S 155.]

4. MUNICIPAL CORPORATIONS \S 921(1) — BONDS—SALES—RIGHTS OF PARTIES.

Persons dealing with a municipality do so with notice of its powers and the authority of its officers, and where a person purchases certain bonds from a city, not including coupons for accrued interest thereto attached, and said coupons are wrongfully delivered with the bonds purchased, such delivery does not convey any interest or right therein, and the city is not estopped thereby to deny liability thereon as against the purchaser or other person with notice.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1932, 1935; Dec. Dig. \S 921(1).]

5. MUNICIPAL CORPORATIONS \S 941—BONDS—SALES—RIGHTS OF PARTIES.

Where coupons for accrued interest upon certain municipal bonds were wrongfully de-

livered to the purchaser of said bonds, who paid no consideration therefor, the fact that a tax was levied for the payment thereof does not estop the city to deny liability thereon or contest the validity thereof in the hands of a holder with notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1961-1966; Dec. Dig. ¶ 941.]

6. MUNICIPAL CORPORATIONS ¶ 941—BONDS—SALE—BONA FIDE PURCHASERS.

Where at the time a bank acquired certain coupons for interest upon municipal bonds same were detached and were past due, the bank took such coupons subject to any defense against them that existed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1961-1966; Dec. Dig. ¶ 941.]

7. BANKS AND BANKING ¶ 77(2)—ASSUMPTION OF POSSESSION BY BANK COMMISSIONER—EFFECT.

Where the bank commissioner assumes possession of a state bank, he does not take the assets thereof for value and without notice, but subject to all claims and defenses that might have been interposed against the bank had it continued under its corporate management.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 169, 170; Dec. Dig. ¶ 77(2).]

Error from District Court, Creek County; Tom D. McKeown, Judge.

Petition by the State, on relation of Chas. West, Attorney General, for mandamus to the City of Sapulpa and another. Judgment for defendants, and relator brings error. Affirmed.

S. P. Freeling, Atty. Gen., and McDougal, Lytle & Allen and Pryor & Rockwood, all of Sapulpa, for plaintiff in error. R. B. Thompson, of Sapulpa, and Asp, Snyder, Owen & Lybrand, of Oklahoma City, for defendants in error.

HARDY, J. The state, upon the relation of the Attorney General, filed suit in the district court of Creek county seeking mandamus against the city of Sapulpa and C. J. Wertzberger, commissioner of finance of said city, directing the payment of certain interest coupons found among the assets of the Farmers' & Merchants' Bank when taken in charge by the bank commissioner. Defendants answered by general denial, and put in issue the title and good faith of plaintiff to the coupons in question. Trial resulted in judgment for defendants, and plaintiff appeals.

The city of Sapulpa prior to January, 1910, had made provision for the issuance of \$200,000 waterworks bonds, \$50,000 sewer bonds, and \$10,000 fire apparatus bonds. The bonds were dated January 1, 1910, but were, in fact, delivered to purchasers some time in June, 1911, and this litigation arose over coupons representing interest claimed to be due before the bonds were in fact issued and delivered.

The contract between the city and the pur-

chasers of the bonds is represented by the following written negotiations. The proposition to purchase is as follows:

"For two hundred thousand (\$200,000) dollars legal issue waterworks bonds, fifty thousand (\$50,000) dollars sewer bonds, and ten thousand (\$10,000) dollars fire apparatus bonds, of Sapulpa, Oklahoma, delivered in Kansas City or Chicago, at our option, dated January 1, 1910, maturing twenty years from date without option, and bearing interest at the rate of 5 per cent. per annum payable semi-annually, both principal and interest payable at the Oklahoma fiscal agency in the city and state of New York, bonds to be in the denomination of one thousand dollars, we will pay \$260,000. * * *

This proposition is dated February 13, 1911, and was considered and accepted by the city commissioners at a special meeting held on that date for the purpose of acting thereon, and the minutes show that the following proceedings were had:

"On motion by Murphy and second by Rice that we accept the offer for the proposed bond issue from Sutherlin & Co., of Kansas City, Mo., for the bonds at par, and we give him 5 per cent. commission when contract is passed and agreed upon by the city attorney."

This motion was carried, and thereupon adjournment was had until 7:30 p. m. of the same day, when the following proceedings were had:

"On motion by Rice and second by Murphy that the contract for the purchase of the bonds with Sutherlin & Co. of Kansas City, Missouri, be accepted and the mayor instructed to sign the same."

This motion was adopted, and the clerk was instructed to notify R. J. Edwards that the bonds were sold. The proposition submitted by Sutherlin & Co. bears this indorsement:

"Accepted at a legally held meeting of the mayor and the city commission of the city of Sapulpa at Sapulpa, Oklahoma, this, the 13th day of February, 1911. J. C. Benton, Mayor. Ira E. Anderson, City Clerk. [Seal.]"

On February 14th a petition was circulated among the business men of Sapulpa to ascertain their preference as to whether the accrued interest on said bonds, together with a commission of 5 per cent. for selling same, should be paid to the buyer. This petition was signed by a number of business men who indicated their preference thereon, and a call was issued by the president of the board for a special meeting of the city commissioners at 2 o'clock p. m. of that day, "for the purpose of drawing a contract with Sutherlin & Co., of Kansas City, Mo., to provide for paying a commission to said person or firm above named for the sale of the water, sewer, and fire apparatus bonds." At this meeting "the president of the board and the city clerk were authorized to sign the commission contract with Sutherlin & Co., of Kansas City, Mo., for the 5 per cent. commission," and thereafter a communication was addressed to Sutherlin & Co. agreeing, in view of their purchasing said bonds, to

accompany the same, when legally issued and delivered, with a good and sufficient certified check for 5 per cent. of the amount of bonds as a commission in placing said issue of bonds, the check to be delivered upon payment of the purchase price of the entire issue.

[1, 2] Upon this record plaintiff insists that the coupons for accrued interest were sold and delivered, and that it is entitled to collect the amount thereof. The proposition of February 13th and its acceptance constituted a complete contract for the sale of said bonds at par, not including the coupons in question, and upon the face thereof nothing was left open except that the contract should be passed and agreed upon by the city attorney, which was done, and the acceptance thereof in writing executed on behalf of the city on that date. The proposition was to pay \$260,000 in money for the total issue of bonds aggregating \$260,000 par value. No mention was made of coupons for accrued interest, and the city expressly accepted the proposition for the bonds at par. The rule is that, where bonds draw interest from their date, and are not disposed of until after that date, a sale thereof at par must include a sum equal to the face value of said bonds and the accrued interest attached. *Dillon, Mun. Corp.* § 893. The fact that the amount paid for said bonds equaled the face value thereof without accrued interest, and that no mention was made in the proposition of coupons for accrued interest, and that the city commissioners construed the proposition as one to purchase said bonds at par, showed that a sale of the coupons in question was not intended. This is made the more apparent by the proceedings of February 14th. One Burnett, the agent of Sutherlin & Co., was instrumental in circulating the petition among the business men upon which the special meeting of the commissioners was called. The proceedings of this special meeting show clearly that the board of city commissioners did not intend to pay Sutherlin & Co. the accrued interest on said bonds. The only place where any reference is made to the accrued interest is in the petition circulated among the business men. If the proceedings of February 14th be construed as having any legal and binding force, the only effect that could be given thereto would be to authorize the payment of a five per cent. commission, which was included in the original acceptance; and by rejecting the proposition to give the accrued interest the commissioners indicated an express intention not to do anything of the kind. The original proposition and acceptance could not furnish a consideration for a subsequent gift of the accrued interest. In 6 R. C. L. 675, the law is stated as follows:

"But, where the original contract does not contemplate the making of a subsequent agreement, the original consideration will not sup-

port such subsequent agreement. Hence a subsequent agreement not forming a part of an original contract or supported by the original consideration thereof or by any new consideration is void."

There was no new consideration paid or agreed to be paid for the purchase of the coupons in question, and, even if the proceedings of the 14th evidenced an intention to transfer them, the lack of consideration therefor would render the proceedings invalid as between the parties. The city commissioners were not authorized to barter away the city's funds or credit without consideration, and no intendment of the law can be drawn favorable to the wrongful dissipation of the city's funds in the giving away of interest accruing at a time when the bonds had not yet passed out of the hands of the city.

[3] The trial court declared the law to be that in the construction of contracts between individuals and corporations, on the one hand, and municipal corporations or bodies, on the other, the contract should be construed more strongly against the individual, and held that the date of said bonds, January 1, 1910, was descriptive thereof, and that the coupons in controversy had not been sold, and it is urged that this declaration by the court was erroneous.

Section 964, Rev. Laws 1910, provides:

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

[4] The contract in question was with the city as a public body in its public capacity, and was within the rule prescribed by said section. The rule announced by the trial court was but an application of the statute to the contract in question, and in this there was no error. The proposition to purchase was prepared and submitted by Sutherlin & Co., and, if any uncertainty existed therein, it should be construed most strongly against them, for it lay within their power to expressly include within the proposition the coupons for accrued interest if such was their intention, and thereby to have avoided any uncertainty in the interpretation thereof, and under this section of the statute and the general rule of law the uncertainty caused by them should be most strongly interpreted against them. 6 R. C. L. 854, 2 Elliott on Contracts, 1528.

Plaintiff insists that contemporaneous construction of the contract by the city and its officers placed a different interpretation thereon, and in pursuance thereof said coupons were delivered to Sutherlin & Co., and ordinances passed levying a tax to pay the same. From what has already been said it is apparent that the proceedings of the city

commissioners nowhere discloses an intention to sell said coupons. The mayor refused to attend the meeting of February 14th, because, in his opinion, the bonds had already been sold, and the contract closed the day previous, and he thought the city had no right to give the coupons away, and that, if he participated in the meeting, he would be liable for his proportionate share thereof. Two of the commissioners, Murphy and Loudermilk, did not understand that said coupons were sold with the bonds, and testified that they did not so intend by the proceedings of February 14th. The other commissioner, Rice, who was president of the board and acting finance commissioner, testified that he thought Sutherlin & Co. were entitled to the coupons as "earned interest," and that the coupons were left attached to the bonds upon the advice of the city attorney. Rice helped in the preparation of the petition circulated among the business men, and admitted upon cross-examination that "there was some change after the sale was made." This evidence indicates that the mayor and all of the city commissioners were of the opinion that the bonds were sold on the 13th. By resolution of April 29th the commissioner of finance was authorized to deliver the bonds to Sutherlin & Co. and take credit for same. No mention was made of the coupons. After being executed the bonds were taken by Rice, acting finance commissioner, Clay Wertzberger, city auditor, and Bates B. Burnett, cashier of the Farmers' & Merchants' Bank, to Kansas City about May 1, 1911, where, failing to obtain the money thereon, Rice turned them over to Burnett, taking a receipt therefor in the name of the Farmers' & Merchants' Bank. Rice never saw the bonds thereafter, and the city took no part in their subsequent delivery. Burnett delivered them to Sutherlin & Co. some time in June, 1911, receiving in exchange therefor a draft on the Commerce Trust Company for \$260,000.

Sutherlin & Co. required the city to furnish them with a full certified copy of all proceedings had in the issuance of said bonds that would evidence their legality to the complete satisfaction of their attorney, and therefore, in addition to the actual knowledge of their agent, Burnett, had record notice of the various steps taken, and of the authority of the finance commissioner in delivering said bonds, and received said coupons knowing same had not been purchased by them and that delivery thereof by Rice to Burnett and by Burnett to them was unauthorized and without consideration. *Gardner v. School District No. 87*, 34 Okl. 716, 126 Pac. 1018; *In re Town of Afton*, 43 Okl. 720, 144 Pac. 184, L. R. A. 1915D, 978; *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005; *City of Atchison v. Butcher*, 3 Kan. 104; *Portsmouth Savings Bank v. Ashby*, 91 Mich. 670, 52 N. W. 74, 30 Am. St. Rep. 511.

[5] If the ordinance levying taxes for the payment of interest upon the bonds be construed to include interest represented by the coupons in question, the fact that a tax was levied for the payment thereof would not estop the city to contest its liability thereon nor from contesting the validity thereof where the city refused to pay such interest and denied liability at the first opportunity. *City of Memphis v. Bethel (Tenn.)* 17 S. W. 191; *Bogart v. Lamotte Tp.*, 79 Mich. 294, 44 N. W. 612; *Faulkenstein Tp. v. Fitch*, 2 Kan. App. 193, 43 Pac. 276.

[6] The activity of February 14th, when an effort was made to embody in the contract provisions with reference to these coupons and commissions, indicate that it was understood that the coupons were not to be delivered with the bonds, and the failure of the commissioners to authorize this to be done can only show that they refused to comply with the desires of Burnett and his principal in reference thereto. In order for the acts of the parties in the contemporaneous construction of a contract to be entitled to much weight in the construction thereof, it should appear with reasonable certainty that they were the acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. 6 B. C. L. 852. One of the issues in the case was whether the bank was a bona fide holder of said coupons, and the court found all the issues in favor of defendants, which included a finding that the bank had notice and knowledge of all defenses against said coupons. At the time they were delivered to Sutherlin & Co. and at the time the bank acquired possession thereof, they were past due, and, under the rule that municipal bonds and coupons payable to bearer are subject to the same rules as other negotiable paper, this fact would put the bank upon notice as to any defenses against said coupons. *Dillon on Mun. Corp.* § 879; *Hainer's Modern Law Mun.* § 344; *Ind. & Ill. Cent. Ry. Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554.

In addition to this rule of law, Bates B. Burnett, cashier of the bank with whom said bonds were left by Rice, commissioner of finance, had actual knowledge of the transactions resulting in the sale of the bonds prior to and at the time same came into possession of the bank. The coupons were first presented for collection by him when he stated that the bank had no interest therein except that they were sent to it for collection by the bond buyers. Birch C. Burnett, agent of Sutherlin & Co., claimed to have purchased them from Sutherlin & Co., but could not tell how much he paid for them or whether a portion of the purchase price was allowed on his commission or not. He and his brother, Bates B. Burnett, claimed the coupons had been sold to the bank upon indebtedness owing by him. He did not know how much

this indebtedness was, nor was there any record of the bank showing any credit thereon. The Burnetts claimed to have turned these books over to the banking board, but it is shown that the banking board had not received them, and in contempt proceedings against the Burnetts secured an order to produce said books, which order was never complied with.

[7] The coupons not having been sold by the city at the time the bonds were negotiated, and the delivery thereof to the purchaser of the bonds being without authority, no right or title thereto passed, and the bank, having both actual and constructive notice of the facts, took them subject to all defenses which existed, and when the bank commissioner took charge of the Farmers' & Merchants' Bank the state took no greater rights therein than those possessed by the bank. *Ward v. Okla. State Bank of Atoka*, 151 Pac. 552; *Briscoe v. Hamer*, 150 Pac. 1101.

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur, except KANE, C. J., absent.

GARRISON v. SPENCER et al. (No. 6786.)
(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. GIFTS — INTER VIVOS — GIFT BY HUSBAND.

A married man may, during his lifetime, give away his separate property, and such gift will be valid and binding against his widow, where she is not a creditor within the contemplation of the statute against fraudulent conveyances.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 11, 13; Dec. Dig. ¶6.]

2. GIFTS — DELIVERY — INTER VIVOS — DELIVERY.

A gift of chattels is complete and valid as an executed gift by deed alone and without an actual delivery of the chattels.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29, 30, 32, 33; Dec. Dig. ¶18(1).]

Error from District Court, Stephens County; Frank M. Bailey, Judge.

Action by Sallie A. Garrison against Myrtle Spencer and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Bond, Melton & Melton, of Chickasha, and Burns & Sandlin, of Duncan, for plaintiff in error. Womack & Brown, of Duncan, for defendants in error.

TURNER, J. On July 18, 1912, Sallie A. Garrison, plaintiff in error, sued T. L. Garrison in the district court of Stephens county. Her petition alleged that she was the wife of the defendant; that he was the owner of certain real estate and was about to transfer same to his two daughters, Myrtle Spencer and Alice Sampson, with intent to defeat the claim of plaintiff in her right to separate maintenance; that he was ill and in failing health and desired to discontinue

his marital relations with plaintiff. She prayed to be allowed a sum certain for separate maintenance and for an injunction, and that a receiver be appointed to take charge of his property. On the same day she filed her "amended and supplemental" petition, making both Myrtle and Alice parties defendant, and alleged that the defendant had, on July 12th, executed and delivered to his two daughters, Myrtle and Alice, a deed purporting to convey to them all his real and personal property, a copy of which she set forth as an exhibit; that said deed was void, because of his mental incapacity to make it; and prayed that they be enjoined from disposing of the property and that the deed be set aside. They were enjoined as prayed. On January 28, 1913, plaintiff filed her "second amended and supplemental" petition, alleging that Garrison died in July, 1912, shortly after the original petition was filed; that at the time of his death he was the owner of the property in controversy; that she was his lawful wife; that she and the defendants, Myrtle and Alice, were his sole heirs; that prior to the execution of the deed on July 12, 1912, Garrison had been in failing health, was mentally unsound and incapable of transacting business; that defendants conspired together to secure his signature to said deed; that the same was without consideration; that it was executed for the purpose of depriving plaintiff of her right to separate maintenance and her right to inherit a share of said property; and that the instrument was a fraud upon her rights. She prayed that the deed be set aside; that the court decree plaintiff and defendants to be the sole heirs of said Garrison, and make the proper orders distributing the property.

Defendants answered and, after a general denial, admitted that plaintiff was the wife of Garrison; that the property in controversy was owned by him at the time of his death; that he, by the deed of July 12, 1912, conveyed all his property to them. They denied that he was mentally unsound or incapable of making the deed, and that the same was procured through fraud or undue influence, and alleged that the deed was executed by him with intent to pass the title to the property described therein to them.

Upon the issues thus joined, the cause was tried to the court, who made the following findings of fact and conclusions of law:

"(1) The court finds that the conveyances made to Myrtle Spencer and others by T. L. Garrison, now deceased, were made voluntarily, without duress, fraud, or undue persuasion, and that, at the time such conveyances were made, such conveyances were made with the intent of said T. L. Garrison, deceased, to place his property in the control of the grantees named in such conveyance and to the exclusion of his wife, Sallie A. Garrison.

"(2) The court further finds that, at the time such conveyances were executed, the said T. L. Garrison was without knowledge or belief that the plaintiff, Sallie A. Garrison, was preparing

or expecting to institute action for divorce or suit for alimony or maintenance against the said T. L. Garrison.

"(3) The court further finds that at the time of the conveyance in question that the said T. L. Garrison, deceased, was in no wise indebted to said Sallie A. Garrison, the plaintiff herein.

"(4) The court further finds that, subsequent to the execution of the conveyances by the said T. L. Garrison to the defendants herein, the said T. L. Garrison undertook an action in replevin relative to the control and custody of certain portions of the property sought to be conveyed to the defendants herein, to wit, one span of mules.

"(5) The court further finds that there was never any manual delivery of the personal property named in the conveyance executed by the said T. L. Garrison to the defendants herein, but that such conveyances were properly recorded in the office of the register of deeds of Stephens county, Okla., and that, prior to the death of the said T. L. Garrison, said T. L. Garrison regarded such personal property as belonging to and in the possession of the defendants herein.

"(6) The court further finds that, at the time of the execution of such conveyances, the said T. L. Garrison was suffering from pellagra and was weakened in both mind and body, but at the time of the execution of such conveyance that said T. L. Garrison had sufficient capacity and understanding and mental activity as to fully understand the meaning and purport of his acts and the nature of the instruments executed by him.

"(7) The court further finds that at the time of the execution of such instrument that it was the purpose and intent of the said T. L. Garrison, deceased, to execute a deed of gift to the defendants herein.

"1. The court concludes that the gift from said T. L. Garrison, deceased, to the defendants herein, having been acknowledged by a written instrument, duly recorded, manual delivery of the personal property covered by such written instrument was unnecessary.

"2. The court further concludes that said deeds of conveyance were sufficient to pass title to the real property mentioned therein.

"3. The court further concludes that said conveyances were valid and transferred such interest as the said T. L. Garrison, deceased, had in said property, to the defendants herein."

[1] This was not a conveyance in fraud of creditors and void under the statute, as contended. This for the reason that plaintiff, whose only claim on him was for support and maintenance and who lived with him and was by him supported and maintained up to his death, was not a creditor of her husband. Neither has she a claim upon his property as an heir or distributee. Being his separate property and not the homestead of the family, he had a right to give the property away as he did. These points are ruled by *Farrell v. Puthoff*, 18 Okl. 159, 74 Pac. 96. There the facts were that the grantor had conveyed his land to what he thought was his second wife. His divorce from his first wife was void. After his death, suit was brought by her to set aside the deed, which she alleged was executed in fraud of her as a creditor; but the court held that such she was not, and said:

"It was his separate property, and she had no interest whatever in it, further than he was

obliged to support her during his life, provided he was not legally divorced; and, under the record, this court holds that his divorce proceedings were void.

"Section 2967 of the Statutes of 1893 provides: 'Except as mentioned in section 2296 (which compels the husband to support his wife) neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.'

"Under this section, Dowling had a right to convey his separate property, and to give it to Anna B. Puthoff Dowling. He had lived and cohabited with her, as husband and wife, for five years, and as a complete settlement he gave her this land and other property, and he, during his lifetime, after having gone through the form of a marriage ceremony and living with her as he did, and entering into the contract of separation, and executing the deed of conveyance, would not have been heard to say that the deed was without consideration. So far as the record shows, he, in good faith, intended to convey the legal title to her, and, once the gift was complete, no one but creditors, or some one representing them or their interests, could recall it. If he could not have canceled the deed during his lifetime, then his first wife and daughter cannot do so after his death. It is true that the law makes it possible for a man, during his life, to give practically all of his property to those to whom he owes no obligation, and deprive those of his own household of the comforts of life; but this is only an incident to the right of husband and wife to own and control separate property. Treating the case under consideration in its most favorable light for the plaintiff, the conveyance of the land from Dowling to the grantee was simply a gift, which was complete, and the possession delivered to her long before his death. As he was bound by it during his life, so are his heirs bound after his death."

[2] The court was right when he held that the gift was good, the same being acknowledged by deed duly recorded, and that manual delivery of the personal property described in the deed was unnecessary. The deed contains this clause:

"I also give both title and possession to all my personal property of any and all kinds, including horses, mules and colts and jack; also all notes which I have to my said daughters."

This for the reason stated in 14 Am. & Eng. Enc. Law, 1045. There it is said:

"A valid gift may be made by deed, although the property is not delivered to the donee."

In *Tarbox v. Grant*, 56 N. J. Eq. 199, 39 Atl. 378, it is said:

"* * * The authorities hold that a gift of chattels or choses in action, by deed, is complete and valid as an executed gift by the deed alone and without an actual delivery of the chattel or security itself. 2 Kent, Comm. 438, citing *Flower's Case*, Noy, 67; *Hooper v. Goodwin*, 1 Swanst. 486 (1818), and cases cited; 8 Am. & Eng. Encyc. L. 1331; *Carr v. Burdiss*, 1 Crompt., M. & R. 782, 788."

In *Irons v. Smallpiece*, 2 Barn. & Ald. 551, the doctrine stated in the text was recognized as a part of the common law.

There is no merit in the remaining contentions.

The judgment of the trial court is affirmed. All the Justices concur.

WHITE SEWING MACH. CO. v. McCARTY FURNITURE CO. (No. 6762.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

*(Syllabus by the Court.)*SALES ~~§~~38(4)—FRAUD BY AGENT OF SELLER.

In a suit for a balance due on account for sewing machines sold and delivered, defendant pleaded fraud in the procurement of the order therefor, in that before he signed the order he and plaintiff's agent entered into certain verbal agreements which the agent represented to him were, but which were not, included in the order containing the contract, and that he was moved to sign the same as a result of said fraudulent representations of the agent, and that he did not read the contract before signing it for the reason the agent left in a hurry to catch the train. Assuming the agent made the representations pleaded and that they were the cause moving defendant to sign the contract, evidence examined, and held, that such did not constitute fraud in its procurement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 68; Dec. Dig. ~~§~~38(4).]

Error from District Court, Kay County; Wm. M. Bowles, Judge.

Action by the White Sewing Machine Company against the McCarty Furniture Company. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

Sam K. Sullivan, of Newkirk, for plaintiff in error. W. K. Moore, of Ponca City (L. A. Maris, of Ponca City, of counsel), for defendant in error.

TURNER, J. On December 23, 1912, in the district court of Kay county, White Sewing Machine Company, plaintiff in error, sued McCarty Furniture Company, defendant in error, for a balance due on account for sewing machines sold and delivered by plaintiff to defendant, aggregating \$283. For answer, defendant denied liability and set up that his order for the machines was procured through fraud, in this, that, as an inducement to him to sign the order, plaintiff's agent came to his store and represented to him that he could sell many sewing machines in and around Ponca City; that he (the agent) had the names of many persons in that vicinity to whom defendant could sell them; that if he would order the machines plaintiff would send a man to solicit and canvass the county and sell them for defendant; that plaintiff would send a lady demonstrator to Ponca City; that she would make public demonstrations and thereby advertise the machines so as to enable defendant to sell them; and that, if he did not sell them before November 1st, the agent would take them back and defendant would not be required to pay for them—to all of which he agreed. The answer further alleged that thereafter said agent produced a written contract or order for the machines which, he represented to defendant, contained the foregoing verbal agreements, and which defendant did not read before signing for the reason the agent

left him in a hurry to catch the train; that he relied upon the truth of said statements, which were false, and, so relying, signed the contract and order for the machines, which said contract contained none of the agreements aforesaid between him and the agent. A demurrer was filed to said answer, which was overruled, whereupon the cause was tried to a jury and judgment rendered in favor of plaintiff for the amount of the account. Thereafter defendant filed its motion for a new trial, which was granted and the cause again set for trial. On February 18, 1914, without further pleading, the cause was again tried and resulted in a judgment in favor of defendant, to reverse which plaintiff prosecutes this appeal. The judgment is contrary to the evidence.

The order was dated January 16, 1912, and was for 17 machines, 2 of which were given to the purchaser to be disposed of as premiums; the balance were to be paid for. Immediately over defendant's signature thereto appears:

"This order is given subject to approval of the White Sewing Machine Co. and if accepted or filled in full or in part, to be settled for at the prices and terms above set forth. It is understood that no claim of any understanding or agreement of any nature whatsoever between this company and its dealers will be recognized except such as is embraced in written orders or is in writing and is accepted by said company in writing from its home office at Cleveland, Ohio."

And the same was approved and accepted in writing by plaintiff on January 24, 1912. It contained none of the stipulations pleaded. By its terms the machines were to be paid for on or before November 1st, with a discount of \$1 per machine, if paid for within 30 days from date of order. They were shipped pursuant thereto, and, in June following, plaintiff again received an order from defendant for another machine, which was shipped and paid for by defendant. On October 1st, defendant wrote plaintiff that, owing to his financial condition and that he had been unable to sell thirteen of the machines, he would be unable to pay for them on November 1st, and asked shipping instructions about them. In answer thereto, on October 5, 1912, plaintiff wrote defendant that they would not take the machines back and credit him therefor. After said account was due, on November 6, 1912, defendant sent plaintiff \$95, the amount he had received for the sale of four machines. On November 20th, plaintiff acknowledged receipt of said \$95 and credited his account with that amount and demanded \$283 as the balance due on the contract, and, when he did not answer, this suit was brought. No claim of fraud was ever made by defendant prior to his answer in the cause, and, aside from that, he has no other defense.

Assuming the agent made the representations pleaded and that they were the cause

moving defendant to sign the contract, when he did so with the clause in the contract above set forth staring him in the face, he must abide thereby. In *Colonial Jewelry Co. v. Bridges*, 43 Okl. 813, 144 Pac. 577, in the syllabus it is said:

"A person signing an instrument is presumed to know its contents, and one in possession of his faculties and able to read and having an opportunity to read a contract which he signs, if he neglects and fails to do so, cannot escape its legal liability, for the reason that at the time false representations were made to the effect that the writing contained the verbal understanding of the parties."

And in the body of the opinion it is said:

"The identical questions presented by the record in this case have heretofore been determined by this court, and these two propositions are settled beyond controversy: First. Where a person signs a written contract, if he is in possession of his faculties, able to read, a mere false representation to such a person that the writing contains their verbal understanding is not the fraud contemplated upon which parol evidence may be admitted to alter or vary the terms of a written instrument. Second. The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of facts, and any representation made prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change, or add to the terms plainly incorporated into and made a part of the written contract."

In *Ames v. Milam*, 157 Pac. 941, in the syllabus we said:

"Merely representing, to a man in possession of his faculties and able to read, that a writing embodies a previous verbal understanding, is not such fraud as will avoid the instrument."

And in the opinion the court said:

"The fact that defendant was too busy to read the contract, or that it suited the convenience of plaintiff's agent for him to sign it, so he could make the outgoing train, does not relieve defendant of his duty to apprise himself of its contents."

The cause is reversed and rendered, and defendant taxed with the costs. All the Justices concur.

LOWERY v. WESTHEIMER et al. (No. 7009.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. DEEDS \S 31—HOMESTEAD \S 118(4)—FORM OF CONVEYANCE — CONSENT TO CONVEYANCE OF HOMESTEAD—"JOINED BY MY WIFE."

In a suit for possession and to clear title to a certain tract of land, the allotment of F. L. and a part of the homestead of the family, a deed purporting to convey said land, reciting in the granting clause that "I, T. M. L., joined by my wife, F. L., * * * do grant" the same (describing it) to defendants, W. and D., and which was duly subscribed and acknowledged by both T. M. L. and F. L., his wife, held, that the deed not only contains apt words of grant on the part of F. L. sufficient to convey her title to the land, but is in form sufficient to satisfy the statute (Rev. Laws 1910, \S 1143), as indicating

the consent of the husband to the sale thereof as part of the homestead of the family.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 60-63; Dec. Dig. \S 81; *Homestead*, Cent. Dig. \S 205-209; Dec. Dig. \S 118(4).]

2. DEEDS \S 90 — CONSTRUCTION — GENERAL RULES.

In construing words of grant contained in a deed, where the words are doubtful or ambiguous, the language being that of the grantor, all doubtful words are construed most strongly against him and most favorably and beneficially for the grantee. A construction will be avoided, if possible, which will render the instrument frivolous and ineffectual; it being presumed that the parties thereto intended the deed to have some operation.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 234-237, 247, 248; Dec. Dig. \S 90.]

3. DEEDS \S 101—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

Where the meaning of the terms used in a deed is not clear, the subsequent acts of the parties showing the construction they have put upon the same themselves before the land became a subject of controversy are to be looked to by the court.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 233; Dec. Dig. \S 101.]

Error from District Court, Carter County; A. Eddlemen, Judge.

Action by Florence Lowery and another against Max Westheimer and others. Judgment for defendants, and plaintiff Florence Lowery brings error. Affirmed.

Ledbetter, Stuart & Bell, Stuart, Cruce & Cruce, and Bayard T. Hainer, all of Oklahoma City, and E. Robitaille and Baldwin & Spradling, all of Tulsa, for plaintiff in error. Geo. S. Ramsey, of Muskogee, and Johnson & McGill, J. C. Thompson, and L. S. Dolman, all of Ardmore, and Edgar A. de Meules, of Muskogee, for defendants in error.

TURNER, J. On May 25, 1914, in the district court of Carter county, Florence Lowery and Thomas M. Lowery, Jr., sued Max Westheimer, David Daube, David Gunsburg, and Southwestern Petroleum Company, and in their petition alleged that they were the owners and entitled to the immediate possession of a certain tract of 250 acres of land (describing it), 110 acres of which was her homestead allotment as an intermarried Choctaw, and 140 acres of which was his homestead allotment as a Choctaw by blood. They further alleged that defendants Westheimer and Daube were in possession of the land, claiming title thereto by virtue of a certain warranty deed dated November 26, 1910, purporting to be their conveyance of said land to defendants, but which, they say, is fraudulent and not their deed, and, as to her 110 acres, they specifically alleged that Florence Lowery does not appear as grantor therein, and that the deed does not attempt to convey and does not convey, to defendants any right, title, or interest in said 110 acres of land; but nevertheless they say defendants are asserting title thereto by reason thereof, and

which said deed constitutes a cloud upon her title, and, further, that she received no consideration therefor. They also allege that since said pretended conveyance the defendants (the grantees therein) have executed an oil and gas lease on 60 acres of the land in controversy to the defendants Gunsburg and Southwestern Petroleum Company, who were in possession operating oil and gas wells thereon, and converting the proceeds of the oil and gas produced to their own use, and prayed judgment for immediate possession of the property and for rents and profits, and for the cancellation of said deed and lease and in effect for general relief.

Later, Thomas M. Lowery, Jr., passed out of the case, and the case proceeded as to her, leaving here involved the title to her 110 acres only. For answer, defendants Westheimer and Daube denied the allegations of fraud and want of consideration contained in the petition and stood on their deed, which they alleged was her deed and conveyed them the title of Florence Lowery to the land. They also admitted the execution of an oil and gas lease to Gunsburg and Southwestern Petroleum Company as alleged, and stated, as to the remainder of the land, they were also operating thereon for oil and gas and had erected thereon valuable improvements. Among other things, they also pleaded that plaintiff was estopped, for reasons stated, to deny the validity of her deed and asked for a reformation thereof, should the court hold the same insufficient to pass her title to the land. For answer, Gunsburg and Southwestern Petroleum Company, in effect, set up that their lease covered only 20 acres of the Florence Lowery land in controversy and that they were innocent purchasers from Westheimer and Daube for value and without notice. After issue joined by reply, in which Florence Lowery pleaded mental incapacity to make the deed, there was trial to the court, who, by agreement of all parties in interest, submitted to the jury certain special interrogatories, answering which they found that Lowery and his wife, on November 26, 1910, executed the deed in controversy; that at the time she did so, she had sufficient mind to understand the nature and consequence of her act; and that she received a part of the consideration of \$350 mentioned in the deed. "It being also agreed in open court that all other issues of fact, not embodied in the special interrogatories submitted to the jury, be reserved for finding by the court without further intervention by the jury." Pursuant to which, the court thereafter found the same to be that Thomas M. Lowery, Jr., and his wife, Florence Lowery were, at that time and all other times mentioned in the pleadings, husband and wife and living together as such; that the 110 acres in controversy was a part of the homestead of the family and patented to her, as stated in the petition; that the 140 acres

therein set forth was likewise patented to her husband, Thomas M. Lowery, Jr.; that he then found that prior to the deed in controversy, that is, on March 30, 1910, they executed a mortgage on their land described in the petition for \$2,700, payable to the Oklahoma Farm Mortgage Company, and another on the same day on the same land for \$1,066, payable to the same company; that no part of the proceeds of those mortgages was paid to Florence, but shortly after their execution \$500 of the proceeds thereof was paid to Westheimer and Daube in full settlement of a prior mortgage which they held on 180 acres of the land; that about November 1, 1910, Thomas M. Lowery, Jr., for both himself and his wife Florence, and with her knowledge and consent, opened negotiations with defendants Westheimer and Daube for the sale to them of the 250 acres covered by said mortgages, but neither of defendants ever spoke to Florence concerning the matter up to the time of the execution of the deed.

Pending negotiations, said defendants through an agent viewed the land, and later an understanding was reached between the parties in which the Lowerys agreed to convey to Westheimer and Daube the 250 acres covered by those mortgages in consideration that Westheimer and Daube assume and pay the same, and also pay the Lowerys \$350 in cash. Accordingly, on November 26, 1910, in the store of Westheimer and Daube in Ardmore, and in the presence of said defendants and each of them, the Lowerys made, executed, and delivered to said defendants the deed in question, but which, before delivery, was then and there read over and explained to them. Soon thereafter the deed was recorded and immediate actual possession of the land yielded to the grantees, save the 110 acres in controversy for which the tenant of the grantors in possession thereafter attorned to Westheimer and Daube, and has since continued so to do. It was also found by the court that defendants have since remained in possession, without notice of any claim of defect in said deed. About September, 1913, the land in controversy became valuable for oil and gas, and in February, 1914, said defendants let contracts thereon to Gunsburg and he to the Petroleum Company for the purpose of development and themselves thereon expended large sums of money, so much so that the 110 acres in controversy is now worth \$100,000; that the consideration of \$4,116 paid for the land was, at the time of the execution of the deed, full, fair, and adequate; that said deferred payment of \$350 has been paid, a part by check for \$77.56 made payable to Florence Lowery which has since been done on her indorsement. The court further found, as to her 110 acres in controversy, that the Lowerys were in possession by their tenant at the time of the execution of the deed and claimed the same, together with 50 acres of his allotted home-

stead as the homestead of the family up to September, 1910; since which time they have resided on no part of the 250 acres described in the deed, but have traveled to regain her health. Upon the facts thus found, the court in effect held that the deed was the deed of Florence Lowery, and, as such, was valid and binding as a conveyance of her title to 110 acres of her allotted homestead and the homestead of the family therein described, and rendered and entered judgment accordingly. To reverse which she brings the case here, where her counsel contend that the court erred, because they say:

"That the deed of November 26, 1910, containing, as it does, a description of the separate homestead allotment of Thomas M. Lowery, Jr., the husband, and the separate homestead allotment of Florence Lowery, and the actual residence homestead of herself and family, is void as to her 110 acres, the same being her separate property and the homestead of herself and family, for the reason that it contains no words of conveyance on her part, and does not purport to convey any land belonging to her; that the deed is not such a joint deed of herself and husband as is required by the Constitution and laws of the state of Oklahoma to convey the homestead."

The deed reads:

"Know all men by these presents: That I, Thomas M. Lowery, Jr., joined by my wife, Florence Lowery, of Hewitt, Carter county, Oklahoma, for and in consideration of the sum of forty-one hundred, sixteen and no-100 dollars (\$4,116.00), \$350.00 of which is cash in hand paid, the receipt of which is hereby acknowledged, and the assuming of two mortgages, one for the amount of \$2,700.00, one for the amount of \$1,066.00 on the land hereinafter described, and in favor of the Oklahoma Farm Mortgage Co., of Oklahoma City, Okla.,

"Do grant, bargain, sell and convey unto Max Westheimer and David Daube of Ardmore, Carter county, Oklahoma, the following described real property and premises situated in Carter county, Oklahoma, to wit: (Then follows a description of 140 acres of the homestead allotment of Thomas M. Lowery, Jr., and 110 acres of her homestead allotment.)

"Together with all the improvements thereon, and all the appurtenances thereunto belonging, and warrant the title to the same.

"To have and to hold the said described premises unto the said Max Westheimer and David Daube, their heirs and assigns forever, free and clear and discharged of and from all former grants, charges, taxes, judgments, mortgages and other liens and incumbrances of whatsoever nature, except the two mortgages, one for the amount of \$2,700.00 and one for the amount of \$1,066.00 assumed and in favor of The Oklahoma Farm Mortgage Co., of Oklahoma City, Oklahoma, as a part of the consideration of this deed.

"Signed and delivered this 26th day of November, 1910.

T. M. Lowery, Jr.
Florence Lowery.

"State of Oklahoma, Carter county—ss.:

"Before me, B. R. Gober, a notary public in and for said county and state, personally appeared on this 26th day of November, 1910, Thomas M. Lowery and Florence Lowery, husband and wife, both to me well known to be the identical persons who executed the within and foregoing instrument, and each for themselves acknowledged to me that they had executed the same as

their free and voluntary act and deed, for the purposes and uses therein set forth.

"Witness my hand and seal the day and year above written.

"B. R. Gober, Notary Public. [Seal]

"My commission expires 8-22-1911."

[1] Against the validity of the deed it is urged:

"The recital: 'I, Thomas M. Lowery, Jr., * * * do grant, sell and convey,' excludes the wife as an active grantor in the deed. The deed does not purport to convey the separate property of Florence Lowery, occupied as a family homestead. The expression, 'I, Thomas M. Lowery, Jr., joined by my wife, Florence Lowery,' is wholly insufficient to bind her as an active participant in the conveyance. * * * The use of the additional words, 'joined by my wife, Florence Lowery,' does not in any way qualify the statement of Thomas Lowery that it is he that is selling.

"The widest scope that can be given to the recital 'joined by my wife, Florence Lowery,' is that she consents to the selling by Thomas Lowery. But this is a clear infraction of the statute. Neither one can sell alone, neither can consent that the other may sell; but the selling, that is, the actual transfer of title, must be the joint coequal act of both."

Not so. While there can be no doubt of the correctness of the rule laid down by Chief Justice Taney, in *Agricultural Bank of Miss. v. Rice*, 4 How. 225, 11 L. Ed. 949, that, " * * * in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient," assuming that the 110 acres described in the deed—the allotted homestead of Florence Lowery—was also the homestead of the family, the deed not only contains apt words of grant on her part sufficient to convey her title to the land, but is in form sufficient to satisfy the statute as indicating the consent of the husband to the sale thereof as a part of the homestead of the family.

Article 12, § 2, of the Constitution, provides that the homestead of the family shall not be sold by the owner, if married, without the consent of his or her spouse, given in such manner as may be prescribed by law. Stripped to the point by Rev. Laws 1910, § 1143, it is prescribed how this may be done. It provides:

"No deed * * * relating to real estate * * * shall be valid until reduced to writing and subscribed by the grantors; and no deed * * * relating to the homestead exempt by law * * * shall be valid unless in writing and subscribed by both husband and wife. * * *"

Which means, when applied to the deed in question, that in order to convey the homestead of Florence Lowery, exempt by law as the homestead of the family, she must appear therein as the party grantor conveying title to the 110 acres in controversy, and that the deed must be subscribed as here, by both herself and her husband, Thomas M. Lowery, Jr., as evidence of his consent to the conveyance. But, it is contended, the vice of this

deed is in the fact, apparent on its face, that Florence Lowery does not therein appear as a party grantor, but that she does appear therein only as consenting to the grant by him of his 140 acres thereby conveyed; as to 40 acres of which such consent was necessary, the same being a part of the homestead of the family. And, it might be said, there does appear on the face of the deed a doubt as to whether Florence Lowery, when therein she said she "joined," and by her act did join her husband in the deed, merely thereby intended to consent to the conveyance of his 140 acres of the land, including 40 acres of the homestead of the family, or whether she intended, in addition thereto, to convey her 110 acres. In other words, whether she merely intended to join him in the execution of the deed in order to evidence her consent to his conveyance of 40 acres of the homestead, or whether she, by including 110 acres of her land in the deed, intended not only that, but also to join him in the deed as a party grantor and convey her 110 acres. This doubt thus arising sends us to a construction of the deed to determine whether it can fairly be said that she appears therein as a party grantor; and, first, to the rules of construction.

[2] In *Charles River Bridge v. Warren Bridge et al.*, 11 Pet. at page 588, 9 L. Ed. 773, the court said:

"It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the king; for, where there is any doubt, the construction is made most favorably for the king, and against the grantee. * * * But it is a rule of very limited application. To what cases does it apply? To such cases only, where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason (says the common law) 'that it will be more for the benefit of the subject, and the honour of the king, which is to be more regarded than his profit.' * * * And in every case, the rule is made to bend to the real justice and integrity of the case."

In *Thomas et al. v. Hatch*, 3 Sumn. 170, Fed. Cas. No. 13,890, in the headnotes it is said:

"Deeds are always construed according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom."

2 Devlin on Deeds (3d Ed.) § 340, lays down the rule thus:

"In construing the words of such a grant, where the words are doubtful or ambiguous, several rules are applicable, all, however, designed to aid in ascertaining what was the intent of the parties; such intent, when ascertained, being the governing principle of construction. And first, as the language of the deed is the language of the grantor, the rule is that all doubtful words shall be construed most strongly against the

grantor, and most favorably and beneficially for the grantee. Again, every provision, clause, and word in the same instrument shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, of covenant, or description, or words of qualification, restraint, exception, or explanation. * * * Where the meaning is doubtful, evidence as to the acts of the party may be admitted to show the intent."

It seems that the rule of interpretation laid down in Comp. Laws 1908, § 1114, has nothing to do with this case. The section reads:

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

This for the reason that, as we get the section mediately from California where it is found (Civil Code, 1906) as section 1654 under the title, as with us, of "Interpretation of Contracts," preceding which, in section 1069, is found the rule, under the title of "Interpretation of Grants," that a grant of this kind is to be construed most strongly against the grantor, it would seem that the rule laid down in section 1114, supra, was never intended to apply to the construction of deeds, but was intended to be confined to the construction of contracts only. This was, in effect, the holding of the court in *Edwards v. Brusha*, 18 Okl. 234, 90 Pac. 727, where the court took no note of section 1114 and said:

"The rule is well settled that in all cases requiring the terms of a deed to be construed, if there be doubt, the language will be construed most strongly against the grantor."

But, assuming that, by failing to enact a statute similar to that contained in the California Civil Code, § 1069, declaring the rule to be as stated, the Legislature intended the deed in controversy to be construed as provided in section 1114, supra, applying that rule to the undisputed facts in this case, this deed must be construed most strongly against these grantors and in favor of the grantees. The section provides:

"In cases of uncertainty not removed by the preceding rules (prescribed for ascertaining the intent of the parties) the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor (Mrs. Lowery) is presumed to be such party. * * *"

And the undisputed facts fail to overcome that presumption. They are that, on the day the deed was executed, T. M. Lowery, Jr., and Florence, his wife, came to the office of the store of the grantees, bringing with them their respective certificates of allotment in order to furnish to the scrivener a description of the land to be conveyed; that there they met one Roland, a cotton buyer, officing in the store, who prepared the deed in question but at whose request, or whether he was acting within the scope of his employment with the grantees, the record fails to disclose. These facts, we repeat, are insufficient

to overcome the presumption that the promisor in the deed caused the uncertainty to exist in its terms. This being true, again we assert the rule to be, as stated in the Brusha Case, that this deed must be construed most strongly against the grantors. See, also, 8 R. C. L. § 104.

What, then, did she mean, when, by subscribing and acknowledging the deed embracing 110 acres of her land, she adopted as her own the language of the deed and said: "That I, Thomas M. Lowery, Jr., joined by my wife, Florence Lowery, * * * do grant," etc.? Webster says that to "join" is to "unite; * * * to come together; to combine or unite in time, effort, action; to enter into an alliance." An "alliance" he defines as "a union or connection of interests between parties," etc. And she did adopt as her own the language of the deed, for it was said in Perkins Profitable Conveyancing, published in 1842 (section 158), and has ever since been the law, that:

"It hath been holden, that a man shall be bounden by the speaking, if another man, by averment thereof, in putting his seal to it, and delivering of it as his deed."

And again (section 159):

"And it is to be known that at this day, a man shall be bounden by putting his seal unto a deed indented, and delivery of the same, and yet the words within the deed are spoken by another man."

And so we say that, when she said she joined with her husband in the execution of this deed, she, in effect said, not that she consented to what he did, but that she, being united in interest, united with him in what he did, that is, united with him in the effort or act of making the deed, that is, joined with him in the grant evidenced thereby; and that hence, by so uniting, she became a party grantor as to all she could grant by the deed, which was her 110 acres described therein. It will not do to say that, by joining with her husband in the deed as she did, she meant to give her consent only to the conveyance of his 140 acres, or at least to 40 acres of the homestead of the family thereby conveyed by him. This for the reason that, while the language of the deed does indicate such consent, to confine it to that would render inoperative that part of the deed contained in her implied words of grant, followed by a description of her land, and make it, in effect, almost frivolous as to her. 17 Am. & Eng. Encyc. of Law, 18, says:

"A construction will be avoided, if possible, which will render the instrument frivolous and ineffectual; it being presumed that the parties intended the instrument to have some operation."

This deed is nothing more than an executed contract. As to the interpretation of contracts, Rev. Laws 1910 provides:

"Sec. 951. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others."

"Sec. 953. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

"Sec. 957. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

In Sloss-Sheffield Steel & Iron Co. v. Lollar, 170 Ala. 247, 54 South. at page 274, the court said:

"While it is true that the body of the deed must show who are the grantors, the rule does not require the names of the grantors to be inserted in the body of the deed. The requirement of the rule is met if, from the deed in its entirety, enough is shown from which, by the aid of extrinsic evidence, the names of the grantors can be made certain."

Schley v. Pullman Car Company, 120 U. S. 575, 7 Sup. Ct. 730, 80 L. Ed. 759, was ejectment in which the plaintiff in error claimed title to certain real estate in Cook county, Ill., of which the Pullman Company was in possession. It was stipulated that judgment be entered for the defendant, if the court was of opinion that a certain deed was valid and binding as a conveyance by the husband and wife of the real estate described therein. The pertinent part of the deed in question read:

"This indenture, made this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six, witnesseth: That I, Christina Lynn, sister and heir at law of Henry Millsapugh, deceased, * * * of the first part, in consideration of the sum of forty-three dollars in hand paid by * * * party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quitclaim unto the said party of the second part * * * all her right, title, claim and interest in that certain tract of land (describing it) to have and to hold," etc.

"In witness whereof the said grantor—have hereunto set our hands and seals the day and year first above written."

"Christina Lynn. [Seal.]
"William Lynn. [Seal.]"

The deed was duly acknowledged by both the signers of the deed. The court, being of opinion that the deed was valid and passed to the grantee all the right, title, and interest of Christina Lynn and William Lynn, her husband, in the real estate described therein, entered judgment for defendant. The plaintiff insisted that the deed was void under the laws of Illinois, upon two grounds, the first of which was that the husband was not a party to the deed. Whether it was in form sufficient to satisfy the statute turned upon a section of a certain act, the pertinent part of which read:

"When any feme covert, not residing in this state, being above the age of eighteen years, shall join with her husband in the execution of any deed, * * * relating to, any lands or real estate, situate within this state, she should thereby be barred of and from all estate, * * * therein, in like manner as if she was sole and of full age."

The question before the court was whether Christina Lynn, within the meaning of that statute, joined with her husband in the ex-

execution of the deed. The court stated the contention of the parties thus:

"The plaintiff contends that she did not, because the name of the husband is not expressly designated in the body of the deed as a grantor. It is argued that as William Lynn, the husband, had during coverture a freehold interest jointly with his wife in her estate of inheritance, with absolute ownership of the rents and profits of the wife, the requirement in the act of 1847, that she should join him in the execution of any deed for real estate, was a recognition of his supremacy and right of control, and necessarily implied that he, as grantor, so named in the granting or operating clauses, must pass whatever interest he had, and thereby, also, express his willingness that the wife should convey her title or estate. While this position is sustained by some adjudications, it is necessary to inquire as to the state of the local law; for the rights of the parties must be governed by the requirements of that law in respect to the mode in which real property situated within the limits of that state may be conveyed or transferred."

And, after reviewing certain cases, said:

"While those cases do not cover the precise question under consideration, we are of opinion that, under the principles announced in them, the deed of May 28, 1856, must be upheld as a valid transfer under the law of Illinois of the interest of Christina Lynn and her husband. If, as adjudged by the Supreme Court of the state, the wife, whose name did not appear in the operative clause of the husband's conveyance of his lands, is to be held as having joined him therein and surrendered her right of dower, by simply signing the deed and acknowledging it in conformity with the statute, and upon privy examination duly certified; if, under a statute making it lawful for husband and wife 'to execute' a conveyance of her real estate, they will both be held to have executed a conveyance of her separate property where her name appears, but that of the husband does not appear, in the granting clause of the deed, but they both sign and acknowledge it in the mode required by law; and if the wife's 'estate of homestead' can be conveyed by a deed, signed and duly acknowledged by herself and husband, her name, however, not appearing in the body of the deed—it would seem to follow that, within the meaning of the act of 1847, and according to the tendency of the decisions of the Supreme Court of the state, the wife joins with her husband in the execution of a conveyance of her estate of inheritance where her name alone appears in the granting clause, but the deed is signed by both herself and husband, is acknowledged by both, and is certified as required by law. Such conveyance, so signed, acknowledged, and certified, of the wife's land, seems to be as effectual, under the local law, to invest the grantee with the title and interest of both husband and wife as if his name had also appeared in the granting clause."

In the headnotes to that case it is said:

"A deed, dated May 28, 1856, by C. L. grantor, described as 'sister and heir at law of H. M.', and as 'of the county of St. Clair and state of Michigan,' which conveyed to the grantee a tract of land in Illinois, and was signed and sealed by C. L. and by W. L., the name of W. L. not appearing in the granting clause of the deed, and which was acknowledged May 27, 1856, by said 'C. L. and W. L. her husband,' held sufficient to pass said title of husband and wife, under the statute of Illinois of February 22, 1847, then in force, respecting the conveyance of lands or real estate situate in Illinois by a feme covert not residing within the state, and respecting her joining with her husband in the execution of the deed."

Now, if in that case William, the husband and owner during coverture of the freehold jointly with his wife, although entirely omitted from the granting clause in the deed, was, by signing and acknowledging the same, held to have joined with her as such and to have passed his freehold interest jointly with the wife in her estate of inheritance conveyed by the deed, we can and do hold that where, as here, Florence, the wife, expressly joins with her husband as a party grantor in the granting clause of the deed, and executes and acknowledges the same, that the deed is her deed and in form sufficient to pass her title, not only to the 110 acres described therein, but to the homestead of the family.

In fact, we can see no substantial difference between the granting part of a deed which reads, as here, "joined by my wife," and a deed which simply says "and wife." This for the reason that both mean "acting in conjugation with my wife"; and, when in each instance the wife executes the deed, she adopts the language of the deed and, in effect, says that she acts in conjugation with him, or that she joins with him in the effort or act of making the deed as a party grantor in the grant evidenced thereby.

In *Smith v. Carmody*, 137 Mass. 128, the facts were that A. died, seised of a parcel of land bounding on a street 128 feet and was 50 feet wide. There was set off to his widow as dower a parcel across the north end measuring 49 feet on the street and bounded on the south by a fence. Later, by partition among the heirs, the remainder of the land became the property of B., who conveyed it mediately to his wife. On the death of the widow, her administrator assumed to convey the estate set off to her in dower and included in the boundaries a strip of land 2 feet 7 inches south of the dower estate, and B. and his wife executed a deed thereto to his grantee. Thereafter the wife brought suit in ejectment for the 2-foot 7-inch strip, claiming that the deed conveyed the title of her husband only to the land with a release by her of both dower and homestead, and the lower court so held. But, on appeal, the Supreme Court held not so, but that the deed was not only one of release and quitclaim by both husband and wife, but conveyed all their interest in the land. The pertinent part of the deed read:

"That I, Chas. T. Smith, * * * and Ellen Smith, wife of the said Charles, * * * in consideration of \$1.00 paid * * * do hereby remise, release and forever quitclaim unto * * * a certain parcel of land (describing it) * * * and I do hereby * * * warrant and defend the same to said grantee, * * * And for the consideration aforesaid, I, Ellen Smith, wife of Charles T. Smith, do hereby release unto the said grantee * * * both homestead and dower in the granted premises."

"In witness whereof we, the said Charles T. Smith and Ellen Smith, * * * hereunto set our hands and seals. * * *"

Now, if the court could there hold, in effect, that the words, "I, Chas. T. Smith and Ellen

Smith, wife of the said Charles, do hereby convey," were apt words of grant sufficient to release and quitclaim her interest in and to the fee in the land described in the deed, although the subsequent part of the deed in which he covenanted to defend the title would seem to make those words of grant his only, and that part of the deed in which she, for the consideration expressed therein, released her homestead and dower, would seem to be all she effected by the deed, we can and do hold that the words of grant under construction, which practically amount to the same thing, are sufficiently apt to convey the title of Florence Lowery to her 110 acres of land described in the deed.

This is in keeping with the practical construction placed on the deed by the parties to it before her 110 acres of land became valuable for oil and gas, which was some three years subsequent to the date of the deed.

In *Otis v. Pittsburgh Westmoreland Coal Co.*, 199 Fed. 87, 117 C. C. A. 598, the United States Circuit Court of Appeals for the Third Circuit said:

"When in the performance of a written contract both parties give it a practical construction, before any controversy has arisen in regard thereto, such construction, rather than its literal meaning, will prevail; for, as Lord Chancellor Sudgen, in *Attorney General v. Drummond*, 1 Dru. & Wal. 853, 366, affirmed 2 H. L. Cas. 337, said: 'Tell me what you have done under a deed, and I will tell you what that deed means.' Unless the language is so clear as to admit of no reasonable controversy as to its meaning, the court is not likely to go astray if it enforces that construction which the parties, without coercion, have themselves acted upon. *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; *Lowrey v. Hawaii*, 206 U. S. 206, 222, 27 Sup. Ct. 622, 51 L. Ed. 1026; *Davis v. Alpha Portland Cement Co.*, 142 Fed. 74, 76, 73 C. C. A. 588; *Chicago G. W. Ry. Co. v. Northern Pacific Ry. Co.*, 101 Fed. 792, 795, 42 C. C. A. 25; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 87, 61 C. C. A. 138; *Central Trust Co. of N. Y. v. Wabash St. L. & P. Ry. Co.* (C. C.) 34 Fed. 254."

[3] In *Old Colonial Trust Co. v. Omaha*, 230 U. S. 118, 33 Sup. Ct. 972, 57 L. Ed. 1410, the court said:

"Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."

In *American Soda F. Co. v. Gerrer's Bakery*, 14 Okl. 258, 78 Pac. 115, 2 Ann. Cas. 818, we said:

"Where a written contract contains provisions which render it uncertain or ambiguous, the court may ascertain and give effect to the mutual intention and understanding of the contracting parties."

And in *Rider v. Morgan*, 81 Okl. 98, 119 Pac. 958, we said:

"Where the meaning of the terms used in a written contract is not clear, the subsequent acts of the parties showing the construction

they have put upon the agreement themselves are to be looked to by the court."

See, also, *Minnetonka Oil Co. v. Cleveland Vitriified Brick Co.*, 27 Okl. 180, 111 Pac. 326.

On this point, the evidence discloses that the parties grantor to the deed, after its execution, after yielding possession to the grantees, frequently asserted that they had sold the land therein described; that they were aware the grantees were receiving rents and profits therefrom, and, outside of the 110 acres in controversy, had expended large sums of money thereupon; and that they made no objection, up to the time of the bringing of this suit. In the meantime, the grantees had paid off the mortgages assumed, and the grantors had spent the \$350 cash consideration received. Immediately after signing the deed, Florence Lowery stated that her home was gone, that they had no more to squander, and that they had left the place and were living elsewhere. Again, shortly thereafter she stated that her son's land was the only land they had left, but made no claim to the land in controversy, although the family at that time was in straightened financial circumstances. From all of which, it appears, and we are of opinion, that at the time she executed the deed in question she intended to convey her 110 acres of land therein described; that such she did by words of grant sufficiently apt to convey her title thereto; and that the deed is in form sufficient to satisfy the statute as indicating the consent of the husband to the sale thereof as part of the homestead of the family. We say the deed is in form sufficient to satisfy the statute and convey the homestead, for the reason that the same is not questioned, except upon the ground that the deed contains no words of grant sufficiently apt to convey her title to the land, which, being decided adversely to plaintiff's contention, renders the point untenable.

Let the judgment of the trial court be affirmed. It is so ordered. All the Justices concur.

SALE, Sheriff, v. SHIPP. (No. 3973.)
(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES ⇐113(1)—LIABILITIES—WRONGFUL LEVY.

An officer who wrongfully levies a writ of attachment upon, and sells the separate property of a wife in an action against her husband, is guilty of conversion, and is liable therefor, and may be sued and compelled to respond in damages for such conversion.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 186-189; Dec. Dig. ⇐113(1).]

2. SHERIFFS AND CONSTABLES ⇐138(2)—LIABILITIES—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Where a writ of attachment against her husband had been levied upon the property of plaintiff and the sheriff had required the plain-

tiff in the attachment to indemnify him against loss, and afterwards sold the property, it was not error to permit proof of that fact in an action against the sheriff for the wrongful seizure of plaintiff's property, in which the sheriff denied any participation in the alleged levy and sale.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 291-294; Dec. Dig. ¶138(2).]

3. EXEMPTIONS ¶114 — ENFORCEMENT OF RIGHT—DUTY OF OFFICER.

It is no part of the duty of an officer levying a writ to select and set apart the property exempt to the judgment debtor or his family.

[Ed. Note.—For other cases, see *Exemptions*, Cent. Dig. § 136; Dec. Dig. ¶114.]

4. EXEMPTIONS ¶116 — ENFORCEMENT OF RIGHT—NOTICE TO LEVYING OFFICER.

Where the wife of defendant in a writ of attachment desires to claim as exempt to the family any portion of the property levied upon, it is her duty to inform the officer holding the process of the particular property claimed as exempt.

[Ed. Note.—For other cases, see *Exemptions*, Cent. Dig. § 137; Dec. Dig. ¶116.]

5. TROVER AND CONVERSION ¶9(5) — ELEMENTS—DEMAND.

In a suit for conversion, where the original taking was wrongful and the property was wrongfully detained at the time of the suit, no other demand is necessary.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 62; Dec. Dig. ¶9(5).]

6. SHERIFFS AND CONSTABLES ¶129—LIABILITIES—SALE OF EXEMPT PROPERTY.

An action for conversion will not lie to recover damages for the sale of exempt property by an officer under process, unless said property is claimed as exempt and notice of such claim is given to the officer in seasonable time.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 264-266; Dec. Dig. ¶129.]

7. SHERIFFS AND CONSTABLES ¶139(4)—LIABILITIES—EXEMPLARY DAMAGES.

Where an officer broke into plaintiff's house, while she was absent in the neighborhood picking cotton, and under a writ of attachment against the property of her husband, and removed everything therein, including all the furniture and household supplies, personal wearing apparel of plaintiff and other members of her family, including a bundle of clothes and shoes belonging to her dead baby, and all of plaintiff's separate property, and removed all the chickens on the place, the jury were justified in awarding plaintiff exemplary damages against said officer for his wrongful act.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 302; Dec. Dig. ¶139(4).]

Error from District Court, Cleveland County; R. McMillan, Judge.

Action by Lucinda Shipp against I. B. Sale, Sheriff of Cleveland County. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Ben F. Williams, Jr., of Norman, and Hutchin & Burke, of Lexington, for plaintiff in error. Rennie, Hocker & Moore, of Purcell, and J. B. Dudley, of Norman, for defendant in error.

HARDY, J. Lucinda Shipp sued I. B. Sale, sheriff, and J. E. Wheeler, as deputy, joining the sureties upon the sheriff's bond, for the conversion of certain personal property. Trial resulted in a verdict and judgment for plaintiff against Sale and Wheeler, she having dismissed as to the sureties.

[1] The defendant Wheeler, who held a special commission under defendant Sale, as a deputy for special work in enforcing the prohibitory laws, had seized said property under an attachment as the property of the husband of plaintiff. Defendant Sale knew the attachment had been levied by Wheeler, claiming to act as his deputy, and thereafter required the plaintiff in the attachment to indemnify him from loss on account thereof, and later directed a regular deputy by the name of Higbee to sell the property, which was done, and the proceeds applied to the satisfaction of the debts of plaintiff's husband. Plaintiff brought suit for conversion of said property before judgment in the attachment suit and before the sale thereof, claiming title in herself, and in addition claiming the property as exempt to the family. The case was submitted to a jury, and a verdict returned in her favor. These facts make out a clear case of conversion as to that portion of the property owned by plaintiff, and under the facts stated the defendant Wheeler, who made the actual seizure, and the sheriff, who made the sale through his regular deputy, are both liable to the plaintiff. *Stump v. Porter*, 31 Okl. 157, 120 Pac. 639.

[2] At the trial the court permitted plaintiff to show that defendant Sale had required the plaintiff in the attachment suit to indemnify him against loss by reason of the attachment, and error is urged upon this action of the court. No authorities are cited in support of this contention. Defendant Sale denied liability, and denied by his pleadings any participation in the alleged sale, and it was competent to show that with knowledge of the levy and of the plaintiff's claim, said defendant required the execution of said bond to save himself harmless, and then proceeded with the sale.

[3] In his instructions the court told the jury that it was not necessary for plaintiff to hunt up the officer making the levy and claim the property, or any part of it, as exempt, but that it was the duty of the officer, at the time he seized the property, to ascertain whether or not the same was exempt to the plaintiff, and the fact that she failed to claim her exemptions, or make a demand for the return of the property, would not waive or forfeit her right to claim said property at the time of the trial. The giving of this instruction was error. In *Parsons v. Evans*, 44 Okl. 751, 145 Pac. 1122, L. R. A. 1915D, 381, it was said:

"Under the statutes in this state, it is no part of the duty, nor is it the right of an officer holding an execution, to select and set apart the judgment debtor's exempt property. Neither is it his duty to advise him as to his right to certain exemptions. The right to claim and select exempt property rests wholly with, and can be exercised only by, the judgment debtor."

The second paragraph of the syllabus in that case is as follows:

"Where a judgment defendant, having more property of a certain class than is exempt by statute, desires to claim his exemptions out of the whole, it is his duty to properly inform the officer, holding process, of the particular property selected and claimed as exempt from levy."

In *Binion et al. v. Lyle*, 28 Okl. 430, 114 Pac. 618, it was held:

"Where personal property reserved to the family by an act amending section 1, c. 34, Rev. Stat. 1893 (Sess. Laws Okl. 1905, c. 18, § 1), is attached and sold by the sheriff for the debt of the husband, held that, he failing so to do, the wife may claim the same as exempt and sue for a conversion thereof."

[4, 5] The plaintiff, her husband failing to do so, had the right to claim such property as exempt, and it was her duty to present said claim to the officer making the levy. It was not his duty to set aside such property, nor to inform her of her rights in the premises according to the holding of the case above cited, and, having failed to make such claim in due time, she cannot maintain an action for the conversion of that portion of the property which she claims in this action as exempt. *Waples, Homestead & Exemptions*, 882. Had she made such claim, the officer would have been under obligations to set the same aside to her. The possession of the officer being lawful in the first instance, by reason of the levy, conversion will not lie for the sale thereof until after demand therefor and refusal to deliver same. *Phelps, Dodge & Palmer Co. v. Halsell et al.*, 11 Okl. 1, 65 Pac. 340; *Bank of Commerce v. Gaskill*, 145 Pac. 1132.

[7] It is urged that under the facts of this case the jury were not authorized to award exemplary damages. The verdict was for \$200 actual, and \$200 exemplary, damages. Section 2851, Rev. Laws 1910, is as follows:

"In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

To entitle a plaintiff to recover exemplary damages in an action sounding in tort, the proof must show some element of fraud, malice, or oppression. The act which constitutes the cause of action must be actuated by or accompanied with some evil intent, or must be the result of such gross negligence—such disregard of another's rights—as is deemed equivalent to such intent. *Western Union Tel. Co. v. Reeves*, 34 Okl. 469, 126 Pac. 216;

Ft. S. & W. Ry. Co. v. Ford, 34 Okl. 576, 126 Pac. 745, 41 L. R. A. (N. S.) 745.

The admitted facts show that defendant Wheeler, while plaintiff was absent from home picking cotton, broke open the house in which she was living and removed everything therein, including all the furniture and household supplies, personal wearing apparel of plaintiff and other members of her family, including a bundle of clothes and shoes belonging to her dead baby, and all the chickens on the place were seized and removed. Defendant Sale, while not personally participating in the seizure and removal of the property, was fully informed thereof, and ratified the same by taking an indemnifying bond and instructing his deputy Higbee to retain possession under the writ and sell the property. The writ was against the husband of plaintiff, and when the officer levied upon the wearing apparel of plaintiff and other members of the family and seized her separate property he exhibited a gross disregard of her rights and of his authority under the writ which he held, and the jury were justified in finding the writ was executed under circumstances that amounted to oppression.

The instruction, submitting the question of exemplary damages to the jury, is said to be erroneous because the court told the jury, in effect, that this was a case where they could allow exemplary damages, thereby expressing an opinion upon the facts. The language complained of told them, in effect, that they were authorized, if they thought proper, under the evidence, in addition to actual damages, if any, to allow plaintiff a further sum as exemplary or smart-money damages, etc. There is no merit in this contention. The language complained of clearly left it to the jury to determine whether plaintiff should recover exemplary damages, and was by no means an expression by the court of an opinion upon the evidence.

[5] As to that portion of the property claimed and shown by the evidence to be her personal property, no demand for the return thereof was necessary. In a suit for conversion, where the original taking was wrongful and the property is wrongfully detained at the time of the suit, no other demand is necessary. The wrongful taking and conversion is an assertion of ownership. *Bank v. Gaskill*, 145 Pac. 1132; *Bilby v. Jones*, 39 Okl. 613, 136 Pac. 414.

The evidence does not clearly distinguish between the property owned by plaintiff in her own right and that claimed by her as exempt; and, as we are unable to separate these items and determine the amount which plaintiff was rightfully entitled to recover, the case is reversed and remanded for a new trial. All the Justices concur, except KANE C. J., absent.

ROTH et al. v. UNION NAT. BANK OF
BARTLESVILLE et al. (No. 3830.)
(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. COURTS — JUDGMENT — "JURISDICTION" — ELEMENTS.

The elements of jurisdiction are: (1) A court created by law, organized and sitting; (2) authority given such court by law to hear and determine causes of the kind in question; (3) power given such court by law to render a judgment such as it assumes to render; (4) authority over the parties to the case, acquired by their appearance or the service of process on them, if the judgment is to bind them personally and not merely as a judgment in rem; (5) authority over the thing adjudicated upon by its being located within the court's territory, and by actually seizing it if liable to be carried away, if the judgment is to be in rem; and (6) authority to decide the question involved, which, if the other essential elements of jurisdiction exist, is acquired by the question being submitted to it by the parties for decision.

(a) An order or decree of a court of general jurisdiction, or of such jurisdiction of the particular subject in question, with the power to make such order or decree under any possible state of facts in the case in which it was made, imports absolute verity, and is not subject to collateral attack, except for fraud in its procurement, unless it affirmatively appears from the record of the action or proceeding in which the same was made that such court was without jurisdiction in respect to one or more of the above-stated elements essential in such case.

(b) Where, the record in a case affirmatively discloses the facts to be such that such court is without power in such case to make the order or decree it assumes to make, the same is void, and therefore subject to collateral attack for want of jurisdiction to the extent, at least, that such court is without power to make the same.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. ¶ 2; Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. ¶ 489.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

2. JUDGMENT — REQUISITES — EFFECT OF PARTIAL INVALIDITY.

If a judgment or decree includes a decision of an independent and separable subject-matter or question within, and an independent and separable subject-matter or question beyond, its jurisdiction, the same is valid as to the former and a mere nullity as to the latter, and is not void in toto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 39; Dec. Dig. ¶ 28.]

3. MORTGAGES — VALIDITY — EFFECT OF PARTIAL INVALIDITY.

When the consideration of a mortgage is made up of two or more distinct transactions, including one or more that are illegal and one or more that are legal, and the legal part of the mortgage can be separated from the illegal part of the same, it may be upheld and foreclosed to the extent of such distinct legal part.

(a) Such illegal part does not necessarily invalidate the mortgage in toto when it does not enter into and taint the legal part of the same.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 191; Dec. Dig. ¶ 82.]

4. GUARDIAN AND WARD — INDIANS — 15(1) — INDIAN LANDS — MORTGAGE — COLLATERAL ATTACK.

Under section 4, Act Cong. May 27, 1908, c. 199, 35 Stat. 312, effective on and after July 27, 1908, for the removal of restrictions, upon

alienation, from a part of the lands of the allottees of the Five Civilized Tribes of Indians, such lands are not subject and cannot be held liable to any form of personal claim or demand against a Cherokee Indian minor allottee of one-eighth Indian blood arising or existing prior to July 27, 1908.

(a) A county court can acquire no jurisdiction under Laws 1895, p. 37, as amended by Laws 1901, p. 38, as amended by Laws 1905, p. 185 (section 6364, Rev. Laws 1910), and under said act of Congress, to determine whether the allotted lands of such Cherokee Indian minor of one-eighth Indian blood should be mortgaged to pay an existing claim or demand to which neither such lands, nor any part thereof, is, by reason of the laws of this state or by reason of said act of Congress, then legally liable; and an order of such court, authorizing such mortgage, and the mortgage itself, to the extent of such claim or demand, are void and subject to collateral attack, without allegation or proof of fraud in their procurement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 103; Dec. Dig. ¶ 90; Indians, Cent. Dig. § 37; Dec. Dig. ¶ 15(1).]

5. GUARDIAN AND WARD — MORTGAGE — COLLATERAL ATTACK — GROUNDS — INVALIDITY OF JUDGMENT.

Where a guardian's application for authority to mortgage allotted lands of a Cherokee Indian minor, under Laws 1895, p. 37, as amended by Laws 1901, p. 38, as amended by Laws 1905, p. 185 (section 6364, Rev. Laws 1910), shows upon its face that the total indebtedness of his ward's estate is \$1,312.98, of which a portion is not subject to be paid or secured by means of such mortgage, and, without alleging any necessity for mortgaging said real estate for more than the indebtedness subject to be paid or secured by means of such mortgage, prays for an order authorizing him to mortgage the same for \$1,800, as a means to pay said indebtedness of \$1,312.98, the county court acquires no jurisdiction to determine whether the same should be mortgaged for more than the amount of the indebtedness subject to be paid or secured by means of such mortgage under said statute, and under section 4 of the act of Congress of May 27, 1908, effective on and after July 27, 1908, relating to such lands, with interest thereon, and its order authorizing such mortgage for any excess of such amount, as well as the mortgage given in pursuance thereof, is, to the extent of such excess, void and subject to collateral attack without allegation or proof of fraud.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 103; Dec. Dig. ¶ 90.]

6. GUARDIAN AND WARD — MORTGAGE — COLLATERAL ATTACK — GROUNDS.

An order, authorizing a guardian to mortgage his ward's estate to pay existing indebtedness, to which the same is liable, under Laws 1895, p. 37, as amended by Laws 1905, p. 38, as amended by Laws 1905, p. 185 (section 6364, Rev. Laws, 1910), made on the same day that application therefor was filed, and without notice, although irregular, is not void, and is therefore not subject to collateral attack without alleging and proving fraud in its procurement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 103; Dec. Dig. ¶ 90.]

7. GUARDIAN AND WARD — MORTGAGE — CORRECTION — NUNC PRO TUNC.

Where a guardian makes application under Laws 1895, p. 37, as amended by Laws 1901, p. 38, as amended by Laws 1905, p. 185 (section 6364, Rev. Laws 1910), for an order authorizing him to mortgage his ward's real estate to pay existing debts, to which the same is liable, correctly describing such real estate in such appli-

cation, and the court grants such application, but erroneously describes such estate as being situate in another township, where such ward owns no real estate, and such mortgage is executed by the guardian in pursuance of such order, but correctly describing such real estate, and where, upon application of an assignee of such mortgage more than two years thereafter, and after such ward has attained her majority, such court enters a nunc pro tunc order, correcting such error, over the objections of such former ward, who, however, does not deny such error, such error will be regarded as merely clerical and subject to be so corrected.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 103; Dec. Dig. ¶ 90.]

Error from District Court, Washington County; R. H. Hudson, Judge.

Action by the Union National Bank of Bartlesville, Okl., against W. L. Norton, as guardian of the person and estate of Gretta E. Roth, née Stokes, and others. Judgment for plaintiff, and defendants Gretta E. Roth, née Stokes, and another bring error. Reversed and remanded.

George & Campbell, of Bartlesville, for plaintiffs in error. B. B. Foster, of Bartlesville, for defendant in error Union Nat. Bank of Bartlesville.

THACKER, J. Gretta E. Roth, née Stokes, one of the plaintiffs in error, will be designated as defendant and the Union National Bank of Bartlesville, one of the defendants in error, will be designated as plaintiff, in accord with their positions in the trial court, while the other parties will be designated by their proper names so far as it may be necessary to refer to them.

This is an appeal from a judgment for the plaintiff against the defendant upon a note for \$1,800, plus interest at the rate of 8 per cent. per annum from the date of the note, and foreclosing a guardian's mortgage to satisfy the same upon her following described "allotted" lands, executed upon the authority and with the approval of the county court during her minority, to wit:

"The southwest quarter of the northwest quarter of section twenty-four (24), and the east half of the southeast quarter of the northeast quarter, and the northwest quarter of the southeast quarter of the northeast quarter of section twenty-three (23), and the northwest quarter of the southeast quarter of the northeast quarter of section eleven (11), all in township twenty-seven (27) north, range twelve (12) east Indian meridian, in Washington county, state of Oklahoma, and containing eighty acres more or less."

This judgment was given upon the sustention of a demurrer to defendant's answer and her election to stand on that answer; and the only question in this case is as to whether the court erred in sustaining this demurrer.

However faulty may be an answer that purports to allege defensive matter, it is not error to overrule a demurrer to it if the petition fails to state facts sufficient to constitute a cause of action. 10 Mod. Am. L. 113; *Shrimsher v. Newton*, 3 Ind. T. 555, 64 S. W. 534; *Hubbard v. Chism*, 5 Ind. T. 95, 82

S. W. 686; *Lafayette v. Hood*, 7 Ind. T. 606, 104 S. W. 853.

And it is contended by the defendant that the converse of this rule is true and that the petition against her in the instant case is insufficient in that: (1) It does not affirmatively show that the county court found that the best interests of the estate of the defendant would be subserved by such mortgage, as is required by said Laws 1895, p. 38, as amended by Laws 1905, p. 185 (section 6364, Rev. Laws 1910); (2) it does not affirmatively show that the county court found all of the \$1,800 nor more than \$1,312.98, to secure which these lands were mortgaged, was owing, nor that the mortgage was necessary as a means to pay or as security for any existing debt, as required by said section 6364, Rev. Laws 1910; and (3) it does not affirmatively show that the county court found that there was any liability for which such estate, or any part thereof, was then legally liable to be ordered sold, as required by said section 6364, Rev. Laws 1910, and also by said act of Congress, the said orders made by the county court being silent in respect to all these matters, except that the order authorizing the mortgage recites "that it will be of advantage to said minor to mortgage her said estate to pay said indebtedness," but this petition is clearly sufficient, as the authorities hereinafter quoted will show; and the only serious questions in this case relate to the sufficiency of the answer, the allegations in which the demurrer admits to be true.

It is contended by defendant that her said answer is sufficient to show a defense, in that it alleges and shows: (1) That all the indebtedness accrued prior to July 27, 1908, attaching a copy of the guardian's application for authority to execute the mortgage in question affirmatively showing this to be true as to a part of the indebtedness, and that these allotted lands could not be mortgaged to secure the same under section 4 of the act of Congress of May 27, 1908, effective on and after July 27, 1908, declaring that such lands shall not be subjected or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of restrictions, other than contracts expressly permitted by law; (2) that the county court authorized and the guardian executed the note and mortgage for \$487.02 more than all of the indebtedness alleged in the application therefor; (3) that said note and mortgage were authorized by said county court without previously fixing a time for a hearing on the guardian's application therefor, and without notice of hearing thereon; (4) and that the order authorizing and the order approving the note and mortgage each misdescribed these lands as being in range 13, where defendant owned no land, instead of in range 12, where these lands were situated, and afterwards corrected this

error by an order nunc pro tunc, made over defendant's objection thereto.

It is claimed by plaintiff, and appears to be tacitly admitted by defendant, that the orders authorizing and approving the mortgage and the mortgage itself are free from fraud.

The precise questions to be decided in this case, as will be seen from the foregoing, may be stated in the following form:

First. Did the county court of Washington county acquire jurisdiction to determine whether defendant's estate should be mortgaged to secure said indebtedness, especially that part of the indebtedness set forth in her guardian's application, which appears therefrom to have arisen and existed prior to July 27, 1908?

Second. Did the county court acquire jurisdiction to determine whether the defendant's estate should be mortgaged for any amount in excess of the alleged indebtedness of \$1,312.98, less such portion of the same for which it could not be mortgaged because it accrued prior to July 27, 1908, with interest thereon from date of mortgage?

Third. Does the fact that the order authorizing the execution of the mortgage was made without a prior order fixing a time for a hearing upon the guardian's application, and without notice of such hearing, affect, in this collateral proceeding, the validity of the mortgage?

Fourth. Did the county court have jurisdiction to make the nunc pro tunc order correcting the error in the description of the lands in question in the orders authorizing and approving the mortgage so as to conform the same to the guardian's application therefor and to the mortgage itself, and, if not, does this error in description defeat plaintiff's right to foreclose?

Fifth. Was it necessary that plaintiff's petition should have alleged and shown affirmatively that the county court found that the best interest of the estate would be subserved by such mortgage, that the county court found that the \$1,800 for which the mortgage was given was in fact owing, and that such estate was legally liable to be ordered sold to satisfy such indebtedness to entitle it to foreclose this mortgage?

[1] Laws of 1895, p. 87, as amended by Laws 1901, p. 38, as amended by Laws 1905, p. 185 (section 6364, Rev. Laws 1910), which is the statutory authority for such proceeding to mortgage the real estate of a ward, reads:

"The county judge may, upon petition supported by competent testimony showing that the best interests of the estate demand it, grant authority by order to administrators of intestates' estates and to guardians of the estates of minors or insane persons to mortgage any real estate belonging to such estate: Provided, that in no instance shall authority be granted by such judge to any such administrator or guardian to mortgage such real estate for a greater sum than is necessary to pay the then existing debts

and liabilities for which such estate, or any part thereof, is then legally liable to be ordered sold."

There is no question, of course, but that the proceedings had in the county court appear from the answer to have been irregular; but, in view of section 1546, Stat. 1890 (section 6489, Rev. Laws 1910); section 1248, Stat. 1890 (section 6190, Rev. Laws 1910); *Hathaway v. Hoffman*, 153 Pac. 184; *Baker v. Cureton*, 150 Pac. 1090; *Greer v. McNeal*, 11 Okl. 519, 69 Pac. 893; *Holmes v. Holmes*, 27 Okl. 140, 111 Pac. 220, 80 L. R. A. (N. S.) 920; *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433; *Spade v. Morton*, 28 Okl. 384; 114 Pac. 724; *Sockey v. Winstock*, 43 Okl. 758, 144 Pac. 372; and *Cowan v. Hubbard*, 151 Pac. 678—the aforesaid orders of the county court must be taken, in this collateral proceeding, as conclusive answers against the defendant to each and all of her contentions, unless these orders are affirmatively impeached by the application of the guardian invoking the jurisdiction of that court to hear and determine the question as to whether the mortgage should be authorized. And these orders are not so impeached except in the respects hereinafter shown. Section 1546, Stat. 1890 (section 6489, Rev. Laws 1910) reads:

"Orders and decrees made by the county court, or the judge thereof need not recite the existence of facts, or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this chapter."

This statute seems to be in perfect accord with and merely declaratory of the general law in respect to the orders and decrees of courts of general jurisdiction or of general jurisdiction in a particular matter; and the county courts of this state are courts of general jurisdiction in probate matters.

It may be here observed, as held in *Jefferson v. Gallagher*, 150 Pac. 1071, that a judgment or decree is void, and therefore subject to collateral attack: (1) Whenever the court is without jurisdiction of the parties, if the judgment is to bind them personally instead of merely as a judgment in rem; (2) whenever the court is without jurisdiction of the subject-matter in general, and (3) whenever the court is without jurisdiction of any particular matter decided. In the case of *Clark v. Arizona Mut. Savings & Loan Ass'n et al.* (D. C.) 217 Fed. 640, affirmed in *Farmers' & Merchants' Bank of Phoenix, Ariz., v. Arizona Mut. Savings & Loan Ass'n*, 220 Fed. 1, 135 C. C. A. 577, where a number of the decisions of the Supreme Court of the United States touching this question are cited and quoted, it is held in the second paragraph of the syllabus:

"Although a court has jurisdiction of the subject-matter of an action or of the parties, its power to render a valid judgment is nevertheless limited by the nature of the suit and the issues made by the pleadings, and if it tran-

scends such limits, its judgment is without jurisdiction and void."

In 24 Cyc. 684, it is said:

"In addition to jurisdiction of the parties and the subject-matter, it is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment presumes to decide, or of the particular remedy or relief which it assumes to grant, and should not undertake to pass upon matters outside the issue."

Also, see 1 Bailey on Jurisdiction, § 24, p. 21.

And in 10 Mod. Am. L. 501 it is said:

"Jurisdiction is the authority to hear and determine; and in order that it may exist the following are essential: (1) A court created by law, organized and sitting; (2) authority given it by that law to hear and determine causes of the kind in question; (3) power given it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment in personam (against the person), which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon by its being located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision."

It appears that the subject-matter of the proceeding in which the county court authorized the mortgage now sued on, considered in one of its aspects, was the entire thing in controversy, that is, was, in this comprehensive aspect, the question as to whether the best interests of the plaintiff's estate demanded that her guardian should mortgage her allotted lands for a sum necessary to pay, not only the then existing debts and liabilities for which her estate was then legally liable to be ordered sold but to pay certain debts and liabilities which accrued prior to July 27, 1908, for which such lands were not then legally liable to be ordered sold, and, also, for \$487.02 in excess of all the then existing debts and liabilities of such estate. Black's Law Dictionary; 37 Cyc. 342-3.

[2] The question as to whether her guardian should mortgage such lands for a sum necessary to pay the debts and liabilities which accrued prior to July 27, 1908, and the question as to whether he should mortgage the same for any amount in excess of the debts and liabilities for which her estate was then legally liable to be sold are each independent questions, and might each have been considered and determined by the county court apart from the other, and apart from the question of mortgaging on account of the balance of the indebtedness, instead of as an inseparable part of the general and all comprehensive questions above stated; and it thus appears that each of these questions may and should here be treated as distinct. And it may as well be here stated,

in respect to whether a judgment in excess of jurisdiction is wholly void or merely void as to the excess, that the true rule appears to be that laid down by 1 Bailey on Jurisdiction as follows:

"A court must proceed and determine within the limits of the power conferred. If it renders a judgment in an action or proceeding, where jurisdiction has attached, that it was not authorized or empowered to render at all, such judgment or decree is in excess of its jurisdiction, and for that reason a nullity. So, if it render a judgment or decree which is within its authority as to part only, but includes also that which is not within its power, the excess will be a nullity, and if the valid and invalid parts are independent of each other, the whole will not be void, but only such part as is in excess of the powers of the court." (The italicization is ours.)

[3] As to the mortgage itself, the same principle applies, as will be seen from the following excerpts from 1 Jones on Mortgages (7th Ed.) § 620, p. 107, and 1 Pingrey on Mortgages, § 547, p. 577. The former reads:

"The mortgage must be upheld for such part of the consideration as was free from taint of illegality, when the consideration of a mortgage is made up of several distinct transactions, some of which are legal and others are not, and the one can be separated, with certainty from the other. Thus a mortgage undertaking to secure two or more notes has been upheld as security for a legal note, though invalid as to an illegal note."

The latter reads:

"If the consideration of a mortgage is made up of several distinct transactions, some of which are illegal, and that part of the consideration which is illegal can be separated with ease and certainty from the legal, the mortgage may be held valid for that part of the consideration free from illegality. * * * If the illegality taints the whole transaction, the mortgage is invalid in toto."

Also see 1 Wiltse on Mortgage Foreclosure, § 407, p. 574.

[4] In 12 R. O. L. 1140, it is said:

"It is held in some cases that such facts as would, if true, give the court power to order the sale must appear in the application or somewhere on the record, but it is also held that where the probate court is a court of general jurisdiction, whose duty it is to pass upon the sufficiency of the facts alleged, and whose judgment is supported by a presumption of validity, its order of sale cannot be attacked collaterally unless the defect of jurisdiction affirmatively appears upon the record." (The italicization is ours.)

The syllabus to Hathaway v. Hoffman, supra, reads:

"Where, in an action of ejectment joined with one to clear title, plaintiffs, in order to prove title in themselves, assail the validity of the record of the county court appointing for them a guardian, who, as such, pursuant to an order of the court, had subsequently sold and conveyed the land in controversy to defendant's grantee, held, that such was a collateral attack, and that the record, being one of a court of general jurisdiction as to probate matters, could not be impeached by evidence aliunde."

"Where, assailing the record of a county court, plaintiff introduced parol evidence aliunde, over objection, that the minors for whom a guardian had been appointed by the court resided at the time of the appointment in a coun-

ty other than the county in which the appointment was made, held, that the court did right, in directing a verdict for the defendant, to lay that evidence out of the case and in effect hold that such was incompetent and without probative force to impeach the validity of the record.

"The appointment of a guardian for minors by a county court imports jurisdiction in the court so to do, and it will be inferred from the fact that such an appointment was made that all the facts necessary to vest the court with jurisdiction to make the appointment had been found to exist before the same was made.

"Where the records of the county court disclose that letters of guardianship were issued and duly recorded, that the guardian gave bond, duly qualified, and entered upon the discharge of his duties as such, as required by law, the guardian's acts will be held valid, when collaterally attacked, although the record may fail to disclose any other evidence of his appointment."

In the body of the opinion in that case it is clearly shown that in a collateral proceeding, such as the instant case is, the record of a county court, being a court of general jurisdiction in probate matters, cannot be impeached by evidence aliunde. And that case is in harmony with *Eaves v. Mullen*, supra, *Spade v. Morton*, supra, and *Sockey v. Winstock*, supra. The case of the Lessee of *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283, cited in both *Hathaway v. Hoffman*, supra, and *Eaves v. Mullen*, supra, is approvingly quoted as follows in the latter case:

"The granting of the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken. The rule is the same whether the law gives an appeal or not. If none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence. The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. *United States v. De la Maza Arredondo*, 6 Pet. 729, 8 L. Ed. 547. A purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error, so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects. They are not courts of special or limited jurisdiction. They are not inferior courts in the technical sense of the term, because an appeal lies from their decisions."

And it is further said in the opinion in the *Grignon* Case:

"Jurisdiction has been thus defined by this court: 'The power to hear and determine a cause is jurisdiction. It is coram iudice whenever a case is presented which brings this power into action. If the petitioner presents such a case in his petition that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction. Whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case is the exercise of jurisdiction, con-

ferred by the filing a petition containing all the requisites, and in the manner required by law.' [*United States v. De la Maza Arredondo*] 6 Pet. 709 [8 L. Ed. 547]. 'Any movement by a court is necessarily the exercise of jurisdiction, so, to exercise any judicial power over the subject-matter and the parties, the question is whether, on the case before a court, their action is judicial or extrajudicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it.' [*Rhode Island v. Massachusetts*] 12 Pet. 718 [9 L. Ed. 1233; *In re Watkins*] 3 Pet. 205 [7 L. Ed. 650]. It is a case of judicial cognizance, and the proceedings are judicial [*Kendall v. United States*] 12 Pet. 623 [9 L. Ed. 1181]. * * *

"No other requisites to the jurisdiction of the county court are prescribed than the death of *Grignon*, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt or his real estate was situate, making these facts appear to the court. Their decision was the exercise of jurisdiction, which was conferred by the representations; for whenever that was before the court, they must hear and determine whether it was true or not; it was a subject on which there might be judicial action. The record of the county court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition into consideration, and for these and divers other good reasons ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes that they were such as to justify their action. [*Philadelphia & T. R. Co. v. Stimpson*] 14 Pet. 458 [10 L. Ed. 535]. But though the order of the court sets forth no facts on which it was founded, the license to the administrator is full and explicit, showing what was considered and adjudicated on the petition and evidence, and that every requisition of the law had been complied with before the order was made, by proof of the existence of all the facts on which the power to make it depended. * * *

"Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject-matter before the court, and their action upon it; that their judicial power arose and was exercised by a definitive order, sentence, or decree. [*Thompson v. Tolmie*] 2 Pet. 165, [7 L. Ed. 381]. The petition in the present case called for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved; they decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale, unless in a case under the third section. * * *

"After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court. Their order of sale is evidence of that or any fact which was necessary to give them power to make it, and the same remark applies to the order to give notice

to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed, after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings in rem after a final decree by a court of competent jurisdiction over the subject-matter. * * *

"If the purchaser (under a decree of the orphans' court) was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men." [Thompson v. Tolmie] 2 Pet. 169, [7 L. Ed. 381] cited [McPherson v. Cunniff] 11 [Serg.] & R. [Pa.] 429, [14 Am. Dec. 642].

"The purchaser is not bound to look farther back than the order of the court. He is not to see whether the court were mistaken in the facts of debts and children. The decree of an orphans' court in a case within its jurisdiction is reversible only on appeal, and not collaterally in another suit. A title under a license to the administrator to sell real estate, 'is good against the heirs of the intestate, although the license was granted upon the certificate of the judge of probate, not warranted by the circumstance of the case.'" (The italicization is ours.)

In that case, which was collateral to the one in the county court in which the decree there under consideration was made, the Supreme Court of the United States shows that the jurisdiction of the county court had in fact been duly invoked by certain representations to it that are set out in the opinion; and, notwithstanding the general statement that "a purchaser is not bound to look beyond the decree," what is there said with reference to the invocation of jurisdiction in the county court leaves little room for doubt, when the opinion is considered as a whole, that the court deemed it important to the decision that such jurisdiction was in fact invoked as a predicate for the decree; the conclusion that the court thought that the record must either affirmatively show that the jurisdiction of the court is invoked, or, if not, must not negative such invocation, seems irresistible from the fact that the court itself did look with the utmost care beyond the decree and show with detail of statement that jurisdiction had been invoked and, in this connection, also made the statements above italicized. For instance, it is there said:

"The power to *hear and determine* a cause is jurisdiction; it is coram iudice whenever a *case is presented* which brings this power into action. * * *

Is it jurisdiction or will jurisdiction be conclusively presumed in a collateral proceeding where it affirmatively appears that there is no power to "determine"? It is there further said:

"No other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court. * * * Their decision was the exercise of jurisdiction, which was *conferred* by the representation. * * * The record of the county court shows that there was a *petition representing some facts*. * * * It did then appear that *there were facts and rea-*

sons before them which brought their power into action, and that it was exercised. * * *

Can it be thought that the Supreme Court of the United States in that case would have upheld the decree of the county court against collateral attack if it had *affirmatively* appeared from the record proper that the jurisdiction of the latter court had not been invoked? And is there any material difference in failing to invoke the jurisdiction of a court and futilely attempting to invoke it in respect to a matter explicitly declared by an unquestioned statute beyond its power of jurisdiction. In U. S., to Use of Hine et al., v. Morse et al., 218 U. S. 493, 31 S. Ct. 37. 54 L. Ed. 1123, 21 Ann. Cas. 782, also cited in Hathaway v. Hoffman, supra, it is said:

"But if we assume that, upon a critical construction of the will and of the statute, the bill seeking a sale of this property for reinvestment did not state a case clearly within the statutory authority of the court, it does not necessarily follow that the decree of sale and all else that occurred are to be treated as mere nullities, subject to collateral attacks such as this is. * * * The Supreme Court of the district had jurisdiction over the subject-matter, the res. It had jurisdiction over the parties. It was, according to due course of equity proceeding, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If, then, jurisdiction consists in the power to hear and determine, as has so many times been said, and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction, and that its decrees are absolute nullities? To this we cannot consent. If the court was one of general, and not special, jurisdiction, if, under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority. To do this was jurisdiction. If it errs, its judgment is reversible by proper appellate procedure. But its judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity. * * *

It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding, being coram iudice, can be impeached collaterally only for fraud. * * * In Voorhees v. Jackson, 10 Pet. 449, 9 L. Ed. 490, this court said: 'The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so.' In the one case, it is a record importing absolute verity; in the other, mere waste paper. There can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well-merited reproach to our jurisprudence if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it."

In this case the Supreme Court of the United States said, in effect, that a decree will not

necessarily be treated as a mere nullity, subject to collateral attack, when the bill invoking jurisdiction does not *clearly* state a case within the statutory authority of the court and:

"The court errs in holding that a case has been made either under its inherent power or its statutory authority."

And the court then says:

"If the court was one of general, and not special, jurisdiction, if under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority."

If in that case it had been *clear* that the court could not have had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, would the Supreme Court of the United States not have held the decree a mere nullity? And, referring to this supposed state of the case, is there any material difference between it and a case in which, in view of the undisputed facts disclosed by the record proper in the case, it is clear that the court could not have had jurisdiction under any circumstances to sell, or mortgage, although it might have had such jurisdiction under some circumstances put for the existence of the undisputed facts so appearing? The court in that case seems to attach some importance to the fact that it was not *clear*, but open to question as to whether the particular application was within or beyond the authority of the court to which it was addressed; and there is room to believe, if the bill had invoked the jurisdiction of the court in violation of a plain provision of unquestionable statutory law as to the authority of the court, a different conclusion might have been reached, although there may possibly be some room for a measure of doubt as to this.

The statement in the Grignon Case, repeated in United States, to Use of Hine, v. Morse, *supra*, and quoted without express disapproval by our own court in Eaves v. Mullen, *supra*, to the effect that a purchaser of land under an order of sale by a probate court of general jurisdiction in such matters need not look beyond such order to be assured of its validity and invulnerability against collateral attack, except for fraud in its procurement, cannot be taken as true, except upon the assumption that the record does not affirmatively show that the jurisdiction of the court had not been sufficiently invoked, in view of other expressions hereinbefore quoted from the same court in the same cases; but it appears from those cases, as well as from cases decided by our own court, that if the probate court has acquired jurisdiction, or if the record does not affirmatively show that it has not acquired the same, over the subject-matter in the case and has the power under the law to make such order, one need not look beyond the order to be so as-

sured. In Cowan v. Hubbard, *supra*, the syllabus reads:

"A guardian's deed will not be held void on a collateral attack merely because the petition of the guardian to sell the real estate of his ward defectively states the existence of the conditions under which the statute authorizes the sale."

In Eaves v. Mullen, *supra*, the fifth paragraph of the syllabus reads:

"A petition of a guardian for an order of sale of his ward's real estate must be filed in the county court of the county in which he was appointed guardian; but the petition is not required to show affirmatively that the ward resides in the county where it is filed, in order to give the court jurisdiction."

In Sockey v. Windstock, *supra*, the first paragraph of the syllabus reads as follows:

"Under section 6567, Rev. Laws 1910, the petition of a guardian to sell the real estate belonging to his ward must state the condition of the estate, and facts tending to show the expediency or necessity of such sale, in order to give the court jurisdiction to order the sale."

This case is one of collateral attack upon a guardian's conveyance; and it shows that a decree is void, and therefore subject to collateral attack, whenever it *affirmatively* appears from the record proper that the court was without jurisdiction.

It is clear that the county court could acquire no jurisdiction to determine whether defendant's allotted lands should be mortgaged to secure an indebtedness for which it was not subject to be mortgaged by reason of section 4 of the act of Congress of May 27, 1908, effective on and after July 27, 1908; and the orders, authorizing and approving the mortgage to secure that portion of the indebtedness which affirmatively appears from the guardian's application therefor to have arisen and existed prior to that date, being within the inhibition of that act, is beyond the power of the court, and therefore void and subject to collateral attack to the extent of that part of the indebtedness. Hill v. Hill, 152 Pac. 1122; Bell v. Fitzpatrick, 157 Pac. 334.

[5] As to whether the county court acquired jurisdiction to determine whether the best interests of the defendant's estate would be subserved by the mortgage in respect to the \$487.02 by which it exceeds the amount of all the indebtedness and in respect to any excess of the actual indebtedness that arose and did not exist until after July 27, 1908, and whether it was necessary to mortgage the same for said excess, with interest thereon from the date of the mortgage, as is apparent from his application, presents a more serious question; but, in the absence of any allegation to the contrary, we think the presumption from the guardian's application is that no necessity existed, and consequently no advantage to the estate could accrue which would justify the mortgage for any amount in excess of the amount of the indebtedness in respect to which a mortgage was permissible, especially in view of our usury laws, and that the county court, hav-

ing no power to render such a judgment, acquired no jurisdiction to authorize or approve the mortgage for more than the amount of the indebtedness, plus such interest thereon. *Hill v. Hill*, 152 Pac. 1122.

[6] As to whether the fact that the county court heard and acted upon the guardian's application without notice, and on the same day that it was filed, renders the order authorizing the mortgage void, and therefore subject to collateral attack without proof of the requisite species of fraud (7 Mod. Am. L. 462-3), must be answered in the negative upon the authority of all the cases hereinbefore cited touching this question, especially *Eaves v. Mullen*. See *Baker v. Cureton*, supra.

[7] As to the nunc pro tunc order, correcting the mere clerical error in the description of the land in the orders authorizing and approving the mortgage, to make that description conform to the description in the guardian's application and the description in the mortgage itself, we think there is no doubt but that the court had the authority and properly corrected this error. *Metz v. Wright*, 116 Mo. App. 631, 92 S. W. 1125.

As to the sufficiency of the plaintiff's petition, it was not necessary to have alleged any of the evidence adduced or findings of fact made by the county court in support of the guardian's application for authority to execute this mortgage, as the sufficiency of the evidence to authorize the orders made by the court, so far as its jurisdiction had been invoked, is conclusively presumed, in the absence of fraud in procurement, when the question arises collaterally as here; and the omission of the petition to allege that the county court found that the best interests of defendant's estate would be subserved by the mortgage, that a certain amount of indebtedness existed for which a mortgage might properly be executed under the statute, and that the defendant's estate was liable to be sold to satisfy that indebtedness, does not render the petition insufficient and subject to demurrer.

The petition being sufficient as we have already stated, and it appearing from the answer that the record proper in the proceedings had in the county court show affirmatively that a severable portion of the indebtedness, as a means for the payment of which the mortgage was authorized, accrued prior to July 27, 1908, when the act of Congress of May 27, 1908, went into effect, this portion of the subject-matter of the proceedings in the county court was beyond its jurisdiction, and, being therefore void and subject to collateral attack in this respect, the amount of the same should be computed and deducted from the demand of the plaintiff; and, as it appears from the answer that the total indebtedness of this defendant's estate at the time of the authoriza-

tion of this mortgage was only \$1,312.98, and that the order of the county court authorizing the mortgage and the mortgage itself was for \$487.02, in excess of such indebtedness, and to that extent beyond the jurisdiction of the county court, this amount should also be deducted, as the plaintiff is not entitled to foreclose this mortgage for more than the amount of the existing indebtedness that accrued subsequent to July 27, 1908.

For the reasons stated, the judgment is reversed, and the cause remanded, for further proceedings in accord with the views herein expressed.

KANE, C. J., and HARDY, J., concur. TURNER and SHARP, JJ., concur in the conclusion reached.

KITTS v. WOODS, Sheriff, et al. (No. 3680.) (Supreme Court of Montana. Oct. 13, 1916.)

1. ESTOPPEL \S 68(6) — GROUNDS — ASSIGNMENT—RECOVERY.

Where a claim was reduced to judgment in a justice court, and then assigned, after which the judgment debtor recognized the judgment as valid by paying it, and a creditor of the assignor recognized it as valid by levying on the proceeds, and the sheriff recognized its validity by paying the proceeds over to the attaching creditor, the assignee in his suit against the debtor, attaching creditor and sheriff for the proceeds thereof, need not prove a valid justice's judgment.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. \S 165; Dec. Dig. \S 68(6).]

2. JUSTICES OF THE PEACE \S 182 — JUDGMENT—ASSIGNMENT—RECOVERY.

Where a judgment was assigned to the plaintiff for value before the levy of attachment against the assignor, the assignee owned the proceeds of the judgment and was entitled thereto as against the attaching creditor.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. \S 182.]

Appeal from District Court, Fergus County; John A. Matthews, Judge.

Action by Mamie C. Kitts against W. R. Woods, Sheriff, and others. Judgment for plaintiff, motion for new trial denied, and defendants appeal. Order, denying new trial, affirmed.

Belden & De Kalb, of Lewistown, for appellants. E. K. Cheadle, of Lewistown, for respondent.

SANNER, J. The pleadings and evidence in this case justify the following: On July 9, 1912, one Thomas J. Kitts caused to be filed and docketed in the district court of Fergus county a memorandum, emanating from the justice court of Ross Fork township in said county, certifying that on July 12, 1911, he recovered a judgment in that court against one M. E. Stoner for \$159.95. This memorandum, entitled and intended as an abstract of judgment under sections 7056 and 7057, Revised Codes, was later amended to show

that the judgment as recovered in the justice court was for \$145.25, with costs amounting to \$23.70, in all \$168.95. On the 19th day of August, 1912, said Kitts, in consideration and partial payment of a debt due from him to Mamie C. Kitts for labor, by formal assignment transferred and set over to her—"the said judgment and all sum or sums of money or other property, rights, or remedies that may be had or obtained by means thereof, or of any proceedings to be had thereon, including liens."

Thereafter, and upon execution issued out of the district court, placed in his hands for levy, W. R. Woods, as sheriff of Fergus county, collected from Stoner the sum of \$173.91, as the accrued principal, interest, and costs of said judgment. Woods refused to pay over the money so collected to Mamie Kitts, though advised by said assignment, but retained it as the money of Thos. J. Kitts because of a writ of attachment issued out of the district court on November 7, 1912, in an action brought against Thos. J. Kitts by the Montana Lumber Company, and at the expiration of his term of office turned it over to his successor, Firmin Tullock. Tullock likewise refused to pay the money to Mamie Kitts, but held it until execution issued in the lumber company's action against Thos. J. Kitts, whereupon Tullock applied the money to said execution by paying it over to the lumber company; the lumber company retained the money notwithstanding the demands of Mamie Kitts therefor, and she brought this action against it, as well as Woods and Tullock, to recover the same. Trial was to a jury, whose verdict was for the plaintiff, and judgment followed accordingly. Defendants moved for a new trial, and, this being denied, they appealed.

[1, 2] The only contention presented to us is that the plaintiff failed to prove by competent evidence the existence of a valid judgment of the justice court in Thos. J. Kitts v. Stoner. In the present instance such proof was not necessary. The essence of plaintiff's case was that the sheriff collected and paid over to the lumber company, and it has kept, the proceeds of her claim against Stoner. This claim is identified as a claim theretofore owned by Thos. J. Kitts, reduced to a supposed or purported judgment in the justice court and assigned to her for value. Stoner chose to recognize the judgment as existing and valid by paying it, and the appellants chose to do the same thing by levying on the proceeds, treating them as the property of Thos. J. Kitts. If, therefore, this claim was assigned for value to Mamie Kitts before the levy of attachment in the lumber company's action against Thos. J. Kitts, then she, at the time the collection was made from Stoner, owned the claim, and was entitled to the money. This—the only real issue in the case—was resolved by the jury in favor of Mamie Kitts, and with that

conclusion no fault is, or can be, founded on this record.

The order denying a new trial is affirmed. Affirmed.

HOLLOWAY, J., concurs.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

STATE ex rel. DANAHER v. MILLER, Register of State Lands, et al. (No. 3879.)

(Supreme Court of Montana. Oct. 9, 1916.)

1. STATUTES ~~§~~167(1) — REPEAL — DISPOSITION AND CONTROL OF PUBLIC LANDS.

Laws 1909, c. 147, being a complete code of laws on control and disposition of state lands, revises the whole subject-matter of earlier statutes, and repeals all acts and parts of acts in conflict with it, superseding all prior and existing statutes upon the same subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 242; Dec. Dig. ~~§~~167(1).]

2. PUBLIC LANDS ~~§~~158½, New, vol. 24 Key-
No. Series—SALE—PAYMENT—BOND.

Since Laws 1909, c. 147, as to state lands, fails to require a purchaser to give bond securing deferred payments, although sections 41, 43, and 45 refer to a purchaser's bond, the courts cannot supply the deficiency.

3. MANDAMUS ~~§~~85 — MINISTERIAL DUTY —
PUBLIC LANDS—ISSUE OF CERTIFICATE.

Since Laws 1909, c. 147, § 43, entitles a purchaser of public lands to a certificate of purchase signed by the Governor as president of the state board of land commissioners, in signing such certificate the Governor performs a mere ministerial duty and if he fails or refuses to perform it, mandamus will lie to compel him to do so.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 184-188; Dec. Dig. ~~§~~85.]

4. MANDAMUS ~~§~~172 — SCOPE OF INQUIRY —
FRAUD IN SALE OF PUBLIC LANDS.

In view of Laws 1909, c. 147, § 48, providing that the board of land commissioners may cancel a certificate for fraud within three years from its date of issue, the formal approval of a sale is not conclusive, and in mandamus to compel issuance of certificate, the court may investigate the question of fraud if raised by the pleadings.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 381-385; Dec. Dig. ~~§~~172.]

5. MANDAMUS ~~§~~15 — RIGHT TO REMEDY.

Mandamus is not a writ of right, but issues only in the discretion of the court, and if the conduct of the party applying therefor has been such as to render it inequitable to grant the writ, relief may be refused.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 47, 49; Dec. Dig. ~~§~~15.]

6. PUBLIC LANDS ~~§~~158½, New, vol. 24 Key-
No. Series—SALE—FRAUD—EVIDENCE.

Where the husband of the purchaser of public lands agreed with another bidder that only one of them should bid and they should then toss a coin to determine which should have the land, and after the property was knocked down to the husband he offered the other \$150 for his chance, which was accepted, and the wife then made her check for \$150 to the other bidder, her act was a ratification of the fraud

which under Rev. Codes, § 5422, has the effect of a prior authorization.

7. PUBLIC LANDS \S 158 $\frac{1}{4}$, New, vol. 24 Key-No. Series—SALE—FRAUD—EVIDENCE.

Such agreement was unlawful, and to permit it to be carried into effect would result in a fraud upon the state.

8. PUBLIC LANDS \S 158 $\frac{1}{4}$, New, vol. 24 Key-No. Series—"SALE AT AUCTION."

Since under Laws 1909, c. 147, § 38, all sales of state lands must be at public auction, which means a sale to the highest and best bidder with absolute freedom for competitive bidding, any agreement to stifle competition or chill bidding is a fraud upon the principle upon which the sale is founded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Auction.]

9. PUBLIC LANDS \S 158 $\frac{1}{4}$, New, vol. 24 Key-No. Series—FRAUD IN SALE—EFFECT—RIGHT TO CERTIFICATE.

Where the purchaser of state lands was guilty of fraud in buying one parcel, but the purchase of an adjoining parcel revealed no fraud, she could maintain mandamus to compel issuance of a certificate for the second parcel, though not for the first.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Mandamus proceedings by the State, on the relation of Mary M. Danaher, against Sidney Miller, Register of State Lands, and S. V. Stewart, President of the State Board of Land Commissioners. From the judgment of dismissal and order denying a new trial, relatrix appeals. Order denying new trial affirmed, and cause remanded, with directions.

Wight & Pew, of Helena, for appellant. J. B. Polindexter, Atty. Gen., and W. D. Rankin, of Helena, for respondents.

HOLLOWAY, J. At a sale of state lands held in Helena, the west half of section 16, Twp. 14 N., R. 9 W., was offered for sale in two separate parcels of 160 acres each. Mary M. Danaher was the only bidder for either parcel, and was declared to be the purchaser of each at \$10 per acre. She paid over to the register of state lands the first installment required by law, and thereafter at a regular meeting of the state board of land commissioners these sales were approved. The Governor, as president of the board, and the register refused to issue a certificate of purchase to Mrs. Danaher, and this proceeding in mandamus was instituted.

The officers interpose as a defense that Thomas Danaher, husband and agent of Mrs. Danaher, conspired with one I. Y. Wood to prevent competitive bidding for the land; that the conspiracy was carried into effect, by reason whereof the state will be defrauded if the relief sought is granted. The trial developed these facts: Mrs. Danaher desired to purchase the entire half section. Wood desired to secure the southwest quarter and came to the sale prepared to bid as much as \$13 per acre, if necessary. Just before the sale commenced, Thomas Danaher and Wood agreed that one of them should bid in this

quarter section, and that the two should then toss a coin to determine which one should get it. Immediately after the register had declared the two tracts sold to Mrs. Danaher, Thomas Danaher turned to Wood and offered him \$150 for his chance, and, the offer having been accepted, Mrs. Danaher drew her check in favor of Wood for the amount and delivered it to him. She had knowledge of the terms of the agreement at the time she paid over the money or immediately thereafter. The trial court dismissed the proceeding, and from the judgment of dismissal and from an order denying a new trial relatrix appealed.

[1] 1. The statutes relating to the management and disposition of the state lands were found in the Political Code of 1895 and the amendments thereto, until the Act of March 19, 1909 (Laws 1909, c. 147) became effective. This later act appears to have been intended, not as a supplement to existing laws, but as a complete code of laws upon the subject, Control and Disposition of State Lands. It revises the whole subject-matter of the earlier statutes and repeals all acts and parts of acts in conflict with it. In our opinion it superseded all prior and existing statutes which had to do with the same subject.

[2] 2. It is insisted that relatrix fails to state a cause of action in that she fails to allege that she gave or tendered a bond to secure the deferred payments. While sections 41, 43, and 45 of the new act refer to the purchaser's bond, the act itself does not anywhere require a purchaser to give bond to secure the deferred payments. The failure to make such requirement may have been the result of oversight, but even so the courts are not authorized to supply the deficiency if one exists.

[3] 3. Section 43 provides that a purchaser shall be entitled to a certificate of purchase, which certificate "shall be signed by the Governor, as the president of the state board of land commissioners, and by the register." In signing such certificate the Governor performs a mere ministerial duty, and if he fails or refuses to perform such duty when he should perform it, mandamus will lie to compel performance. *Chumaseo v. Potts*, 2 Mont. 242.

[4] 4. The trial court was not precluded from investigating the question of fraud raised by the pleadings. That the formal approval of a sale by the state board was not intended to be conclusive, even upon questions of fact, is manifested by the further provision in section 49 that the board may cancel a certificate for fraud at any time within three years from its date of issue.

[5] It is to be borne in mind further, that mandamus is not a writ of right. It issues only in the discretion of the court (*State ex rel. Donovan v. Barrét*, 30 Mont. 208, 81 Pac.

349; *State ex rel. Bailey v. Edwards*, 40 Mont. 313, 106 Pac. 703; and when it is made to appear that with reference to the very question at issue, the conduct of the party applying for the writ has been such as to render it inequitable to grant it, the relief may be refused (*People ex rel. Durant L. I. Co. v. Jeroloman*, 139 N. Y. 14, 34 N. E. 726). Courts are not created to aid in the perpetration of fraud.

[6-8] 5. Is relatrix bound by the acts of Thomas Danaher? Whether Thomas Danaher was the duly authorized agent of his wife at the time he entered into the agreement with Wood is of no moment here. The agreement was made for the benefit of Mrs. Danaher, and, conceding that she was not bound by it at the time and that she might have repudiated it when she became aware of its terms and conditions, yet she failed to exercise such right, but, on the contrary, has ever since insisted that the courts should aid her to profit by it. She ratified her husband's act, which has the effect of a prior authorization. Rev. Codes, § 5422. The agreement was unlawful, and to permit it to be carried into effect would result in a fraud upon the state. 6 Corpus Juris, 830. "All sales of state lands shall be at public auction" (section 38, Act 1909), and this means a sale to the highest and best bidder with absolute freedom for competitive bidding. Any agreement, therefore, to stifle competition or chill the bidding is a fraud upon the principle upon which the sale is founded. 4 Cyc. 1044, and cases cited.

The transaction before us bears no resemblance to an agreement between two bona fide prospective bidders to combine their means for the purchase of property to be divided between them. It was intended to stifle competition in bidding, and had that effect. The relatrix has no standing in a court to insist upon a right to, or interest in, the southwest quarter.

[9] If the purchase of the entire west half had constituted one transaction, the fraud would have permeated the whole transaction; but each quarter section was sold as a distinct entity as the law requires. There were two sales, and, so far as this record discloses, the purchase of the northwest quarter was free from any taint of wrongdoing. The relatrix appears to have established her right to a certificate of purchase for that parcel, and should have been granted relief to that extent.

A new trial is unnecessary, and the order denying one will be affirmed. The cause is remanded to the district court, with directions to grant the relatrix relief to the extent herein indicated.

SANNER, J., concurs. Mr. Chief Justice BRANTLEY, being absent, takes no part in the foregoing decision.

POHL v. CHICAGO, M. & ST. P. RY. CO.
(No. 3879.)

(Supreme Court of Montana. Oct. 16, 1916.)

1. TAXATION — § 37 — CONSTITUTIONAL PROVISIONS — APPORTIONING DIRECT TAXES.

Const. U. S. art. 1, § 2, 9, declaring that direct taxes, if laid, shall be apportioned among the several states according to population, have no application to the states, but are merely limitations upon the power of Congress.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 64-66, 133; Dec. Dig. § 37.]

2. CONSTITUTIONAL LAW — § 284(2) — TAXATION — § 55 — DUE PROCESS — POLL TAX.

The so-called poll tax statute (Rev. Codes, §§ 2692-2714) does not deprive the taxpayer of his property without due process of law, in violation of Const. U. S. Amend. 14, § 1, because it fails to provide for notice before the tax is levied or collected.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 893, 894; Dec. Dig. § 284(2); *Taxation*, Cent. Dig. §§ 129-132; Dec. Dig. § 55.]

3. CONSTITUTIONAL LAW — § 82 — POLL TAX — DECLARATION OF RIGHTS.

The so-called poll tax statute (Rev. Codes, §§ 2692-2714) is not repugnant to the provisions of Const. art. 3, § 2, declaring that the people of the state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, etc.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 149; Dec. Dig. § 82.]

4. CONSTITUTIONAL LAW — § 42 — STATUTES — RIGHT TO QUESTION VALIDITY.

One who is not affected by a statute may not question its validity.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.]

5. TAXATION — § 55 — CONSTITUTIONALITY — POLL TAX — LACK OF UNIFORMITY.

Although the so-called poll tax law (Rev. Codes, §§ 2692-2714) does not apply to paupers, insane persons, Indians not taxed, or to persons under 21 or over 60 years of age, and, although Rev. Codes, § 1068, specifically exempts members of the organized militia, these statutes do not, because of this lack of uniformity, conflict with Const. art. 12, § 6, providing that no county, city, etc., or the inhabitants thereof shall be released or discharged from their proportionate share of state taxes, since this last provision refers only to state taxes levied for the support of the state government, and not to taxes imposed for county or local purposes, and no part of the so-called poll tax is devoted to maintaining the state within the meaning of this constitutional provision.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 129-132; Dec. Dig. § 55.]

6. CONSTITUTIONAL LAW — § 47 — STATUTES — QUESTIONING VALIDITY — FORM OF STATUTE.

In considering the constitutionality of a statute, courts look beyond the mere form of expression to the object and purpose of the legislation.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 47.]

7. TAXATION — § 55 — UNIFORMITY — LOCAL TAXATION FOR RELIEF OF POOR — "TAX."

The so-called poll tax statute (Rev. Codes, §§ 2692-2714) is a valid police regulation to carry into effect section 5, art. 10, Const., providing that the counties shall provide as prescribed by law for the poor or unfortunate, and the exaction imposed thereby is not a "tax" as the term is used in the Constitution and reve-

nue measures generally, and therefore is not subject to the uniformity rule or other restrictions on the taxing power.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 129-132; Dec. Dig. § 55.

For other definitions, see *Words and Phrases*, First and Second Series, Tax.]

Appeal from District Court, Powell County; J. E. Erickson, Judge.

Proceeding by E. C. Pohl against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment, plaintiff appeals. Affirmed.

W. E. Keeley, of Deer Lodge, for appellant. J. B. Poindexter, Atty. Gen., and C. S. Wagner, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. This is an appeal by the plaintiff from a judgment upholding the statute imposing our so-called poll tax. Rev. Codes, §§ 2692-2714. The statute was enacted in 1891 (Laws 1891, p. 73), amended slightly in 1893 (Laws 1893, p. 65), and, as thus modified, carried into the compilations of 1895 and 1907. It is assailed upon the ground that it conflicts with the provisions of sections 2 and 9, art. 1, of the Constitution of the United States, which declare that direct taxes, if laid, shall be apportioned among the several states according to population, and with section 1 of the Fourteenth Amendment, which forbids any state to deprive a person of life, liberty, or property without due process of law.

[1] The first two sections have no application to the states. They are merely limitations upon the power of Congress. *Cooley on Taxation* (2d Ed.) p. 8; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759.

[2] Assuming for present purposes that the statute under review provides for the imposition of a tax as that term is understood in revenue parlance, it is not subject to the objection that in failing to provide for notice before the tax is levied or collected it deprives the taxpayer of his property without due process of law. This question was set at rest by the Supreme Court of the United States in *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, where it is said:

"Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally specific taxes on things, or persons, or occupations. In such cases the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded."

[3] In his brief counsel for appellant suggests that the statute is repugnant to the provisions of section 2, art. 8, of our state Constitution; but, in the absence of something more specific, we are utterly unable to appreciate the force of the suggestion or to discover the remotest relationship between those provisions and the subject-matter under consideration.

[4, 5] The statute does not apply to paupers, insane persons, Indians not taxed, or to persons under 21 or over 60 years of age. Another statute (section 1068, Rev. Codes) specifically exempts members of the organized militia. Because of this lack of uniformity it is urged that these statutes conflict with section 6, art. 12, which provides:

"No county, city, town or other municipal corporation, the inhabitants thereof nor the property therein, shall be released or discharged from their or its proportionate share of state taxes."

In the first place, appellant cannot raise the question of the authority of the state to exempt members of the organized militia from the payment of this so-called tax. Appellant is not a member of the National Guard, and is not affected by the exemption. His contribution is not increased in amount by reason of the exemption, and would not be diminished in amount if every member of the organized militia contributed. The validity of section 1068 is not in issue here; for it is an elementary rule that one who is not affected by a statute will not be heard to question it. *State ex rel. Holliday v. O'Leary*, 43 Mont. 157, 115 Pac. 204.

Section 6, art. 12, refers only to state taxes levied for the support of the state government, and not to taxes imposed for county or local purposes. No part of this so-called poll tax is devoted to maintaining the state, within the meaning of section 6, above.

[6] The statute (sections 2692-2714) is not open to the objections urged against it for the stronger reason. While in terms it designates the imposition a "poll tax," the name itself is of no significance. A different designation might have been more appropriate; but in any event courts look beyond the mere form of expression to the object and purpose of the legislation. This so-called tax is imposed for and applied to a single purpose—the care of the county poor. Section 2714. It will scarcely be questioned that the state, in the exercise of its police power, can care for its poor, sick, and infirm who are public charges, or delegate the power to do so to the several counties, its political subdivisions. Enlightened civilization imposes this duty upon every community, but in this state the duty is made imperative by the Constitution itself (section 5, art. 10):

"The several counties of the state shall provide as may be prescribed by law for those inhabitants, who by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."

[7] The statute now under consideration is nothing more nor less than a police regula-

tion designed to carry into effect the will of the people expressed in the constitutional provision quoted above. It is analogous to a so-called road poll tax exacted for the maintenance of the public highways, and the authorities are practically unanimous in holding that such an exaction is not a tax as the term is used in the Constitution and in revenue measures generally. It is not subject to the uniformity rule or to other restrictions which hedge about measures relating to taxation. *Salt Lake City v. Wilson* (Utah) 148 Pac. 1104; *State v. Rayburn*, 2 Okl. Cr. 413, 101 Pac. 1029, 22 L. R. A. (N. S.) 1067, Ann. Cas. 1912A, 733, and note. See, also, *Tekoa v. Rellly*, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. (N. S.) 901; *Short v. State*, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404; *Elting v. Hickman*, 172 Mo. 237, 72 S. W. 700; *Fairbault v. Misener* (Ill. 347) 20 Minn. 396; *Shane v. City of Hutchinson*, 88 Kan. 188, 127 Pac. 606.

It is competent for the Legislature to provide for securing these poor funds through the instrumentalities designated in the statute, and the assessor, in performing his allotted duty in this behalf, is not a collector of taxes, and the decision of this court in *Mutual Life Ins. Co. v. Martien*, 27 Mont. 437, 71 Pac. 470, has no application to the state of facts exhibited by this record.

The judgment is affirmed.
Affirmed.

SANNER, J., concurs.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

COATES v. SMITH et al.

(Supreme Court of Oregon. Oct. 17, 1916.)

1. ACKNOWLEDGMENT — SUFFICIENCY OF CERTIFICATE OF ACKNOWLEDGMENT.

In considering the sufficiency of the certificate of acknowledgment of a mortgage, the whole instrument should be examined.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 151-159; Dec. Dig. —29.]

2. ACKNOWLEDGMENT — NAMES OF MORTGAGORS — CLERICAL ERROR — STATUTE.

Under L. O. L. § 7100, relative to certificates of acknowledgment of mortgages, where the certificates of acknowledgment of a mortgage identified the parties as known to the officer taking the acknowledgment to be the persons executing the instrument, the fact that the names appeared spelled as "Samuel H. Smith" and "Adora L. Smith," instead of the names of the mortgagors, Chester A. Smith and Otis S. Smith, will not vitiate the instrument, the presumption being that the variance in names was the result of a mere clerical error, as the material matter is the identification of the mortgagors, and not the notation of their names.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 181, 182, 184, 187; Dec. Dig. —36(1).]

3. VENDOR AND PURCHASER — CERTIFICATE OF ACKNOWLEDGMENT — RECORD — NOTICE.

A certificate of acknowledgment of a mortgage failing to name the acknowledging party, does not affect the validity of the acknowledgment, where reference is made in the certificate to the party who executed the conveyance, nor does it render the record of the instrument less efficacious to impart constructive notice to a subsequent purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 538; Dec. Dig. —231(15); *Acknowledgment*, Cent. Dig. § 155.]

4. ACKNOWLEDGMENT — SUFFICIENCY.

The language of a certificate of acknowledgment of a mortgage will be liberally construed, and, when it refers to the conveyance, reference may be had to the body of the deed or mortgage in aid of the certificate, which is sufficient if the two together show a substantial compliance with the statute.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 151-159; Dec. Dig. —29.]

5. ACKNOWLEDGMENT — DUTY OF OFFICER TAKING — PRESUMPTION — STATUTE.

There is a presumption that the officer taking an acknowledgment of a deed or mortgage complied with L. O. L. § 7109, requiring that he know or have satisfactory evidence that the person making the acknowledgment is the individual described in and who executed the conveyance.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 320-335; Dec. Dig. —59.]

6. ACKNOWLEDGMENT — MORTGAGES — FORM.

No particular form is required for an individual acknowledgment of a mortgage.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 151-159; Dec. Dig. —29.]

7. BANKRUPTCY — RIGHT OF TRUSTEE — BONA FIDE PURCHASER.

A trustee in bankruptcy, having the right of an attaching creditor, is not ipso facto a bona fide purchaser for value, and that he is such a purchaser, unaffected by outstanding equities against the bankrupt, is an affirmative defense, which must be pleaded and proved.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 457; Dec. Dig. —302(4).]

8. REFORMATION OF INSTRUMENTS — EQUITABLE JURISDICTION — PAROL TESTIMONY.

Equity will exercise its jurisdiction for the correction or reformation of a written instrument on the ground of mutual mistake, and for such purpose will receive parol testimony.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 68, 155, 156; Dec. Dig. —16, 44.]

9. REFORMATION OF INSTRUMENTS — BETWEEN WHAT PARTIES.

Reformation of a written instrument on the ground of mutual mistake will be decreed in a court of equity as between the original parties or those claiming under them in privity, such as judgment creditors.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 101-111, 114-116; Dec. Dig. —28.]

10. REFORMATION OF INSTRUMENTS — MISTAKE — PLEADING.

In a suit to reform a deed or written contract on the ground of mistake, plaintiff should

plead the particular circumstances constituting the mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144; Dec. Dig. ¶ 36(3).]

11. REFORMATION OF INSTRUMENTS ¶36(1)—SUIT TO REFORM NOTE AND MORTGAGE—COMPLAINT—SUFFICIENCY.

In suit to reform a note and mortgage against the mortgagors and the trustee in bankruptcy of one of them, where the complaint did not show that it was the intention of the parties that an alleged oral agreement as to the time of payment of interest should be incorporated in the note, nor that it was not the intention of either of the parties to rely upon the oral agreement, averred to have been made both before and after the execution of the note, and did not disclose when the alleged omission was discovered by plaintiff, nor what instructions were given the scrivener, or by whom, asserting no fraud on the part of the mortgagors, the circumstances relating to the transaction, as set forth, being very meager, such complaint was insufficient against demurrer on the ground that it did not state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 143, 146; Dec. Dig. ¶ 36(1).]

12. COSTS ¶238(2) — APPEAL AND ERROR — FAILURE TO RAISE POINT BELOW.

In suit to reform a note and mortgage, where the specifications of a defendant's demurrer to the complaint did not direct the attention of the trial court to the point urged against it on such defendant's appeal, he could not recover costs, though successful.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 912; Dec. Dig. ¶ 238(2).]

Burnett, J., dissenting.

In Banc. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit by Catherine Coates against Chester A. Smith, Otis S. Smith, and R. L. Sabin, trustee in bankruptcy. From a decree for plaintiff, the trustee appeals. Reversed, and cause remanded for further proceedings.

This is a suit in equity to reform and foreclose a mortgage for \$1,621, and interest, executed on January 2, 1913, by the defendants Chester A. Smith and Otis S. Smith. A demurrer was filed and sustained to the complaint. An amended complaint and a supplemental complaint were thereafter filed. Defendant R. L. Sabin, trustee in bankruptcy, demurred to the amended complaint.

It is shown by the pleadings of plaintiff that on January 2, 1913, the defendants Chester A. Smith and Otis S. Smith executed to plaintiff their promissory note as follows:

"\$1,621. Portland, Oregon, January 2, 1913.

"Five years after date, without grace, we promise to pay to the order of Catherine Coates sixteen hundred and twenty-one dollars, for value received, with interest after date at rate of 7 per cent. per annum until paid. Principal and interest payable in U. S. gold coin at Sunnyside, Portland, Oregon, and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay such sum as the court may adjudge reasonable as attorney's fees in said suit or action. There may be paid on any interest-bearing date any amount in even hundred dollars.

Chester A. Smith.
Otis S. Smith."

On the same date, for the purpose of securing the payment of the note, defendants Chester A. Smith and Otis S. Smith executed their real estate mortgage which is set forth in *hæc verba* in the complaint, to which was affixed the following certificate of acknowledgment, omitting the formal parts:

"On the 2d day of January, A. D. 1913, personally came before me, a notary public in and for said county and state, the within-named Samuel H. Smith and Adora L. Smith, his wife, to me personally known to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same freely for the uses and purposes therein mentioned."

This mortgage was duly recorded on January 2, 1913. No interest having been paid on the note, plaintiff elected to declare the whole amount due, and instituted proceedings to foreclose the mortgage. In addition to the allegations of the original complaint, the pleadings of the plaintiff contained the following:

"That at the time the said note was executed and subsequent to the date of its execution, the said defendants Chester A. Smith and Otis S. Smith orally promised and agreed to pay the said interest provided for in said note yearly, that is, to pay the interest on the principal sum of said note on or about the 2d day of January of each year, after the time of the execution of said note, but that the scrivener who drew up the said note neglected to state in said note that the interest made payable thereby should be paid annually; that at the time of the execution of said note it was, and now is, the custom to pay the interest on promissory notes annually when the time of payment of said note is not stated in said note, and the said custom was known to the plaintiff and the defendants at the time of the execution of said note; that at the time of the execution of said note and mortgage the said E. C. Minor, who acknowledged the same as notary public, erroneously inserted in the acknowledgment of said mortgage the names of Samuel H. Smith and Adora L. Smith, wife of said Samuel H. Smith, in place and instead of the names of the makers of said mortgage, and that the insertion of said names of Samuel H. Smith and Adora L. Smith was through the error, inadvertence, and mistake of the said E. C. Minor, and that the said defendants Chester A. Smith and Otis S. Smith were present at the execution thereof, and in the presence of said notary public acknowledged the execution of said document, and that it was the intention of said scrivener or notary public to insert the names of said Chester A. Smith and Otis S. Smith in the said acknowledgment instead of the names of said Samuel H. Smith and Adora L. Smith."

Plaintiff prayed that the note and mortgage be reformed to correct the alleged mistake.

It appears that in May, 1914, subsequent to the date of the execution of the mortgage, the defendant Chester A. Smith was declared bankrupt; that thereafter, about May 28, 1914, R. L. Sabin, one of the defendants, was elected by the creditors of Chester A. Smith, as trustee in bankruptcy for the latter, and that he has duly qualified as such. It further appears that on April 21, 1913, defendant Otis S. Smith executed a deed conveying all his right and title in the real property

mortgaged to defendant Chester A. Smith, in consideration of the sum of \$1,500, to be paid thereafter, with interest at 6 per cent., and that such deed was duly recorded; that on June 17, 1914, Otis S. Smith filed his claim against the estate of Chester A. Smith, bankrupt, in the sum of \$1,566.50, based upon the note given for the conveyance of said real estate, and received from the trustee in bankruptcy 3 per cent. on the amount claimed. The defendant Chester A. Smith made no defense to this suit. The defendant R. L. Sabin made no answer and has pleaded no equities for the creditors in the bankruptcy proceedings. The defendant Otis S. Smith filed an answer setting up that at the date of the execution of the mortgage he was a minor, and therefore not liable upon his contract.

Plaintiff filed a supplemental complaint pleading therein facts occurring subsequently to the date of filing the original and amended complaints as a waiver and estoppel against the defendant Otis S. Smith of his right to plead infancy as a defense, and setting forth particularly that all right, title, and interest owned by him in the real property described in the mortgage had been conveyed to Chester A. Smith. No other or additional allegations affecting the rights or interests of the defendant R. L. Sabin, other than as appeared in the amended complaint, were contained in the supplemental complaint. Otis S. Smith defaulted, and R. L. Sabin filed a demurrer identical in terms with the demurrer filed to the amended complaint. The court entered his default, and also a judgment and decree on the pleadings reforming the note and mortgage and foreclosing the latter as reformed. From this decree R. L. Sabin, trustee in bankruptcy for defendant Chester A. Smith, appeals.

Sidney Telser, of Portland, for appellant. John K. Kollock, of Portland (Kollock, Zollinger & McDowall and Jeffrey & Lenon, all of Portland, on the brief); for respondent.

BEAN, J. (after stating the facts as above). It is contended by defendant R. L. Sabin that he is an innocent third party, that the acknowledgment of the mortgage did not entitle the same to be recorded, and that therefore the recordation imparted no notice to the trustee, and that the latter took the title to the property unaffected by the plaintiff's mortgage.

[1-4] In the consideration of the certificate of the acknowledgment of the mortgage the whole instrument should be examined. Where the certificate of acknowledgment of a conveyance identifies the parties as known to the officer taking the acknowledgment to be the persons who executed the same, the fact that the names of the parties appear in such certificate spelled as "Samuel H. Smith" and "Adora L. Smith" instead of the names of the mortgagors, Chester A. Smith and

Otis S. Smith, will not vitiate the instrument. It will be presumed that such variance in names is the result of a clerical error merely. 1 O. J. p. 848, note 67 b; 1 R. C. L. p. 284, § 62; Rodes v. St. Anthony & Dakota Elevator Co., 49 Minn. 370, 52 N. W. 27; Bell v. Evans, 10 Iowa, 353. The material matter in such a certificate of acknowledgment is the identification of the mortgagors, and not the notation of their names. The one in question shows that the officiating notary declares that the persons appearing before him and acknowledging the execution of the instrument are personally known to him to be the identical persons described therein, and who executed the same. It therefore appears from the instrument that the officer taking the acknowledgment identified the mortgagors, although he did not correctly write their names.

Under our statute there is no specific requirement that the name of a grantor or mortgagor shall be contained in the certificate of acknowledgment. Section 7109, L. O. L., directs that:

"The officer taking such acknowledgment shall indorse thereon a certificate of the acknowledgment thereof, and the true date of making the same, under his hand."

If the certificate shows that such officer knows that "the person making such acknowledgment is the individual described in and who executed such conveyance," the identification is complete according to section 7119, L. O. L. No other description or name of the grantor is absolutely essential. Omitting the erroneous names, which may be treated as surplusage, the certificate in the present case plainly identifies the mortgagors. A reference to the mortgage clearly indicates that the names written in the certificate, and also the description of one of the mortgagors as the wife of the other, when both are designated in the conveyance as "single," are clerical errors. It is now well established by the great weight of authority that a certificate failing to name the acknowledging party where reference is made in the certificate to the party who executed the conveyance does not affect the validity of the acknowledgment. 1 R. C. L., supra; Larson v. Elsner, 93 Minn. 303, 101 N. W. 307, 2 Ann. Cas. 989, and note; Pickett v. Doe, 5 Smedes & M. (Miss.) 470, 43 Am. Dec. 523; Milner v. Nelson, 86 Iowa, 452, 53 N. W. 405, 19 L. R. A. 279, and note, 41 Am. St. Rep. 506; Wilcox v. Osborn, 77 Mo. 621. Neither does it render the record of the instrument less efficacious. The record of such an instrument is sufficient to impart constructive notice to a subsequent purchaser in good faith without actual knowledge. Milner v. Nelson, supra. The language of such certificate will be accorded a liberal construction, and, when it refers to the conveyance, reference may be had to the body of the deed or mortgage in aid of the certificate of acknowledgment, and, if the two together show a substantial compliance

with the statute, it is sufficient. 1 C. J. p. 846, § 187; 1 R. C. L. p. 282, § 59; 1 Cyc. 585, 586; *Bell v. Evans*, supra; *Milner v. Nelson*, supra; *Wilcoxon v. Osborn*, supra; *Carpenter v. Dexter*, 8 Wall. 518, 19 L. Ed. 426; *Bird v. McClelland, etc., Co. (C. C.)* 45 Fed. 458; *Geekie v. Kirby Carpenter Co.*, Fed. Cas. No. 5,295; *Frederick v. Wilcox*, 119 Ala. 355, 24 South. 582, 72 Am. St. Rep. 925; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Wilson v. Russell*, 4 Dak. 376, 81 N. W. 645; *International Kaolin Co. v. Vause*, 55 Fla. 641, 46 South. 3; *Sammer v. Mitchell*, 29 Fla. 179, 10 South. 562, 14 L. R. A. 815, 30 Am. St. Rep. 106; *Rackleff v. Norton*, 19 Me. 274; *King v. Merritt*, 87 Mich. 194, 84 N. W. 689; *Hughes v. Morris*, 110 Mo. 306, 19 S. W. 481; *Graham v. Whitely*, 26 N. J. Law, 254; *Bauer v. Schmelcher (City Ct. Brook.)* 5 N. Y. Supp. 423; *Beckel v. Petticrew*, 6 Ohio St. 247; *Dahlem's Estate*, 175 Pa. 454, 34 Atl. 807, 52 Am. St. Rep. 848; *Love v. Shields*, 3 Yerg. (Tenn.) 405; *Gulf, etc., Ry. Co. v. Carter*, 5 Tex. Civ. App. 675, 24 S. W. 1083; *Chandler v. Spear*, 22 Vt. 388; *Blake v. Hollandsworth*, 71 W. Va. 387, 76 S. E. 814, 43 L. R. A. (N. S.) 714; *Hiles v. La Flesh*, 59 Wis. 465, 18 N. W. 435. It is unnecessary to re-form the certificate of acknowledgment.

[5, 6] The substantial requirement of the recording statute should not unnecessarily be sacrificed for an obvious clerical mistake. It does not appear that any one has been misled or injured thereby, and the acknowledgment and record of the mortgage were not thereby invalidated. Section 7119, L. O. L., requires that the officer taking the acknowledgment know, or have satisfactory evidence, that the person making it is the individual described in and who executed the conveyance, and it is presumed that the officer did his duty. The officer taking acknowledgment of a deed in this state is required to endorse thereon a certificate of the acknowledgment thereof. Section 7109, L. O. L. No particular form is required for an individual acknowledgment. The mortgage of plaintiff was acknowledged so as to entitle the same to record, and was therefore constructive notice of plaintiff's equity, notwithstanding the notary's clerical error in the certificate. 1 Am. & Eng. Ency. of Law (2d Ed.) p. 547b; *King v. Merritt*, 87 Mich. 194, 34 N. W. 689; *Kentucky Land Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31; *Shelton v. Aultman Co.*, 82 Ala. 315, 8 South. 232. As stated in 1 Am. & Eng. Ency. of Law, supra:

"Whenever substance is found, obvious clerical errors and technical omissions or defects will be disregarded."

In 1 C. J. p. 848, § 190, the rule is thus laid down:

"Where, from an inspection of the whole instrument, it appears with reasonable certainty that the person who acknowledged was the one who executed it, the clerical error in stating the name of the grantor will not invalidate the instrument."

The following principle is briefly stated in the case of *Platt v. Rowand*, 54 Fla. 237, 45 South. 32:

"The declared and settled policy of the law as construed by this court is 'to uphold certificates of acknowledgment of deeds, and wherever substance is found obvious, clerical errors and all technical omissions will be disregarded.'"

Any interest that the trustee in bankruptcy may have in the premises is subordinate to the lien of plaintiff's mortgage.

[7-12] It is next contended by counsel for the defendant trustee that a reformation of a written instrument will not be decreed as against third parties whose rights were acquired without notice of the circumstances, and that the trustee is such a party. It is therefore pertinent to inquire as to the status of the trustee.

Bankr. Act July 1, 1898, c. 541, § 47, subd. "a," cl. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500 [U. S. Comp. St. 1913, § 9631]), provides that a bankrupt's trustee, as to all the property in the custody or coming into the custody of the bankruptcy court, shall be vested with all rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and as to all property not in the bankruptcy court the rights of a judgment creditor holding an execution duly returned unsatisfied. See *Bank v. Coats*, 205 Fed. 618, 123 C. O. A. 634, Ann. Cas. 1913E, 846. Under the amended statute a trustee in bankruptcy is in the position of a lien creditor, and, as stated by Mr. Remington in his work on Bankruptcy, has—

"whatever rights creditors under state law would have had had they been 'armed with process,' whether actually so 'armed' or not; the trustee being deemed a levying creditor, so far as property in the custody of the bankruptcy court is concerned, and a creditor armed with an execution returned unsatisfied as to property not in such custody." 2 Remington on Bankruptcy, § 1207.

In Collier on Bankruptcy, p. 660, it is stated:

"The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the states."

Assuming that the rights of the trustee are equal to those of an attaching creditor under our statute, and considering the case first from such standpoint, it is the settled law in this state that a trustee having the right of an attaching creditor is not ipso facto a bona fide purchaser for value. That one is such a purchaser, and not affected by outstanding equities, is an affirmative defense which must be pleaded and proved. Before an attaching creditor or one standing in an equal position can be deemed a purchaser in good faith, he must allege and prove all the facts necessary to establish that character of his ownership. *Rhodes v. McGarry*, 19 Or. 222, 229, 26 Pac. 971; *Meyer v. Hess*, 23 Or.

599, 601, 32 Pac. 755; *Raymond v. Flavel*, 27 Or. 219, 243, 40 Pac. 158; *Laurent v. Lanning*, 32 Or. 18, 51 Pac. 80; *Dimmick v. Rosenfeld*, 34 Or. 101, 105, 55 Pac. 100; *Flegel v. Koss*, 47 Or. 366, 83 Pac. 847; *Jennings Leutz*, 50 Or. 483, 487, 93 Pac. 327, 29 L. R. A. (N. S.) 584; *Ayre v. Hixson*, 53 Or. 19, 27, 98 Pac. 515, 133 Am. St. Rep. 819, Ann. Cas. 1913E, 659; *Barnes v. Spencer*, 153 Pac. 47. It would seem from the record in this case that, at the most, the standing of the trustee in bankruptcy is equal to that of a judgment creditor. *Bank v. Coats*, supra, 205 Fed. at page 626, 123 C. C. A. 634, Ann. Cas. 1913E, 846; *Cooper Grocery v. Park*, 218 Fed. 42, 43, 134 C. C. A. 64; *Smith v. Bank*, 57 Or. 82, 86, 110 Pac. 410.

Section 7129, L. O. L., provides thus:

"Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

Equity will exercise its jurisdiction for the correction or reformation of a written instrument on the ground of mutual mistake, and for this purpose will receive parol testimony. *Jones*, Evid. § 437.

Reformation of a written instrument on the ground of mutual mistake will be decreed in a court of equity as between the original parties or those claiming under them in privity, such as judgment creditors. 1 *Story's Eq. Juris.* (13th Ed.) § 185; *Lally v. Holland*, 1 *Swan* (Tenn.) 396; *Smith v. Interior Warehouse Co.*, 51 Or. 578, 581, 94 Pac. 508, 95 Pac. 499; *Howard v. Tettelbaum*, 61 Or. 145, 120 Pac. 373; *Zartman v. First Nat. Bank*, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418; *Meier v. Kelly*, 22 Or. 136, 29 Pac. 265. *Mr. Elliott*, in his work on *Contracts* (volume 3, § 2381), says:

"In cases of mistake in written contracts equity may interfere, not only as between the original parties, but those claiming under them in privity, such as personal representatives, heirs, assignees and the like. * * * However, reformation will not be granted where intervening rights of bona fide purchasers for value will be prejudiced, and it has been held that this protection will be extended to the grantee of a bona fide purchaser, even though he had notice of the mistake."

In *Zartman v. First Nat. Bank*, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418, which was a suit to reform a written contract, it was held that the jurisdiction which equity has to decree correction of errors in written contracts caused by mutual mistake is not suspended by the bankruptcy law; and the trustee takes property as the debtor had it at the time of the petition subject to all valid claims, liens, and equities, including the power of a court of equity to correct a manifest error by mutual mistake in an agreement made prior to the petition.

Was the note due when this suit was instituted? In order that this may be shown

it is necessary to reform the note to conform to the agreement of the parties as they intended the same to be executed. The defendant demurred to the complaint and supplemental complaint, and insists that the same are insufficient for such purpose. Each demurrer was as follows:

"Comes now R. L. Sabin, trustee in bankruptcy, one of defendants herein, and demurs to plaintiff's amended complaint for the reason that the same does not state facts sufficient to constitute a cause of action: I. That the note set forth in said complaint shows upon its face that the same is not due, and consequently that there has been no default in the payment of interest, and nothing is set forth in said complaint to modify or change the rule that a written instrument cannot be varied by parol evidence. II. That the mortgage, copy of which is set forth in said complaint, and foreclosure of which is prayed, is not a valid mortgage as against the trustee in bankruptcy, same showing upon its face that it was not acknowledged by the makers thereof as prescribed by law. III. That said complaint does not show that permission of the District Court of the United States for the District of Oregon was obtained before suit was instituted against R. L. Sabin, who is an officer of said court."

In *Sellwood v. Henneman*, 36 Or. 575, at page 577, 60 Pac. 12, at page 13, Mr. Justice Moore states the rule as follows:

"It has been repeatedly held by this court that, in a suit to reform a deed or written contract on the ground of mistake, the complaint should distinctly show the original agreement of the parties, and point out with clearness and precision wherein there was a mistake."

See, also, *Ramsey v. Loomis*, 6 Or. 367; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Hughey v. Smith*, 65 Or. 323, 133 Pac. 68; and cases to which those opinions refer.

The particular circumstances constituting the mistake must be pleaded. 14 *Enc. Pl. & Pr.* pp. 48, 45, and notes; 18 *Enc. Pl. & Pr.* p. 824.

The complaint does not show that it was the intention of the parties that the alleged oral agreement as to the time of payment of interest should be incorporated in the note, nor that it was not the intention of either of the parties to rely upon the oral agreement which is averred to have been made both before and after the execution of the note. When the alleged omission was discovered by plaintiff is not disclosed; nor what instructions were given to the scrivener or by whom. No fraud on the part of the payors is asserted. The circumstances relating to the transaction as set forth in the pleading are very meager. While it may be possible that, in the absence of a demurrer, the complaint might be held sufficient, a majority of the members of the court are of the opinion that there was error in overruling the demurrer.

The decree of the lower court, therefore, will be reversed, and the cause remanded for such further proceedings as may be deemed proper, not inconsistent herewith. A default decree was rendered against the trustee defendant. He failed to ask the trial court to set the same aside. To have this done ap-

pears to be the main purpose of this appeal. See L. O. L. § 103; *White v. N. W. Stage Co.*, 5 Or. 99; *Bailey v. Williams*, 6 Or. 71; *Mayer v. Mayer*, 27 Or. 133, 39 Pac. 1002. It is doubtful if the specifications of the demurrer directed the attention of the trial court to the point now urged against the complaint. Neither party, therefore, should recover costs upon this appeal.

EAKIN, J., not sitting.

BURNETT, J. (dissenting). On January 2, 1913, Chester A. Smith and Otis S. Smith executed and delivered to the plaintiff their promissory note of that date, of which a copy is here set out:

"\$1,621. Portland, Oregon, January 2, 1913.

"Five years after date, without grace, we promise to pay to the order of Catherine Coates sixteen hundred and twenty-one dollars, for value received, with interest after date at rate of 7 per cent. per annum until paid. Principal and interest payable in U. S. gold coin at Sunnyside, Portland, Oregon, and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay such sum as the court may adjudge reasonable as attorney's fees in said suit or action. There may be paid on any interest-bearing date any amount in even hundreds dollars.
Chester A. Smith.
Otis S. Smith."

At the same time they mortgaged to her certain real property in the usual form, conditioned that, if the money due upon the note should be paid, the mortgage should be void, but in case default should be made in payment of the principal and interest, as provided in the note, then she might sell the premises in the manner prescribed by law, etc. Appended to this mortgage was an acknowledgment in the following form:

"State of Oregon, County of Multnomah—ss.:

"On the 2d day of January, A. D. 1913, personally came before me, a notary public in and for said county and state, the within-named Samuel H. Smith and Adora L. Smith, his wife, to me personally known to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same freely for the uses and purposes therein mentioned.

"In witness whereof I have hereunto set my hand and seal the day and year last above written.
E. C. Minor,

"Notary Public for Oregon."

A demurrer to the original complaint having been sustained, an amended complaint was filed alleging the giving of the note set out by copy, and making the following statement:

"And that at the time the said note was executed, and subsequent to the date of its execution, the said defendants Chester A. Smith and Otis S. Smith orally promised and agreed to pay the said interest provided for in said note yearly, that is, to pay the interest on the principal sum of said note on or about the 2d day of January of each year, after the time of the execution of said note, but that the scrivener who drew up the said note neglected to state in said note that the interest made payable thereby should be paid annually; that at the time of the execution of said note it was and now is the custom to pay the interest on promissory notes annually when the time of pay-

ment of said note is not stated in said note, and the said custom was known to the plaintiff and the defendants at the time of the execution of said note."

The execution of the mortgage is averred and a complete transcript of it is written into the amended complaint. Concerning the acknowledgment this averment appears:

"That at the time of the execution of said note and mortgage the said E. C. Minor, who acknowledged the same as notary public, erroneously inserted in the acknowledgment of said mortgage the names of Samuel H. Smith and Adora L. Smith, wife of said Samuel H. Smith, in place and instead of the names of the makers of said mortgage, and that the insertion of said names of said Samuel H. Smith and Adora L. Smith was through the error, inadvertence, and mistake of said E. C. Minor, and that the said defendants Chester A. Smith and Otis S. Smith were present at the execution thereof, and in the presence of said notary public acknowledged the execution of said document, and that it was the intention of said scrivener or notary public to insert the names of said Chester A. Smith and Otis S. Smith in the said acknowledgment instead of the names of said Samuel H. Smith and Adora L. Smith."

About the defendant Sabin the complaint says:

"That subsequent to the date of the execution of said mortgage, to wit, on or about the day of May, 1914, the said mortgagors were declared bankrupt, and thereafter, and on or about the 28th day of May, 1914, the said R. L. Sabin, one of the defendants herein, was elected by the creditors of said mortgagors trustee in bankruptcy for said mortgagors, and said defendant has qualified as such trustee."

On the ground that the interest had not been paid annually, the plaintiff prays for a correction of the note and mortgage and for a decree foreclosing the latter as corrected with personal judgment against the makers of the note for the principal and interest, and \$175 attorney's fees. The defendant Sabin, as trustee in bankruptcy, demurred to this amended complaint on the ground that it does not state facts sufficient to constitute a cause of action; that the note set forth in the complaint shows upon its face that the same is not due, and nothing is pleaded to modify or change the rule that a written instrument cannot be varied by parol evidence; that the mortgage copied at large into the plaintiff's pleading is not valid as against the trustee, the same showing upon its face that it was not acknowledged by the makers thereof as prescribed by law; and that the complaint does not show that permission of the District Court of the United States for the District of Oregon was obtained before suit was instituted against Sabin, who was an officer of such court. This demurrer was overruled. Subsequently, upon leave obtained, there was filed what was denominated a supplemental complaint, but which was precisely like the former one, except that it stated in substance that about April 21, 1913, Otis Smith had conveyed to Chester Smith the interest of the former in the real property mortgaged, and that for the unpaid balance of the purchase price in that sale Otis had filed his claim against the

estate of Chester, a bankrupt, upon which the defendant Sabin, as trustee in bankruptcy, had paid a dividend of 3 per cent. The Smiths made no appearance at any stage of the litigation. The defendant Sabin demurred to this complaint, but, without passing upon the same, the court entered a decree against all the defendants for want of an answer, correcting the note and mortgage as prayed for in the complaint, and foreclosing the same. From this decree the defendant Sabin, as trustee in bankruptcy, appeals.

This case comes to us to test the validity of the complaint as against a demurrer to the same. In such a state of the pleadings the rule of construction is that the allegations of the complaint are to be taken most strongly against the pleader; for the validity of his statement is challenged at the outset while there is yet opportunity for him to amend. Concerning the alleged mistake in the note we observe that it is said that the makers thereof orally promised and agreed to pay the interest annually, but that the scrivener who drew up that instrument neglected to state that provision therein. On its face the pleading avers two separate agreements, one written in the note, and the other expressed orally by the makers. It is not stated that they intended or agreed that this latter stipulation should be included in the note. There is no allegation anywhere in the complaint indicating in the least that the alleged mistake was mutual between the parties or that it occurred through the inadvertence of the plaintiff and the fraud or deceit of the makers of the note. Neither is it claimed that the alleged mistake occurred without the fault or negligence of the plaintiff. The precept for pleading in such cases has been settled by a long line of authorities in this state. It is thus laid down by Mr. Justice Moore in *Hughes v. Smith*, 65 Or. 323, 133 Pac. 68:

"The rule is settled in this state that, in a suit to reform a written instrument on the ground of misapprehension of the facts involved, the complaint must distinctly allege what the original agreement of the parties was, or point out with clearness and precision wherein there was a misunderstanding, and that such mistake was mutual and did not arise from the gross negligence of the plaintiff, or that his misconception originated in the fraud of the defendant."

See *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73; *Eppstein v. State Ins. Co.*, 21 Or. 179, 27 Pac. 1045; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Osborn v. Ketchum*, 25 Or. 352, 35 Pac. 972; *Thornton v. Krimbel*, 28 Or. 271, 42 Pac. 995; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Sellwood v. Henneman*, 36 Or. 575, 60 Pac. 12; *Stein v. Phillips*, 47 Or. 545, 84 Pac. 793; *Bower v. Bowser*, 49 Or. 182, 88 Pac. 1104; *Smith v. Interior*

Warehouse Co., 51 Or. 578, 94 Pac. 508, 95 Pac. 499; *Howard v. Tettelbaum*, 61 Or. 144, 120 Pac. 373.

It is also declared in the same substance in *Suksdorf v. Spokane, P. & S. Ry. Co.*, 72 Or. 398, 143 Pac. 1104.

The allegation of the custom to pay interest annually on promissory notes does not help the matter, because custom, while used as a rule of interpretation, can neither add to nor take from the express terms of a contract. L. O. L. § 727, subd. 12; *McCulsky v. Klosterman*, 20 Or. 108, 25 Pac. 366, 10 L. R. A. 785; *Holmes v. Whitaker*, 23 Or. 819, 31 Pac. 705; *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69, 10 Ann. Cas. 1065, note; *Barnard v. Houser*, 68 Or. 240, 137 Pac. 227; *Oregon Fisheries Co. v. Elmore Packing Co.*, 69 Or. 340, 138 Pac. 862. Moreover, the allegation makes the usage depend upon the fact that no time of payment of the note is stated, but the very note itself would take it out of this alleged custom, because there it is prescribed that it must be paid five years after its date. The oral agreement mentioned cannot be taken as part of the written agreement, for this would violate section 713, L. O. L., saying:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except * * * where a mistake or imperfection of the writing is put in issue by the pleadings."

As we have shown by the authority of *Hughes v. Smith*, supra, the statements of the complaint are not sufficient to raise the issue of mistake. The agreement of the Smiths made subsequent to the execution of the note to pay the interest annually cannot affect the case, because there is no consideration pleaded, for the subsequent agreement, and the mortgage does not purport to secure anything but the note. It does not assure the performance of the alleged oral agreement, whether contemporaneous with or subsequent to the execution of the written promise to pay.

As to the alleged mistake in the acknowledgment of the mortgage, it is sufficient to say that, if Samuel H. Smith and Adora L. Smith, his wife, were indeed the identical persons described in and who executed the mortgage as the notary certifies, then the interest of Chester A. and Otis S. Smith was not affected by the mortgage. On the other hand, if Chester A. and Otis S. Smith were really the persons who executed the instrument, then is the acknowledgment insufficient to authorize the recording of the mortgage so as to charge the trustee in bankruptcy with notice of its contents. There are many cases where a mere clerical error in the spelling of a name has been disregarded by the court in construing the acknowledgment. Such a case is *Rodes v. St. Anthony & Da-*

kota Elevator Co., 49 Minn. 370, 52 N. W. 27, where the maker of the mortgage was "Wm. Schrieber" and the certificate of the acknowledgment alluded to him as "Wm. Strieber," whom the notary declared "to be the person above named." In *Paxton v. Ross*, 89 Iowa, 661, 57 N. W. 428, there was a deed to "M. Thompson, of Washington City, D. C." The next conveyance in chain of title was from "Michael Thompson, widower, now of Honolulu, Sandwich Islands." It was signed "M. Thompson." The certificate of acknowledgment referred to him as "Michael Thompson," known by the officer to be the person who executed the deed. These differences were disregarded by the court in construing the effect of the conveyances. Many other such cases might be cited; but others, like *Boothroyd v. Engles*, 23 Mich. 19, *Stephens v. Motl*, 81 Tex. 115, 16 S. W. 731, *Carleton v. Lombardi*, 81 Tex. 355, 16 S. W. 1081, *Hell v. Redden*, 38 Kan. 255, 16 Pac. 743, and *Powers v. Hatter*, 152 Ala. 636, 44 South. 850, hold that, where the name in the acknowledgment is entirely different from that signed to the deed to be authenticated, the instrument is not entitled to record. This seems to be the view taken by the pleader in the instant case; for she counts upon it as a mistake and seeks to have it corrected. To hold that the acknowledgment was sufficient to entitle the mortgage to record would be making a better case for the plaintiff than she makes for herself.

In cases such as *Larson v. Elsner*, 93 Minn. 303, 101 N. W. 307, 2 Ann. Cas. 989, *Wilcox v. Osborn*, 77 Mo. 621, and *Milner v. Nelson*, 86 Iowa, 452, 53 N. W. 405, 19 L. R. A. 279, 41 Am. St. Rep. 506, cited in support of the acknowledgment in question, the name of the grantor was left blank in the certificate, but in each instance the officer certified that "personally appeared before me —, to me personally known to be the identical person described in and who executed the foregoing instrument, and acknowledged that he executed the same for the purpose therein named," or employed words substantially the same. These were held good on the principle that the officer certifies that some one described, not by name, but as the person who executed the deed, appeared and acknowledged the execution. There are other cases like *Smith v. Hunt*, 13 Ohio, 260, 42 Am. Dec. 201, *Stanton v. Button*, 2 Conn. 527, and *Hayden v. Westcott*, 11 Conn. 129, where the certificate recited substantially that "Personally appeared — and acknowledged that he did sign," where the acknowledgment was deemed bad because it did not appear who had executed or acknowledged the instrument. The acknowledgment was held void in *Buell v. Irwin*, 24 Mich. 145, where the certificate recited that "personally appeared before me I. D., to me known to be the person described in and who executed the above deed, and acknowledged

that — executed the said deed"; it not appearing who had acknowledged or executed the same. Much reliance is placed upon the case of *Pickett v. Doe*, 5 Smedes & M. (Miss.) 470, 43 Am. Dec. 523. There a sheriff's deed signed "A. G. Harrison, Sheriff," had appended to it this certificate, omitting the venue:

"Personally appeared before me, George Crockett, clerk of the probate court in and for said county, whose name is subscribed to the within deed, as such, who acknowledged that he signed, sealed, and delivered the same, as his act and deed, on the day and year therein mentioned, and for the purposes therein contained. Witness my hand and seal of office this 3d day of August, 1841. [Signed] George Crockett, Clerk."

It will be noted that the acknowledging officer put his own name into the blank which should have been filled with the name of the sheriff. This deed was issued in pursuance of a sale under a judgment against one *Ratliff*, dated February 24, 1838, and was offered in evidence by the plaintiff in ejectment in support of his claim. He also read in evidence another deed for the same land by the sheriff under an execution on a judgment against a defendant named *Hawley* rendered November 25, 1836, which was properly acknowledged. In discussing the quoted certificate the court merely said:

"It is believed that the certificate of the clerk is very nearly, if not entirely, to the effect required. But suppose it should be insufficient; does that alter the case? The land claimed was purchased by the Planters Bank, under two different executions, and separate deeds taken, and if either be good, it is sufficient."

The opinion proceeds to show that the *Hawley* deed was sufficient to pass title, and affirmed the judgment for plaintiff on that ground. Although the syllabus of the case would indicate that the court held the quoted certificate sufficient, yet it is not sustained by the opinion itself. The case is not an authority for the validity of such an acknowledgment. The case of *Carpenter v. Dexter*, 8 Wall. 513, 19 L. Ed. 426, is not applicable here. There the statute required that the grantor should be known to the officer taking the acknowledgment, and that the fact should be recited in the certificate. There was appended to the deed in question proof by the affidavit of a subscribing witness of its execution. This was sworn to before the other witness. All this, taken in connection with a curative statute, was held to validate the deed. Another case relied upon by Mr. Justice Bean is *Rodes v. St. Anthony & Dak. Elevator Co.*, 49 Minn. 370, 52 N. W. 27. There a chattel mortgage was executed by "Wm. Schrieber." The certificate referred to him as "Wm. Strieber," known to the officer "to be the person above named." The court held that as between the parties this was sufficient to pass the title. But the case was made to depend upon *Rogers v. Manley*, 46 Minn. 403, 49 N. W. 194, where the issue was whether a certain deed was a forgery. In deciding this question of fact the court considered the name of

the grantor in the body of the deed and in the certificate, "Charles Y. Rogers," as circumstantial evidence, when taken in connection with other occurrences, that that individual wrote the name "Charles F. Rogers" as signature to the deed. The question of the acknowledgment being sufficient to entitle the deed to record was not considered. *Bird v. McClelland* (C. C.) 45 Fed. 458, went off on the principle that, where a clerk of the circuit court was ex officio clerk of a certain special court in which it was proper to acknowledge deeds, and the officer taking the acknowledgment styled himself as above, and said that the "grantor appeared in said court," it meant the court in which such a procedure was proper. *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108, holds that under a statute allowing a clerk of a court of record to take acknowledgments his deputy signing as such without using the name of his principal may also take the acknowledgment. This court ruled differently on a like question in *Dennison v. Story*, 1 Or. 272, holding that a return signed "A. S. Crabb, Deputy Sheriff," not disclosing his superior, was insufficient. *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 645, merely decides that a deputy sheriff executing a deed in the name of his principal may acknowledge it as the act of the latter.

International Kaolin Co. v. Vause, 55 Fla. 641, 46 South. 3, relates to the acknowledgment of a deed by the corporation's president, under a special statute of that state. *Summer v. Mitchell*, 29 Fla. 179, 10 South. 562, 14 L. R. A. 815, 30 Am. St. Rep. 106, treats of the abbreviation of the officer's title. The decision was referable to the principle that the court will take judicial notice of "the true significance of all English words and phrases and all legal expressions." Section 729, L. O. L.; 16 Cyc. 875. *Buckleff v. Norton*, 19 Me. 274, was a case in which the acknowledgment is not quoted, but the objection was that no venue was laid. The court held that this was not required, and that, the authority of the officer being conceded, it would be presumed that he acted where he had a right to act. *King v. Merritt*, 67 Mich. 194, 34 N. W. 689, disclosed that the certificate stated that the wife acknowledged that she executed the deed "with fear or compulsion of any person," using the word "with" instead of "without." The court held the deed sufficient to convey title as against the grantors. Whether the acknowledgment was sufficient to entitle the instrument to record, and thus impart constructive notice to the creditors of the grantor, was not considered by the court. In *Hughes v. Morris*, 110 Mo. 306, 19 S. W. 481, the instrument in question recited "that the undersigned J. C. Mason and O. A. Barron, composing the firm of J. C. Mason & Co.," do sell, etc. It was signed by the firm name only, which also alone appeared in the certificate of acknowledgment. The Supreme Court held it void

as against attaching creditors. How this precedent sustains the acknowledgment involved in the instant case is not apparent. Again, *Graham v. Whitely*, 26 N. J. Law (2 Dutch.) 254, holds that under the statute of New Jersey a conveyance of land in that state could not be acknowledged in another state, unless the grantor resided in the latter and held a deed thus acknowledged void as to all grantors whose residence was not shown to be in the foreign jurisdiction. It is not believed that this case sustains the certificate which we are considering. In *Bauer v. Schmelcher*, 5 N. Y. Supp. 423, a widow, devisee of some realty under her deceased husband's will, conveyed the same. No executor or administrator had been appointed, although the surrogate had admitted the will to probate. She was described in the conveyance by her name and as "executrix and devisee" of the will. In terms, the deed was sufficient to convey her estate. She signed it in her individual name only without the addition of "executrix." The court held that, as she acknowledged the execution of the conveyance not only as executrix, but also "for the purposes therein named," it was sufficient to pass the title she had as an individual. The words "executrix and devisee" were properly to be rejected as merely descriptive of the person, having no more effect than if she had written after her name "widow" or "dressmaker" or "housekeeper." In *Beckel v. Petticrew*, 6 Ohio St. 247, the blank for the venue in the form of certificate was not filled; but the officer recited that he was a "justice of the peace in and for said county," and, as the name of the county appeared in the body of the mortgage, it was held sufficient. *Estate of Dahlem*, 175 Pa. 454, 34 Atl. 807, 52 Am. St. Rep. 848, was a case where the blank for the date of the acknowledgment was not filled, but the mortgage itself was dated, and it was recorded the same day. The court presumed the acknowledgment was also taken on that day. *Love's Lessee v. Shields*, 3 Yerg. (Tenn.) 405, was where there was indorsed on the deed this writing:

"State of Tennessee, Greene County. January sessions, 1807, Tuesday, 27th. Then was the execution of the within conveyance duly acknowledged in open court by Seymour Catching, the grantor therein named, and admitted to record. Let it be registered. Teste: Val. Sevier, Clerk."

The objection was that neither the name of the grantor nor the quantity of land appeared in the certificate quoted. The court held, however, that these faults were cured by reference to the deed upon which it was indorsed. This case is criticized by the same court in *Yerger v. Young*, 9 Yerg. (Tenn.) 88, showing it not to be in accord with the current of authority. It is not applicable to the present contention. *Blake v. Hollandsworth*, 71 W. Va. 387, 76 S. E. 814, 43 L. R. A. (N. S.) 714, holds that, where there are two certificates of acknowledgment indorsed on the

same deed, one for the husband and the other for the wife, taken on the same date before the same officer, the official capacity of the officer not being written after his signature to the former, it may be cured by reference to the latter which he signed properly, adding the title of his office. The court held it good as against the grantor, but whether it was entitled to record as constructive notice to creditors was not considered. *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315, 8 South. 232, holds that, in the absence of fraud or imposition where a wife signed a mortgage using the name of "S. E. Shelton," and the officer used the same name in a certificate of acknowledgment otherwise regular, she cannot impeach the certificate by showing that her true name is "Lucinda E. Shelton."

There is no objection to the doctrine that we may look to the whole deed in construing its validity whether of execution or acknowledgment. The principle is that one part may aid, but not dispute the other. This, however, does not support the acknowledgment in question. Instead of being aided by reference to the body of the mortgage it is contradicted. If we are to believe the officer's certificate, it appears that the names of two single men have been appended to a deed by a man and his wife who then acknowledge it as their own act, and not that of those named as grantors. If, indeed, as the officer's statement says, the married couple did execute the mortgage, it cannot bind the estate of the bankrupts without further showing of authority, as by power of attorney or the like. On the other hand, if the bankrupts in fact signed the mortgage, then the acknowledgment is manifestly untrue, and does not entitle the instrument to record. In either case the trustee in bankruptcy is not affected in the absence of actual notice of the execution of the mortgage by his bankrupts. To uphold the certificate is tantamount to saying that Jones can acknowledge as his own a deed purporting to be that of Brown so as to bind the latter and furnish record notice to his creditors.

If the allegations of the complaint were sufficient to authorize the correction of a mutual error the plaintiff might obtain relief under the doctrine of *Meier v. Kelly*, 22 Or. 186, 29 Pac. 265, where it is held thus:

"A judgment lien attaches only to the actual, and not to the apparent, interest of the judgment debtor in land, and is subject to any equitable estate therein hostile to the judgment debtor existing at the time the judgment was rendered, whether known to the judgment creditor or not; and for the purpose of protecting such equitable estate, courts of equity will correct a mistake in a mortgage upon which the equitable estate depends, and, as corrected, give it priority over a subsequently acquired judgment, so that

the judgment lien will be confined to the actual interest of the judgment debtor in the land."

The national bankrupt law provides that:

Trustees in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." U. S. Comp. St. Supp. 1911, p. 1500 (U. S. Comp. St. 1913, § 9631).

In section 70 on page 1511 of the same compilation (U. S. Comp. St. 1913, § 9654) it is provided that the trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except as to exempt property, to all property which prior to the filing of the petition he could by any means have transferred or might have been levied upon or sold under judicial process against him. It thus appears, according to the national legislation, that immediately upon the qualification of the defendant Sabin as trustee in bankruptcy of the Smiths, so far as the complaint discloses, he at once became the owner of the equity of redemption in the realty described in the mortgage sought to be foreclosed. From that time on it was in the custody of the bankruptcy court within the meaning of the act of Congress. As holder of this estate in the land the trustee may rightly resist the premature foreclosure of the mortgage. He was entitled to withstand the visitation upon his estate of the expenses of foreclosure and the amount of attorney's fees charged in the complaint. By that much would the estate of his bankrupt be lessened unnecessarily and prematurely. It is possible that the estate may be sufficient to pay in full all claims against the same, including the mortgage in question without resort to foreclosure; hence he has standing to object to the present suit. That the pleading is insufficient to authorize a correction of the alleged mistake is clearly demonstrated by the case of *Hughey v. Smith*, and the demurrer should have been sustained. The so-called supplemental complaint is not in any sense such a document. All its contents could have been stated in either of the previous declarations of the plaintiff. It is merely a second amended complaint. In addition to the objection being well taken to this last complaint, it was error to proceed to judgment and decree without deciding the issue of law thus tendered. It was an error to overrule the demurrer to the second complaint.

For these reasons, I dissent from the opinion of Mr. Justice BEAN in respect to the sufficiency of the acknowledgment of the execution of the mortgage in question.

MAGNESS v. DITMARS et al.

(Supreme Court of Oregon. Oct. 24, 1916.)

1. DEEDS \S 68(1 $\frac{1}{2}$)—"MENTAL CAPACITY."
 "Mental capacity" at the time of signing a conveyance sufficient to comprehend the nature of the business in which the grantor is engaged is the standard fixed by the law for determining his competency.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 151; Dec. Dig. \S 68(1 $\frac{1}{2}$).]

For other definitions, see Words and Phrases, First and Second Series, Mental Capacity.]

2. DEEDS \S 211(1)—COMPETENCY OF GRANTOR—SUFFICIENCY OF EVIDENCE.

In suit involving the validity of a deed executed by defendant's father, evidence held to show that at the time of execution the father was mentally competent, knowing the nature of the business in which he was engaged, and fully understanding its effect.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 637-640, 642, 647; Dec. Dig. \S 211(1).]

Department 1. Appeal from Circuit Court, Yamhill County; Webster Holmes, Judge.

Suit by R. N. Magness against Hattie M. Ditmars, by Tillie Ditmars Kirkwood, general guardian of her person and estate, and Tillie Ditmars Kirkwood, as guardian ad litem of Hattie M. Ditmars. From a decree for plaintiff, defendants appeal. Decree affirmed.

John A. Ditmars and his wife, Tillie Ditmars, on July 19, 1899, deeded to James H. Shipley 80 acres of land, together with "a suitable right of way across the premises of" the grantors to the Dayton and Salem county road. This suit involves the validity of that deed. The plaintiff purchased the land from James H. Shipley, and alleges that John A. Ditmars was sane while the defendants claim that he was insane and not competent to execute the deed. John A. Ditmars was committed to the Oregon State Insane Asylum on November 15, 1897, and was detained there until February 26, 1898, when he was released "upon six months' leave of absence." He returned to his farm, where he continued to reside with his wife; and afterwards the asylum authorities made an entry in their records showing that he was discharged October 5, 1898, as cured.

At the time of his commitment to the insane asylum John A. Ditmars owned a farm which embraced 253 acres of land, including the 80 acres involved in this suit. He paid \$1,000 on July 24, 1897, for 57 acres; he purchased the remaining 196 acres on October 12, 1897, from Damon E. Sawyer and wife for \$2,610.36, and at the same time gave a note for \$1,300 to A. J. Hunsaker and secured it by executing a mortgage on the 253 acres. The consideration for the deed to Shipley was \$1,600, of which \$600 was paid on or before the delivery of the conveyance, and Shipley and his wife gave a note to Ditmars for the remaining \$1,000 and secured it with a mortgage on the land. Shipley en-

tered into the possession of the 80 acres soon after the delivery of the deed. He improved the land, and subsequently sold the premises with the right of way to the plaintiff, R. N. Magness, on August 20, 1906, for \$3,000. Magness has been in possession ever since he purchased the land, and he has made permanent improvements. Ditmars and wife gave a note to J. R. Forrest on October 14, 1899, for \$1,400, and secured the paper by executing a mortgage on all the land then owned by them, and two days later the mortgage held by A. J. Hunsaker was satisfied.

John A. Ditmars was taken to a private sanatorium about May 1, 1900, but at the end of about three weeks he was committed to the Oregon State Insane Asylum, where he remained until his death, which occurred on February 4, 1901. He died intestate, leaving a widow, Tillie Ditmars, and a minor child, Hattie M. Ditmars, who was born in March, 1899. Tillie Ditmars was appointed administratrix of the estate of the deceased, and she was also appointed guardian of the person and estate of the minor daughter, Hattie M. Ditmars. James H. Shipley paid the \$1,000 note which he had given to John A. Ditmars, and on December 19, 1901, the date of the payment, Tillie Ditmars, as administratrix of the estate of John A. Ditmars, duly satisfied the mortgage. Tillie Ditmars married again, and her name now is Tillie Ditmars Kirkwood. The note and mortgage from Ditmars and wife to J. R. Forrest were paid and satisfied on July 1, 1908. A dispute arose in 1911 between the Kirkwoods and Magness over the location of the right of way which had been provided for in the deed from the Ditmars to Shipley. The Kirkwoods attempted to prevent Magness from traveling over the way which had been previously used, and then on July 19, 1911, Magness commenced a suit against the minor child, her guardian, and the Kirkwoods, to enjoin them from interfering with his right to travel over the way which he had been using. The suit terminated on December 27, 1911, in a stipulated decree, which fixed the route of the way to be traveled. Afterwards, in 1913, Hattie M. Ditmars, by her guardian, Tillie Ditmars Kirkwood, commenced an action in ejectment against R. N. Magness to recover the 80-acre tract which he had purchased from Shipley. Magness answered, and then commenced this suit by filing a complaint in equity in the nature of a cross-bill and praying that the minor child be barred from claiming any interest in the land. After hearing the evidence the trial court found that John A. Ditmars was competent when he made the deed to Shipley, and decreed that Magness was the owner of the 80-acre tract and right of way. The defendant appealed.

W. T. Vinton and J. E. Burdett, both of McMinnville (McCain, Vinton & Burdett, of

McMinnville, on the brief), for appellants. Frank Holmes, of McMinnville, and Chas. L. McNary, of Salem (B. A. Klika, of McMinnville, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1] Hattie M. Ditmars asserts that the deed which John A. Ditmars and wife executed on July 19, 1899, to James H. Shipley was invalid for the reason that her father was, at that time, mentally incompetent, and that therefore she is the owner of the land as his daughter and heir. The daughter cannot successfully claim any interest in the land unless at the time of the execution of the deed her father did not comprehend the nature of the business. Mental capacity at the time of signing a conveyance sufficient to comprehend the nature of the business in which the person is then engaged is the standard fixed by the law for determining the competency of the person signing the document. *Carnegie v. Diven*, 31 Or. 366, 369, 49 Pac. 891; *Swank v. Swank*, 37 Or. 439, 445, 61 Pac. 846; *Wade v. Northup*, 70 Or. 569, 578, 140 Pac. 451.

[2] We must now look to the evidence and ascertain whether, on July 19, 1899, John A. Ditmars knew the nature of the business in which he was then engaged, and fully understood the effect of the transaction. Some years prior to 1897 he contracted a disease which in turn produced general paresis. The medical witnesses agree that paresis is incurable; and, while it inevitably causes death, the patient will ordinarily live from two to five years. The mind is never again normal after paresis seizes its victim, and consequently complete lucidity becomes impossible. While a recovery never occurs and rationality never again becomes normal, the patient may nevertheless pass through periods of remission, lasting from several weeks to months and occasionally for a year or more, during which it may be difficult or almost impossible to discover any trace of a deviation from normal mental health, and the patient can return to his affairs. Dr. W. T. Williamson, who was for 17 years a physician at the Oregon State Insane Asylum and has made a study of nervous diseases for about 28 years, when a witness for the defendant, said that he believed "a person suffering from general paresis would be able to do business more or less, and whether he was competent to do any given thing would have to rest upon the proof of his competency at the time, adduced from a series of events." Dr. L. F. Griffith, who was a witness for plaintiff, expressed the opinion that the best method to determine the mental capacity of a paretic is to ascertain "whether he was reasonable in the ordinary affairs of life, his conduct about—going about the affairs of life in an ordinary, reasonable manner." When Ditmars was received at the insane asylum in 1897 the physical signs of the disease had not yet developed, and consequently the persons in charge could not, at that time,

"make the diagnosis of general paresis." At first he was in a condition of mental excitement; but when he was released on February 26, 1898, his condition was much improved, and he had returned to "a comparatively sane condition of mind" and "had already entered a remission," and, in the opinion of Dr. L. F. Griffith, who has been connected with the asylum, except one year, since 1890, and was a member of the medical staff in 1897 and 1898, "he was capable to do ordinary things at that time." Soon after his return home he resumed the management of his farm, going about much as the ordinary person does; and, while he had "spells" which left him in a stupor on different occasions, he nevertheless continued to conduct the business of the farm until a comparatively short time before being taken to the private sanatorium in May, 1900.

James H. Shipley was a neighbor who lived "about a couple of hundred yards from" the Ditmars home. About ten days before the sale Ditmars asked Shipley if he "wouldn't like to buy a piece of land," explaining to Shipley that:

"He had a mortgage on his own place, and if he could sell that piece of land when he got that he would turn it in on his own mortgage on the farm, and it would help him out to get some tools to farm with and other things he needed on the farm at the time."

Shipley told Ditmars that he would make up his mind a little later, and the former testified that:

"The next time I met him down in the river bottom, he asked me, 'What about that trade?' and I told him we would go down the next Sunday and measure it off and look it over; so we did."

In company with another person they measured off the land "about where the line would come to." They agreed upon a price of \$1,600, which was to be on terms of \$600 cash and a note and mortgage for \$1,000. The land was not reasonably worth more than the agreed price. Ditmars said the whole farm was leased, but Shipley told him if he "could get possession, the price and terms was satisfactory." Shipley arranged with the lessee for possession of the land, and then "told Ditmars I guessed we could trade and make the deal," and paid \$10 to apply on the purchase price. Ditmars and his wife, accompanied by Shipley and his wife, drove to McMinnville for the purpose of making a conveyance. When they arrived in town Ditmars and Shipley obtained a description of the 80-acre tract from a surveyor who had made a survey for Ditmars and an adjoining land proprietor. After obtaining a description of the land, they went to an office, where the conveyance was prepared. Ditmars and his wife signed the deed and received a check for \$590, together with a note and mortgage for \$1,000, signed by Shipley and wife. Ditmars cashed the check on the day he received it, and deposited \$500 of the amount in a bank. Both the deed and the

mortgage were filed for record within two hours of the time of delivery, and the Ditmars, accompanied by the Shipleys, then returned to their homes. John A. Ditmars neither said nor did anything unusual when going to or returning from McMinville. The notary public who witnessed the deed and took the acknowledgment of the grantors testified that Ditmars "acted in a rational manner about signing the deed and answering questions as to whether he made it of his free will and accord," and "was sane and rational and in good condition to transact business." The second witness to the deed did not notice anything unusual. Shortly before the sale Ditmars told L. A. Byrd that he was going to sell that piece of land; that would put him out of debt, and he would have plenty of land left." John Ross worked for Ditmars, and heard him say he was going to sell. Ditmars wanted to sell the 80 acres to Thomas Collinson, but the latter could not buy because he had no money, and two or three weeks later Ditmars told him that he had sold the property, and was satisfied with the sale. Frank Ditmars said that his brother was running his own business in 1899, and that he noticed nothing peculiar with John after he came back from the asylum until about two weeks before the second commitment. Fifteen different witnesses, who had either worked for John A. Ditmars or around him, or had bought live stock from or had sold live stock to him, testified that he was sane or competent, or that he appeared rational, or that they noticed nothing peculiar about him.

Ditmars transacted important business both before and after the execution of the deed to Shipley. On October 12, 1897, Ditmars received the Sawyer deed, and at the same time executed the Hunsaker mortgage. The notary public who witnessed and took the acknowledgment of Sawyer to the deed did not notice anything wrong with Ditmars and the person who acted as the second witness to the Sawyer deed and who also witnessed and as notary public took the acknowledgment of Ditmars to the Hunsaker mortgage testified that:

"During this transaction, Mr. Ditmars conducted himself in a rational way. I could see nothing wrong with the man's actions, and we looked over the business."

The Forrest mortgage was executed by Ditmars and his wife on October 14, 1899, and at that time, according to the testimony

M. D. L. Rhodes, who acted as notary public and as a witness to that instrument, Ditmars comprehended the business; and George E. V. Littlefield, who also witnessed the mortgage testified that Ditmars "was

competent to transact business," and "the question never entered my mind but what he was as sane as any man could be." This witness knew that Ditmars had been in the asylum, and on that account it is fair to assume that any peculiar or unusual conduct on the part of Ditmars would have been noticed.

The evidence shows that John A. Ditmars comprehended the business in which he was engaged, and understood the nature and effect of the transaction when he signed the deed. He had a good reason for selling the land; he went about the business in a reasonable manner; and he received the full market value of the land. His mentality measured up to the gauge which both medical experts applied. He possessed a sufficient understanding to meet the test fixed by the law, and the deed to Shipley was therefore valid.

Although it is not necessary to proceed further with the discussion, yet a better understanding of the surroundings may be had if we again look at the record. Some light is thrown upon the attitude of Tillie Ditmars Kirkwood and the position now taken by the defendant when it is recalled that no assault was made upon the deed until the commencement of the action in 1913 to eject Magness; and no claim was ever made, or even intimated, that Ditmars was incompetent to sign the deed until 1911, when, according to the testimony of the plaintiff, Mrs. Tillie Ditmars Kirkwood told him that:

"If I went ahead with the suit (concerning the right of way) she would bring this suit against me for the property on the grounds that Ditmars was not capable of making a deed."

For a period of 12 years Mrs. Tillie Ditmars Kirkwood, the widow of the deceased, the administratrix of his estate and the guardian of his child, recognized the validity of the deed, not only by her failure to object, but also by her positive acts of approval. She signed the Forrest mortgage which excepted the 80 acres sold to Shipley; she affirmed the deed when she satisfied the Shipley mortgage on December 19, 1901; she did not claim any right to the land as guardian, nor assert any interest in it as administratrix; and she acknowledged the validity of the deed when as an individual and as guardian she signed the stipulation which authorized the decree in the right of way suit for the very basis of the right to a way was the deed itself. She has never questioned the validity of the deeds conveying 253 acres to Ditmars in 1897, nor has she ever claimed that the Hunsaker and Forrest mortgages were invalid.

The decree is affirmed.

MOORE, C. J., and BURNETT and McBRIDE, JJ., concur.

BUTSON v. MISZ et ux.

(Supreme Court of Oregon. Oct. 24, 1916.)

1. COMPROMISE AND SETTLEMENT ¶6(4) — CONSIDERATION—INVALID CLAIMS.

Where the mortgagee and the purchaser from the mortgagor believed that the mortgage contained a clause for the payment of taxes, and the former in good faith had started foreclosure proceedings because of the failure to pay taxes, a settlement of such proceedings is sufficient consideration for a promise made by the purchaser to insure the building for the mortgagee's benefit, though in fact the mortgage contained no clause for the payment of taxes, and there was no right to foreclose, and that promise will be enforced in equity.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 40; Dec. Dig. ¶6(4).]

2. CONTRACTS ¶50—"CONSIDERATION."

"Consideration" is a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 222; Dec. Dig. ¶50.

For other definitions, see *Words and Phrases*, First and Second Series, *Consideration*.]

3. MORTGAGES ¶201 — INSURANCE — CONSTRUCTIVE TRUST.

Where a mortgagor is bound either by the mortgage or by a valid verbal agreement to insure the property as further security, the mortgagee is entitled to an equitable lien on the insurance money, and the proceeds when collected by the mortgagor are held in trust for the benefit of the mortgagee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 532-536; Dec. Dig. ¶201.]

4. MORTGAGES ¶201—AGREEMENT TO INSURE — ORAL AGREEMENT—AMOUNT OF INSURANCE.

An oral agreement to insure mortgaged premises, which does not state the amount to be taken out, ordinarily requires the proper amount of a policy upon the building.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 532-536; Dec. Dig. ¶201.]

5. MORTGAGES ¶201—INSURANCE—RIGHT TO PROCEEDS—MORTGAGEE.

Where an insurance policy is taken out by the mortgagor who had agreed to insure for the benefit of the mortgagee, equity will treat the policy as payable to the mortgagor as his interest may appear.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 532-536; Dec. Dig. ¶201.]

6. MORTGAGES ¶201 — INSURANCE — MORTGAGEE'S RIGHT TO INSURANCE MONEY.

Equity has jurisdiction of a suit to enforce a mortgagee's right to the proceeds of insurance on the premises since he is entitled to have the specific fund held intact for him, and an action at law would not afford an adequate remedy.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 532-536; Dec. Dig. ¶201.]

Department 2. Appeal from Circuit Court, Multnomah County; H. H. Belt, Judge.

Suit by John E. Butson against W. H. Misz and wife. Decree for the plaintiff, and defendants appeal. **Affirmed.**

This is a suit to have the defendants declared trustees for the benefit of the plaintiff in the sum of \$700. From a decree in favor of plaintiff, defendants appeal.

Raymond A. Sullivan, of Portland, for appellants. Geo. F. Brice and W. H. Masters, both of Portland, for respondent.

BEAN, J. The record discloses the following facts, the controverted part being amply supported by the evidence: On July 3, 1914, defendant W. H. Misz, acting in behalf of his wife, the other defendant, purchased a tract of 5.64 acres of land, with a house and other buildings thereon, situated at Wilsonville, Clackamas county, Or. Upon this property the plaintiff Butson held a mortgage in the sum of \$2,500, executed April 12, 1911, by one Cook and his wife, who purchased the land from plaintiff. The mortgage was given to secure two notes, one for \$1,000, and the other for \$1,500, due thereafter in five and ten years, respectively. The Cooks conveyed the property to one Adams who deeded the same to defendant W. H. Misz subject to plaintiff's mortgage. Prior to the time Mr. Misz bought the land he met the plaintiff at Wilsonville and informed him he was about to trade for the property. Butson told him he would give him three days to pay the two years' delinquent taxes on the premises, and complained that the buildings had run down, and if the taxes were not so paid he would place the mortgage in the hands of his attorney for foreclosure. In about a week, the taxes not having been liquidated, plaintiff made arrangements with his attorney to foreclose the mortgage. A short time afterwards Mr. Misz went to Butson and informed him that he had made the deal, but plaintiff told him he was too late; that his attorney had the matter for collection. In order that the deal might not be thwarted, negotiations were entered into to settle the controversy, pay the delinquent taxes, and stop the threatened foreclosure of the mortgage. In order to effect this adjustment, Misz agreed to pay the delinquent taxes, pay the plaintiff's attorney his charges in the matter, and take out insurance on the house in his own name, payable to Butson as mortgagee. To this plaintiff assented and Misz paid the taxes and expenses amounting to \$48.48, and agreed to send the policy of insurance to Butson. Plaintiff's evidence as to this contract is corroborated by his wife and attorney, and is not successfully refuted. Plaintiff afterwards allowed a policy of \$200, which he had on the dwelling house payable to himself, to lapse. The title to the property was first conveyed to Mr. Misz and afterwards he deeded the same to his wife who was the equitable owner thereof. On October 8, 1914, Misz procured a policy of insurance on the dwelling house in the sum of \$700, payable to Mrs. Misz. Butson never saw the policy, and in fact could not read nor write. He inquired of defendant about the insurance policy and was told by him that he had it all right in his safety box. Butson states that he trust-

ed Mr. Miss in the matter. On March 29, 1915, the insured building was consumed by fire and plaintiff demanded the insurance money which defendants collected. A compromise agreement that defendants would pay plaintiff \$200 and build another house on the land was effected, but never carried out by the former, a circumstance which does not affect this suit except to explain why defendants were permitted to collect the insurance. Plaintiff's mortgage contained no covenant that the mortgagor should insure the building nor for the payment of taxes. No interest was due on the mortgage at the time Mr. Misz purchased the property.

[1] It is contended on behalf of defendants that the agreement of Miss to insure the dwelling and make the policy payable to the mortgagee, if made, was not supported by any consideration, for the reason that no condition of the mortgage had been broken at the time of the contemplated foreclosure when Misz negotiated for the real estate, and that plaintiff had no right to foreclose the mortgage and no cause of suit to settle.

A compromise and settlement of a bona fide controversy between the parties, where each having equal knowledge or equal means of knowledge of the facts in good faith claims a right in himself against the other, and which claim the parties consider good or doubtful, constitutes a valid binding agreement and is a sufficient consideration to support a new contract, even though the law and facts were such that a court would not have adjudged such an adjustment. *Smith v. Farra*, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115; *Thayer v. Buchanan*, 46 Or. 106, 111, 79 Pac. 343; *Roane v. Union Pac. Life Ins. Co.*, 67 Or. 264, 135 Pac. 892; *McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460. A new contract based upon such a consideration will be enforced in equity. 2 Pom. Eq. Juris. (3d Ed.) § 850.

[2] Consideration is defined as a benefit to the party promising or a loss or detriment to the party to whom the promise is made. 9 Cyc. 308; *Visalia Gas Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105.

The plaintiff in good faith claimed the right to foreclose his mortgage. Both the parties appeared to have believed that it contained a covenant for the payment of taxes on the land, and that its condition had been broken at the time they made the new agreement. Having an abstract of title of the premises neither examined the mortgage or record thereof. Butson had paid the taxes which were in arrears, and to that extent his demand was valid. Whether the mortgage was then due or not the court will not inquire. The parties have settled that matter between themselves in so far as the new contract is concerned. That the policy of insurance should be made payable to the mortgagee as his interest might appear was the reasonable and usual method of under-

writing a building with an incumbrance. Defendants were not deceived nor overreached by plaintiff in any manner. The law favors a voluntary settlement of disputes to the end that the energies of the parties may be exercised in the affairs of life other than litigation.

There can be no question but that defendants, purchasing the real estate upon which plaintiff held a mortgage of \$2,500 and against which property there were unpaid delinquent taxes, gained an advantageous position by settling the matter, when a foreclosure of the mortgage was threatened, which was refrained from by the mortgagee. A contract based upon such a settlement did not lack a consideration. When the equities are otherwise all in favor of the enforcement of such a stipulation and it is necessary in order to preserve the security of plaintiff's mortgage that an equitable lien upon the insurance fund be declared, a court of equity should lend its aid in the enforcement of the covenant and declare the amount of the policy of insurance which has been collected by defendants to be held in trust for the plaintiff. 19 Cyc. p. 885; *Nordyke v. Gery*, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219.

[3] Where a mortgagor is bound either by covenants in the mortgage or otherwise, for example, by a valid verbal agreement to keep the property insured as a further security for the payment of the mortgage debt, then the mortgagee is entitled to an equitable lien upon the money due on the insurance policy, even though the policy is made payable to the mortgagor; and the proceeds when collected by such mortgagor are held in trust for the benefit of the mortgagee. *Swearingen v. Hartford Ins. Co.*, 52 S. C. 909, 316, 29 S. E. 722; *Nichols v. Barter*, 5 R. I. 491; *Wheeler v. Ins. Co.*, 101 U. S. 439, 442, 25 L. Ed. 1055; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641; *Nordyke v. Gery*, supra; *Chipman v. Carroll*, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; *Hazard v. Draper*, 7 Allen (89 Mass.) 267.

[4] Counsel for defendants urge that no amount of insurance was fixed by the agreement. It would be understood ordinarily by such a promise that the usual and proper amount of a policy upon the building was intended by the parties. They may not have known at the time the proper figures.

[5] However, there is no difficulty upon that score as the amount of the insurance policy was fixed and determined when the same was written. A clause making the same payable to the mortgagee as his interest might appear should have been inserted in the instrument in accordance with the stipulation between plaintiff and defendants. Equity will treat the document as having been so framed. This is upon the principle that equity treats that as done which should have been done. *Nordyke v. Gery*, supra.

[6] Defendants' counsel challenges the jurisdiction of a court of equity in the prem-

ises upon the ground that plaintiff's remedy was at law. He was entitled to have this specific fund held intact for him. The trial court required the defendants to pay the money into court to await the final determination of the cause. An action at law would not afford plaintiff an adequate remedy. In order to fully protect his rights, equity has jurisdiction and is an appropriate proceeding. *So. Portland Land Co. v. Munger*, 86 Or. 457, 54 Pac. 815, 60 Pac. 5; *Benson v. Keller*, 37 Or. 120, 127, 60 Pac. 918; *Livesley v. Johnston*, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; *Hall v. Dunn*, 52 Or. 475, 479, 97 Pac. 811, 25 L. R. A. (N. S.) 193.

The decree of the lower court was right, and should be affirmed; and it is so ordered.

MOORE, C. J., and BENSON and HARRIS, JJ., concur.

COOS BAY TIMES PUB. CO. v. COOS COUNTY.

(Supreme Court of Oregon. Oct. 27, 1916.)

1. COUNTIES ⇨210—ACTIONS—REMEDY BY CERTIORARI.

An ordinary action at law may be brought to recover the amount claimed under a contract with the county which had been rejected in part by the county court, where there are questions of fact as well as of law involved, since on a writ of review the court cannot examine a disputed question of fact, but can consider only facts disclosed by the record.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 339, 340; Dec. Dig. ⇨210.]

2. COUNTIES ⇨114—OFFICERS—AUTHORITY—PUBLICATION OF TAX LISTS.

Gen. Laws 1913, p. 576, requires the tax collector to publish in the newspapers selected by the county court to publish court proceedings under L. O. L. § 2902, a notice of delinquent taxes, which publication shall be for a price not exceeding the price prescribed by L. O. L. § 2903. The latter section provides that compensation for the publication of lists and proceedings shall be fixed by the county court not exceeding the limit therein specified. L. O. L. § 937, gives the county court the general care and management of the county property. *Held*, that the tax collector has no authority to contract for the publication of delinquent tax lists at a rate exceeding that fixed by the county court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 175; Dec. Dig. ⇨114.]

3. COUNTIES ⇨114—OFFICERS—AUTHORITY—PUBLICATION OF TAX LISTS.

The provision of Gen. Laws of 1913, p. 576, that in counties of more than 100,000 inhabitants the county court shall cause the delinquent tax lists to be published at a compensation therein definitely fixed, does not indicate an intention of the Legislature to confer on the tax collectors of other counties the authority to fix the compensation for such publication.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 175; Dec. Dig. ⇨114.]

4. NEWSPAPERS ⇨2—CONTRACTS—PUBLICATION OF TAX LISTS.

The selection of official newspapers and establishing of the compensation for notices published therein by the county court, and the ac-

ceptance of such appointment by a newspaper by doing the work with knowledge of the rate designated, constitutes a contract for the printing of the list at the rate specified, which neither party can thereafter ignore.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 14, 15; Dec. Dig. ⇨2.]

5. WORK AND LABOR ⇨9—EXPRESS CONTRACT—EFFECT.

A newspaper which publishes a delinquent tax list under a contract fixing the amount of compensation pursuant to statute cannot recover a larger compensation on quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 23-24; Dec. Dig. ⇨9.]

In Banc. Appeal from Circuit Court, Coos County; G. F. Skipworth, Judge.

Action by the Coos Bay Times Publishing Company against the County of Coos. Judgment for the defendant, and plaintiff appeals. Affirmed.

The plaintiff brings this action to recover compensation for printing the delinquent tax list for Coos county. From a judgment on a verdict in favor of defendant, plaintiff appeals.

Peck & Peck, of Marshfield, for appellant.
L. A. Liljeqvist, of Marshfield, for respondent.

BEAN, J. As developed by the record the case is as follows: On February 15, 1915, in accordance with the mandate of section 2902, L. O. L., the county court of Coos county selected the Coos Bay Times, published by plaintiff, as one of the official newspapers of the county. On the same date, as shown by plaintiff's Exhibit D, the county court entered a separate order fixing the price to be paid by the county for the publication of delinquent tax notices at three cents per line for each insertion. On and between April 5 and May 3, 1915, at the instance of the county, plaintiff published the delinquent tax list and notice of delinquency in five issues of its paper. This was done upon a copy being furnished by the sheriff. The plaintiff claims that a contract was made with the tax collector to the effect that the defendant would pay five cents per line for each publication thereof. Plaintiff duly presented its claim for such services to the county court, aggregating, at the five-cent rate, \$1,035. The county court allowed \$592.35, the price fixed by it, rejected \$440.65 of the amount claimed, and issued a warrant for the sum allowed, which was not accepted by the publishing company, and this action was instituted. Plaintiff alleges a contract for the printing at the rate of five cents per line for each issue of the newspaper. Defendant denies the contract as alleged, and insists that under the statute the county court is the proper tribunal to fix such compensation. Plaintiff also claims that the amount charged by it was the reasonable value of the services. The trial court rejected this latter claim and all evidence in support thereof and also all evi-

dence tending to prove a contract fixing the rate made by the tax collector on behalf of the defendant county.

[1] It is contended by counsel for defendant that the questions involved herein cannot be settled in an ordinary action at law, and that plaintiff's remedy, if any, is by a writ of review. We see no merit in this contention. There is presented in this case an important question of law. There was also a controverted question of fact as to what was the contract between the parties. Plaintiff also sought to establish the reasonable value of the services performed. Both questions of law and fact can appropriately be tried in this action at law without resorting to a writ of review. *Metschan v. Grant County*, 36 Or. 117, 120, 58 Pac. 80; *Wallowa County v. Oakes*, 48 Or. 33, 35, 78 Pac. 892; *Mackenzie v. Douglas County*, 159 Pac. 625. Upon a writ of review the court will not examine a disputed question of fact. *Oregon Coal Co. v. Coos County*, 30 Or. 308, 47 Pac. 851; *Curran v. State*, 53 Or. 154, 99 Pac. 420. In such a proceeding the court will consider only such facts as are disclosed by the record presented by the return. *Raper v. Dunn*, 53 Or. 203, 205, 99 Pac. 889. In such case evidence outside of the record will not be considered. *Gue v. City of Eugene*, 53 Or. 282, 288, 100 Pac. 254; *Gay v. City of Eugene*, 53 Or. 289, 294, 100 Pac. 306, 18 Ann. Cas. 188. "When the facts are all admitted," says Mr. Justice Strahan in *Vincent v. Umatilla Co.*, 14 Or. 375, 12 Pac. 732, "the sole question at issue is one of law, and the writ may furnish a cheap and expeditious remedy."

[2] The question herein presented for consideration involves the construction of chapter 301, General Laws of Oregon, 1913 (see page 576), as to who is authorized to enter into a contract on behalf of a county for the printing of the delinquent tax list. That statute, in so far as necessary to here note, requires that four months after the date when taxes charged against real property are delinquent, the tax collector shall cause to be published once each week for four successive weeks in the newspaper or newspapers selected by the county court to publish court proceedings under the provisions of section 2902, L. O. L., a notice of delinquent taxes on real property and statement that six months after such taxes are delinquent a tax certificate of delinquency will issue. Such notice shall be published for a price not exceeding the price prescribed by section 2903, L. O. L. The act further provides that in counties of 100,000 or more inhabitants the county court shall cause such delinquent tax to be published in daily newspapers having a specified circulation, and definitely fixes the compensation for such publication in the latter class of counties which does not include the defendant county. Coos county is in the class containing over 10,000 population.

We turn now to sections 2902 and 2903, L. O. L., to which for brevity's sake reference is made in the act of 1913. The two laws, so far as they relate to the same subject, must be construed in *pari materia*. Section 2902 requires the county court of counties of the class embracing the defendant to select two newspapers having the largest circulation within the county, in which the proceedings of the court as entered of record shall be published at the expense of the county. Section 2903 is as follows:

"Compensation for the publication of such list of claims and proceedings shall be fixed by the county court: Provided, that for each square of ten lines of brevier type (newspaper measure), or its equivalent, the cost shall in no case exceed fifty cents per square as aforesaid."

It will be seen, therefore, that the price for printing the delinquent tax list as provided by chapter 301 is that to be fixed by the county court not exceeding the figure named. The county court having in the manner prescribed by section 2904 obtained the information as to the number of bona fide subscribers of the plaintiff's newspaper and one other, selected the two publications as the county official newspapers. On the day of the appointment of the official organs which was the proper time as announced in *Flagg v. Columbia County*, 51 Or. 172, 94 Pac. 184, pursuant to the authority given, that tribunal fixed the amount to be paid by the county for such services. Sections 2902 and 2903, L. O. L., are as much a part of the act of 1913, in so far as the provisions are cognate to the subject-matter thereof, as though the provisions relating to the fixing of the price were incorporated in that statute. Again, as emphasizing the legislative intent, section 937, L. O. L., declares:

"The county court has the authority and powers pertaining to county commissioners to transact county business; that is — * * * 9. To have the general care and management of the county property, funds, and business, where the law does not otherwise expressly provide."

See *State v. Holman*, 68 Or. 546, 137 Pac. 771.

[3, 4] The tax collector is a ministerial officer and is not empowered by our statute in this instance to make a contract binding upon the county for the performance of the work in question. The provision relating to counties of over 100,000 inhabitants does not indicate to us that the Legislature intended to confer such authority upon that official as contended by counsel for plaintiff. The plaintiff was aware of the rate designated by the county court, and before the printing was done applied to that tribunal to change the order made from three to five cents a line, which request was denied. The selection of the newspaper and establishing the compensation for the notice to be published therein by the county court and the acceptance of such appointment by plaintiff by doing the work constituted a contract for the printing of the delinquent tax list which nei-

ther the county nor plaintiff had a right to ignore after the services were performed. *Flagg v. Columbia County*, supra; 29 Cyc. 700 (e).

[5] Under the facts in this case as delineated by the evidence the matter of the averment of a reasonable value of the printing becomes unimportant, and the plaintiff was not prejudiced by any ruling of the trial court in regard thereto; that is, the plaintiff could not recover upon a quantum meruit when the amount of compensation was fixed by contract pursuant to the statute. The plaintiff failed to establish a valid contract as alleged in its complaint, and is only entitled to the amount for which the county warrant was drawn. The trial court apparently by a slightly different process arrived at the same conclusion as indicated herein.

Finding no prejudicial error in the record, the judgment of the lower court is affirmed.

STATE v. EDLUND.

(Supreme Court of Oregon. Oct. 24, 1916.)

1. CRIMINAL LAW — 507(1) — OFFENSES — "ACCOMPLICE" — WHO IS.

L. O. L. § 2370, declares that all persons concerned in the commission of a crime, whether they directly commit the crime or aid and abet in its commission, are principals, while section 1540 declares that a conviction cannot be had upon the testimony of an accomplice unless corroborated, and that evidence merely showing the commission of the crime or the circumstances thereof is not sufficient. Prohibition Act (Laws 1915, pp. 151, 155) §§ 5 and 9, denounce the sale or barter of intoxicating liquors, while section 7 declares that it shall be unlawful for any person to solicit, take, or receive any order for intoxicating liquors, or to make any contract for the sale of any intoxicating liquors except where the sale is permitted. There was no provision for the punishment of persons purchasing intoxicating liquors. *Held*, that neither a purchaser nor his agent in effecting a purchase of intoxicating liquors is an accomplice of the seller, and a conviction may be had on the uncorroborated testimony of either; an "accomplice" being a responsible person whose willful participation in the commission of a crime renders him liable to conviction, though of course the agent of the seller would be an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1062, 1084, 1087, 1091, 1095; Dec. Dig. — 507(1).]

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. CRIMINAL LAW — 747 — TRIAL — JURY QUESTION.

When the evidence is conflicting as to whether a witness is an accomplice, the question should be submitted to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. — 747.]

3. CRIMINAL LAW — 1165(3) — APPEAL — HARMLESS ERROR.

In a prosecution for the sale of intoxicating liquors, where the court improperly charged that the buyer's agent was an accomplice, the seller cannot complain that the instruction did not declare the buyer to be an accomplice, and require corroboration of the agent other than by

the buyer to justify a conviction, for the instruction as given was more favorable than the seller was entitled to; the agent not being an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3089; Dec. Dig. — 1165(3).]

In bank. Appeal from Circuit Court, Coos County; J. W. Hamilton, Judge.

Otto Edlund was convicted of illegally selling intoxicating liquor, and he appeals. Affirmed.

Stoll & Hodge, of Marshfield, for appellant. George M. Brown, Atty. Gen., and L. A. Liljeqvist, Dist. Atty., of Marshfield, for the State.

MOORE, C. J. The defendant, Otto Edlund, was convicted of the crime of unlawfully selling intoxicating liquor in Coos county, Or., and appeals from the resulting judgment, assigning as errors the action of the court in refusing to direct a verdict of not guilty, in denying requested instructions and in giving instructions. The testimony introduced by the state tends to show that on February 14, 1916, at Marshfield, Or., Mode T. Burwell informed E. Edson he desired to purchase some whisky, whereupon the latter replied it could be secured from the defendant, to whom Edson introduced Burwell who told the defendant he wanted to buy a quart of whisky "in bond." Edlund replied that he did not then have any of that kind. Thereupon the three men walked along the street until they came to a building in which was an office occupied by a physician whom Burwell wished to consult with reference to an injured hand. When the men reached the entrance leading to such office Burwell gave Edson some money with which to purchase the desired liquor. Edson then accompanied the defendant to a room which he occupied in that city, where for a consideration of \$1.50 he delivered to Edson a bottle of whisky. In the meantime Burwell, having seen the physician and obtained a prescription, had it filled at a drug store and, returning to the street, he met the defendant and Edson, when the latter in the presence of the defendant delivered the bottle to Burwell. The defendant then departed and Burwell and Edson went behind a building on a dock and drank from the bottle, the contents of which was intoxicating. The errors assigned may be reduced to a single inquiry, viz.: Did the transaction on the part of Burwell and Edson make them accomplices in the alleged commission of the offense so as to render the testimony of either insufficient unless corroborated as required by our statute?

[1] The defendant denies the sale of the liquor, but admits meeting Burwell and being introduced to him as stated. It will thus be seen that the proof of the actual delivery of the alcoholic beverage by the defendant to

Edson depends upon the latter's testimony. Our statute declares:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals, and to be tried and punished as such." L. O. L. § 2370.

Another enactment reads:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime, or the circumstances of the commission." L. O. L. § 1540.

"An accomplice," says a text-writer, "is a person who knowingly, voluntarily, and with common intent, with the principal offender, unites in the commission of the crime." Wharton's Crim. Ev. (10th Ed.) § 440. This definition is approved in *State v. Roberts*, 15 Or. 187, 197, 13 Pac. 896, and cited as an authority in *State v. Carr*, 28 Or. 389, 396, 42 Pac. 215. In 1 R. O. L. 156 it is said:

"Notwithstanding the frequency of its use, there would seem to be no universally accepted definition of the term 'accomplices,' and its meaning in the law of evidence cannot be said to be settled."

The term so far as involved herein may be defined as follows: An accomplice is a responsible person whose willful participation in the commission of a crime, when that fact is established by competent evidence in a court of requisite jurisdiction, renders him liable to a conviction of the offense. As tending to show that Edson was a particeps criminis in the transaction, the defendant's counsel call attention to section 7 of the Prohibition Act (Gen. Laws Or. 1915, c. 141), which is as follows:

"It shall be unlawful for any person to solicit, take or receive within this state any order for intoxicating liquor or make any contract for the sale of any intoxicating liquor, except in cases where the sale of such liquor within the state is permitted."

Reliance is also placed upon the decision rendered in the case of *State v. Gear*, 72 Or. 501, 143 Pac. 890, where an intermediary, with money furnished by a minor, having purchased from a licensed saloon keeper intoxicating liquor, delivered it to the minor, and it was ruled that such intervening agent was guilty of violating section 2142, L. O. L., which declared it to be unlawful to "sell, give, or cause to be sold or given, any intoxicating liquor to any minor in this state." When that decision was given it was lawful for a person, having a license to sell in a particular place intoxicating liquor, to vend it therein to competent adults. In that case the opinion states in effect that the saloon keeper did not understand nor had he any reason to know that the intoxicating liquor delivered to the intermediary was intended for a minor. The dealer must therefore have supposed the sale was made to the person applying for the beverage. Such person should

have known whether or not the applicant to purchase intoxicating liquor was of legal age and if any error in judgment was committed in this particular by the intermediary, he should have been and was properly adjudged guilty of giving alcoholic beverage to a disqualified person. *State v. Gulley*, 41 Or. 318, 70 Pac. 385; *State v. Brown*, 73 Or. 325, 144 Pac. 444. In *State v. Gear*, supra, Mr. Justice Burnett, in speaking for the court, remarked:

"If the purveyor of liquor to boys can escape on the subterfuge that he was their agent, drunkenness of minors had as well be canonized and the statute repealed."

The decision in that case has no bearing upon the questions here involved.

The Prohibition Act, which contains section 7 hereinbefore quoted, repeals all other enactments on that subject in conflict therewith. Gen. Laws Or. 1915, c. 141, § 41. It prescribes, however, no provision for the punishment of a person found guilty of purchasing any intoxicating liquor from another in Oregon. The statute referred to is directed against the person who unlawfully manufactures, sells, or barter intoxicating liquors within this state (Id., § 5), or who illegally gives away or furnishes intoxicating liquor for the purpose of evading the provisions of that enactment (Id., § 9). No sales of alcoholic beverage can be made without obtaining a purchaser, it is true, but such buyer not having been interdicted from purchasing intoxicating liquors within Oregon, nor any punishment provided if he do so, he is not "concerned in the commission of a crime" within the meaning of that phrase as used in section 2370, L. O. L., except perhaps, as all good citizens should be, in the enforcement of the provision of the Prohibition Act, and hence the conviction of a person for unlawfully selling intoxicating liquor may rest upon the uncorroborated testimony of the purchaser. Any other conclusion would render it almost impossible to secure the conviction of a person charged with illegally vending intoxicating liquors, unless such sale were made in the presence of disinterested witnesses who could testify in relation to the fact. If in consummating the sale of the intoxicating liquor Edson acted as the defendant's agent he, as vendor, was an accessory whose testimony, in respect to the commission of the offense, required corroboration. If, however, in securing the alcoholic beverage, Edson acted as Burwell's agent, he, as a purchaser, was not an accomplice, and hence his testimony alone was sufficient to authorize a conviction of the defendant.

[2] When the evidence is conflicting, as to whether or not a witness is an accomplice, the question should be submitted, under proper instructions, to the jury. *Underhill*, Crim. Ev. § 69.

[3] The trial court, after referring to the issues, said to the jury:

"I instruct you that the witness Edson would be under the evidence a party to the crime, if you find there was any crime committed; and therefore you can neither find there was a crime committed or that the defendant committed one, upon his uncorroborated testimony. There must be evidence independent of his testimony which tends to prove the commission of the offense, and to connect the defendant with it."

An exception to this part of the charge was taken by defendant's counsel, on the ground the court should have said the corroboration to be sufficient must be by some witness other than an alleged purchaser of the intoxicating liquor.

An examination of the testimony conclusively shows there is no controversy in respect to the fact that Edson in purchasing the liquor was acting solely as Burwell's agent. The error of the instruction quoted seems to be based on a wrong conception of the Prohibition Act, wherein it appears to be taken for granted that section 7 of that enactment rendered a purchaser of intoxicating liquor in Oregon amenable to that provision. Such is not the law. The instruction, however, was more favorable to the defendant than he could legally have asked, and for that reason he cannot complain of the language employed. The Prohibition Act has exempted the buyer of intoxicating liquors from the provisions of that statute, and, this being so, no error was committed as alleged.

The judgment is therefore affirmed.

GREENBERG v. GERMAN-AMERICAN INS. CO.

(Supreme Court of Oregon. Oct. 24, 1916.)

1. PLEADING \S 252(2)—AMENDMENT OF COMPLAINT.

Where the original complaint was supplanted by an amended complaint on which the action was tried, the original complaint cannot be considered in aid of plaintiff's case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 737½; Dec. Dig. \S 252(2).]

2. APPEAL AND ERROR \S 193(9)—ADEQUACY OF COMPLAINT—QUESTIONING IN SUPREME COURT.

The adequacy of plaintiff's statement of his cause of action in his complaint may be questioned for the first time in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1232-1236; Dec. Dig. \S 193(9); Pleading, Cent. Dig. \S 1355, 1366.]

3. PLEADING \S 403(2)—DENIAL OF ANSWER—EFFECT.

An averment of defendant's answer, denied by plaintiff's reply, is of no effect by way of aid to the defects of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1344-1347; Dec. Dig. \S 403(2).]

4. PLEADING \S 8(7) — CONCLUSIONS — CONTRACT TO INSURE—BREACH.

In an action for damages resulting from breach of an alleged executory contract to insure property, plaintiff's amended complaint, averring that the policy tendered by defendant "did not conform to the oral contract between the parties, and was not a complete performance of the said oral contract," was insufficient, pleading a mere conclusion of law and stating no

fact; plaintiff should have disclosed the terms of the oral contract for insurance, and also, a policy having been issued, should have set forth the terms of the instrument, that the court might have been able to judge whether or not it was a fulfillment of the oral contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 18; Dec. Dig. \S 8(7).]

5. INSURANCE \S 138(1) — CONTRACT TO INSURE—BREACH—PLEADING.

In an action for breach of an executory oral contract to insure property, the amended complaint, stating that plaintiff accepted the policy issued by defendant through his ignorance of its legal effect, was insufficient to state a cause of action, since ignorance of the law will excuse no one.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 246-249; Dec. Dig. \S 138(1).]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by William Greenberg against the German-American Insurance Company, a corporation. From a judgment for plaintiff, defendant appeals. Judgment reversed, and cause remanded.

This is an action for damages resulting from the breach of an alleged executory oral contract for insurance of property. An original complaint, which appears in the abstract of record, was superseded by an amended complaint, upon which the action was tried. It alleges the plaintiff's ownership of the stock of goods in question, the corporate character of the defendant, states the oral agreement of the defendant to issue a policy, insuring the property for \$2,000 and containing certain conditions relating to further insurance and hypothecation of the merchandise, all to be evidenced by proper notations on the first page of the instrument. It avers that the goods were damaged by fire prior to the delivery of the policy. These allegations then follow:

"That thereafter said defendant, under the pretense of fulfilling said oral contract to insure, delivered to plaintiff its written policy of insurance, but that the said policy so delivered, as aforesaid, was not delivered until after said damage by loss of fire, and did not conform to the oral contract between the parties, and was not a complete performance of the said oral contract; that because of the fraudulent failure of the defendant to incorporate in or indorse upon or add to said written policy the necessary provisions relating to the matter set forth in the fifth paragraph of this complaint, the said policy, so delivered as aforesaid, was utterly void, and so known to be by the said defendant; * * * that plaintiff believed as a matter of law that the policy, so issued as aforesaid, was a complete and legal performance of the said oral contract by said defendant, for the reason that he believed that under the settled rule of law the defendant would be held to have waived said breaches of the said conditions of said policy by accepting and retaining said premium with knowledge of the said facts so stated to said agent under the law; and that, therefore, plaintiff, believing as a matter of law that said oral contract had been fully complied with, made proofs of loss under the said policy, and brought suit thereon to recover his said loss; that thereafter plaintiff discovered that under the construction of chapter 175, Laws of 1911, by the Supreme Court of this state, and under its

construction of the conditions set forth in said statute, and which were incorporated in said policy, so delivered as aforesaid, proof of the agent's knowledge of said facts could not be shown, and that said policy was therefore void, and not a complete performance by defendant of said oral contract; and that thereupon plaintiff voluntarily dismissed the said action. * * * The plaintiff hereby elects to proceed, not in equity for the specific performance of said oral contract and for damages, but proceeds at law in this action to recover damages sustained by him for breach of the said oral contract to issue a policy of insurance as aforesaid."

The answer denied most of the amended complaint, especially the part concerning the conditions to be incorporated into the contract of insurance, and set up various affirmative defenses, which, in turn, were traversed by the reply. From a judgment on a verdict in favor of the plaintiff, the defendant appeals.

John McCourt, of Portland (Veazie, McCourt & Veazie, of Portland, on the brief), for appellant. R. R. Giltner, of Portland (Giltner & Sewall, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1-4] It is unnecessary to consider any of the affirmative defenses. It is enough to give our attention to the sufficiency of the complaint upon which the action was tried. The original was supplanted by the new pleading of the plaintiff, and cannot be considered in aid of his case. *Wells v. Applegate*, 12 Or. 208, 6 Pac. 770; *Slemmons v. Thompson*, 23 Or. 215, 220, 31 Pac. 514; *Hume v. Woodruff*, 26 Or. 373, 38 Pac. 191; *Condon Nat. Bank v. Rogers*, 60 Or. 189, 118 Pac. 846, Ann. Cas. 1914A, 101. The adequacy of the plaintiff's statement of his cause of action may be questioned for the first time in the Supreme Court. *Howard v. Horticultural Fire Relief*, 77 Or. 349, 150 Pac. 270, 151 Pac. 476. If he would prevail in this form of action, he must not only disclose the terms of the oral contract for insurance, but also, in cases where a policy has been actually issued, set forth the terms of that instrument, so that the court may be able to judge whether or not it is a fulfillment of the alleged oral contract. It is true that the defendant appends to its answer as an exhibit a copy of what it alleges was a policy delivered to and accepted by the plaintiff as the contract between the parties, and which differs in some respects from the oral contract stated by the plaintiff. This averment of the answer, however is denied by the reply, and hence is of no effect by way of aid to the defects in the complaint. It suffices not to aver, as in the amended complaint, that the policy tendered "did not conform to the oral contract between the parties, and was not a complete perform-

ance of the said oral contract." This is a mere conclusion of law and states no fact.

[5] Again, it does not avail plaintiff to state his belief about the legal effect of the policy that was issued. Ignorance of the law will not excuse any one. The principle is fully discussed in an opinion by Mr. Justice Wolverton in *Scott v. Ford*, 45 Or. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469. In *Utermehle v. Norment*, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 8 Ann. Cas. 520, 524, it is said:

"It has been held from the earliest days, in both the federal and state courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. *Hunt v. Rhodes*, 1 Pet. 1, 15 [7 L. Ed. 27]; *United States Bank v. Daniel*, 12 Pet. 32, 55 [9 L. Ed. 969]; *United States v. Hodson*, 10 Wall. 409 [19 L. Ed. 937]; *Lamborn v. Dickinson County*, 97 U. S. 181, 185 [24 L. Ed. 926]; *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85, 90, 92 [25 L. Ed. 52]; *Allen v. Galloway*, 30 Fed. 466, where Hammond, J., in reviewing the decisions of this court, says: 'Whatever rule may prevail elsewhere, there can be, in the equity courts of the United States, no relief from a mistake of law.' *Drake v. Wild*, 70 Vt. 52, 59 [39 Atl. 248]. In that case the court said: 'That ignorance of the law does not excuse a wrong done or a right withheld; that relief from liabilities under the law, arising from a known state of facts, will be denied. But to these general rules there are exceptions, as where there is a mistake of law caused by fraud, imposition, or misrepresentation. We think it will be found that in most of the cases cited in these notes, and in *Pomeroy*, the party seeking relief was led into error by the action of the other party to a transaction, as in contracts and releases.' *Light v. Light*, 21 Pa. 407, 412; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166 [10 Am. Dec. 316]; *Whitwell v. Winslow*, 184 Mass. 343, 345; *Alabama, etc., R. Co. v. Jones*, 73 Miss. 110, 55 Am. St. Rep. 488, note."

The complaint under consideration does not state facts sufficient to constitute a cause of action.

Whether by commencing action upon the policy and afterwards abandoning the same the plaintiff has failed to avail himself of the right of prompt rescission within the doctrine of *Scott v. Walton*, 32 Or. 460, 52 Pac. 180, or whether he has sufficiently pleaded a mistake in the contract within the doctrine of *Hughey v. Smith*, 65 Or. 323, 133 Pac. 68, or whether he has stated a case of fraud against the plaintiff within the rule of pleading laid down in *Anderson v. Adams*, 43 Or. 621, 627, 74 Pac. 215, are questions which do not require consideration at this time. The judgment of the circuit court is reversed, and the cause remanded for further proceedings.

MOORE, C. J., and BENSON, J., concur. BEAN, J., withholds his assent.

STATE v. APLIN.

(Supreme Court of Oregon. Oct. 24, 1916.)

1. INTOXICATING LIQUORS \S 150 — ILLEGAL SALE — STATUTE.

There are three necessary elements to the crime of selling intoxicants without a license in violation of L. O. L. \S 4938, as amended by Laws 1913, p. 506: First, defendant must have sold intoxicating liquor; second, must have sold it outside the limits of any incorporated city or town; and, third, must have sold without a license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. $\S\S$ 164, 165; Dec. Dig. \S 150.]

2. INTOXICATING LIQUORS \S 215 — ILLEGAL SALE — INDICTMENT — SUFFICIENCY — STATUTE.

An indictment, charging that defendant, on a specified date in a specified county "then and there being, did then and there unlawfully sell two quarts of malt liquor, to wit, beer to [another] without first obtaining a license therefor as provided by law," was insufficient to charge the offense denounced by L. O. L. \S 4938, as amended by Laws 1913, p. 506, relative to the sale of intoxicants, as failing to allege the necessary element of the crime that the sale was outside the limits of an incorporated town.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. $\S\S$ 258-260; Dec. Dig. \S 215.]

In Banc. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Alfred Aplin was indicted for selling intoxicating liquor without a license, and from judgment sustaining his demurrer, the State appeals. Judgment affirmed.

The defendant was indicted for the crime of selling intoxicating liquor without a license. The charging part of the indictment is as follows:

"The said Alfred Aplin, on the 15th day of July, A. D. 1915, in the county of Marion and state of Oregon, then and there being, did then and there unlawfully sell two quarts of malt liquor, to wit, beer, to W. B. Gill without first obtaining a license therefor, as provided by law."

The defendant demurred on the grounds: (1) That the indictment did not state facts sufficient to constitute a crime; (2) that the indictment did not substantially comply with the requirements of chapter VII, title XVIII, L. O. L., in that it failed to state the particular circumstances of the crime charged. The demurrer was sustained, and the state appeals.

Ernest R. Ringo, Dist. Atty., and Elmo S. White, Deputy Dist. Atty., both of Salem, for the State. F. A. Boyington, of Silverton, for respondent.

McBRIDE, J. [1, 2] At the date of the alleged offense there was in force in this state an act (Laws 1913, chapter 265, p. 506) which provided among other things:

"No person shall be permitted to sell, give, or in any manner dispose of any spirituous, malt, vinous liquors, near beer, or fermented cider, commonly known as hard cider, in this state,

outside of the limits or boundaries of any incorporated city or town."

It was, however, provided that in any place outside of any incorporated city or town where the sale of intoxicating liquors was not prohibited by law, the county court might, in its discretion, upon the petition of a majority of the voters of such precinct, grant a license to any bona fide club of not less than 50 members to dispense such liquors, and, further, that it might, upon a like petition, grant to any hotel outside of the limits of any incorporated town, and having accommodations for not less than 50 guests, a like license. For selling such liquors without a license there was prescribed a fine of from \$250 to \$500, or imprisonment for not less than 60 days or more than 6 months, or both such fine and imprisonment. There are three necessary ingredients to this crime: (1) The defendant must have sold intoxicating liquor; (2) he must have sold it outside the limits of any incorporated city or town; (3) he must have sold it without a license. The passage of the prohibition amendment did not have the effect to extend this statute to cities and towns not theretofore embraced in its terms, and it is clear that the offense is not stated in the indictment sufficiently to bring it within any provision of the local option law, since it is not alleged that the sale was in dry territory. It is necessarily an attempt to charge the offense under section 4938, L. O. L., as amended in 1913, supra. It is generally sufficient to charge a statutory offense in the language of the statute, but this was not done here. Everything charged in this indictment might be true, and yet the defendant not be guilty of the offense attempted to be charged. It is urged by the state that it was not necessary to charge that the offense was committed outside of any incorporated town or city, and State v. Tamler & Polly, 19 Or. 528, 25 Pac. 72, 9 L. R. A. 853, is cited in support of the contention. The case is not in point. In that case the defendants were indicted for violation of the provisions of an act prohibiting the sale of intoxicating liquor (Laws of 1889, p. 9), the first section of which provided that it should be unlawful for any person to sell intoxicating liquors without having first obtained a license from the county court of the proper county for that purpose. Subsequent sections prescribed a method by which such license should be obtained and a penalty for selling without a license. A further section contained this provision:

"Nothing in this act shall be so construed as to apply in any manner to incorporated towns and cities of this state."

The court held that it was not necessary for the indictment to negative this proviso, Justice Bean saying:

"The general rule on this subject is that where the exception or proviso is stated in

the enacting clause, it is necessary to negative them in order that the description of the offense may in all respects, correspond with the statute; but where such exception or proviso is contained in another or subsequent section of the statute, it is a matter of defense and need not be negated in the indictment. 1 Bishop on Crim. Pro. §§ 631, 633; *Mills v. Kennedy*, 1 Bailey (S. C.) 17. While this seems to be the general rule, there is much diversity of judicial utterances as to the proper application, and to attempt to reconcile the authorities would be a useless, if not hopeless, task. When the exceptions or provisos are a material part of the description of the offense, it is necessary to negative them in the indictment. The indictment must contain such averments as show affirmatively an offense; and, where the exceptions or provisos are a material part of the description of the offense, the indictment must aver that the act charged does not come within the exception or proviso. The exceptions should be negated only when they are descriptive of the offense, or a necessary ingredient of its definition; but when they afford matter of excuse merely, they are matters of defense, and therefore need not be negated in the indictment. The offense defined in the act of 1889 is that of selling spirituous, vinous, or malt liquors in certain prescribed quantities, without first having obtained a license in the manner prescribed by law. The provision of section 11 is no part whatever of the description of the offense, nor a necessary ingredient of its definition, but is simply a limitation in the application of the provisions of the act. The description of the offense of selling liquor without a license is full and complete without reference to the provisions of this section, and since it forms no part of the definition thereof, it is mere matter of excuse or defense, and need not be negated in the indictment."

Here the fact that the sale is outside the limits of an incorporated town is a necessary ingredient of the offense, and is included in the section defining it, and upon reasoning of that case the indictment is insufficient.

The judgment of the circuit court is affirmed.

STATE v. APLIN (four cases).

(Supreme Court of Oregon. Oct. 24, 1916.)

In Banc. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Four indictments were found against Alfred Aplin for selling intoxicating liquor without a license, and from judgments sustaining demurrers thereto, the State appeals. Judgments affirmed.

Ernest R. Ringo, Dist. Atty., and Elmo S. White, Deputy Dist. Atty., both of Salem, for the State. Floyd A. Boyington, of Silverton, for respondent.

PER CURIAM. These cases are, in all respects, similar to the case of the same title (160 Pac. 538), in which the opinion was this day handed down; and, upon the authority of that case, the judgment of the circuit court will be affirmed in each of them.

DOUGLAS CREDITORS' ASS'N v. HUTCHASON.

(Supreme Court of Oregon. Oct. 24, 1916.)

1. EXCEPTIONS, BILL OF \S 16—INCORPORATING EVIDENCE.

A bill of exceptions consisting of a verbatim report of the testimony for both parties given at the trial in the circuit court is not a proper bill.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 16, 17; Dec. Dig. \S 16.]

2. APPEAL AND ERROR \S 248—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO RULINGS.

There can be no reversal where, throughout the testimony, no exception was taken to any ruling of the court, since only for error legally excepted to will a decision of the circuit court be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1432, 1467, 1468; Dec. Dig. \S 248.]

Department 1. Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Action by the Douglas Creditors' Association, a corporation, against J. F. Hutchason. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

The plaintiff sued the defendant in a justice's court on some assigned accounts against him. Defeated in that tribunal, the defendant appealed to the circuit court, where a like result befell him. On his appeal here the only assignment of error is "that at the conclusion of the plaintiff's testimony the defendant moved the court for a nonsuit, and the court overruled said motion."

Albert Abraham, of Roseburg, for appellant. Ora H. Porter, of Roseburg (Buchanan & Porter, of Roseburg, on the brief), for respondent.

BURNETT, J. [1] The so-called bill of exceptions before us is a verbatim report of the testimony for both parties given at the trial in the circuit court. It does not conform to the frame of such a document as specified in *National Council v. McGinn*, 70 Or. 457, 138 Pac. 493, and cognate cases.

[2] Besides this it appears that throughout the narration of the testimony not an exception was taken to any ruling of the court. It has been held from the earliest judicial times in this state that only for error legally excepted to will a decision of the circuit court be reversed. This precludes further examination of the instant case.

The judgment is affirmed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

In re MARKS' ESTATE.

(Supreme Court of Oregon. Oct. 27, 1916.)

1. EXECUTORS AND ADMINISTRATORS §337— SALE OF REALTY—JURISDICTION OF COUNTY COURT.

By the publication of a citation to some of the parties interested in an estate and personal service as to the others, the county court acquired jurisdiction to make a decision on the matter of an administrator's application for an order to sell realty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1397-1409; Dec. Dig. §337.]

2. EXECUTORS AND ADMINISTRATORS §358 (4)—SALE OF REALTY—ORDER—REVIEW.

In the absence of any direct provision for setting aside an order for an administrator's sale of realty, L. O. L. § 103, providing that the court may allow an answer or reply to be made after the time limited by the Code, and may within one year after notice thereof relieve a party from an order taken against him through his mistake, inadvertence, etc., orders made in the exercise of the court's discretion are not reviewable except for abuse of discretion, and a refusal to vacate an order for an administrator's sale of realty on the ground that it was made without actual notice to part of the petitioners was not an abuse of such discretion.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1475-1477, 1479; Dec. Dig. §358(4); Appeal and Error, Cent. Dig. § 159.]

3. EXECUTORS AND ADMINISTRATORS §348— SALE OF REALTY—ORDER—VACATION—ANSWER.

Under L. O. L. § 59, providing that defendants against whom publication has been ordered may, upon good cause shown, be allowed to defend within one year after judgment, parties seeking the vacation of an order for an administrator's sale of realty and for permission to make objections and defenses thereto would be denied relief for failure to tender an answer with the petition.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1448; Dec. Dig. §348.]

4. EXECUTORS AND ADMINISTRATORS §76— COUNTY COURT—REMOVAL OF ADMINISTRATOR—DISCRETION.

County courts are vested with a very large discretionary power over the conduct of executors and administrators.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 336-338; Dec. Dig. §76.]

5. EXECUTORS AND ADMINISTRATORS §37(1) —QUALIFICATION — SURETY OF FORMER ADMINISTRATOR.

The surety of a former administrator is not necessarily disqualified from acting as administrator de bonis non because of a potential interest which may thereafter appear, but to justify his removal something more should appear, as the court cannot presume that he will squander the estate or fail to properly administer it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 267, 278; Dec. Dig. §37(1).]

6. DESCENT AND DISTRIBUTION §91(2)—EXECUTORS AND ADMINISTRATORS §509(4)— SURCHARGING ADMINISTRATOR.

Parties interested in an estate may surcharge an administrator's final account if he fails to reduce its choses in action to possession, and, if he refuses to collect debts owing the estate and properly apply the proceeds, the

heirs may themselves realize upon them in the interest of the estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 360; Dec. Dig. §91(2); Executors and Administrators, Cent. Dig. §§ 2199-2206; Dec. Dig. §509(4).]

7. EXECUTORS AND ADMINISTRATORS §528(5) —ADMINISTRATOR'S INDEBTEDNESS—LIABILITY OF SURETIES.

If an administrator owes an estate, his debt will be reckoned as so much money on hand for which his sureties will be liable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2386; Dec. Dig. §528(5).]

Department 2. Appeal from Circuit Court, Douglas County; L. T. Harris, Judge.

Petition for the removal of E. L. Parrott, as administrator de bonis non of the estate of S. Marks, deceased, and of the partnership estate of S. Marks & Co., and to vacate an order of sale of real property, obtained by the administrator. From a judgment of the circuit court affirming a dismissal of the petition for removal and the denial of the petition to vacate the order, the petitioners appeal. Affirmed.

This litigation originated in the county court of Douglas county. The matter before us has a double aspect. It appears from the petition to that tribunal that E. L. Parrott was appointed administrator de bonis non of the estate of S. Marks, deceased, and of the partnership estate of S. Marks & Co., of which said decedent was one of the partners. H. Wollenberg had previously been administrator de bonis non of those estates succeeding a deceased administrator, and Parrott had underwritten his bonds with others. The petition recites the relationship of the petitioners to S. Marks, the history of the partnership, the removal of Wollenberg, and the appointment and qualification of Parrott. It also recounts the appointment of one Asher Marks as the first administrator of those estates and his death, leaving the estates unadministered. It avers various shortcomings of Wollenberg. All it says about Parrott, besides the fact that he was one of the sureties of Wollenberg on his official bond, is this:

"That said Herman Marks, as executor, and the sureties on the official bond of Asher Marks, as administrator of the estates of S. Marks, deceased, and said H. Wollenberg as administrator de bonis non of the estate of S. Marks, deceased, and S. Marks & Co., and as administrators of the copartnership of S. Marks & H. Wollenberg, and the sureties on his official bonds, must account to the administrator de bonis non of said estates in the premises, and the county court of the state of Oregon has original and exclusive jurisdiction of the same; and E. L. Parrott, present administrator de bonis non of said estates, is disqualified to act in the premises by reason of his being a surety on each of said official bonds of H. Wollenberg; that accountings and settlements of both said copartnerships and said former administration of Asher Marks and H. Wollenberg are necessary to be had before any final account and settlement of said estates can be ordered, and they cannot

be proceeded with until the present administrator, E. L. Parrott, is removed, and a qualified administrator de bonis non appointed in his place."

The county court dismissed the petition to remove Parrott, and this action was affirmed on appeal to the circuit court. Heard with this, by agreement of counsel, was the matter of a petition filed by the same petitioners on April 26, 1911, in the county court to vacate an order of sale of real property secured by Parrott as administrator on February 1, 1911. Jurisdiction for the making of such order was acquired partly by publication and partly by personal service of citation. The petition to vacate the order makes no question about the regularity of service, but alleges that the order was made without actual notice to three of the petitioners. They declare that, if they had received such notice or information of the proceedings, they could and would have defended against the application on certain grounds which they allege. The county court denied this petition and refused to vacate the order of sale. An appeal was taken by these petitioners to the circuit court which there affirmed the decision of the county court. In both these matters the original petitioners have appealed to this court.

C. S. Jackson, of Roseburg (E. B. Watson, of Portland, on the brief), for appellants. George M. Brown, of Salem, for respondent E. L. Parrott.

BURNETT, J. (after stating the facts as above). [1, 2] All that appears in the abstract in the way of pleadings are the petitions for the removal of Parrott and for the vacation of the order of sale. As to the latter, it is sufficient to say that by the publication of a citation to part of the petitioners and personal service as to the others the county court acquired jurisdiction to make a decision in the matter involved. It is not by the mark at the present juncture to say whether that decision was right or wrong in point of law. Having jurisdiction of the subject-matter and of the parties, the court had a right to decide either correctly or erroneously. In the statute relating to the administration of estates there is no direct provision for setting aside an order of sale. The petitioners claim they were entitled to relief by virtue of the provisions of section 103, L. O. L., reading thus:

"The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this Code, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

It will be observed that relief under this section is explicitly referred to the discretion of the court, and it has been constantly held that orders made in the exercise of this pre-

rogative are not reviewable on appeal except for abuse of the power. The record before us does not disclose any such situation. Hence, so far as relates to section 103, supra, the matter of the vacation of the order may be dismissed without further attention; it not being an appealable order.

[3] If the petitioners base their contention on section 59, L. O. L., allowing them as a matter of right, as decided in *Felts v. Boyer*, 73 Or. 83, 144 Pac. 420, to answer within one year after default decree taken on publication of summons, they yet must fail because they did not tender their answer with their petition to vacate the order of sale. On the contrary, they pray for "an order vacating and setting aside said order of sale of February 1, 1911, and allowing them to make said and any other proper objections and defenses to said petition for the sale of real property as they may be advised and believe proper to do under section 103 of B. & O. Code Laws of Oregon." The answer was avowedly in futuro and might or might not have been filed. In *Mayer v. Mayer*, 27 Or. 133, 89 Pac. 1002, and *Egan v. North American Loan Co.*, 45 Or. 181, 76 Pac. 774, 77 Pac. 392, this court has decided that the proper practice in such cases is to tender the proposed answer with the application to take off the default. The court will not set aside a decree and leave the way open for such experiments ad libitum as may suggest themselves to ingenious counsel. It is only for "sufficient cause shown" that the belated defendant will be let in. An answer to the merits tendered with the application is an essential part of the procedure wanting in this instance.

[4-7] As to the matter of removal of the administrator, it is said by Mr. Justice Eakin in this selfsame case, *In re S. Marks & Co.'s Estate*, 66 Or. 340, 346, 133 Pac. 777, 779, that:

"In the very nature of things, county courts are vested with a very large discretionary power over the conduct of executors and administrators."

This was stated with reference to the removal of Wollenberg as administrator de bonis non. The allegation here against Parrott is a mere conclusion of law. No charge is made that he has proved unfaithful to his trust in any manner whatever, yet this is one of the grounds authorizing the removal of an administrator under section 1159, L. O. L. We might imagine that in the future complications could possibly arise, where his personal interests would conflict with his official duty; but no such situation is yet presented. It does not follow as a matter of law that the surety of a former administrator is necessarily disqualified because of a potential interest which might afterwards appear. The same objection might be urged against the appointment of a creditor of a decedent to administer the estate of the latter. Debtors of an estate are often appointed to its administration. Something

more should appear in the petition than the bare fact that Parrott had been surety for a former administrator. We cannot presume that he will squander the estate or fail to properly administer it. The petitioners are not without remedy in the premises, for they may surcharge his final account if he squanders the estate or fails to reduce its choses in action to possession. If he owes the estate, his debt would be reckoned as so much money on hand for which his sureties would be liable under *United Brethren v. Akin*, 45 Or. 247, 77 Pac. 748, 66 L. R. A. 654, 2 Ann. Cas. 353 note. If he refuses to collect debts owing to it and properly apply the proceeds, the heirs by suitable litigation may themselves realize upon them in the interest of the estate under the doctrine announced in *Hillman v. Young*, 64 Or. 73, 127 Pac. 793, 129 Pac. 124.

We are not unmindful of what has been said by this court in the cases of *In re Estate of Mills*, 22 Or. 210, 29 Pac. 443; *Marks v. Coats*, 37 Or. 609, 62 Pac. 488; *Bean v. Pettengill*, 57 Or. 22, 109 Pac. 865; and *Manser's Estate*, 60 Or. 240, 118 Pac. 1024. In all those instances there was a direct conflict between the estate and the administrator as to the title to certain property in which it was impossible for him to act indifferently. They each present a situation where the administrator claimed as his own certain property which had and as the petitioners averred yet belonged to the decedent, all of which was made to appear by appropriate pleading. In the present juncture the liability of Parrott is at best secondary and may never arise. When it does, it will be time enough to suspend his activities in the fiduciary capacity under consideration. It would invade the discretionary power of the county court over administrators if upon the showing made we should sanction the removal of the present administrator, especially where the petitioners have so many means of protecting their interests in the estate.

The decree of the circuit court is affirmed.

MOORE, O. J., and McBRIDE and BEAN, JJ., concur. HARRIS, J., took no part in the consideration of this case.

In re MARKS' ESTATE et al.

(Supreme Court of Oregon. Oct. 27, 1916.)

Department 2. Appeal from Circuit Court, Douglas County; L. T. Harris, Judge.

Petition for the removal of E. L. Parrott, as administrator de bonis non of the estate of S. Marks & H. Wollenberg. From a judgment of the circuit court, affirming the county court's denial of such petition, petitioner appeals. Affirmed.

C. S. Jackson, of Roseburg (E. B. Watson, of Portland, on the brief), for appellants. Geo. M. Brown, of Salem, for respondent E. L. Parrott.

BURNETT, J. This is an appeal from the decision of the circuit court sustaining the action of the county court of Douglas county in refusing to remove E. L. Parrott from the position of administrator de bonis non of the estate of the firm of S. Marks & H. Wollenberg. As to the removal of the administrator, it presents the same questions considered in the opinion this day rendered in the matter of the Estate of S. Marks, Deceased, and of the Partnership Estate of S. Marks & Co., 160 Pac. 540.

For the reasons there stated, the decision of the circuit court is affirmed.

MOORE, O. J., and McBRIDE and BEAN, JJ., concur. HARRIS, J., took no part in the consideration of the case.

KYLÄ-KIEROLA v. STANLEY-SMITH LUMBER CO.

(Supreme Court of Oregon. Oct. 27, 1916.)

APPEAL AND ERROR \Leftrightarrow 98 — DECISIONS REVIEWABLE—ORDER REINSTATING CAUSE.

An order reinstating an action dismissed without prejudice, because the statute of limitations would bar the institution of another action for the same cause, is not final, and an order therefrom will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 643-647; Dec. Dig. \Leftrightarrow 93.]

Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by Gustava Kylä-Kierola against the Stanley-Smith Lumber Company, a corporation. From an order reinstating the action after dismissal without prejudice, defendant appeals, and plaintiff's counsel moves to dismiss the appeal. Appeal ordered dismissed.

Leroy Lomax, of Portland, Kazis Krauczunas, of Seattle, Wash., and James J. Crossley and J. N. Hart, both of Portland, for the motion. Crawford & Eakin, of La Grande, opposed.

MOORE, O. J. The reply in this cause was filed November 16, 1915, but prior thereto a commission was issued to take the testimony of the plaintiff who resided in Finland. At the next term of court which convened March 6, 1916, the action was dismissed without prejudice and without notice to the plaintiff's counsel.

As the statute of limitations would bar the institution of another action for the same cause, the court during the same term, upon the motion of the plaintiff's counsel, reinstated the action, from which order the defendant appeals. The plaintiff's counsel moves to dismiss the appeal on the ground that the order undertaken to be reviewed is not final. Based upon the decision in the case of *First Christian Church of Medford v. Robb*, 69 Or. 283, 138 Pac. 856, the appeal should be dismissed, and it is so ordered.

MORGAN v. RUBLE et al.

(Supreme Court of Oregon. Oct. 27, 1916.)

CORPORATIONS — 262(1)—LIABILITY OF STOCK-HOLDERS—UNPAID SUBSCRIPTIONS—DEFENSES—FRAUD.

In a suit by a judgment creditor after execution returned nulla bona, to enforce the liability of the stockholders in an insolvent corporation upon their unpaid subscriptions to its capital stock, where the creditor did not know of alleged fraudulent representations to defendants to induce them to become stockholders, such fraudulent representations were no defense to the suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1076; Dec. Dig. —262(1).]

In Banc. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by W. H. Morgan against John Ruble and others. Decree dismissing the suit, and plaintiff appeals. Reversed, and decree entered for plaintiff.

This is a suit by a creditor to enforce the individual liability of stockholders in an insolvent corporation upon their unpaid subscriptions to capital stock. The Lincoln Stove Company, having been duly incorporated with the defendants as stockholders, executed and delivered its promissory note to plaintiff, which was not paid at maturity, and plaintiff, in a proper proceeding, obtained a judgment against the corporation thereon in the sum of \$213.25, with interest at 6 per cent., \$65 as attorney fees, and costs at \$14.70. An execution having been issued and returned nulla bona, this suit was begun. A second cause of suit is based upon an assigned claim of \$613.33, upon an account stated in favor of the H. S. Gile Grocery Company. The insolvency of the corporation is admitted. The execution and delivery of the promissory note, the judgment thereon, and the unsatisfied execution are admitted. The assignment of the claim of the H. S. Gile Grocery Company is admitted. After some unimportant denials the defendants plead affirmatively that the organizers of the corporation made false and fraudulent representations to them, whereby they were induced to subscribe for the corporate stock. A trial being had, there was a decree dismissing plaintiff's suit, from which he appeals.

William H. Trindle, of Salem, for appellant. Smith & Shields, of Salem, for respondents.

BENSON, J. (after stating the facts as above). There is but one question involved in this case, and that is as to whether or not the fact that the promoters of a corporation made false and fraudulent representations to the defendants to induce them to become stockholders can be relied upon to defeat the claim of a creditor. It is true that the answer alleges that plaintiff knew of these facts and fraudulent representations, but we

find no evidence in the record to support the allegation. It is perfectly clear from the evidence that if there was anything wrong in the procuring of defendants' stock subscriptions, the plaintiff was ignorant of the fact and had nothing to do with it.

In *Stewart v. Rutherford*, 74 Ga. 435, 440, the court says:

"Of course if innocent parties have been affected by the corporation during its operation, the court will protect them, and the complainant alleges that creditors thereof should be paid, if there be such. As he united with the defendants in creating this wildcat sort of adventure, all the way from West Virginia to Georgia, although deluded and decoyed into it, the equity of people who had no part or lot in making it and bringing it to Georgia is superior to his own."

The case of *Howard v. Glenn*, 85 Ga. 238, 261, 11 S. E. 610, 612 (21 Am. St. Rep. 156) is a case precisely like the one at bar, and in discussing a similar defense the court says:

"Whether Howard became a stockholder in this company by subscription which was induced by fraud practiced upon him, or not, if he did become a stockholder in said company, he is liable to the creditors of the company for so much of his unpaid stock as might be necessary to pay the company's debts, taken in connection with the other corporators of the company. And whether fraud was practiced upon him or not, would make no difference as to the creditors; it would be a question between him and the corporation, with which the creditors had nothing to do."

This is in line with the weight of authority, and is strictly equitable.

It follows that the decree must be reversed and one entered here in accordance with the prayer of the complaint, and it is so ordered.

GILES et al. v. CITY OF ROSEBURG et al.
(Supreme Court of Oregon. Oct. 24, 1916.)**1. MUNICIPAL CORPORATIONS — 460—PUBLIC IMPROVEMENTS—ASSESSMENTS—EXTRAS.**

Under a city charter authorizing the council to levy an assessment on lands specially benefited to pay the whole or any part of the expense of a public improvement, but making no specific provision for assessment to pay the incidental expenses of such improvement, the amount paid the city engineer for superintendence and the amount paid for the abstract of the property owners and the clerical work of preparing the assessment cannot be included in the assessment for the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1102-1104; Dec. Dig. —460.]

2. MUNICIPAL CORPORATIONS — 518(1)—PUBLIC IMPROVEMENTS—ASSESSMENT—INTEREST.

Under a city charter providing that all general or special taxes levied for public improvements should bear interest at the legal rate from the time they are delinquent, the interest on warrants drawn in favor of contractors for a public improvement from the date of such warrants until the assessment was levied and the lien attached is not chargeable against the property owners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1218; Dec. Dig. —518(1).]

Department 1. Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Suit by E. L. Giles and others against the City of Roseburg and others to enjoin the enforcement of part of a special assessment. Judgment for the plaintiffs, and defendants appeal. Affirmed.

Carl E. Wimberly, of Roseburg (Albert Abraham, of Roseburg, on the brief), for appellants. A. N. Orcutt, of Roseburg, for respondents.

MOORE, C. J. This is an appeal by the defendant from a decree enjoining the enforcement of that part of a special assessment which undertook to impose upon the several tracts of real property in a designated district, asserted to have been benefited by a street improvement, the following charges: For engineering, \$350; for interest, \$108.37; for an abstract, \$15.75; and for clerical work, \$21.81. The question to be considered is whether either of these items constitutes a valid charge against the real property affected by the improvement.

[1] In *Smith v. City of Portland*, 25 Or. 297, 35 Pac. 665, it was held that in the absence of a provision in an ordinance authorizing a public improvement, or a general provision in a city charter, extras or incidentals incurred in making the improvement could not be charged against the property benefited. Section 66 of the charter of the city of Roseburg declares:

"The common council shall have power * * * to levy and collect assessments upon all lots and parts of lots and parcels of land specially benefited by such improvements for the purpose of defraying the whole or any part of the cost and expense thereof."

It appears from the testimony that the defendants' engineer does not receive a regular salary, but is paid a stated daily compensation for the services which he renders. He received in this instance, as evidence of the remuneration due him for superintending the improvement, warrants drawn on the general fund, and not upon the fund arising from the special assessment. We have been unable to find any clause in the charter or in the ordinance under which the improvement was made that expressly authorizes the imposition of any part of the engineer's charges against the property benefited. When it is kept in mind that the levy of a special assessment is a proceeding in invitum, and that

the authority in this instance to impose upon the real property the burden of the engineer's charges for supervising the work is not apparent from an inspection of the charter or the ordinance under which the improvement was made, so that the owners of the land would have proper notice of the cost of the extra work, the court properly excluded the item of \$350 as an incidental incurred in making the improvement.

What has been said with respect to the engineer's charges will apply with equal reason to the items of \$15.75 for an abstract, showing the names of the owners of real property affected by the improvement, and \$21.81 for clerical work in making up the assessment so as to lay upon each tract of land benefited by the improvement its ratable share of the cost thereof. These items were also properly excluded.

[2] The testimony shows that warrants were drawn in favor of the contractors for the value of installments of the work as they were performed, and interest on these warrants, \$108.37, was charged for the alleged detention of the money by reason of the non-payment of the assessment. In *Mall v. City of Portland*, 35 Or. 89, 93, 56 Pac. 654, 655, Mr. Justice Bean observes:

"It is the universal rule that a special assessment, like the one in question, does not bear interest unless the law so provides."

Section 97 of the charter of Roseburg reads:

"All general or special taxes levied, as provided and authorized in this act, and all assessments for the improvements, widening, or repairing of streets or alleys, or for laying sewers or drains, and every part thereof, shall bear interest at the legal rate from the time it is delinquent until paid or collected."

It appears that no assessment was made for the improvement until five months after it was finished. Until an owner of the real property benefited could tell with certainty what sum he should pay as his share of the burden imposed he could not be delinquent in withholding his part of the assessment. He was therefore not chargeable with interest until the lien attached. No error was committed in excluding that item.

The decree should therefore be affirmed, and it is so ordered.

BENSON, BURNETT, and McBRIDE, JJ., concur.

MERCANTILE TRUST CO. OF SAN FRANCISCO v. SUNSET ROAD OIL CO. et al. KERN VALLEY BANK v. SAME (WILLIAMS, Superintendent of Banks, Intervener). (L. A. 3784.)

(Supreme Court of California. Oct. 14, 1916. Rehearing Denied Nov. 9, 1916.)

1. APPEAL AND ERROR ⇐82(1) — DECISIONS APPEALABLE.

An order denying appellants' motion to call in another judge to hear and determine the motion for new trial is appealable under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, as a special order made after final judgment, for the order, if erroneous, subjected appellants under a void proceeding to a final judgment disposing of their rights, and the error could not be corrected on appeal from the order on the motion for new trial, for the relief to which appellants were entitled was not reversal, but vacation of the order and a remand of the matter for a hearing before a qualified judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 517, 521; Dec. Dig. ⇐82(1).]

2. JUDGES ⇐51(1)—DISQUALIFICATION—PROCEEDING.

One filing an affidavit alleging the disqualification of a judge to sit, while entitled, under Code Civ. Proc. § 170, to have counter affidavits by the judge filed before hearing, may waive that right.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224, 225; Dec. Dig. ⇐51(1).]

3. JUDGES ⇐51(1)—AFFIDAVITS OF DISQUALIFICATION.

Where appellants' counsel, who filed an affidavit setting forth the disqualification of the judge to proceed with the hearing, agreed that the counter affidavit of the judge might be filed at any time, the right to insist on the strict statutory procedure requiring the filing of counter affidavits before hearing was waived, and an affidavit filed after hearing was in time.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224, 225; Dec. Dig. ⇐51(1).]

4. JUDGES ⇐51(3) — DISQUALIFICATION — COUNTER AFFIDAVITS.

Under Code Civ. Proc. § 170, providing for disqualification of a judge for interest, for relationship to parties or attorneys, or former participation in the case as an attorney, a judge is not disqualified by an affidavit in support of a motion to call in another judge, stating that he had been appointed by the Governor, a bitter enemy of one of the moving parties, that the Governor's son was of counsel in the case, and that the judge, though of little experience, had consented to try the matter, where the allegations of prejudice were contradicted by an affidavit of the judge, for constructive bias is not recognized by the statute.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 227, 228; Dec. Dig. ⇐51(3).]

5. APPEAL AND ERROR ⇐185(3)—REVIEW—MATTERS REVIEWABLE.

On appeal from an order of the judge refusing to call in another judge on the ground of his disqualification, the question of the jurisdiction of the judge to hear the proceeding cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1166; Dec. Dig. ⇐185(3).]

Department 2. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by the Mercantile Trust Company of San Francisco, a corporation, against the Sunset Road Oil Company and others, defendants, in which the Kern Valley Bank, by W. R. Williams, cross-complained against the Sunset Road Oil Company, W. S. Tevis, and others, and in which W. R. Williams, as Superintendent of Banks of the State of California, intervened. From an order denying their motion to call in another judge to determine the motion for new trial, the Sunset Road Oil Company and W. S. Tevis and others appeal. Affirmed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellants. Hiram W. Johnson, Jr., of San Francisco, A. A. De Ligne, of Sacramento, and Donzel Stoney, William Denman, and G. S. Arnold, all of San Francisco, for respondent.

MELVIN, J. Sunset Road Oil Company, W. S. Tevis, and other defendants appeal from an order overruling an objection by appellants to the hearing by Judge Peairs of a motion for a new trial made by the cross-complainant, Kern Valley Bank, and the intervener, the superintendent of banks, and denying their motion to have some other judge called to preside at the hearing of the motion for a new trial.

The cause was tried before Judge G. W. Nicol of Tuolumne county, who presided by consent of all the parties instead of one of the judges resident in Kern county. After the trial of the case Judge Peairs was appointed to the superior bench, and appellants made a motion and an objection under section 170, Code of Civil Procedure. An affidavit was filed alleging Judge Peairs' bias and prejudice, counter affidavits were prepared and presented, and Judge Peairs, denying the prayer of appellants, proceeded to hear and determine the motion for a new trial.

[1] Respondents insist that this court lacks jurisdiction to hear this appeal because, they say, an order denying a motion to call in another judge is not a "special order made after final judgment," and is not, therefore, appealable under the provisions of section 963, Code of Civil Procedure, as that statute existed prior to the amendment of 1915 (St. 1915, p. 209). They say that any errors committed by the court in denying such a motion are reviewable on an appeal from the order granting the motion for a new trial. An order granting the motion for a new trial has been made in this case, and an appeal therefrom is pending. Respondent relies upon such cases as Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497, and Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176, which announce the rule that an order granting relief under section 473, Code of Civil Procedure, to one in default in presenting a bill of exceptions for settlement within the time required by law is not appealable separately "as a spe-

cial order made after final judgment," while an order refusing such relief is so appealable. We find no analogy between this appeal and the one attempted in *Kaltschmidt v. Weber*, supra; nor does *Griess v. State Investment & Insurance Co.*, 93 Cal. 411, 28 Pac. 1041, support respondent's position. In the case last mentioned there was an effort to appeal from an order denying a motion to dismiss a motion for a new trial. It was declared by this court that such an order is not appealable because the refusal to dismiss a motion for a new trial does not dispose of the motion itself, and until some order is made by the trial court, which, in effect, grants or denies the motion for a new trial, neither party is aggrieved, and there is nothing to appeal from. But in the case at bar the order refusing to call another judge to the hearing of the motion for a new trial, if erroneous, subjected the appellant under a void proceeding to a final judgment disposing of his rights. If error was committed it was not such as might be corrected on appeal from the order subsequently made granting the motion for a new trial by reversing that order on appeal, but the proper order to be made by this court would be one pronouncing void the order denying the motion to disqualify the judge. This would operate not to reverse the order granting a new trial, but to vacate it and send the matter back for a hearing before a qualified judge. *Keating v. Keating*, 169 Cal. 754-760, 147 Pac. 974.

In *Estate of Friedman*, 171 Cal. 431, 153 Pac. 918, an appeal similar to this one was taken. It was the only appeal then before the court in that proceeding, and while the right of appellants to a separate appeal from the order there considered was not questioned, we think the court properly assumed jurisdiction of the controversy.

We will therefore decide this appeal on its merits. It is not necessary to discuss here the details of the litigation in the superior court, as certain appeals are pending from the judgment and from the order granting the motion for a new trial. The cause was tried in the superior court of Kern county, Judge Nicol of Tuolumne county presiding. After judgment motions for new trial were made by certain of the litigants, and Judge Nicol settled the statement on motion for a new trial. Subsequently the Hon. Howard A. Pairs was appointed judge of the superior court of the state of California, in and for the county of Kern. On October 24, 1913, the motions of the Kern Valley Bank and of the superintendent of banks for a new trial of the action so far as they were concerned were called for hearing before Judge Pairs. Thereupon the appellants objected to Judge Pairs and moved that he forthwith secure the services of some other judge to preside at the hearing as required in proper cases by section 170, Code of Civil Procedure. This

motion was supported by the affidavit of Gavin McNab, Esq., one of the attorneys for Sunset Road Oil Company, W. S. Tevis, and others. In this affidavit it was directly charged that the judge was biased and prejudiced against one of the parties to the action, Mr. William S. Tevis. It also contained charges of constructive bias and prejudice on the part of the judge against Mr. Tevis, based upon allegations which were in substance as follows: The Governor of California, who appointed Judge Pairs, was a bitter enemy of Mr. Tevis and of Mr. McNab, and as attorney for the defendants in some criminal proceedings instituted by Mr. Tevis against them he had filed affidavits abusing Mr. Tevis. The Governor's son was one of the attorneys in this case for the superintendent of banks, who was also one of the Governor's appointees. It was also alleged in the affidavit that instead of bringing the motion on for hearing before the judge who tried the case and settled the bill of exceptions, counsel had solicited Judge Pairs to hear the motion, and that he had granted their request, although he was a judge of very little experience, and the record in the case was more than 10,000 pages long. The moving parties also offered to consent to a hearing before any judge who had been elected by the people and who then presided in any one of certain specified counties—a total of about 30 judges.

On the day when the affidavit was presented and read to the judge, opposing counsel filed an affidavit in response to it, by A. A. De Ligne, Esq., one of the attorneys for the superintendent of banks of the state of California. Among the averments contained in this document were those to the effect that the Governor of California had selected and appointed Judge Pairs only because of his fitness, and not to influence judgments in this or other cases; that the superintendent of banks took no part in the selection of the said judge; that the Governor's son, although an attorney of record in this case, had never taken any part nor rendered any services in the action since the filing of the pleadings; that the compensation of the Governor's son was in no manner contingent upon the outcome of the action; and that the chief executive officer of California was not influenced, in his appointment of Judge Pairs, by bias or prejudice against Mr. W. S. Tevis nor against any other person, whereby said W. S. Tevis or any other person could not have a fair and impartial hearing on the motion. There were other allegations impugning the motives of opposing counsel in seeking a hearing before some judge not of Kern county, but, as they are immaterial to the issues involved we will not discuss them.

After the reading of Mr. De Ligne's affidavit, Mr. Stoney, one of his associates, called the court's attention to the fact that,

nder the decisions of this court a judge might properly file an affidavit touching the matter of his alleged prejudice. Then he following proceedings were had:

"The Court: The court will state that it has absolutely no knowledge of the facts connected with this case. I am not acquainted with the attorneys, nor am I acquainted with the facts, and leaving aside the affidavit filed by Mr. McNab, I have no possible reason for any bias or prejudice in the case. Concerning the affidavit itself, I will make no comments. If the counsel in the case desire to stipulate that the matter be heard before some other judge, it will relieve me of a great deal of work, but in so far as making any ruling in the case upon the ground that I am biased or prejudiced, it would not be possible. If the counsel desire an affidavit from me to that effect and will prepare it, I will take a recess of the court for such time as deemed necessary.

"Mr. Stoney: If Mr. Henshall will stipulate that the affidavit will be dispensed with, but that the statement of the court may be regarded as an affidavit, we say that there will be no necessity for the making of the affidavit.

"The Court: I wish to say to counsel that I have no desire to hear the matter, but that I am not disqualified in any manner.

"Mr. Henshall: I do not think that a request like that should be made of me. I do not think I should be called upon to do it.

"Mr. Stoney: I will ask you to stipulate that if the affidavit is filed to-day, it may be deemed to have been filed at this time.

"Mr. Henshall: It can be filed at any time."

After some further conversation between court and counsel, which we need not reproduce here, a short recess was had, and upon the reconvening of court the following occurred:

"The Court: I will say, gentlemen, that I have carefully read the affidavit of Mr. McNab, and there are no features of this affidavit worthy of consideration, except those relating to the trial judge, G. W. Nicol; that under the stipulation—the last clause of that affidavit asked this court to designate some other judge to hear this motion for a new trial, which if I should do, under the affidavit as filed would be a reflection upon Judge Nicol, which could not be said to be the case, when I set this matter for hearing before this court, as I had no knowledge at that time of the fact that it had been tried before any judge other than Judge Bennett. The clerk of the court here can tell you that I had not opened Mr. Shaw's letter, and knew nothing of the facts of the case when I set it for this date, and in view of all the circumstances, and considering the affidavit, I will hear the motion for a new trial.

"Mr. Henshall: I understand that the objection was formally overruled?

"The Court: It is.

"Mr. Henshall: And that the motion to call in another judge under section 170, Code of Civil Procedure, is denied.

"The Court: It is."

A formal order embodying the substance of the oral statement of the judge was thereupon entered in the minutes of the court. One of the paragraphs of said order was as follows:

"Pursuant to stipulation of counsel for respective parties, including R. P. Henshall and Donzel Stoney, in open court, it is by the court ordered that the affidavit of the court in answer to the affidavit of Gavin McNab heretofore filed be presented later and considered as filed at this time."

The court then proceeded to hear argument on the motion for new trial. This hearing was continued from time to time pursuant to regular adjournments. One of the days upon which argument was heard was November 10, 1913, and on that day in the presence of the attorneys for all of the interested parties the affidavit of Judge Peairs was "produced in open court and filed with the clerk of said court, and said clerk of said court did then and there deliver to and serve upon each of the said attorneys, R. P. Henshall, T. O. Toland, and A. E. Shaw, a copy thereof, and such service and such filing was had and done with the full knowledge of all of said attorneys and without objection of any kind thereto."

[2-4] This affidavit, dated November 8, 1913, contained emphatic denial by Judge Peairs of any bias or prejudice against the litigants objecting to his presiding at the hearing of the motion. The judge deposed that, while he had been regularly appointed by the Governor of California, that official had never discussed nor mentioned this case nor any litigation of any kind pending in Kern county; that he had no knowledge of the Governor's hatred toward W. S. Tevis nor any other party to the action except such information as he received from Mr. McNab's affidavit; that if such feeling existed he was not prejudiced by it; that the fact of the Governor's son being connected with the case would not cause prejudice nor bias for or against any litigant in the case; that he was not aware of any interest in the case on the part of the state's chief executive officer, but that if such interest did exist it would cause no bias nor prejudice in the mind of the affiant; and that his sole desire was to see the laws applied to the facts in this cause with equal and exact justice to all the parties.

The appellants contend that under the authority of certain decisions of this court, notably *Bassford v. Earl*, 162 Cal. 115, 121 Pac. 395, there was no sufficient contradiction of the affidavit asserting the judge's prejudice at the time when the motion under section 170, Code of Civil Procedure, was denied. Undoubtedly under our statute, the qualification of the judge to preside in a case where sworn objection is made on the ground of his alleged prejudice, must be tried on affidavits, and the judge must put in the form of an affidavit an account of his own state of mind, if his fairness is called in question, but in this case counsel waived the filing of a formal affidavit until such time as the court might conveniently put in form and solemnly swear to a statement substantially equivalent to the declaration which he had made in open court. The petitioners were entitled to have the allegations of prejudice contained in Mr. McNab's affidavit traversed by the judge's affidavit before there should be a decision upon their motion, but this was a right which they might waive, and they did

waive it. Mr. Stoney asked a stipulation that if the affidavit should be filed the day of the hearing it might be deemed to have been filed at the hour of the hearing. Opposing counsel with great generosity said: "It can be filed at any time." Subsequently when asked to stipulate that the judge might have five days in which to file the affidavit he said: "Anything that the court desires to do in that regard will have no opposition from me." This amounted to a waiver of the strict letter of the statutory requirement. It was entirely analogous to an agreement that the court may proceed without the formal presentation of a pleading the substance of which is known to both parties. Such arrangements are common in the practice of law, and many times the filing of a formal amended complaint or answer follows the actual decision of the cause.

The affidavits on behalf of the respondents were sufficient to support the ruling of the court, refusing to call another judge. We find no uncontradicted assertion of bias, nor was there a showing of constructive bias sufficient to support the motion. Section 170, Code of Civil Procedure, points out three classes of cases in which a judge may be disqualified. They are (1) interest in the case; (2) relationship to a party or attorney; and (3) former participation as an attorney; and "constructive bias" is not one of them.

[8] Appellants further argue that since Judge Nicol had been called to try the case Judge Peairs never acquired jurisdiction to hear any phase of it, but that is a question which, if pertinent at all, could not be raised on the motion before the court. It might have been raised by some other appropriate proceeding, but the only question presented by this record is the correctness or incorrectness of the ruling declining to call in another judge. That question was determined upon conflicting testimony, and we will not disturb the court's ruling, as we do not find any abuse of discretion. We fail to see how the appointment of a judicial officer by a Governor would even have a tendency to cause the former to adopt all the latter's prejudices and to decide cases not according to law, but in a manner which he might think pleasing to the appointing power.

The order is affirmed.

We concur: HENSHAW, J.; LORIGAN, J

In re HUGHSON'S ESTATE.
BRIGHAM v. HUGHSON et al.
(Sac. 2495.)

(Supreme Court of California. Oct. 11, 1916.
Rehearing Denied Nov. 10, 1916.)

1. MARRIAGE \S 39—PROCEEDING TO DETERMINE HEIRSHIP—ISSUES, PROOF, AND VARIANCE.

In a proceeding under Code Civ. Proc. \S 1664, to determine heirship to a decedent whose

estate was in administration, where plaintiff sought to establish her position as the widow of decedent, alleged her marriage to him and the continuance of her status as his wife to his death, and where defendants denied the marriage as pleaded and that the plaintiff was his widow by averring that one of the defendants was his wife at his death, the defendants, by relying upon the presumption that a marriage being proven stands as valid until proof of a prior unrevoked marriage, were not seeking to change their pleading or position or to substitute presumptions for proven facts.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. \S 56, 57; Dec. Dig. \S 39.]

2. MARRIAGE \S 40(11)—CONTINUANCE—PRESUMPTION AND BURDEN OF PROOF.

In a proceeding under Code Civ. Proc. \S 1664, to determine heirship of a decedent, plaintiff, alleging her marriage to him and the continuance of her status as his wife to the time of his death, had the burden of proving that his subsequent marriage was void, and that her own earlier marriage to him had not been set aside by divorce or annulment so that at his death she was his wife by virtue of a lawful and subsisting marriage; and it was not incumbent upon the defendants to show that decedent had been divorced prior to his second marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. \S 68; Dec. Dig. \S 40(11).]

3. MARRIAGE \S 40(1, 11)—VALIDITY—PRESUMPTION.

A ceremonial marriage having been proven is to be presumed lawful and valid until strong proof to the contrary, and the person asserting its invalidity by reason of a former marriage has the burden of proving that the first marriage had not ended before the second marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. \S 58, 68; Dec. Dig. \S 40(1, 11).]

4. MARRIAGE \S 50(1)—SUFFICIENCY OF EVIDENCE.

In a proceeding under Code Civ. Proc. \S 1664, to determine plaintiff's status as the widow of a decedent, opposed by a defendant claiming to be his surviving wife, evidence held to sustain a finding that the plaintiff was not decedent's wife at the time of his death.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. \S 79, 83, 88, 89; Dec. Dig. \S 50(1).]

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Proceeding to determine heirship by Julia J. Brigham against Luella R. Hughson, as administratrix of the estate of Hiram Hughson, deceased, and others. Judgment for defendants, motion for new trial denied, and plaintiff appeals. Affirmed.

Frank J. Gordon, of Oakland, Welles Whitmore, of San Francisco, and J. J. Van Hovenberg, of Oakland, for appellant. J. W. Hawkins, of Modesto, Geo. F. McNoble and Nutter & Orr, all of Stockton, Griffin & Carlson and Hatton & Scott, all of Modesto, and Thomas, Beedy & Lanagan and J. Lanagan, all of San Francisco, for respondents.

MELVIN, J. Julia J. Brigham instituted a proceeding under section 1664 of the Code of Civil Procedure to determine heirship to Hiram Hughson, deceased, whose estate

had been for more than one year in process of administration. After appropriate proceedings to bring in all interested persons the said Julia J. Brigham became the plaintiff by filing a pleading in which she asserted that she was the surviving wife of Hiram Hughson by virtue of a marriage by and between herself and said Hughson contracted in the state of New York on the 27th day of October, 1860, and continuing and subsisting until the death of said Hiram Hughson, on January 15, 1911. This pleading was answered by Luella R. Hughson, who asserted that she was the surviving wife of Hiram Hughson, and by her ten children who claimed interest in the estate as legitimate heirs of the said Hiram Hughson.

After trial judgment was given in favor of the defendants. From said judgment and from an order denying her motion for a new trial, the plaintiff appeals.

The findings of the court disclose a very remarkable story. On the 27th of October, 1860, in the town of Norwich, county of Chenango, state of New York, Hiram Hughson and Julia J. Porter, this plaintiff, were lawfully joined in the bonds of matrimony by a ceremonial marriage duly performed. In February, 1861, Hiram Hughson left his wife, near Chenango Forks in the state of New York, came by steamer to California, and never thereafter lived with her. During his lifetime she never heard from him directly or indirectly after his departure from Chenango Forks. About February 1, 1864, she left New York and went to Hongkong, China, where she was united to one Elias J. Manning by a ceremonial marriage duly solemnized according to law. Thereafter four children of this union were born. In 1866, the Mannings and their family left China and went to Chenango Forks, where they resided until a time shortly before Mr. Manning's death, which occurred in Delaware in 1872. Thereafter plaintiff continued to live near Chenango Forks until her marriage on February 16, 1875, to Frank Brigham at Greene, Chenango county, N. Y. This was a ceremonial marriage solemnized according to the laws of the state of New York. As a result of this union four children were born. Julia J. Brigham and Frank Brigham continued to live together as husband and wife and to hold themselves out to the world as such until a time following the 1st day of January, 1915. She never knew that Hiram Hughson had survived the voyage from New York and had reached and resided in California until early in the year 1914, when she learned of his death. The court also found that plaintiff entered into the marriage relations with Manning in Hongkong and with Brigham in New York in good faith, and that she had good and sufficient reasons to believe that Hiram Hughson was dead. There were specific findings that plaintiff before her marriage to Manning acted in the highest good faith both in law and in fact to ascer-

tain whether her first husband was living or dead, and that:

"She, the said Julia J. Brigham, was before her marriage to the said Elias J. Manning and also before her marriage to the said Frank Brigham, deceived as to the existence of her first husband, said Hiram Hughson, by a false report of his death, which said report had been communicated to her by persons in whom she had confidence and upon whose statements she had a right in good faith to rely for truthful statements, which said statements she did rely upon to be true in all respects."

The court also found that Hiram Hughson and Luella R. Avery were lawfully and by due solemnization married at Stockton, Cal., November 21, 1864, and continued to be such husband and wife until his death in 1911. It was found that they lived before the world as married people, raised a large family, and worked together diligently and faithfully to accumulate the ample fortune which was theirs at the time of Mr. Hughson's death. There were further findings that at the time of the wedding of Hiram Hughson and Luella R. Avery there was no legal impediment to their contracting such marriage; that Julia J. Brigham was not the wife of Hiram Hughson at any time on or after November 21, 1864; and that she was the legal wife of Frank Brigham from the time of her marriage to him in 1875 to and until January 1, 1915, a time following the commencement of this proceeding to determine heirship. The court made elaborate findings upon many matters connected with the administration of the estate and with the interests of the widow, Luella R. Hughson and her children, but it is not necessary to review them in the light of the conclusion which we have reached.

[1, 2] Respondent confidently depends upon the strength of the presumption which prevails in this state that a ceremonial marriage having been proven, it is to be treated as lawful until there is strong proof to the contrary; the burden of proof being upon the person asserting its invalidity. But appellant, while conceding that the authorities do seem to sustain the rule regarding the validity of marriage for which respondent contends, resists the application of the presumption to the facts of this case upon the ground that the question of a possible divorce of plaintiff from Hiram Hughson was not litigated. Appellant insists that the case was tried upon the theory by respondents that she and Hiram Hughson never had been married, and that the finding to the contrary is a complete overthrow of their position, and is fatal to their case. She cites numerous authorities, among them *Brusie v. Gates*, 96 Cal. 265-268, 81 Pac. 111, to the effect that a litigant may not assume a position at variance with his pleadings. It is also argued that the denial by respondents that there ever was a marriage between Hughson and Miss Porter amounts to a denial that there ever was or could have been a divorce. Appellant also asserts that as the

record shows Hiram Hughson to have been the deserter and wrongdoer, no presumption of divorce may be invoked in his favor or in favor of any one claiming through him.

But respondents, by relying upon the presumption that a marriage being proven it stands as valid until proof of a prior unrevoked marriage, do not seek to change their pleading or position, nor to substitute presumptions for proven facts. And the question whether Hughson was a wrongdoer or not in leaving and not returning to his bride in New York has no place in the discussion of this particular point. The sole question is this: Did plaintiff meet the burden of proof resting upon her under her pleading? She was seeking to establish her position as the widow of Hiram Hughson. To succeed it would have been necessary for her to show that at the very moment of the death of Hiram Hughson she was his wife by virtue of a lawful and subsisting marriage. *Estate of Harrington*, 140 Cal. 244-246, 73 Pac. 1000, 98 Am. St. Rep. 51. She had not only alleged the marriage, but had pleaded the continuance of her status as the wife of Hiram Hughson to the moment of his death, and although respondents in their answers denied the marriage as pleaded, they also controverted the asserted position of plaintiff as Hughson's wife when he died, by averring that Luella R. Hughson was his wife at that time. The court found in their favor. It was not incumbent upon the respondents to show that Hiram Hughson had been divorced prior to his marriage to Luella. It was plaintiff's task to prove that the second marriage which she attacked was void—that her own earlier marriage to Hiram Hughson had not been set aside by divorce or annulment.

[3] In many of the states of this Union the presumption in favor of the legality of a marriage is not overcome by mere proof of an earlier ceremony, but to show the illegality of the second marriage there must be proof of a continuance of the prior marital relation, even when such proof involves the establishment of the negative proposition that there has been no divorce. In California the principle announced more than 20 years ago by this court in an opinion written by Mr. Justice Temple has been consistently followed ever since. In that case the following language was used:

"It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage."

Hunter v. Hunter, 111 Cal. 261-267, 43 Pac. 756, 81 L. R. A. 411, 52 Am. St. Rep. 180.

In the very recent case (*In re Pusey's Estate*, 159 Pac. 433), where a person was seeking to show the invalidity of the marriage of petitioner to Gertrude Pusey, whose estate was involved, this court held that even if the person attacking the sufficiency of certain purported divorce proceedings could do so successfully, it would be necessary to show additionally that petitioner's undivorced wife was living when he married Gertrude Pusey; otherwise there could be no valid finding that he was not the latter's surviving husband. In *Wilcox v. Wilcox*, 171 Cal. 770, 155 Pac. 95, an action for annulment of marriage, it was held that proof of a marriage was not overcome by evidence of an earlier one without a showing of the continuance of the life of both husband and wife up to the moment of the second marriage. In *McKibbin v. McKibbin*, 139 Cal. 448, 73 Pac. 143, it was held that proof of a prior marriage and the continued life of both spouses was not sufficient to make a prima facie case as against a second ceremonial marriage; that there must be further showing that the first marriage had not been set aside by judicial decree. The books contain many similar decisions, but it is not necessary to go outside of California for authority. We will refer, however, to the frequently cited case of *Maier v. Brock*, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 763, which in its facts is very similar to the one at bar. It was a suit for assignment of dower. Plaintiff had married Maier in Germany in 1865. In 1866 he left her and came to America. In 1885 he visited Germany, and she then saw him for the last time. It was shown that in 1872 he married another woman and lived with her until her death. In 1885 he married Mary Baldruff and lived with her until she died. He then married another woman and was divorced from her. In 1902 he married Nora Carl and lived with her until his death in 1904. The finding of the court in favor of defendants was upheld. Many of the leading cases were there discussed, and upon the very presumption upon which respondent here depends the judgment was upheld.

[4] We conclude that the court was justified in finding that the plaintiff was not Hughson's wife at the moment of his death. It therefore becomes immaterial whether or not the court erred in finding that under the laws of New York the marriage of plaintiff to Brigham was voidable merely and not void; and whether or not there was error in excluding proof that after the commencement of the action that marriage had been annulled by the judgment of another superior court of this state. Indeed many interesting questions are eliminated from the discussion when this fundamental finding is upheld. Having no interest in the estate, appellant is not concerned with the manner of

its distribution nor with other matters not related to her status. Estate of Walden, 168 Cal. 759-761, 145 Pac. 100.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.

EDWARDS v. ARP. (L. A. 8775.)

(Supreme Court of California. Oct. 13, 1916.)

1. VENDOR AND PURCHASER §70 — CONTRACTS—CONSTRUCTION.

Plaintiff sold land on part of which walnut trees were growing, under an agreement that, as compensation for the trees, defendant should pay a sum equal to ten times the net proceeds from the sale of the walnut crop. The agreement provided that the harvesting and marketing of the crops should be done under joint supervision of the parties, but defendant was admitted into possession, and no rights were reserved to plaintiff other than to enter on the land to harvest the crop. Defendant allowed his hogs to range on the land covered by the walnut trees, and they ate up considerable of the nuts which were shaken down and were ripening on the ground. Held that, in computing the value of the crop, such nuts should be taken into consideration; plaintiff being under no duty and having no right to prevent the hogs from going on that part of the land where the trees were located.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 102, 106-111; Dec. Dig. §70.]

2. VENDOR AND PURCHASER §70 — CONTRACTS—CONSIDERATION.

In such case, as the wrongful act of defendant prevented the nuts eaten by the hogs from being gathered and sold, defendant cannot object to taking into account of such nuts on the theory that it was not within the contemplation of the parties.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 102, 106-111; Dec. Dig. §70.]

3. INTEREST §19(3) — UNLIQUIDATED AMOUNT.

Where the amount defendant was to pay for walnut trees on land purchased was uncertain until judgment, interest prior to the time that the amount was ascertained should not be allowed.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 39; Dec. Dig. §19(3).]

4. APPEAL AND ERROR §1151(2)—REVIEW—REVERSAL.

That interest on the amount of the judgment was improperly allowed from a date prior to the rendition of judgment does not necessitate a reversal, for the error can be remedied by striking out such item from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4500, 4503-4505; Dec. Dig. §1151(2).]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by R. L. Edwards against James Arp. From a judgment for plaintiff and order denying new trial, defendant appeals. Order affirmed, and cause remanded, with directions to modify judgment.

Kay & Siemon, of Bakersfield, for appellant. Alfred Daggett, of Visalia, and T. M. McNamara, of Bakersfield, for respondent.

LORIGAN, J. As part of the purchase price of a tract of land in Kern county, appellant agreed, by written contract, to pay respondent for certain walnut trees growing thereon a sum to be determined as follows: From the gross proceeds received from the sale of the crop of walnuts for the year 1911 the cost of harvesting and marketing the same was to be deducted, and the appellant was to pay respondent a sum equal to ten times the net proceeds received from the sale of said walnut crop. The harvesting and marketing of the crop was to be done under the joint superintendence of the parties. Respondent sued upon the contract to recover \$2,335, the purchase price of the trees, and was awarded a judgment for \$1,410.37 with interest on that amount from December 7, 1911, a date prior to the filing of his complaint. Appellant appeals from the judgment and order denying his motion for a new trial and seeks a reversal on two grounds.

He insists, first, that the court erred in including in the amount of the walnut crop of 1911 some 500 pounds of nuts of the net value of \$60 which had been eaten or destroyed by hogs owned by appellant, and then awarding respondent ten times that sum—or \$600—in making up the judgment in his favor. He further claims that it was error for the court to allow interest at 7 per cent. from a date in December, 1911, after the nuts had been harvested and sold and up to the entry of the judgment. The action was commenced April 19, 1912.

[1, 2] As to the first point: The evidence shows that the walnut grove on which the crop was harvested consisted of about two acres of a larger tract embraced in the contract of sale; that appellant owned some hogs which, while he permitted them to roam over the entire tract, he could readily have kept out of the walnut grove while the nut crop was ripening and being harvested, and was requested by respondent to do so during that period; that appellant failed to take any precautions in that respect, but willfully permitted the hogs to range over the grove during all the time the nuts were ripening and falling, and also while the crop was being actually gathered and harvested, and a large quantity of the nuts had been shaken from the trees and lay on the ground; and that the hogs of appellant ate up or destroyed the quantity as found by the court.

The theory of the appellant in support of a reversal seems to be that he had a right at all times to range his hogs on any portion of the tract embraced in the contract of sale, including the walnut grove, and that, though the exercise of that right resulted in a partial destruction of the nut crop by the

hogs, it is a loss for which respondent was entitled to no redress. Further it is claimed by appellant that, conceding negligence on his part in permitting the hogs to roam over the grove, still respondent was guilty of contributory negligence in not taking proper precautions to prevent the depredations of the animals which also precluded any right of recovery on his part. As to the claim of contributory negligence, the argument of appellant is that the contract of sale, in which this provision with reference to payment for the walnut trees is embraced, itself placed no limitation upon the right of appellant to use all of the premises for ordinary farming purposes, nor is there anything therein precluding him during any period of the year from ranging his hogs upon the land constituting the walnut grove; that the contract as respects the grove gave as much right to respondent, as the appellant had, to enter the grove and harvest and market the crop; that it was as much the duty of respondent as of appellant to provide means for protecting the crop from the ravages of the hogs, and respondent, having failed to do so, cannot complain of any loss he may have suffered.

We cannot indorse the theory of appellant or accept his argument as sound. Taking up the points made by him inversely, there is no ground for the assertion that respondent was guilty of contributory negligence in not keeping the hogs of appellant out of the grove. Under the contract of sale of the property appellant was given possession of the tract including the grove. Respondent had no right to enter it save for the limited purpose of supervising jointly with appellant the harvesting and gathering of the nut crop and for that purpose only. Nothing in the contract authorized respondent to enter the premises and build fences to inclose the grove, and there was no contractual or legal duty imposed upon him to do so or to employ swine herds to prevent the hogs of appellant from ranging over it. Under the contract the walnut crop was made the basis of the price to be paid for the trees, and, appellant, being in possession of the tract embracing it, it was his duty to conduct himself respecting it so as to neither do, nor permit to be done, any act which would tend to diminish or destroy the crop of walnuts. Obviously it was to the interest of appellant that no crop should be harvested off the grove in 1911; and, to the extent that any prospective crop might be diminished or destroyed by appellant permitting his hogs to roam through the grove during harvest time, it would be of material advantage to him. But it is fundamental that one cannot take advantage of his own wrong and to sanction the conduct of appellant in the face of the purposes of their contract would be to violate that principle. Whatever right the appellant had to range his hogs over the entire premises at

other seasons of the year, he had no right, having a due regard to a fair and honest carrying out of the contract between himself and respondent, to range them over the grove at a time when the crop had ripened and was ready for gathering and harvesting and when the inevitable result would be to have a large quantity of it destroyed. The duty of appellant under the contract was to permit nothing to be done which he might prevent that would diminish the nut crop to be harvested and gathered, and his disregard of that duty by negligently allowing his hogs to range over the grove and destroy a portion of the crop made him liable to respondent to the extent of the net value of the portion of the crop destroyed which would have constituted a partial basis for determining the price to be paid for the walnut trees. The court found that 500 pounds of walnuts of the market value of 12 cents per pound, amounting to \$60, were so destroyed and determined that defendant was liable to ten times the value thereof under the terms of the contract. While appellant contends that this is a departure from the method whereby under the contract the purchase price of the trees was to be fixed, we do not think this is true. It is in effect adopting just the standard which the parties provided. If the hogs of the appellant had not destroyed a portion of the crop, it would have been taken into account in fixing the purchase price of the trees. If the appellant had surreptitiously given away that amount of the nut crop or burned up a like quantity, it certainly could have been taken into consideration in settling the rights of the parties under their contract. So, here, the wrongful act of the appellant in negligently permitting his hogs to destroy it having prevented the actual gathering and harvesting of a portion of the crop, the court properly ascertained what its value would have been had not appellant thus prevented its being actually harvested and marketed, and took that value into consideration to the same extent exactly as it was to be taken under the contract in determining the purchase price of the trees.

[3] The second point made by appellant is that the court erred in allowing respondent interest from the 1st day of December, 1911, at which date the court found that the crop of walnuts was fully marketed and disposed of by both respondent and appellant. We think this point is well taken. Here the demand sued on was uncertain and unliquidated. The fact of the contract furnished nothing whereby it could be determined by calculation what amount was due plaintiff. The elements under which the amount due was to be ascertained were uncertain. The quantity of the nuts gathered and sold, the cost of harvesting, and the market value of the crop, were all matters to be determined upon a trial, and, when that is the situation, interest is not allowable prior to judgment.

Brady v. Wilcoxson, 44 Cal. 245; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 11.

[4] This error, however, does not require a reversal of the order and judgment appealed from. It can be remedied by a modification of the judgment. The order appealed from is heretofore affirmed. The cause is, however, remanded, with directions to the trial court to modify the judgment by striking out the amount allowed for interest prior to judgment, and, as thus modified, the judgment is to stand affirmed. Appellant to recover his costs on this appeal.

We concur: MELVIN, J.; HENSHAW, J.

In re COOK'S ESTATE. (L. A. 4561.)

Supreme Court of California. Oct. 13, 1916.)

WILLS §215—PROBATE—ISSUES.

The court on a petition for the probate of several writings claimed to constitute a will is limited solely to the inquiry as to whether the writings constitute the will of decedent, and cannot ordinarily construe the writings as a will and solve inconsistencies in the disposition of property, or construe provisions of the writings.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. §215.]

WILLS §207 — WRITINGS CONSTITUTING WILL.

A person who had suffered for about 20 years on a malignant disease, and who could obtain relief only from an operation, wrote the day before going to a hospital for the operation three letters—one to a brother, another to sisters and brother jointly, and a third to her business agent. She stated therein her intention of going to the hospital and expressed the belief that she might not survive. She then gave directions to her funeral, and then proceeded to dispose of her property. She declared that she wanted a person named to have all of her jewelry except a diamond ring, which in one letter she directed could be sold, while in another letter she stated that she wanted a sister to have it. She further stated that she wanted the proceeds of a mortgage to be collected by her business agent, turned over to a brother, with balance due "on the effs payments." She directed further that all her clothing should be sent to a sister, and then declared that, after all expenses were paid, anything left should be equally divided with her father, brothers, and a sister. *Held*, that the letters were testamentary in character, and could be admitted to probate as her will, in the absence of any other showing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 515; Dec. Dig. §207.]

WILLS §207—PROBATE—EVIDENCE.

A person who had suffered for about 20 years on a malignant disease, and who could obtain relief only from an operation, wrote the day before going to a hospital for the operation letters testamentary in character giving directions for the disposition of her property, but used expressions therein, "If I should die from the operation," and "In case I do not live through the operation," and "I have reason to believe I will not live through it," and "I want you to see it done in case of my death only." She died a month after the operation from gastric ulcers, a disease from which she had suffered. She had never been informed and did not know of the nature of the disease. The physician who oper-

ated on her diagnosed her case as involving a diseased condition of other organs than her stomach, and the operation, as far as it went, was successful. There could have been no successful operation for gastric ulcers. *Held*, that the letters were properly admitted to probate as against the objection that they made it a condition precedent to their becoming effective as a will that she should die as a result of the operation, and that she died from a new and different disease.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 515; Dec. Dig. §207.]

4. APPEAL AND ERROR §1040(2)—HARMLESS ERROR—RULINGS ON PLEADINGS.

A party cannot complain of the sustaining of a demurrer to a portion of his pleading where on the trial he was informed that the ruling did not affect the issues, and he fully presented his evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4097; Dec. Dig. §1040(2).]

5. EXECUTORS AND ADMINISTRATORS §17(3)—APPOINTMENT OF ADMINISTRATOR WITH WILL ANNEXED—STATUTORY PROVISIONS.

Under Code Civ. Proc. §§ 1350a and 1365, providing that, where no executor is named in the will, letters of administration with the will annexed must be issued as provided for in granting of letters in case of intestacy, and declaring that the administration of the estate of an intestate must be granted to one or more of enumerated relatives of the intestate in the order named (1) the surviving husband, (2) children, (3) father and mother, (4) brothers, (5) sisters, only when entitled to succeed to the estate or any part thereof, a brother of decedent named a beneficiary under the will not nominating an executor may be appointed administrator with will annexed as against the surviving husband, who does not take anything under the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 45-47; Dec. Dig. §17(3).]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Proceedings for the probate of letters written by Jane Boylan Cook, deceased, as her will, in which her surviving husband, W. E. Cook, filed a contest. There was a judgment admitting the writings to probate as the will of the deceased, and the contestant, W. E. Cook, appeals. *Affirmed*.

West, Koepsel & Eden, of Santa Ana, for appellant. Tipton & Callor, of Los Angeles, and Gonsalves & Keller, of Oakland, for respondent.

LORIGAN, J. The deceased on April 25, 1915, being about to go to a hospital to have an operation performed, wrote and sent three letters—one to a brother, another to her sisters and a brother jointly, and a third to a friend who was her business agent. She died on May 26, 1915. A petition was filed in the superior court of Orange county for the probate of the several letters referred to, as constituting the last will of decedent, and, as no person was nominated therein as executor, that letters of administration with the will annexed be issued to John H. Higgins, a brother mentioned in one of the proffered letters as a legatee, and who was petitioner for the probate of the will. W. E. Cook, the husband

of the deceased, filed a contest to the probate of said letters as the last will of deceased on the grounds: First, that the said letters were not testamentary writings, or testamentary in character; and, second, that even if testamentary in character, nevertheless they should be denied probate because their taking effect as the last will of deceased was made conditional by her upon her death under an operation she was about to have performed when they were written; that her death did not occur therefrom, and hence said letters never became effective as the will of deceased. Contestant also prayed that in the event of probate of said letters as the will of deceased, he, as surviving husband of deceased, be appointed administrator with the will annexed.

At the trial the court determined that the letters were of a testamentary character, admitted them to probate as the last will of deceased, and appointed the petitioner, the brother of deceased, administrator with the will annexed. The contestant husband appeals from the order.

As to the points made by appellant for a reversal: It is claimed, first, that the letters of deceased offered for probate were not testamentary in character. The letters were entirely written, dated, and signed by the deceased and sent to the parties to whom they were addressed. The evidence indicates, and the letters themselves state, that the deceased had been suffering for upwards of 15 or 20 years from a malignant disease, and had reached that condition of physical disability where the only hope held out to her for relief was through an operation which she had consented to undergo. It was the day before her departure for the hospital for that purpose that the three letters were written. She stated therein her intention of going to the hospital; that she had been very sick and felt that the only way to regain her health was through an operation; that, while everything might turn out in her favor, she felt that her condition was more serious than the doctor thought; and that she had reason to believe she might not live through it. She then proceeded to declare what she wished done respecting her funeral. She specified the cemetery and lot in which she wished to be buried, the kind of headstone she wanted, and the inscription to be placed on it, and named the minister she wished to perform her funeral service. Standing alone, these matters would probably evidence only a desire as to the disposition of her body after her death. But, in addition, she then proceeded to make a disposition of her property. She declared that she wanted Pansy to have all her jewelry except a diamond ring. She wanted the proceeds of a mortgage to be collected by her business agent, to whom one of the letters is written, and such proceeds to be turned over to her brother James W. Higgins, together with the balance due "on the Neffs payments." She directs further that

all her clothing be sent to Alice. In one of the letters she declared that "after all expenses is paid if there is anything left I want it equally divided with my father, Mr. H. Higgins, * * * my brother Mr. J. H. Higgins, * * * my brother Mr. C. W. Higgins, * * * my brother J. W. Higgins, * * * my sister Mrs. Alice Grey, or Lovely." It is the claim of appellant that this last clause in the will had relation only to a disposition of the proceeds of a diamond ring which she directed to be sold, and that even this disposition found in one letter is inconsistent with her declaration in another letter that her sister Emma is to have the ring, hence creating an uncertainty as to whom the ring or its proceeds is given. Respondent appears to assert that the quoted clause constituted a residuary devise of the estate of the deceased. But this court will not, nor did the trial court undertake to, construe the will of deceased manifested by her several letters.

[1, 2] The only question before the superior court on a petition for the probate of one or several writings claimed to constitute a will is: Does it or they constitute the will of the deceased; is a testamentary disposition of property intended and disclosed by the writings? The court is limited solely to that inquiry. In determining whether an instrument proffered for probate is or is not a will, the court cannot ordinarily enter into any consideration of the construction of the will, resolve inconsistencies in the disposition of property, or construe the provisions of the instrument. These are matters which may properly arise only after the probate of the will. *Estate of Cobb*, 49 Cal. 599; *Estate of Murphy*, 104 Cal. 554, 38 Pac. 543. As to the ring, certain it is that by the letters she intended, in connection with the other dispositions we have referred to, to give it or its proceeds to some one named in them, and for the purpose of determining whether or not the letters amount to a testamentary disposition of it that fact need only be considered. We are satisfied from the circumstances under which deceased wrote these letters, and the language used by her in them that they were written *animo testandi*, and the trial court properly determined they constituted the last will and testament of the deceased unless the further claim made by appellant against their testamentary effect is meritorious.

[3] This claim of appellant is that the deceased made it a condition precedent to these letters becoming effective as her will that she should die as the result of the operation which was to be performed; that she did not die therefrom, but recovered, and died from an entirely new and different disease; that hence the letters never became effective as her will. As to this claim appellant contends that it is supported by evidence of the nature of the operation performed and its results, taken in connection with language employed by the deceased in her letters. In the

letters the deceased uses the expressions, "If I should die from the operation," and "In case I do not live through the operation," and "I have reason to believe I will not live through it," and the instructions are to be carried out "only in case I do not live," and "I want you to see it is done in case of my death only."

As to the operation: The deceased went to the hospital on April 26, 1915, and the next day an operation was performed on her. When she was taken to the hospital she was in a weak and debilitated condition. She did not at all improve after the operation; she never recovered her strength, but grew gradually weaker. After remaining three weeks in the hospital, she was taken home, where she still continued to fail, and a week afterwards, on May 26, 1915, she died, just a month after the operation was performed. An autopsy disclosed that she died of gastric ulcers, a disease from which she had suffered for some 20 years. It appears that she was never informed, nor did she know, the nature of this disease from which she so long suffered. All she knew was that it had so far afflicted her that the only relief she could hope for was through an operation of some kind which she went to the hospital to have performed. The evidence does not disclose whether she had ever been previous to that time the patient of the physician who performed the operation on her. This operating physician, however, diagnosed her case as involving a diseased condition of other organs of the body than her stomach, and operated on her for those troubles which he said he found existed. This operation, as far as it went, was successfully performed, but it was not an operation for the principal and fatal disease from which the patient was suffering and from which she shortly thereafter died. It was in evidence that in the advanced stage of her stomach disease at the time she went to the hospital no operation could have been performed which would have relieved her condition, and that she would have died from her disease of the stomach about the time probably that she did even if he had not undergone the operation which was performed. While it is claimed by appellant that the language in the letters themselves show that they were only to become testamentary should she die under, or as a result of, the operation itself, we cannot agree with him that such is the reasonable and fair construction to be given to the various expressions used in them. The purpose of her going to the hospital was to be relieved of her wasting disease through an operation. There is nothing to show she knew anything of the kind or extent of the operation to be performed. As we have said, she did not even know the nature of her disease. If she knew was that her disease, whatever it was, had finally reached that stage where an operation was essential to prolong her life. She, of course, did not believe that the

proposed operation would be so unsuccessfully performed that she would die under its effects. She doubtless had confidence in the competency of the physician to perform the operation, and an assurance that it would be successfully performed, which she believed, or she would not have consented to have undergone it. What she undoubtedly had in mind in referring to the operation in the various expressions used by her was the possibility of dying from the disease which the operation was intended to relieve, and not from the effects, or as a result of, the operation itself. Her doubt was whether the operation would be effective to cure her. This is fairly disclosed in one of the letters where, after speaking of the contemplated operation, she says:

"Everything may turn out in my favor, but something tells me that it is more serious than the doctor thinks."

This evidently refers to her disease, and the improbability, on account of her long suffering and debilitated condition, and the stage that the disease had reached, of her recovering from her malady even through an operation.

Nor is there any merit in the claim of appellant that the deceased died from a wholly new and different disease than the one she was operated on for. The most that can be said is that the operation which was performed did not reach the real disease with which she was afflicted. But she did not die from any new or different disease than the malignant one from which she was gradually dying when she went to the hospital to have an operation performed for her relief, and from which she did die, notwithstanding an operation. It is of no consequence what the diagnosis of her case by the operating physician was, or what the disease was for which he operated on her. An operation was intended to relieve her, as far as an operation could, from any and all disease from which she was suffering which was the reason she submitted to it and he performed it. He undoubtedly thought that the operation he performed would be effectual for that purpose, and the deceased, no doubt, believed that it was intended to and might accomplish that result. The operation, however, did not relieve her from the fatal disease with which she was afflicted; she did not recover from it as a result of the operation, but died directly from it. This was the event or condition she had in mind, the happening of which was to make the letters effectual as her last will—a failure to recover from her disease under an operation, and her death from the disease notwithstanding it—a condition which the trial court found to have occurred, and which we are satisfied may not be disturbed.

[4] Appellant complains of the action of the court in sustaining a demurrer to a portion of his answer and contest in which he presented the issue as to whether the deceased died from the effects of the operation,

or had entirely recovered therefrom and died from the effects of a wholly different disease. This point is based on a construction placed by counsel for appellant on the language in the order sustaining the demurrer of respondent in part, and overruling it in part. But this is a matter we need not consider, because the appellant was not injured whatever the effect of the ruling was, as on the hearing he was informed by the court that the demurrer as sustained did not affect that issue, and that he was entitled to present his evidence on it, which he did as fully as he desired and without limitation, and the court found upon the issue against him. The evidence so presented on this issue is that which we have just finished discussing.

[5] The last claim of appellant is that the court—no executor being nominated in any of the letters constituting a will—should, on admitting the will to probate, have granted letters of administration with the will annexed to him as the surviving husband of the testatrix. But this point is not well taken. Section 1365 of the Code of Civil Procedure, applied to section 1350a thereof, governs in the matter of granting letters of administration with the will annexed to the same extent as it governs the granting of letters of administration in cases of intestacy, and in both cases, under the terms of said section 1365, those only are entitled to letters who in case of intestacy are entitled to succeed to the personal estate of the deceased or some portion thereof, and who in case of testacy take by bequest some portion of that personal estate. The brother of the deceased who was appointed administrator with the will annexed filled the requirement of the statute. The contestant did not. The brother was a beneficiary under the will, and entitled thereunder to take a portion of the personal estate of the deceased. The contestant husband took nothing at all under the will, and hence, under the section cited, was not entitled to letters. Further discussion of this claim of appellant is unnecessary as the decision in the Estate of Crites, 155 Cal. 392, 101 Pac. 316, disposes of it adversely to his contention, and in harmony with the ruling of the trial court.

The order appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

In re FINCH'S ESTATE. (L. A. 4454.)

(Supreme Court of California. Oct. 18, 1916.)

1. EXECUTORS AND ADMINISTRATORS §181 — ADMINISTRATION — ALLOWANCES FOR SUPPORT.

Under Code Civ. Proc. §§ 1465, 1466, declaring that on return of the inventory, or at any other time during administration, the court may set apart, for the use of the surviving husband or wife, all property exempt from execution, and that, if the property set apart is insufficient

for the support of the widow and children, the court must take such reasonable allowance out of the estate as shall be necessary for the maintenance of the family during the progress of the settlement of the estate, a surviving widow is entitled to have a reasonable allowance made by the court for her support from the estate of her deceased husband, whether it be community property or separate estate, and irrespective of whether she has an estate of her own out of which she might support herself.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-686; Dec. Dig. §181.]

2. EXECUTORS AND ADMINISTRATORS §176 — ADMINISTRATION — ALLOWANCES FOR SUPPORT.

Though a husband and wife entered into an agreement that the rents, issues, and profits of their separate property should be considered as community property, but that the separate property should not lose its identity as such, the wife is on the death of her husband entitled under Code Civ. Proc. §§ 1465, 1466, to a reasonable allowance for support and maintenance out of the husband's separate property; the agreement not operating as a waiver of any of the rights of the wife in her husband's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-686; Dec. Dig. §176.]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Allen Finch, deceased. From an order granting to the widow a family allowance, the objecting devisee appeals. Affirmed.

B. A. Finch, of Los Angeles, in pro. per. Purington & Adair, of Riverside, for respondents.

LORIGAN, J. Deceased died testate in Los Angeles leaving an estate consisting of separate property of the value of \$15,000. He left a widow but no children, and by his will gave one-half of his estate to his widow, the other one-half to his father and four brothers. The widow petitioned for a family allowance, to the granting of which objections were interposed by one of the brothers, a devisee under the will. The court granted the widow an allowance of \$75 a month, and the objecting devisee appeals.

[1, 2] The claim of the appellant is that, by reason of a contract entered into between the widow and the deceased at the time of their marriage, the widow was precluded from making any claim against the estate of deceased for a family allowance. The contract relied on by appellant is as follows:

"Los Angeles, Cal., Mar. 11, 1913.

"In conformance with an understanding had contemporaneous with our contract of marriage, and in consideration of mutual love and affection said understanding is hereby reduced to writing acknowledged and recorded and agreed to by and between Allen Finch and Mary L. Finch, formerly Mary L. Vogel, both of Los Angeles, Cal., that all the rents, issues and profits of our separate property shall be considered

as community property but our separate property as a whole shall not lose its identity as such.

"Allen Finch.
"Mary L. Finch."

It was conceded on the hearing herein that the spouses lived happily together during their marriage; that when the contract was made between them, and during their marriage, they were each the owners of income-bearing property which was managed entirely by the husband, and the income therefrom devoted to the family expenses and their joint use; that during such marriage, and at the death of deceased, the widow owned separate estate of the value of \$25,000, producing, when the application for a family allowance was made, an income of at least \$100 a month.

The contention of appellant is that by reason of this contract between them the widow was precluded from making any claim for a family allowance against the separate estate of her husband. His argument is that by the contract the respondent here relieved her husband from supporting her as long as the income from her separate estate, which was to be treated as community funds, was sufficient for that purpose, a condition which existed up to the time of the death of deceased and which still exists, as the income from her separate estate is more than sufficient for her support. Hence it is claimed that, having relieved him by contract from supporting her during her lifetime, his separate estate is relieved from any claim for such support after his death. As supporting his contention, appellant relies on such cases as *Estate of Noah*, 78 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, and *Estate of Yoell*, 164 Cal. 540, 129 Pac. 999. But a little consideration will show that the principle of these cases cited is entirely inapplicable here. They were cases where the application of the widow to the court for a family allowance from the estate of her deceased husband was denied—in the *Noah* Case because the wife had by an agreement of separation from her husband expressly relinquished "all her marital claims," and was further living apart from her husband at his death, and in the *Yoell* Case because the wife had also by an agreement of separation with her husband renounced and waived all claim she might then have against his property, and also as his heir or surviving wife. It is only as surviving wife that a demand for family allowance against the estate of her deceased husband can be made under the statute (sections 1465 and 1466, Code of Civil Procedure), and in each of the cited cases the widow had by a solemn agreement with her husband expressly relinquished and renounced the right to make such demand against his estate on his death. But the agreement under consideration here is not at all of the character involved in those cases. Here the wife did not release her husband from either his primary

obligation to support her in his lifetime, or renounce any claim which as surviving wife she might have against his estate upon his death. The contract recognized such primary obligation on the part of the husband by devoting the income of his property to their mutual support. She devoted her income to the same purposes. The contract, however, constituted an arrangement prompted, as stated, by a feeling of mutual affection whereby, while the matrimonial relation existed, the income of the separate estate of each should be devoted to the support of the community. It was necessarily terminated on the death of either of the spouses, as no community would then exist to which it could have any relation. The spouses had a perfect right to contract with reference to their property during the continuance of the marital relation, and this is all they did. The wife did not contract away any right which she might be entitled to as the surviving wife or widow of her deceased husband in his estate. Her right to an allowance as such is, as we have stated, founded on the statute (sections of the Code of Civil Procedure, supra), and does not accrue to the widow until the death of her husband. Under these sections the surviving wife is then given the right to have a reasonable allowance made by the court for her support from the estate of her deceased husband whether the estate was community property or his separate estate and irrespective of whether the widow has estate of her own out of which she might support herself (*Estate of Bump*, 152 Cal. 274, 92 Pac. 643; *Estate of Cowell*, 164 Cal. 636, 180 Pac. 209), and, as the contract relied on by appellant was in no respect a relinquishment of this right, the superior court properly ignored it and awarded her a family allowance.

Appellant complains that the court failed to make special findings of fact which he requested. But he was in no way prejudiced thereby. No material issue was raised by his objection to a family allowance based solely upon this contract between the spouses which was all he relied on. A special finding respecting it would have been of no benefit to him had it been made; hence a failure to make it could not have prejudiced him.

The order appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

SCHADER v. WHITE.
WHITE v. SCHADER et al.
(L. A. 3802.)

(Supreme Court of California. Oct. 11, 1916.
Rehearing Denied Nov. 9, 1916.)

1. PLEADING ~~§~~98(2)—SEPARATE DEFENSES—
PLEADING IN SEPARATE COUNTS.

In ejectment, defendant had the right to plead in separate counts: First, that a contract of sale to him was executed by plaintiff's husband under written authority from plaintiff,

second, on a parol contract with plaintiff and a sufficient execution thereof to satisfy the statute of frauds; and, third, that the property was owned by plaintiff's husband and was community property.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. ¶93(2).]

2. HUSBAND AND WIFE ¶188(9)—AGENCY FOR WIFE—EXCEEDING POWER OF ATTORNEY—RATIFICATION.

Where a power of attorney authorized a husband to execute contracts and deeds in the name of his wife, and he executed, in his own name, a contract to exchange her land, the formal execution of the deed itself by the wife with full and complete knowledge of the transaction was an acceptance and ratification of the executory contract.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 535; Dec. Dig. ¶138(9).]

3. SPECIFIC PERFORMANCE ¶32(3)—MUTUALITY OF OBLIGATION.

The fact that a wife, whose husband contracted to exchange her land, could sue or be sued on the contract as undisclosed principal, though she had not herself signed her husband's contract, was sufficient to give the contract the mutuality of obligation essential to entitle the other party to specific performance against the wife.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 92-98; Dec. Dig. ¶32(3).]

4. SPECIFIC PERFORMANCE ¶49(2) — "ADEQUACY OF PRICE."

In relation to specific performance of a contract to sell land, "adequacy of price" does not mean equality of price, and an adequate consideration does not mean a consideration measuring to the fullest extent up to the value of the property, each case resting for determination on its own facts, and equity finding adequacy or inadequacy after considering all the circumstances in each case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 141-151; Dec. Dig. ¶49(2).]

5. SPECIFIC PERFORMANCE ¶49(2) — INADEQUACY OF CONSIDERATION.

Where a purchaser of land contracted to give the value of but \$11,500 for the property, which was worth, above mortgage for \$7,500, \$12,500, the figures being reached by resolving a mass of conflicting evidence touching values, there was no inadequacy of consideration justifying refusal of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 141-151; Dec. Dig. ¶49(2).]

6. EXCHANGE OF PROPERTY ¶8(4) — RIGHTS AND LIABILITIES OF PARTIES—FRAUD—SUFFICIENCY OF EVIDENCE.

In a wife's action in ejectment, wherein defendant sought specific performance of a contract, made by her husband, to exchange her land for defendant's, evidence held insufficient to show fraudulent misrepresentations by defendant concerning the value of his property.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 17; Dec. Dig. ¶8(4).]

Department 2. Appeal from Superior Court, Los Angeles County; N. A. Hawkins, Judge.

Action by Nellie M. Schader against A. Stanley White, wherein White filed a cross-complaint against plaintiff and Carl F. Schader. From a decree for defendant, and an order denying a motion for new trial,

plaintiff and cross-defendants appeal. Judgment and order affirmed.

Tanner, Odell, Odell & Taft, and S. W. Odell, all of Los Angeles, for appellants. Oscar C. Mueller, Hartley Shaw, and Frank Stewart, all of Los Angeles, for respondent.

HENSHAW, J. [1] Plaintiff brought her action in ejectment, charging in two counts. In the first she averred ownership of property consisting of land and a dwelling house thereon in the city of Santa Monica, which property, for convenience, will be spoken of as the Santa Monica property, and alleged an ouster by defendant on December 3, 1911. By her second count she fixed the time of the ouster as June 8, 1912. In both her damage is declared to be \$30,000 and the rental value \$500 per month. Defendant answered by denial and by cross-complaint. In his pleadings he set up in different forms and counts the following facts: That he, defendant, had entered into a written agreement with Carl F. Schader, husband of plaintiff, for the sale and exchange of property in Seattle belonging to himself, for the Santa Monica property. The terms of this sale or exchange were the payment by defendant to plaintiff of a certain sum of money, the assumption by each party of the mortgage existing upon the property of the other, and the transfer of a good and sufficient title respectively upon these terms. He alleged that the necessary papers for the consummation of this transaction were placed in escrow, he, the defendant, being given a reasonable time within which to present a certificate of title showing good title in himself to the Seattle property; that his agreement called upon him to pay in cash to Carl F. Schader \$4,500, which he did, Carl F. Schader and wife then depositing in escrow their deed of grant to the Santa Monica property, awaiting a like deed from defendant of his Seattle property. Owing to the failure of the Title Company of Seattle to send a sufficient certificate of title, some little delay followed before defendant was able to secure this certificate and make his deed. But this delay was fully concurred in and assented to by the Schaders. On the 27th day of December, 1911, he delivered to the Ocean Park Bank, the escrowee, a warranty deed of himself and wife to the Seattle property, in which deed plaintiff Nellie M. Schader was named as grantee. On the 20th day of March, 1912, the Schaders, without authority or right, withdrew from the Ocean Park Bank their deed and certificate of title which they had previously placed there. The prices upon which the properties were to be exchanged were fair and adequate, and the agreement equitable and just. Demand had been made upon the Schaders to perform their contract, but they had refused to do so. Such, in substance, are the allegations of the

cross-complaint. In the first count it is charged that the contract was executed by Carl F. Schader under written authority previously conferred upon him, and that the agreement, although executed in the name of Schader, was intended and understood to be the agreement of Mrs. Schader, the owner of the property. The second count charges upon a parol contract with Mrs. Schader and a sufficient execution thereof to lift the ban of the statute of frauds. The third count alleged ownership of the property to be in the husband and the property to be community property. The defendant had the unquestioned right thus to plead in separate counts, and the explanation that these pleadings were thus framed so as to meet any elusive defense which the Schaders might interpose is quite reasonable. The Schaders answered separately. Carl Schader denied that he entered into the contract as the agent of his wife, averred mutual mistake and error in a minor term of the contract, and asked the court to reform it in that particular; this minor term going merely to the payment of the taxes for the current year. He then set up an oral contract between himself and his wife, by which he was to pay her \$25,000 for the property. He admits the receipt of the money, does not offer to restore it, and declares his election to rescind because of false and fraudulent representations made to him concerning the Seattle property. He asserts a great difference in the value of the two properties, and that the contract is therefore inequitable. Finally he declares that the ownership of the property is in Mrs. Schader, that she refuses to make the conveyance to the cross-complainant, and that he is unable to do so, and that he has become obliged to pay her for the use of her premises. Mrs. Schader's answer is to the same effect, asserting ownership in herself, denying all participation in the contract, and charging fraud. The court in equity decreed specific performance in favor of the defendant, and this appeal has followed.

To fill out the skeleton of the facts above given, it was shown by the evidence that the negotiations were conducted between Stanley White and Carl Schader; the executory contract was signed by Carl Schader and not by Nellie Schader, and the \$4,500 paid to and received by Carl Schader. Before the money was paid, however, and the contract executed negotiations were had in the presence of Mrs. Schader. White visited the house. There were discussions over the price, over what personal property within the house should go to the purchaser, and, finally, when these matters were agreed to and embraced in the executory contract, Mrs. Schader joined with her husband in executing the deed, which they placed in escrow with the certificate of title to their Santa Monica property.

[2] Appellants first contend that Carl F. Schader was not the agent of his wife. A

very full power of attorney by the wife, authorizing the husband to act for her, had been executed and recorded and was introduced in evidence. Appellants' objection to the force of this power of attorney is that it is "an ancient document which everybody had forgotten." Of course there is no legal substantiality to such an attack. But it may be added that it was not utterly forgotten; that Mrs. Schader testifies that her husband was wont to deal in her real estate; that Mr. White was unaccustomed to these transactions, and that when he suggested to Mr. Schader that Mrs. Schader sign the executory contract and said, "You promised your wife should sign," Schader replied: "My signature is good, all right. I would not render myself liable. In fact I have a power of attorney from Mrs. Schader." This was upon the occasion of the payment of the \$4,500. Another objection to the power of attorney was that it is not shown to have been delivered. It is shown, however, to have been recorded at the request of Mr. Tanner, one of appellants' counsel in the case, and no effort is made to deny his authority so to have it recorded.

Finally it is objected that the power of attorney authorizes the agent to execute contracts and deeds in the name of the principal, and that this executory contract was executed by Carl Schader in his own name. But following the executory contract was the formal execution of the deed itself, made by Mrs. Schader. There is and can be no question of her full and complete knowledge of the transaction at the time she so executed, and her deed is itself an acceptance and ratification of the executory contract. *Salmon v. Hoffman*, 2 Cal. 139, 56 Am. Dec. 322; *Love v. Sierra, etc., Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902; *Ralphs v. Hensler*, 97 Cal. 302, 32 Pac. 243; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 689, 46 Pac. 738; *S. P. Ry. Co. v. Von-Schmidt Co.*, 118 Cal. 371, 50 Pac. 650.

[3] Appellants' second objection is that of lack of mutuality in the contract, herein arguing that because Mrs. Schader had not herself signed the executory contract, she could not have compelled specific performance, and therefore it was inequitable to decree specific performance against her. But it is sufficient, in addition to what has been said herein, to add that as an undisclosed principal she could sue or be sued. *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978; *Walton v. Davis*, 22 Cal. App. 456, 134 Pac. 795; *Ford v. Williams*, 62 U. S. (21 How.) 287, 16 L. Ed. 36; *Pomeroy*, Spec. Per. (2d Ed.) § 89; 31 Cyc. 1416.

[4, 5] The third and fourth propositions advanced by appellants may be considered together. They are that the respondent misrepresented the value of his property, and

that the Schaders were not, therefore, to receive an adequate consideration for their own property. Touching the adequacy of consideration, the court found the value of the Santa Monica property to be \$20,000, upon which was a mortgage of \$7,500, reducing its actual value to the purchaser assuming the mortgage to \$12,500. The value of the Seattle property was found to be \$14,000, upon which was a mortgage of \$7,000, reducing its value to \$7,000. In addition, however, the defendant paid to the Schaders \$4,500, which would leave a disparity and difference of \$1,000 between the values of the two properties as found and fixed by the court. We have recently had occasion to discuss the question of adequacy of price (*O'Hara v. Lynch*, 157 Pac. 808), and little need be added to what is there said. Adequacy of price does not mean equality of price. An adequate consideration does not mean a consideration measuring to the fullest extent up to the value of the property. Each case must rest for determination upon its own facts, and equity will find adequacy or inadequacy after considering all of the circumstances appearing in each particular case. Herein, in a transaction involving the exchange of property to the value of \$20,000 the disparity is \$1,000. This disparity itself is found by the court only as it resolves a mass of conflicting evidence touching values. Moreover, there is the testimony of Schader that in his desire to move away from Santa Monica he would have been indifferent to even a greater discrepancy in the values of the properties. And finally there is the testimony, to which we will shortly advert more in detail, showing a full, complete, and independent investigation made by the Schaders themselves of the value of the Seattle property, which investigation took the form, not only of letters to them from real estate agents in Seattle, but as well the form of a personal inspection of the property and oral inquiries in the city of Seattle regarding its value. In *Wilson v. White*, 161 Cal. 453, 119 Pac. 895, where there was found a discrepancy in value of \$1,000 on a purchase price of \$14,000, this court, declaring the rule to which we have adverted, the adequacy or inadequacy is to be determined by a consideration of all the circumstances, said that a mere difference of \$1,000 on property worth \$15,000 "is perhaps not so large as to warrant a conclusion of inadequacy sufficient to justify a refusal of specific performance." The court then proceeded to show, however, that there were certain equitable circumstances justifying the court's refusal, the essential one being the duty of the vendee under the circumstances of the case to give all information to the vendor, and his concealment of that information, facts wholly wanting in the case at bar.

[8] The contention of the Schaders that they were deceived by the fraudulent mis-

representations of defendant concerning the value of the Seattle property rests upon an even more unsubstantial foundation than the unsustained contentions which we have just been considering. It appears that Schader had a trusted friend in Seattle by the name of Atkinson, with whom he communicated upon the subject-matter. Atkinson replied, saying that the largest real estate house in Seattle said the property might be sold within 60 days for \$14,000, "but will make no absolute assurances; market very dull, and triangular lot a little harder to sell than square ones." He followed this with a letter in which he said:

"My advice to you is to let Seattle real estate alone, especially this lot, as it is a little triangle that could not be improved with a building higher than two stories."

Not satisfied with this, Schader sought and obtained from independent sources other views of the value and desirability of the lot. And, finally, in February, 1912, he went to Seattle with his wife, personally inspected the property, inquired of its value, and placed the property with a real estate firm for sale. It remained with that firm for sale on account of the Schaders until July 27, 1912. Upon his return to Santa Monica he never sought a rescission upon the ground of fraud, never declared that he had been deceived during all of the time that defendant remained in possession of the Santa Monica property, until ten months afterward, when he asserts this fraud in his answer to the cross-complaint. The defendant had been put in possession of the house before the departure of the Schaders by the Schaders themselves, and Mrs. Schader, after her visit to the Seattle property, wrote to the maid that she had left at Santa Monica, expressing the hope that she "had cleaned the house to suit the gentleman," meaning the defendant White. No discussion is required upon these facts. It is sufficient to refer to *Nounan v. Sutter County*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Schmidt v. Messmer*, 116 Cal. 270, 48 Pac. 54; *Oppenheimer v. Clunie*, 142 Cal. 813, 75 Pac. 899; *Spinks v. Clark*, 147 Cal. 444, 82 Pac. 45; *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509, 137 Pac. 240.

That respondent White performed all the covenants and conditions of his contract is not left in doubt. He was to pay \$4,500, \$500 at one time, \$4,000 within a limited time thereafter. He made these payments; Schader received the money, and still retains it. He was to deliver to Schader a warranty deed to the Seattle property. He executed this deed to Mrs. Schader, in whom title to the Santa Monica property was apparently vested, and he did this, as the evidence discloses, under the directions of her husband. He was also to deliver in escrow to the bank a certificate by a responsible guaranty company of Seattle, showing a good title, free from incumbrances, saving the mortgage of \$7,000. Upon the doing of these things the

evidence discloses that Mr. Schader gave directions to the officials of the bank to examine and pass upon the deed executed to him. They did so examine it, and found no objection to it. Thereafter Schader wrote White that "Everything (in escrow) is in due form." At the time Mr. Schader wrote this after the deed had been in the bank for two months, and at this moment the only objection urged against the deed is that it is a conveyance to Mrs. Schader instead of to her husband, though the husband pleads that he title is in his wife, and that he cannot induce her to perform the contract which he says he alone entered into. We will not unduly extend this by a discussion of the similar untenable and ultratechnical objections advanced against the sufficiency of the certificate. The evidence fully sustains respondent's position that the delay in obtaining a proper certificate of title was through neglect of his own, and was fully known and assented to by appellants.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

PEOPLE v. WILT. (Cr. 2022.)

Supreme Court of California. Oct. 13, 1916.
Rehearing Denied Nov. 9, 1916.)

HOMICIDE §253(1) — MURDER IN THE FIRST DEGREE—EVIDENCE—SUFFICIENCY.

Evidence held to justify a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523, 531; Dec. Dig. §253(1).]

CRIMINAL LAW §695(5)—EVIDENCE—OBJECTIONS—EFFECT.

An objection to evidence of threats made by accused on the ground of the remoteness goes to the weight rather than to the admissibility of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1633; Dec. Dig. §695(5).]

HOMICIDE §158(4)—THREATS—EVIDENCE—ADMISSIBILITY.

Where accused assaulted decedent and a third person, and the third person was wounded as shot fired by accused at the time decedent was shot by accused, evidence of previous threats made by accused against the third person was admissible under the rule that while threats against decedent are admissible to show motive, threats against another person are only admitted under circumstances showing some connection with the injury inflicted on decedent. Ed. Note.—For other cases, see Homicide, Cent. Dig. § 296; Dec. Dig. §158(4).]

WITNESSES §269(1) — EXAMINATION — CROSS-EXAMINATION.

Where no statement was made to the court to the purpose of a question asked a state's witness on cross-examination, and nothing had been elicited to show the pertinency of the question, which called for an isolated matter concerning which nothing had been asked on direct examination, it was not error to sustain an objection to the question.

Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 949; Dec. Dig. §269(1).]

5. CRIMINAL LAW §1172(6) — EVIDENCE — INSTRUCTIONS.

Where accused denied the killing, and did not justify, excuse, or mitigate it, an instruction that if a homicide by accused was proved to a moral certainty and beyond a reasonable doubt, then it devolved on him to prove mitigation, justification, or excuse, unless the proof of the prosecution showed that the crime only amounted to manslaughter, or that accused was justifiable or excusable, was not prejudicial, though inapplicable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8159; Dec. Dig. §1172(6).]

6. CRIMINAL LAW §552(2) — CIRCUMSTANTIAL EVIDENCE—QUESTION FOR JURY.

The jury in case of circumstantial evidence cannot rely on any circumstance as a link in the chain of circumstances establishing to their satisfaction beyond all reasonable doubt the guilt of accused, unless satisfied beyond all reasonable doubt by the proof of the existence of that circumstance, and it is for them to determine what circumstances are essential to satisfy their minds beyond all reasonable doubt of guilt, and thus constitute necessary links in the chain of circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1260; Dec. Dig. §552(2).]

7. CRIMINAL LAW §823(14)—INSTRUCTIONS — MISLEADING INSTRUCTIONS.

Where the court correctly defined circumstantial evidence as testimony of a chain of circumstances pointing sufficiently strong to the commission by accused of the crime charged, and stated that whether the evidence was direct or circumstantial, the final test was whether the whole evidence considered together satisfied the minds of the jurors beyond a reasonable doubt of the truth of the charge, an instruction that it was not necessary that every fact and circumstance given in evidence should be proved beyond a reasonable doubt, but only that every fact and circumstance necessary to the conclusion of guilt should be so established, and that it was for the jury to decide whether any particular fact or circumstance was a necessary link in the chain of evidence, and that if the jury decided that such fact or circumstance was a necessary link, then it must be proved to their satisfaction beyond a reasonable doubt, was not objectionable as leaving to the jury the determination of what was necessary to constitute the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. §823(14).]

8. CRIMINAL LAW §798(1)—INSTRUCTIONS — CAUTIONARY INSTRUCTIONS.

An instruction that if any juror entertained a reasonable doubt of accused's guilt he should vote to acquit and should continue to so vote until convinced to the contrary, and that a juror should not hesitate to change his views when convinced that they are erroneous, is not objectionable as advising the jury that a juror may change his vote from not guilty to guilty in deference to the views of his fellow jurors when not satisfied beyond all reasonable doubt of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1940; Dec. Dig. §798(1).]

9. HOMICIDE §309(6)—GRADE OF OFFENSE—EVIDENCE.

Where, on a trial for murder in the first degree, the undisputed evidence showed that accused, decedent, and a third person were the only persons present at the time of the killing, and that either accused, or the third person, killed decedent, and that accused, when arrested

within a few hours of the homicide and charged therewith, did not claim innocence nor intimate that the third person had done the shooting, and there was evidence that accused had threatened the third person who was shot at the time decedent was killed, there was no evidence warranting instructions on manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 655; Dec. Dig. ¶ 309(6).]

In Bank. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Joseph Vance Wilt was convicted of murder in the first degree, and he appeals. Affirmed.

Arthur C. Huston, of Woodland, and W. T. Belleu, of Willow, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Ben F. Gels, of Willow, for the People.

ANGELLOTTI, C. J. Defendant having been indicted for the crime of murder in the unlawful killing of one Warner C. Smith, was convicted of murder in the first degree and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

[1] 1. It is asserted and most earnestly argued by learned counsel for appellant that a careful consideration of the facts "will convince any fair-minded man that there is at least a reasonable doubt as to the guilt of the defendant." The jury by their verdict and the judge of the trial court by his order denying defendant's motion for a new trial have said otherwise. We have given the report of the evidence contained in the record our most careful consideration, as, indeed, we do in every capital case where there is the slightest intimation that there is doubt as to the correctness of the verdict. The result of our examination is that we are not only satisfied that the evidence was such that we cannot say that it did not warrant the jury in being satisfied beyond all reasonable doubt as to the guilt of the defendant, but also that the record gives us no reason to doubt the correctness of the verdict. Any possible doubt as to the presence of the defendant at the scene of the homicide is removed by his own testimony given at the trial, from which it appears that he, Jansen (the principal witness for the people), and deceased were the only persons present. That either he or Jansen killed deceased when all three were together is one of the admitted facts of the case. His story told on the witness stand practically a month after the event is to the effect that Jansen, after an altercation with deceased, drew a revolver and fired several shots at him, and that deceased fell to the ground and Jansen ran away, leaving him (defendant) alone with the deceased. This testimony on the part of defendant was apparently the first intimation on his part that Jansen was the guilty party. Although arrested on the day and within a few hours of the homicide, and

charged with the offense, neither protestation nor claim of innocence, nor any intimation that Jansen did the shooting was forthcoming until he gave his testimony on the trial. All that he appears to have said prior to this in regard to the shooting, so far as we have found, is contained in the report of his recross-examination relative to a conversation between himself and the district attorney a few hours after the homicide, as follows:

"Q. (By district attorney): Then didn't you say, in the presence of Mr. Bailey (the sheriff), after I had made those statements to you, didn't you then say to me, after I said to you that it was not Jansen you killed, that it was Smith, and weren't you surprised and said, 'I thought it was Jansen'? A. I said I was told that it was Jansen, and I turned to Bailey and accused him of saying that. Q. Didn't you say to me, 'I thought it was Jansen who was killed'? A. I didn't say I thought that; no, I turned to Bailey, and I might have said those words, perhaps, but what I meant was I had heard him say it. Everybody was saying it out there. * * * Q. You had heard what? A. That it was Jansen. Q. But, Mr. Wilt, you knew it was Smith, didn't you, that was killed? You knew Jansen killed him; you saw it; you knew all about it. A. Yes; I knew all about it. Q. Then what did you say that for? A. I don't know; I didn't say it with any ulterior motive at all."

Except for the testimony of the defendant, there was no shred of testimony tending in the slightest degree to inculpate Jansen as the perpetrator of this murder, and his testimony was, in view of all the circumstances, of such a nature that, to say the least, it is not surprising that it was rejected by the jury as absolutely unworthy of belief.

The deceased and Jansen were employed in a store in Germantown. Deceased roomed in the home occupied as a residence by Mr. and Mrs. Jansen. Except for the testimony of defendant there was absolutely nothing to indicate that their relations were not of the most friendly nature. Defendant had been the husband of a sister of Jansen, but she had obtained a divorce some years before, and the minor child of the marriage had been for some years and was at the time of the homicide in the custody of the Jansens. Defendant lived in Orland, some miles from Germantown. There certainly had been no great degree of intimacy after the divorce between defendant and the Jansens. Some two years before the homicide there had been some differences between them in relation to defendant visiting the child, and the testimony fairly indicated that defendant had not visited the Jansen house thereafter. There was testimony that about that time he made threats against the Jansens because of this difference. Testimony of Jansen was to the effect that he had seen defendant on very few occasions, and did not know him at all well. According to the testimony of Jansen, he was aroused from his sleep early on the morning of February 14, 1916, about 5:30 o'clock, by the deceased, and on going into the hall found there the deceased and a strange man,

some time after declared by him to have been the defendant, whom he did not at once recognize, armed with a revolver. The key of the store having been produced by Jansen, this man marched deceased and Jansen out of the house and to the store, which was opened and entered, and they were then ordered to open the safe. The outer door of the safe was opened, but no key being produced which would open its inner door the attempt of his man to obtain access was abandoned. He marched Jansen and deceased out of the store and down the railroad track away from Germantown for about a mile, and then began firing his revolver at them. Apparently he shot deceased first, killing him. Another shot struck Jansen, inflicting a slight wound, but he, running away, escaped serious injury. He did not at the moment identify in his mind the assailant as Wilt, but a little later, thinking the matter over, became convinced that it was Wilt. The assailant had attempted to disguise himself with a false mustache, and, as already noted, the testimony fairly showed that Jansen had seen very little of Wilt. Much in a general way was Jansen's story, and while it indicated a rather peculiar and at first blush a somewhat incomprehensible course of conduct on Wilt's part, it is not at all an impossible story when considered in the light of all the other circumstances. Confessedly, Wilt did go that night on his bicycle from Orland to Jansen's house in Germantown, leaving his bicycle under a bridge several hundred feet from the house and walking from the bridge to the house. Confessedly, he then carried the .38-caliber Savage automatic revolver which was found on him at the time of his arrest, and it sufficiently appears that deceased was killed by a shot from a weapon of this caliber. Confessedly, he fled from the scene of the homicide, and then captured some hours later steadily refused to say a word in reply to the accusation against him, except as we have already indicated, until he gave his testimony at the trial. Any conclusion that his testimony as to his reason for going from Orland to Jansen's home in Germantown was true was unwarranted in view of what the evidence fairly showed as to the relations existing between him and the Jansens. Certainly no such degree of intimacy between Jansen and Wilt appeared as would make it reasonable to suppose that Jansen might desire the counsel or assistance of Wilt in a matter of such personal nature as that suggested by him. His testimony as to the letter he claimed to have received from Jansen asking him to come, and its contents (such a letter never being produced), and as to his consequent arrival at Jansen's home between 9 and 10 o'clock the night of February 13th and his conversation with Jansen, and with Jansen and deceased, from that time on until shortly before the homicide, when the three took walk down the railroad track together, is of such a nature that the jury were fully

warranted in rejecting it as false. In addition to its inherent probability it was absolutely opposed to the testimony given by both Mr. and Mrs. Jansen as to the whereabouts of Jansen during the night of February 13th. We have stated this much for the purpose of showing our reasons for the conclusion that the record is not such as to raise in our minds any doubt as to the correctness of the verdict.

[2, 3] 2. Mrs. Masterson, at whose house defendant boarded for a time in January, 1914, and Mrs. Peterich, her daughter, testified as to certain threats then made by him against Jansen. Mrs. Masterson testified substantially that he went out one evening with the avowed purpose of seeing his baby, was away about 30 minutes, and came back pale and angry, and said:

"Well, it is certainly rough; they have even turned my own baby against me;" and "now to-night they wouldn't even allow me in the house. I tell you right here, I will get my revenge on that bunch. I will kill that Swandt woman and Jansen. I will get my babies."

Mrs. Peterich said substantially that on this occasion defendant said they had refused to let him see his baby, and that he would get Jansen and the Swandt woman, that he would kill them, and that about two months later he repeated this threat. Complaint is made that this evidence was improperly admitted, the objection made to Mrs. Masterson's evidence being, according to the record, that it was "incompetent, irrelevant, and immaterial," and no objection apparently having been made to Mrs. Peterich's testimony which was given after Mrs. Masterson had testified. It is earnestly urged that the admission of this evidence was prejudicial error. We are satisfied that as to the claim that the making of these threats was too remote the objection is one that goes to the weight rather than to the admissibility of the evidence.

As to the claim that the evidence was not admissible because the threats were not against the deceased, it is unnecessary to discuss the many authorities cited by learned counsel for appellant, in view of the admission by them that a terse and clear statement of the rule applicable is contained in our own case of *People v. Bezy*, 87 Cal. 223, 7 Pac. 643, where it is said:

"While threats against the deceased are admissible in evidence to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased." (The italics are ours.)

Where a sufficient connection is shown such threats are clearly admissible. The evidence of Jansen was to the effect that while Smith alone was killed the assault was not upon Smith alone, but upon himself and Smith, and, according to his testimony, he was wounded by another shot from defendant's pistol. Where A. fires shots at B. and C., who are together, killing B. and wounding C., who nevertheless makes his escape,

there being nothing except the mere fact that B. was first hit to indicate that the assault was specially directed against him, there would appear to be such a connection between the killing of B. and previous threats of A. against C. as to warrant evidence thereof. Such threats would tend to show a designed assault on the part of A., the primary object of which was the killing of C., and in fact including B. simply because he was with C. If the evidence was that A. only the day before the homicide had threatened to kill C. on sight, and B. (whom A. had never before seen) and C. while walking together were fired upon by A., with the result that B. was killed and C. wounded, we think no one would question the existence of the connection essential to the admissibility of the evidence as to the threat. There is no difference in principle between such a case and the one before us, so far as the question we are discussing is concerned. We are aware of no decision declaring such evidence inadmissible. There was nothing to indicate that prior to going to Jansen's house during the night preceding the shooting, defendant knew anything about deceased or even that there was any man living in Jansen's home other than Jansen himself, or that at any time prior to the homicide he ever had any difference whatever with deceased. We are satisfied that in view of all the circumstances the evidence of threats against Jansen on the part of defendant was properly admitted. As we have said the remoteness of the threats was a matter going solely to the weight of the evidence.

[4] 3. Error is alleged in sustaining an objection to a question asked Jansen on cross-examination, as follows:

"How long after the shooting did you go down and have a chat with Mr. Smith, the uncle of this boy, about this tragedy?"

The objection was substantially that the same was not proper cross-examination. No statement was made to the court as to the purpose of the question, and apparently nothing had been elicited up to that time to show the pertinency of any such inquiry. It was apparently an isolated and immaterial matter concerning which nothing had been asked Jansen on direct examination, and up to this time it had not been intimated that there was any claim that Jansen himself was the guilty party. We see no good ground for holding that the court erred in sustaining the objection. It is proper to note that it was subsequently fully shown by the testimony of Benjamin Smith, the uncle, that on March 12, 1916, Jansen did come to his house in Maxwell to talk with him about the homicide, in pursuance of a request on his (Jansen's) part that he be permitted to see him made two or three days before.

[5] 4. The defendant denied the killing, and there was no attempt to justify, excuse, or mitigate it. The court instructed the jury as follows:

"Upon a trial for murder if the commission of the homicide by the defendant is proved to a moral certainty and beyond a reasonable doubt, then it devolves upon the defendant to prove circumstances of mitigation or that justify or excuse the act, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable. This does not mean that he must prove such circumstances by a preponderance of the evidence. He is only bound under this rule to produce such evidence as will create in your minds a reasonable doubt as to whether there were circumstances of mitigation, or that justify or excuse the act."

In so instructing the jury the court was giving a rule declared by section 1105 of the Penal Code. It is claimed that it is error to give such an instruction where the killing is denied. It may be conceded that the instruction was inapplicable; no circumstances of mitigation, excuse, or justification being suggested. See *People v. Tapia*, 131 Cal. 647, 654, 63 Pac. 1001; *People v. Grill*, 151 Cal. 592, 91 Pac. 515. But, as said in *People v. Tapia*, supra:

"Of course, a judgment will not be reversed for an instruction containing a mere abstract principle because it is not applicable to the case, where it appears that no injury was done."

In that case an instruction on this subject, where the killing was denied and the evidence to show that the death of the deceased was due to criminal means used by another person, and not by his own act or accident was said to be "very slight," was held prejudicially erroneous, on the ground that the jury may readily have understood the language "upon a trial for murder, the commission of the homicide by the defendant being proved" as intimating an opinion or belief or statement on the part of the trial judge that the homicide had been proved. Ordinarily this language could not fairly be held to have any such signification. See *People v. Grill*, 151 Cal. 596, 91 Pac. 515. But in the case at bar the language of the instruction was "upon a trial for murder, if the commission of the homicide by the defendant is proved to a moral certainty and beyond a reasonable doubt, then," etc., which entirely obviates the objection suggested in *People v. Tapia*, supra. We can see no possible prejudice to defendant in the giving of this instruction.

[6, 7] 5. We can see no reason for concluding that the jury may have been misled by certain instructions given in regard to circumstantial evidence. Some criticism is made to an instruction declaring:

"It is not necessary that every fact and circumstance given in evidence should be proven beyond a reasonable doubt, but only that every fact and circumstance necessary to the conclusion of guilt should be so established. * * * It is for you to decide whether or not any particular fact or circumstance is a necessary link in the chain of evidence; and if you decide that such fact or circumstance is a necessary link, then it must be proven to your satisfaction, beyond a reasonable doubt."

The latter part of this instruction, concerning which the principal complaint is

made, is exactly in accord with what is said in *People v. Ah Jake*, 91 Cal. 98, 27 Pac. 595, and as applied to the subject under discussion is unquestionably correct. The learned trial judge had correctly defined circumstantial evidence as testimony "of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant," and had further told the jury that whether the evidence was direct or circumstantial, "the final test is the same, to wit: Does the whole evidence, considered together, satisfy the minds of the jurors beyond a reasonable doubt of the truth of the charge?" The language attacked simply told the jury substantially that it was for them to decide whether any particular circumstances concerning which testimony had been given was necessary to complete a chain of circumstances establishing to their satisfaction beyond all reasonable doubt the facts essential to guilt, and that if they decided that it was necessary, it must be proven beyond all reasonable doubt before they could act upon it. In other words, they could not rely upon any circumstance as a link in the chain of circumstances establishing to their satisfaction beyond all reasonable doubt the guilt of the defendant, unless satisfied beyond all reasonable doubt by the proof of the existence of that circumstance; but that it was for them to determine what circumstances were essential to satisfy their minds beyond all reasonable doubt of such guilt, and thus constitute necessary links of such chain. This we think must be correct, and we do not understand that any different rule is declared in any California case. It is certainly in accord with what is said in *People v. Ah Jake*, supra. We do not think the instruction can fairly be construed, as claimed by appellant, as leaving "to the jury the determination of what was necessary to constitute the crime." It had reference to an entirely different subject-matter, viz. the matter of proof of the facts essential to guilt by circumstantial evidence. As to the facts essential to guilt of murder and the various degrees thereof, the jury were fully and correctly instructed, and they were clearly instructed that they could not convict the defendant of murder in either degree, unless satisfied beyond all reasonable doubt of all the facts essential to such a conviction. We do not think it can fairly be assumed that there may have been any misunderstanding as to this. We see no good ground for criticism as to the first portion of the instruction.

[8] 6. In our opinion the instruction as to the duty of the jurors in the matter of consulting and agreeing upon a verdict cannot fairly be construed as advising them that a juror may properly change his vote from not guilty to guilty in deference to the views of fellow jurors, when not satisfied beyond all reasonable doubt of such guilt. They were

expressly told thereby that if any juror entertained a reasonable doubt of the defendant's guilt he should vote to acquit, and should continue to so vote "until convinced" to the contrary. The word "convinced," as here used, and as used in the last sentence of the instruction, "A juror should not hesitate to change his views or opinions of the case when convinced that they are erroneous," clearly means "convinced beyond all reasonable doubt," and could not fairly be otherwise understood by the jurors.

[9] 7. The evidence was not such as to warrant instructions on manslaughter or the submission to the jury of a "manslaughter verdict." What we have said disposes of all the points made in the briefs. We have fully examined the record, and find no other matters requiring notice.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

SPIVOK v. INDEPENDENT SASH & DOOR CO. (L. A. 8764.)

(Supreme Court of California. Oct. 11, 1916.
Rehearing Denied Nov. 9, 1916.)

1. MASTER AND SERVANT §101, 102(8)—MASTER'S DUTY—SAFE PLACE TO WORK.

An employer is not required to furnish an absolutely safe place for work, but one which is reasonably safe, having regard to the character of the work itself.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 138, 171, 179; Dec. Dig. §101, 102(8).]

2. MASTER AND SERVANT §238(3)—MASTER'S LIABILITY—TOOLS AND APPLIANCES—SELECTION.

Where an employer furnishes adequate appliances and methods, and an employé, for his own convenience, adopts other methods involving a needless risk and consequent injury, the employer is not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 745; Dec. Dig. §238(3).]

3. MASTER AND SERVANT §356—MASTER'S LIABILITY—WORKMEN'S COMPENSATION ACT.

Where the employer was without fault and the injury to an employé occurred solely through his own negligence in using other appliances than those furnished the case was not within the *Roseberry Act*, St. 1911, p. 796, as the foundation of that act is the want of ordinary or reasonable care on the part of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §356.]

Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Frank Spivok against the Independent Sash & Door Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order reversed.

Patterson Sprigg, of San Diego, for appellant. Luce & Luce, of San Diego, for respondent.

HENSHAW, J. Plaintiff recovered judgment following the verdict of a jury for injuries sustained under the following circumstances: He was a carpenter, in the employ of the defendant. There was a scaffold called a "canopy" used in connection with the work. This canopy was a platform attached to the building and about 14 feet above the ground level. The canopy was used in connection with the wooden forms employed to hold the concrete in the construction of the building. The floor of the canopy could be reached by a stairway inside of the building leading to an upper floor; the canopy floor being 4 or 5 feet lower than the floor of the structure. There were ladders, however, which could be used for the descent, or a workman could jump or swing himself down. Instead, however, the workmen, for their own convenience, seemed to have adopted another method of reaching the canopy. This was by a stepladder 9 or 10 feet long, which reached a "transom bar" 3 or 4 feet below the canopy floor. The workmen stepped from the ladder to the transom bar, and, standing on the transom bar, climbed onto the platform, which was about 3 feet higher than the transom bar. This climb was of course not difficult for any man and not unusual for one in the employment of a carpenter. Plaintiff had used this method of access to the canopy. Indeed, he had been at work upon the canopy for a day or two previous to his accident. Upon the canopy, and, indeed, this was one of the purposes of its use, were the forms for the concrete work, which were there piled up. The plaintiff upon the occasion of the accident had climbed the ladder, stood upon the transom bar, put one knee upon the canopy floor and seized (doubtless by inadvertence) one of these forms in the effort to pull himself onto the platform. The form, of course, being loose, gave way and he was precipitated to the floor beneath, sustaining injury to his ankle.

The complaint charged a negligent construction of the scaffold because of which "the floor fell apart from said scaffold when grasped by the plaintiff." But all the evidence, including that of the plaintiff, discredits and disproves this charge; plaintiff himself and all of his witnesses testifying that the scaffold was properly constructed and was and remained perfectly firm. The second charge of negligence against the defendant avers:

That the defendant "furnished to the said plaintiff as a means of climbing upon said scaffolding a stepladder of such a defective and improper length, size, and construction as to compel him to reach from the top of said ladder a considerable distance to the floor of said scaffold in an effort to climb upon said scaffold, and the said defective and improper stepladder, together with the said above-mentioned unsafe, defective, and dangerous scaffold, caused the said plaintiff to fall to the ground."

It has been said that the scaffold was neither defective nor dangerous. It has been

shown, and indeed must be conceded, that plaintiff did not meet with any injury because the ladder was defective. Indeed, at the time of his injury he had left the ladder and was standing securely on the transom beam. It cannot successfully be contended that there was any hazard worthy of the name in a climb from the transom beam to the canopy floor. It is manifest that the proximate cause of the injury was the negligence of the plaintiff in grasping the loose form, which doubtless he thought was a fixed stanchion on the canopy. He was familiar with the work, with the place of labor, with the condition of the canopy platform, and from a better and safer means of approach to his work he himself deliberately selected this particular one. He could have gone up the stairway, as other of the workmen did, but he did not do so.

[1, 2] An absolutely safe place of labor is not, of course, required of an employer. It is to be reasonably safe, having regard to the character of the work itself. Carpenters walk freely and unhesitatingly, and expect to walk, over floor joists before the floor is laid. One would not expect to see a cause of action for injuries occasioned by an inadvertent slip of a carpenter walking over such floor joists, predicated upon the fact that the employer had not caused the floor to be laid so as to make the place of labor safe. So in this case it was not because the ladder was short that the plaintiff was injured. His cause of action might as well have been founded upon the fact that the defendant furnished him no elevator nor inclined plane to reach his work. Adequate appliances and methods were at hand. If the employes, for their own convenience, refuse to use them and adopt methods involving a needless risk, the employer is not liable. *Brymer v. Southern Pacific Ry. Co.*, 90 Cal. 496, 27 Pac. 371; *Thompson v. C. C. Construction Co.*, 148 Cal. 35, 82 Pac. 367.

[3] The conclusion is unescapable that the employer in this case was without fault, and that the injury occurred solely through the negligence of the employé. The case therefore does not come within the provisions of the Roseberry Act. Stats. 1911, c. 399, p. 796. The foundation of the rights under the Roseberry Act was the "want of ordinary or reasonable care of the employer." When the existence of this fact was proven, then the employer was not entitled to avail himself of the plea of contributory negligence of his employé, nor the latter's assumed risk of the hazard complained of; nor yet of the want of reasonable care of a fellow servant. But in the case at bar no want of ordinary or reasonable care upon the part of the employer is shown.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

MELLOR v. BANK OF WILLOWS et al.
(MELLOR et al., Interveners). (Sac. 2239.)

(Supreme Court of California. Oct. 13, 1916.)

1. HUSBAND AND WIFE \S 49½(8) — GIFTS CAUSA MORTIS—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support finding that deceased made a gift in contemplation of death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. \S 49½(8).]

2. HUSBAND AND WIFE \S 49½(8) — GIFTS CAUSA MORTIS—SCOPE OF INQUIRY.

Where a wife alleged that her deceased husband made a gift causa mortis to her, but no other was present at the time of making, her testimony should be viewed with caution, and even with suspicion, in order to prevent fraud.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. \S 49½(8).]

. APPEAL AND ERROR \S 931(1)—PRESUMPTIONS—FINDINGS BY COURT.

The court on appeal cannot assume that the lower court ignored rules for determining the sufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. \S 931(1).]

GIFTS \S 66(2) — GIFTS CAUSA MORTIS — SUFFICIENCY OF WORDS USED.

The intention to give need not be manifested solely by the particular words of the donor, but may need only be susceptible of that meaning, and the words: "Here are the certificates of deposit. Take them to C. and they will be all right"—are sufficient to create a gift causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 136; Dec. Dig. \S 66(2).]

GIFTS \S 83—GIFTS CAUSA MORTIS—QUESTIONS FOR JURY.

It is a question for the jury, under the facts and circumstances of each case, whether a gift one causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 166; Dec. Dig. \S 83.]

HUSBAND AND WIFE \S 49½(8) — GIFTS CAUSA MORTIS—PRESUMPTIONS.

Where the donor and his wife had lived together for many years, and he had made no other provision for her future and no will, and had other relatives save those in England, whom he had not seen for many years, the law will presume from the moral obligation to give that handing her certificates of deposit and telling her to take them to the cashier and that would be all right was a gift causa mortis.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. \S 49½(8).]

GIFTS \S 60—GIFTS CAUSA MORTIS—SUFFICIENCY OF WORDS USED.

The mere fact that the donor, who at the time was suffering intensely and in his last illness, did not use elaborate words indicating a gift, cannot be construed as against a claim to it gift causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 109; Dec. Dig. \S 60.]

HUSBAND AND WIFE \S 49½(8) — GIFTS CAUSA MORTIS—EVIDENCE—SUFFICIENCY.

Evidence held to show the execution of a gift causa mortis.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. \S 49½(8).]

GIFTS \S 66(2) — GIFTS CAUSA MORTIS — CERTIFICATES OF DEPOSIT—NECESSITY OF ENDORSEMENT.

The mere fact that certificates of deposit were given to be the subject of a gift causa mortis

were not indorsed would not defeat the gift or raise a presumption against the validity of the transfer, where at the time of the gift the donor was suffering intensely from his fatal illness.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 136; Dec. Dig. \S 66(2).]

Department 1. Appeal from Superior Court, Glenn County; John F. Ellison, Judge.

Action by Dora Mellor against the Bank of Willows and another, wherein John Mellor and others intervened. From a judgment for plaintiff and an order overruling motion for new trial, interveners appeal. Affirmed.

W. T. Belieu, of Willow, and Arthur C. Huston, of Woodland, for appellants. A. J. Zumwalt and Frank Freeman, both of Willow, for respondent.

LAWLOR, J. This action was brought by Dora Mellor, the plaintiff and respondent, to recover from the Bank of Willows the sum of \$5,162.50, representing a certificate of deposit for \$5,000, and the interest thereon, issued by the defendant bank, and payable to George Mellor, the deceased husband of the plaintiff, or order. The plaintiff claims that she received the money as a gift causa mortis from her husband. By leave of the court, a complaint in intervention was filed on behalf of certain heirs of the decedent who are contesting the plaintiff's claim. The defendant bank deposited the money in court to be delivered to the successful party in accordance with the decree. The case was tried without a jury, and judgment was rendered for the plaintiff. The interveners interposed a motion for a new trial, which was denied, and from such order this appeal is prosecuted.

The sole question presented is whether Dora Mellor acquired title and right of possession to the funds represented by the certificate of deposit. The court found:

"That on the 25th day of November, 1911, George Mellor, early in the morning of that day, became violently ill, and later, to wit, on or about 8 o'clock p. m. of that day, died; that during said last illness the said George Mellor, while in great pain, and believing that he was about to die, and in the fear and peril of death, delivered into the possession of and gave to plaintiff, Dora Mellor, with intention to make a gift of the same to her, the certificate of deposit, * * * and the said George Mellor died without having revoked said gift of said certificate of deposit."

[1] 1. It is insisted by the appellants that the evidence is insufficient to support the finding that the gift was made by the decedent in view of impending dissolution from the effect of his last illness. For more than 17 years Mellor had suffered from a serious ailment involving the kidneys. The malady grew worse as time wore on, and in later years was frequently accompanied by attacks during which stones would pass from the kidneys to the bladder, causing intense pain. He was admonished by Dr. Randolph,

who had attended him for nearly 20 years, that he was likely to die very suddenly in one of these attacks. The physician, testifying for the appellants, on cross-examination said:

"People die suddenly in these cases. I do not know whether or not he had been suffering a number of weeks prior to that time. I had not called upon him, and he had not called me. Mr. Mellor always thought that he would pass away in one of those spells; he thought they would finally kill him; he said that to me often. I have had conversations with him, and have told him that it would not be more than two or three years that he had to fix up his business. I said: 'George, you are going to quit on the sidewalk, and you had better fix up your business.' I told him that from the very nature of his ailment."

His wife said that he was impressed by these warnings. She testified:

"He had talked about it more than once, and he said if he ever got a rough one he wouldn't live; as he was getting older it worried him more."

Mellor's attorney testified to like effect. In the early morning of the day of his death Mellor was again stricken with "one of his old spells." He suffered intensely, but recovered sufficiently to go to the garage, of which he had charge, only to return a few moments later in a condition of great agony.

"When he first came home," his wife testified, "he looked agony and seemed to have a death pallor on his face and he said, 'It is a rough one.'"

She assisted him to undress and helped him to bed. It was at this time he handed her a purse containing \$150 in cash and three certificates of deposit, including the one involved in this action. Subsequently he repeated the remark, which must be regarded as significant:

"It is a rough one, Dora."

After getting into bed he laid over on his side and said:

"Dora, the taxes are due Monday. See that they do not become delinquent if I do not awake."

Although the physician made several visits to Mellor during the day, he did not recover from the attack, and died about 8 o'clock in the evening. It is provided in the Civil Code that:

"A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death." Section 1150.

But, unaided by this presumption, the evidence is amply sufficient to support the finding of the court that the decedent acted in contemplation of death.

[2, 3] 2. The appellants next contend that the court was not warranted in finding that the decedent intended to make and did make a gift to the plaintiff. They claim that:

"The evidence is wholly insufficient to justify the finding of the court in favor of the plaintiff, for the reason that she is asserting title to certificates of deposit on her unsupported statement that her deceased husband, George Mellor, made a gift causa mortis of them."

The rule is, as argued by them:

"He who attempts to establish title to property through a gift as against the estate of a decedent takes upon himself a heavy burden which he must support by evidence of great probative force which clearly establishes every element of a valid gift." *Denigan v. Hibernia, etc., Society*, 127 Cal. 137, 59 Pac. 889.

No one else was present at the time the plaintiff claims the decedent gave her the certificate of deposit. It is well established that under such circumstances the testimony of the claimant should be viewed with caution, and even with suspicion, in order to prevent fraud. *Freeze v. Odd Fellows Savings Bank*, 136 Cal. 662, 69 Pac. 493. But, while this is true, the trial court in this case has found in favor of the testimony of the plaintiff, and we cannot assume that in making its finding the court ignored the rules above stated.

[4, 5] Her testimony follows:

"Saturday morning, the 25th day of November, 1911, when he gave them to me, he was sitting on the edge of the bed. I was undressing him. I took off his shoes. I helped him take off his overalls, and he puts his hand in his pocket and takes out his purse, and says: 'Here, Dora, here are the certificates of deposit. I should have attended to them before.' He said: 'Take them to Clarence [referring to the cashier of the defendant bank] and they will be all right.' It was about 8 o'clock in the morning when he said this. He was very sick, suffering a great deal at this time. I took the purse and put it between the mattresses of the bed he was lying on, and they remained there until he died. He died about 8 o'clock in the evening. I did not open it until Sunday morning; then I looked in the purse. The purse had been in my possession all the time. At the time I opened the purse I found these certificates of deposit, and they have been in my possession ever since."

She also testified that this was the first time he ever mentioned the certificates to her. He did not refer to them again.

"Upon this expression of the decedent, assuming it to have been made," insist the appellants, "the court must base a finding that the decedent made a gift of the certificate to Mrs. Mellor."

It is argued:

"There was no word spoken indicating an intention to give the certificates to any one. Mellor did not employ the language that is usually used to indicate an intention to give. He did not say, 'These are yours,' or 'I give these to you,' or 'Take these for yourself.'"

But the intention to give need not be manifested solely by the particular words employed by the donor. It is a question of fact to be determined like other questions of fact upon all the evidence in the case—the situation of the parties, their relationship, the circumstances surrounding the transaction, the apparent purpose in making the gift, the words spoken at the time, and the like. *Estate of Hall*, 154 Cal. 527, 98 Pac. 269. See *Follmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544. If the words accompanying the delivery of the thing can be said to be expressive of a gift, and, in the light of the circumstances, consistent with the intention to give, the execution of the gift is established. In considering a similar question, the court remark-

ed in *Vandor v. Roach*, 73 Cal. 614, 15 Pac. 354:

"The counsel says that the operative words of a gift are, 'I give,' or 'I have given,' and that these words are wanting. But we do not think that any formula or set phrase is necessary. It is sufficient if there was delivery, and any words importing an intention to give."

While it is not necessary that the words used shall be exclusively language of gift, when tested by all the circumstances of the case, they must be susceptible of that meaning. In this case, possibly, as contended by the appellants, the bare words employed by Mellor might constitute a direction merely to deliver the certificates to the cashier of the bank. But the language is also consistent with an intention to make a gift, and, as we will presently show, the decedent's intention to make a gift is well established by the evidence. It must therefore be held that the language used constitutes words of gift.

[6] For more than a quarter of a century Mellor and his wife lived together, during the greater part of which time he was afflicted with the kidney trouble which eventually caused his death. The warnings of his physician that he was likely to die suddenly, and the admonition to fix up his business caused him unceasing worry. But there is no evidence that he had previously made any attempt to provide for his wife's future. When, however, the final attack came, and he realized his life would soon end, it is apparent that the duty of providing for her was uppermost in his thoughts. It was then he handed her the certificates of deposit. As is said in *Davie v. Davie* (Wash.) 91 Pac. 950:

"It would seem to be but a natural thing for a man in the expectation of near approaching death to make a gift of this kind to his wife."

There are circumstances where the presumption of gift arises from the moral obligation to give. See *Spitler v. Kaeding*, 133 Cal. 500, 65 Pac. 1040. It seems to us that such a case is presented here. No creditors are complaining. The only parties contesting the claim of the wife are heirs of the decedent, residents of England, whom he had not seen for 40 years. Nor is it suggested that any will was made by the decedent, the terms of which are inconsistent with the gift. The appellant's suggestion that perhaps Mellor intended the plaintiff should pay the taxes which were due out of the money on deposit is without merit.

[7, 8] It is also argued that had Mellor intended to make a gift he would have clearly expressed his intention in apt words, and that the absence of such words must be taken as evidence that he had no such intention. But his failure to use more elaborate language cannot be construed against the gift. When he gave the plaintiff the certificates of deposit he was suffering intensely, and apparently was unable to converse or concentrate his mind to any extent. While this circumstance did not dispense with the ne-

cessity of using appropriate words of gift, it may be considered in explanation of his failure to employ formal or conventional language. The trial court therefore may well have concluded that but for his physical condition he would have said, in effect:

"Dora, I make you a gift of the certificate of deposit, and Clarence will give you the money."

It is also quite evident that he trusted to the cashier of the bank to recognize the right of the plaintiff to receive the money, and considered more specific directions to her as unnecessary. Nor was it necessary for his wife to ask him whether the money was intended as a gift, to insist upon full particulars as to the action expected of the cashier, or to suggest that the certificate of deposit be indorsed. It was sufficient that both parties to the transaction understood that a gift of the money represented by the certificate of deposit was intended to be made, and that it was given and accepted in this spirit. We think the evidence fully sustains the finding that the decedent gave the certificate of deposit to the plaintiff, and that he did so with the intention of making a gift of the money to her.

[9] 3. The certificate of deposit was unindorsed. The appellants contend that this was a fatal defect to the validity of the gift.

"Assuming for the sake of argument," they say, "that Mellor intended to make a gift, and that he actually delivered the certificates with the intention that they should be the property of Mrs. Mellor, still there is no gift, because the certificates were not indorsed."

But the wife testified:

"At the time Mr. Mellor delivered these certificates of deposit to me, he was too sick to write. He was very sick, suffering a great deal at this time."

Where there is no opportunity to make an indorsement or written assignment of an instrument, such as a certificate of deposit intended as a gift *causa mortis*, the absence of an indorsement does not raise a presumption against the validity of the transfer. The certificate was payable "to self or order." Its delivery constituted an equitable assignment of the money on deposit. *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500. This clearly brings the case within the principle of the prevailing authorities that a gift of a deposit in a bank is a proper subject of a gift *causa mortis*, and may be evidenced by the delivery of the certificate of deposit without indorsement. *Royston v. McCulley* (Tenn. Ch. App.) 59 S. W. 625, 52 L. R. A. 899; *Caldwell v. Goodenough*, 170 Mich. 114, 135 N. W. 1057; *Connor v. Root*, 11 Colo. 183, 17 Pac. 773; *First National Bank, etc., v. O'Bryne*, 177 Ill. App. 473; 12 R. C. L. p. 965, § 38; 20 Cyc. 1238. The conditions of transfer printed upon the certificate calling for an indorsement do not alter the rule. *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758. The authorities relied upon by the appellants to establish the necessity of an indorse-

ment or actual delivery of the funds on deposit are, for the most part, concerned with checks, drafts, and other evidences of money on deposit in banks of issue, discount, and deposit. These cases are not in point; for a different rule generally prevails where the money can be drawn from the bank by the depositor's check or draft. In this state it has been well settled that "negotiable paper payable to order is the subject of a donatio causa mortis, even though it is not indorsed by the payee." *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821. This rule has been applied to a promissory note (*Druke v. Helken*, 61 Cal. 346, 44 Am. Rep. 553), United States bonds (*Vandor v. Roach*, supra), and bills of exchange (*Edwards v. Wagner*, supra). It applies with equal force to a certificate of deposit, payable to order, when transferred as a gift causa mortis.

We find no error in the rulings of the court admitting the testimony complained of.

The order is affirmed.

I concur: SLOSS, J.

SHAW, J. I am of the opinion that there was sufficient evidence, direct and circumstantial, to support the findings, and that the equitable title to the certificate of deposit passed by its delivery with the intent thereby to make a gift of it. I therefore concur in the judgment.

EARL v. SAN FRANCISCO BRIDGE CO.
(Civ. 1573.)

(District Court of Appeal, Third District, California. Sept. 4, 1916.)

1. MASTER AND SERVANT §245(1)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—UNSAFE PLACE TO WORK.

It is negligence for a master to change the switch cutting off an electric current from its wires so that it did not entirely cut the current off, and then to direct an employé, who had previously inserted fuses in the connections after cutting off the current at the switch, to insert a switch without warning him that the switch had been changed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 291-294; Dec. Dig. § 149(1).]

2. MASTER AND SERVANT §235(7)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Though the employé knew of the danger of working around wires carrying a current of such voltage, he was justified in assuming that the switch would still cut the current off from the wires, the difference in its appearance not being so palpable as to compel the conclusion that in the exercise of ordinary care he would have discovered it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 714; Dec. Dig. § 235(7).]

3. MASTER AND SERVANT §235(4)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SUPERVISION OF SUPERIOR.

A rigger employed in a plant, whose machinery is operated by electricity and who was directed by the engineer to replace a fuse, was

entitled, in doing so under the immediate supervision of the engineer, to rely on the superior knowledge of the latter.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 713; Dec. Dig. § 235(4).]

4. MASTER AND SERVANT §245(4)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS.

An employé, who had knowledge that the cut-off switch had been changed so as not to cut off the entire current, is not contributorily negligent in attempting to replace a fuse under the direct supervision of the engineer where the change merely rendered the attempt more dangerous, but did not make it inevitably or imminently dangerous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 781; Dec. Dig. § 245(4).]

5. DAMAGES §208(1)—AMOUNT—PERSONAL INJURIES—DISCRETION OF JURY.

In cases of personal injury, there is no certain and absolute measure of damages, but the amount must be left largely to the discretion and sense of justice of the jury, subject to the supervision and correction of the trial court to determine what will be a fair compensation for the suffering and misery and financial loss.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 533, 534; Dec. Dig. § 208(1).]

6. DAMAGES §130(1)—AMOUNT—ELECTRICAL INJURIES.

The severity of injuries caused by electricity is a matter of general observation, and courts have been liberal in upholding verdicts for large amounts in such cases.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357, 363, 364, 366; Dec. Dig. § 130(1).]

7. TRIAL §296(11)—MISLEADING INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

An instruction that the jury should assess the damages in such sum as they believed, under all the circumstances in evidence, the plaintiff ought to recover, even if misleading when standing alone, could not have been misunderstood, where it was supplemented by the specific directions as to all the elements of damage for which the plaintiff could recover.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 715; Dec. Dig. § 296(11).]

8. TRIAL §233(2)—INSTRUCTIONS—STATEMENT OF ISSUES.

It is not error for the court to state plaintiff's claim in the language of the complaint, instead of using equivalent phraseology.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 528; Dec. Dig. § 233(2).]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by William Earl against the San Francisco Bridge Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

H. B. M. Miller, of San Francisco, for appellant. Walter Shelton and J. C. Campbell, both of San Francisco, and Frank R. Devlin, of Fairfield, for respondent.

BURNETT, J. The interesting argument of appellant is based largely upon the theory that we must discredit and reject the testimony in favor of respondent's contention. It should hardly be necessary to add that we

are not permitted to do so, since the statements therein contained are not improbable. Indeed, after a careful reading of the entire record, we can only say that at most a substantial conflict is presented as to the material elements of the alleged cause of action.

[1] The facts, as substantially stated and shown by respondent, are as follows: Appellant at the time of the accident was engaged in dredging a channel near Pinole Flats at Mare Island in Solano county, and for said purpose was using dredgers, pumps, and other machinery and equipment operated by electricity. On the 7th of November, 1913, plaintiff was in the employment of the defendant as an operator in and about one of its pumping stations or substations, and it was his duty, under said employment, "to work with, use, handle and repair the machinery, apparatus and equipment in and about said pumping plant or station." While he was so engaged, "he was required by defendant to replace a fuse or connection in the aforesaid apparatus and equipment, and plaintiff, before proceeding to do so, turned or threw the switch provided by defendant to disconnect the electrical current from that portion of said electrical apparatus or equipment where plaintiff was about to insert the aforesaid fuse or connection, but owing to the unsafeness, unsuitableness, unfitness, defectiveness, and dangerous and unrepaired condition of said wires, * * * devices and electrical equipment, a powerful and dangerous electrical current of high potential, used by defendant on said electrical apparatus and equipment for the purpose of supplying power to be used as aforesaid, was not disconnected from the aforesaid electrical apparatus and equipment, but said electrical apparatus and equipment remained surcharged therewith and defendant carelessly and negligently and knowingly, but without the knowledge of plaintiff, failed to disconnect or cause to be disconnected the aforesaid electrical apparatus and equipment from the aforesaid current, so that, when plaintiff undertook to replace the aforesaid fuse or connection as required by defendant, he came in contact with the aforesaid powerful and dangerous current and received the same into and through his body, and suffered great shock and injury." Defendant's machinery and apparatus where plaintiff was employed was protected from unusual electric currents by means of fuses which melted or "blew out" and thus automatically disconnected the current when it became too strong. Whenever a fuse blew out, it was the duty of plaintiff to insert another.

Until just prior to the accident, defendant had furnished a switch or cut-off which could be used to disconnect the current, and a fuse could then be put in without any danger; and while this condition prevailed plaintiff had restored many of these fuses. A few

days before the accident, that part of the switch disconnecting the middle phase of the three incoming high-tension wires burned out, so that it had to be repaired in order to re-establish the connection on the middle wire. The duty to make this repair devolved upon defendant's chief engineer and not upon plaintiff. Instead of restoring the switch to its original condition, the chief engineer connected the middle high-tension wire directly to the middle transformer wire by means of an ordinary wire called a "solid" or "jumper" so that the middle phase could not thereafter be disconnected. As a consequence, the middle wire was always alive so that, when the two outside high-tension wires were disconnected by throwing the switch, the corresponding wires below the switch, where the fuses had to be inserted, were always charged by a return current from the transformer. Although the fuses in the two outside wires were still kept in use to protect the machinery and had to be replaced when they blew out, the switch to protect the employees while putting in fuses no longer performed its function. While the switch appeared to accomplish its purpose on the wires where the fuses had to be inserted, and apparently disconnected the current in those wires as it had always done, there was a way left open for the current to become a hidden and disguised peril. We must conclude from the record that plaintiff had no knowledge nor notice of this change in the condition of the switch, but, to the contrary, had every reason to believe that, by manipulating the switch, the current would be turned off completely so that the fuse could be inserted without danger. Herein lies the negligence of defendant. It consisted manifestly in making such change in the electrical appliances without notifying plaintiff. Of course, if it had not been the duty of respondent to restore the fuses, a different question would be presented. But from the showing made, we must accept it as true that such was the duty of respondent, and, moreover, that the chief engineer specifically ordered him to put in the fuse and in effect assured him that he was not incurring any danger.

Reduced to its simplest form, the case seems clearly to be that a safe place was furnished to plaintiff for his work with certain appliances that he could and did use in a certain manner without danger; that said appliances were changed in a material way without his knowledge; that thereby they could not be safely operated as before; and that, while performing his duty, he was greatly injured in consequence of said change having been made.

The essential features of the situation are covered in the following narrative of plaintiff:

"I am 83 years old. My occupation has been that of rigger, and for that work I have received from \$90 to \$125 per month. * * * I was operator on the relay station. My duties were

to see that the pump was oiled, well greased and oiled, and running. * * * If anything happened, a fuse blown out, we were supposed to put it back in place, supposed to keep the thing running. I had been employed there about a month. I had been in the employ of the San Francisco Bridge Company about 2½ months. During that time I had worked there on the machine, on the dredger as a handy man. I was off about 4 days before the morning on which I was hurt. I reported for duty on the dredger, on board the launch, at 7 o'clock, and I was told to go over aboard the Booster and pack the pump and get ready to start up, and I did so. Two hours later Mr. Purcell, the chief engineer, came by in the launch and said he was going to cut in the power from Vallejo and when he did to start the pump. I started the pump immediately as soon as the power came into the building. We ran for about 10 minutes when the motor burned out. I shut off the power and stopped the motor and hoisted up the flag to call the launch up, and they came back; that is, Mr. Purcell and Mr. Squires. I called them back. It was my duty to accept instructions in regard to my work from these two men I called back. After I had thrown the controller so that the power went on and the motor did not run, Mr. Purcell went out in the back of the Booster where the transformers are, and he came in directly afterwards and said: 'Earl, there is a fuse blown; go put one in.' I took the key to the cut-out and went outside and unlocked the cut-out or switch—that is, the disconnecting switch—and pulled it out and disconnected the power from the fuse platform and locked it out. When I pulled the arm of the connecting switch down and locked it, Mr. Purcell was there. I asked him if all was ready, and he said, 'Yes.' Then I went up and caught hold of the thumbscrew and was caught. The thumbscrew was on the inside wire; that is, the one nearest the building. I just stayed there burning. I first felt a sensation in the throat here, then the burns down here (indicating), then I felt the legs burning, both of my legs from here down here. The key that I had I put in my mouth and had it there when I was on the wire, I tried to spit it out, but could not. I was tense on the wire and could not do anything except to hang there. I was in the hospital about five months. I had to undergo one large operation and three minor ones. I have not been able to work since that time. Some nights I sleep pretty good, and some nights I don't sleep a single wink. That did not exist before the accident. Before my injury I weighed 168 or 170 pounds, and when I got out of the hospital I weighed 105; now I weigh about 140 pounds. I was not nervous before the accident. My doctor's bills and expenses at the hospital were between \$1,300 and \$1,400. I had put in fuses lots of times before I was hurt. The correct method of putting in one of these fuses was to take the key and go out and unlock the cut-out and pull down the switch. The cut-off switch is a pole running up the height to the three cut-off leaders. It cuts off the power from the coming-in wires to the fuse wire. I had been in the habit of doing that before this time. When I went up that day to put that fuse in, I had never been told or advised by any one and did not know that the cut-out or switch that I had undertaken to disconnect had been changed or modified in any way. I did not notice at any time that morning any change or modification in the cut-off or switch. At the time of the accident when I was up there I saw the wire then at that time, running from the high-tension wire that brings the current in. It ran to the lower fuse bracket and switch. It was connected with the center wire. I saw that wire from above the switch to the lower fuse bracket. It was joined at one end to the main feed wire and then across the cut-off switch, the middle

arm, and extended down below the middle fuse and attach to the lower fuse bracket. It was four days before I was hurt that I had seen that cut-off or switch. It was not then in that condition; it was in good condition."

He further testified that he caught hold of the thumbscrew to put in the fuse when he got to the top of the ladder, and the accident happened immediately, and that he did not know that it was dangerous to come in contact with the wire while "the cut-off was thrown out," nor was he told that "in the condition affairs were in on that platform that the cut-out did not cut the current off."

Applying to the foregoing testimony the familiar legal principles involved in such cases, we reach the conclusion that appellant was rightfully charged with the burden of responding in damages for the injury suffered by plaintiff. Those principles need not be restated, and it is probably sufficient, without quotation, to refer to *Stephens v. Pacific Electric Ry. Co.*, 16 Cal. App. 512, 117 Pac. 559; *Giraudi v. Electric Improvement Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Reeve v. Colusa Gas & Electric Co.*, 152 Cal. 99, 92 Pac. 89; *Dow v. Sunset Telephone Co.*, 157 Cal. 182, 106 Pac. 587; *Grimm v. Omaha Electric Light & Power Co.*, 79 Neb. 387, 112 N. W. 620.

[2] It is, however, insisted that respondent was guilty of such contributory negligence as to prevent recovery. The real basis for the contention is that respondent is chargeable with knowledge of the dangerous character of the element with which he was dealing. That he was not ignorant of the peril involved in coming into contact with a current of such voltage must be conceded, and that he should be required to exercise care in operating the appliances cannot be disputed; but these considerations are only remotely, if at all, connected with the controversy here. The real danger, the proximate cause of the injury, was, as we have already seen, the failure of the switch to disconnect the current, and this by reason of a change made by appellant. It was not negligence on the part of respondent to assume that conditions were as before, and that the switch would disconnect the current. Having the right to assume that the appliance was in the same condition, he was excusable for his failure to make an examination or inspection whereby he might have ascertained what had been done; nor was the difference in the appearance of the equipment so palpable and obtrusive as to compel the conclusion that, while hastening to perform his duty, if he had exercised ordinary care he would have discovered the change.

[3] Moreover, plaintiff, as testified to by him, was acting under the direct supervision of the chief engineer and was entitled to rely upon his superior knowledge. In *Price v. Northern Electric Railway Co.*, 168 Cal. 173, 142 Pac. 91, it is said:

"He was working under the immediate supervision of a foreman, and was not erecting trestle

bents or creating them on his own judgment and at his own risk. In the absence of actual knowledge to the contrary, or circumstances under which he would be held to be required to have such knowledge, he had the right to assume, when directed to assist in removing the scaffolding, that the bent had been so braced that it would not fall when the scaffolding was removed. And it cannot be held as matter of law, under the circumstances, that he was guilty of contributory negligence in not observing the absence of bracing, however obvious that fact might have been if he had made an examination to see what the actual condition was."

See, also, *Cumberland Telephone & Telegraph Co. v. Graves' Adm'x* (Ky.) 104 S. W. 356; *Chicago Suburban W. & L. Co. v. Hyslop*, 227 Ill. 308, 81 N. E. 381; *Green v. Varney*, 165 Cal. 347, 132 Pac. 436; *Lee v. Woolsey*, 109 Pa. 124.

[4] Moreover, if plaintiff had full knowledge of the change, he would not be chargeable with contributory negligence in obeying orders unless performance thereof was inevitably or imminently dangerous. *Martin v. California Central Ry. Co.*, 94 Cal. 326, 29 Pac. 645; *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412; *Van Duzen Gas, etc., Co. v. Schelles*, 61 Ohio St. 298, 55 N. E. 998.

There is room for the application of this principle, since there was testimony on the part of appellant that the work done by respondent was not imminently and necessarily dangerous. The chief engineer testified that after the repairs he put in a fuse on the outside wire without injury and that he, an electrical and steam engineer of 20 years' experience, "did not consider it taking a chance" to put in a fuse. Defendant's superintendent, civil engineer, who was present at the time of the accident, testified that he knew the middle wire was through solid and that he did not warn plaintiff, but that he "did consider that a man had to exercise more care there after the middle wire was through solid." From this statement it is quite clear that he did not consider putting in the fuse particularly and obviously dangerous, or so he would have cautioned plaintiff. Upon this theory it is a reasonable conclusion that plaintiff was justified in believing that he could perform the duty intrusted to him without danger if he exercised the care necessarily required in directing and controlling an electric current of such voltage.

In this connection, it might be well to state the suggestions of respondent that, since plaintiff proceeded carefully and skillfully, there was no more than an assumption of risk if he realized the danger, and that this defense was not open to defendant; the Employers' Liability Act having been in force at the time of the accident. *Crabbe v. Mammoth Tunnel G. Mining Co.*, 168 Cal. 500, 143 Pac. 4.

Another point urged upon our attention that the verdict is excessive, and therefore could be set aside. The amount awarded

is quite large, but respondent was grievously injured, and we cannot say that it is so disproportionate to the damage done as to compel the conclusion that the jury were controlled by passion or prejudice. We may supplement the testimony of plaintiff on the subject already quoted, by the following statement of Dr. E. A. Peterson, one of the attending physicians:

"It was January 15th when I first saw the plaintiff. Dr. Klotz asked me to come over there and help him operate on a man he was going to leave in my charge, as he was going away. I assisted him in the operation, removing the internal condyle of the tibia. He was in my charge from then on. He was in a very critical condition from the inflammation which he had in the bone, which caused a good deal of pain, and we had to remove it, and other bone became infected, and it was necessary to operate on him three times about, to remove pus from under the periosteum, the covering of the bone, and there is nothing more painful, so excruciatingly painful. He was suffering a general condition, as I understand it, he was very much run down, and he had to be put under an anæsthetic three times more. The cause of his condition was the generally weakened vitality, especially as the bone had been burned and rendered very inactive and unhealthy from being burned; this is what we call a complication after a burn. The complications which occurred in this case were unavoidable, and the condition I have described was not due to any neglect that the plaintiff may have received. His pain was so great that opiates would not relieve it. This condition continued from about January 17th to—well, it was a month, anyway, that he was in awful agony. * * * The plaintiff, in my opinion, will never be able to perform labor such as a rigger, or any structural work owing to his present condition."

Dr. Klotz described minutely the patient's condition, and, among other things, said:

"The bone was diseased from the electric shock, that is the necrosis, the live bone, was destroyed. * * * The nervous condition was due, of course, to the shock and electrical burns that he had. If a person were to receive enough electricity to throw them down and to require artificial respiration and of course burns like the patient had, it would leave him in an awful state afterwards. * * * He never will be able to perform such services as a rigger, a person who has formerly worked with his feet, arms, and hands."

[5, 6] Of course, in cases like this, there is no certain and absolute measure of damages. It must be largely left to the discretion and sense of justice of the jury "subject to the supervision and correction of the trial court" to determine the amount that will be a fair compensation for the suffering and misery and financial loss endured by the injured party. The severity of the injury caused by electricity is a matter of general observation, and the courts have been quite liberal in upholding verdicts for large amounts in such cases. As illustrating this tendency of the courts, we may refer to the following cases cited by respondent: *Tedford v. Los Angeles Electric Co.*, 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; *Reeve v. Colusa Gas & Electric Co.*, 152 Cal. 99, 92 Pac. 89; *Southwestern Telegraph & Telephone Co. v. Shirley* (Tex. Civ. App.) 155 S. W. 663; *Hill v. Union Electric*

Light & Power Co., 260 Mo. 43, 169 S. W. 345; New Omaha Thompson-Houston Electric Light Co. v. Rombold, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030; Goetzke v. City of Chicago, 174 Ill. App. 446.

Some errors in the matter of instructions and rulings of the trial judge are claimed, but they seem to be without substantial merit.

[7] The instruction to the jury that they should assess the damages, if any, in such sum as they believed under all the circumstances in evidence the plaintiff ought to recover, if standing alone might have been misleading, but it was supplemented by specific directions as to all the elements of damage that the plaintiff could recover, and therefore could not have been misunderstood as claimed by appellant. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513; Harmon v. Donohoe, 153 Mo. 263, 54 S. W. 453; Lamb v. City of Cedar Rapids, 108 Iowa, 629, 79 N. W. 366; Denver City Tramway Co. v. Martin, 44 Colo. 324, 98 Pac. 836.

[8] There was no error in stating the claim of the plaintiff in the language of the complaint. It was certainly proper to inform the jury as to the issues, and it is a mere question of rhetoric whether for this purpose the language of the pleadings or equivalent phraseology should be used.

There is no merit in the contention by appellant of the alleged failure of the court to define "affirmation of the issue" and "preponderance of evidence." As a matter of fact, they were sufficiently defined in the instructions given on behalf of defendant, and, if any further elucidation was desired, it should have been requested. O'Connor v. United Railroads, 168 Cal. 43, 141 Pac. 809.

The instructions as a whole were very fair and presented every legal phase of the case that was needed for the enlightenment of the jury. Every instruction requested by defendant was given, and in those given on behalf of plaintiff we find no prejudicial error.

The court properly refused to strike out the testimony on cross-examination of Dr. Klotz as to the value of the hospital services incurred by plaintiff. The motion was upon the ground that he was testifying as to what the usual charges were and not the actual charge in this case, but he had so testified on direct examination without objection, and the motion came too late. Moreover, the testimony of plaintiff as to that point was uncontradicted, and hence the doctor's testimony could not have prejudiced defendant.

Objection is made to the ruling of the court excluding a written report to the company made by William J. Knoll, a witness for defendant. The only purpose of the evidence was to show that the witness was at the station in No. 5. The witness had testified from memory with this report before

him that he was there at that time, and the report itself was not admissible as corroboration of his testimony. People v. Eliyea, 14 Cal. 145; Baum v. Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561; Wigmore on Evidence, § 763; Elliott on Evidence, § 872.

Two or three other assignments of error are made, but they are so inconsequential as to merit no specific attention.

From an examination of the whole record, we think it can be safely declared that defendant's rights were carefully protected, and that the proceedings were free from prejudicial error.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE'S WATER CO. v. BOROMEIO et al. (Civ. 1813.)

(District Court of Appeal, First District, California. Aug. 23, 1916. Rehearing Denied Sept. 22, 1916. Denied by Supreme Court Oct. 20, 1916.)

1. ADVERSE POSSESSION ⇨86—DESTRUCTION OF LEGAL RIGHT OF POSSESSION—STATUTES.

Under Code Civ. Proc. §§ 318, 322, 323, 325, providing when occupation under written instrument or judgment is deemed adverse, and what constitutes adverse possession under unwritten claim of title, the seisin in law which plaintiff had on bringing ejectment, and for four years immediately preceding, though a mere right of possession, could be destroyed only by the ripening of defendants' title by adverse possession prior to that time through their compliance with all legal requirements, including payment of taxes.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 504; Dec. Dig. ⇨86.]

2. TAXATION ⇨428—"LEVY" AND "ASSESSMENT"—NEGLECT OF AUDITOR.

The work of the county auditor, relative to the computation and entry in a separate money column in the assessment book of the respective sums to be paid as a tax on property, after making changes in such book, etc., required by Pol. Code, § 3731, is no part of the "levy" and "assessment" of taxes within Code Civ. Proc. § 325, which words apply to the acts of the supervisors in making the levy and the assessor in making the assessment, and failure of auditor to perform this duty for two years does not make the taxes illegal.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 736, 738-740, 767; Dec. Dig. ⇨428.]

For other definitions, see Words and Phrases, First and Second Series, Levy; Assessment.]

3. ADVERSE POSSESSION ⇨85—INVALIDITY OF LEVIES AND ASSESSMENTS—BURDEN OF PROOF.

In ejectment against parties claiming by adverse possession, where plaintiff introduced in evidence assessment rolls for certain years, showing that taxes were levied and assessed upon the land, the burden was then cast upon defendants to show that such levies and assessments were invalid to entitle them to the benefits of the sections of the Code relative to adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530-532; Dec. Dig. ⇨85.]

Appeal from Superior Court, Alameda county; Everett J. Brown, Judge.

Action of ejectment by the People's Water company against Harry Boromeo and others. from a judgment for plaintiff, defendants appeal. Judgment affirmed.

Milton Shepardson and L. A. Kottinger, of Oakland, for appellants. Tom Brady and Harry E. Leach, both of Oakland, for respondent.

PER CURIAM. This is an appeal from a judgment in an action of ejectment. The plaintiff alleges seisin or right of possession of the premises for the period of five years last past, and also alleges possession on the part of the defendants at the time of the commencement of the action. The answer of the defendants denies the plaintiff's possession and right of possession for the period claimed, and alleges that the defendants have been in the adverse possession of the premises for more than five years. The trial court found in favor of the plaintiff's seisin during the past five years, but also found that the defendants had been in the open, notorious, exclusive, and interrupted possession of the premises during the period from 1901 up to March 22, 1912, the date of the filing of the complaint. The court, however, found that the taxes had been duly levied and assessed upon said premises for the years 1903, 1904, 1907, 1909, and 1911, which had not been paid by the defendants or any of them or by any person on their behalf; and thereupon found as a conclusion of law that the plaintiff was entitled to the possession of the premises in question.

[1] The appellants contend that the finding of the court of the plaintiff's seisin within five years and of the defendants' adverse possession for the period of 12 years prior to the filing of the complaint are inconsistent, and also contends that the latter finding by the court is sufficient to bar the plaintiff's recovery under section 318 of the Code of Civil Procedure. There is no merit in either of these contentions. The seisin which the plaintiff had in the premises at the time of the commencement of the action, and for the period of four years immediately preceding that date, was merely the right of possession which could only be destroyed by the ripening of the defendants' title by adverse possession through their compliance with all of the legal requirements, including the payment of taxes necessary to produce that result; section 318 of the Code of Civil Procedure is to be read in connection with sections 322, 323, and 325 of the same Code, which set forth the legal prerequisites of the creation of such title by adverse possession as would defeat plaintiff's seisin in law.

The final and only substantial contention involved in this appeal arises out of the appellants' admission that the taxes levied and assessed upon the premises for the years here set forth were not paid by them, but

their insistence that said taxes were not legally assessed or levied, and hence that they were not bound to pay them. This contention is based upon a number of alleged irregularities in the levy and assessment of the taxes for said years, but in the closing brief of appellants these are finally refined down to the single contention that section 3731 of the Political Code was not complied with by the officials charged with the duty of making a proper and legal levy and assessment of the taxes to be charged against the premises in question.

[2] In this section of the Political Code the county auditor, after receiving from the state board of equalization a statement of whatever changes have been ordered by said board in the assessment book of the county, and after making the corresponding changes, if any, in said assessment book, must then compute and enter in a separate money column in the assessment book the respective sums to be paid as a tax on the property, and segregate and place in their proper columns of the book, the respective amounts due in installments. The record shows that this duty was not performed by the auditor in respect to the property and for the years in question; but the respondent insists, and we think correctly, that this work of the auditor as required by the foregoing section of the Political Code is no part of the levy and assessment of the taxes, but is merely a step in the process of their collection. The terms "levied" and "assessed" employed in section 325 of the Code of Civil Procedure in relation to taxes have been considered to have reference to the act of the board of supervisors in making the levy and of the assessor in making the assessment, and have no reference to the acts of the auditor in making the computations and carrying out the columns and segregating installments required by section 3731 of the Political Code. *Allen v. McKay*, 120 Cal. 332, 52 Pac. 828; *Waterhouse v. Clatsop*, 50 Or. 176, 91 Pac. 1083.

The argument of the appellants that every step in the process of making up the assessment roll is strictly *in limine juris* and must be complied with to the letter before a valid obligation to pay taxes is imposed upon the property owner, while no doubt true in its application to the proceeding leading up to a valid levy and assessment of the tax, has not been held to apply with the same degree of strictness to the mere ministerial acts of the clerk of the board of supervisors and of the auditor in making the affidavits and carrying out the computations after the taxes have been duly levied and assessed. *Steele v. San Luis Obispo*, 152 Cal. 785, 93 Pac. 1020.

[3] The plaintiff having introduced in evidence the assessment rolls for the years in question, showing that taxes were levied and assessed upon the property, the burden was then cast upon the defendants to show that these levies and assessments were not valid

in order to entitle them to claim the benefit of the sections of the Code relating to title by adverse possession. In our opinion they have not sustained this burden, and it follows that the trial court was not in error in its conclusion of law that the plaintiff was entitled to possession of the premises in dispute.

Judgment affirmed.

JENNINGS v. JORDAN. (Civ. 1775.)
(District Court of Appeal, First District, California. Aug. 31, 1916.)

1. BROKERS §61(1)—COMPENSATION—WHEN EARNED.

A broker employed to procure a binding agreement for the exchange of property has earned his commission when he has procured the agreement, though no exchange takes place because of defective title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 77, 78, 92; Dec. Dig. §61(1).]

2. BROKERS §60 — COMPENSATION — WHEN EARNED.

Defendant and a third person contracted for an exchange of their lands and each agreed to pay commissions to a broker. The broker had brought the parties together, and had proposed different lines of trade, one of which was finally agreed on. *Held*, that the provision for payment of commissions was not separable from the remainder of the contract, and where the third person failed to perform, the broker could not recover any commission from defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. §60.]

3. PROPERTY §9—TITLE—PRESUMPTIONS.

Under Code Civ. Proc. § 1963, subd. 32, declaring that a thing once proved to exist continues as long as is usual with things of that nature, proof that title to land was in one person less than a year before another should perform his contract to convey the same in exchange for other land, raises the presumption that the title so remained when performance was due under the contract, and the party asserting the contrary has the burden of proving it.

[Ed. Note.—For other cases, see Property, Dec. Dig. §9; Evidence, Cent. Dig. § 78.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Samuel Jennings against F. R. Jordan. From a judgment for defendant, plaintiff appeals. Affirmed.

Dunn, White & Aiken, of Oakland, for appellant. Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

KERRIGAN, J. This action was brought to recover \$1,825 alleged to have been earned by Hermann Eppinger, Jr., the assignor of the plaintiff, as a commission upon a proposed exchange of certain lands. Judgment went for defendant, and the plaintiff prosecutes this appeal therefrom, and from an order denying his motion for a new trial.

On the 2d day of May, 1914, John Fletcher and the defendant entered into a written contract, under the terms of which Fletcher was to convey to the defendant some 333

acres of land, to be chosen by the defendant from a certain described larger tract of 436 acres in Yuba county, in exchange for a certain apartment house in Alameda county belonging to the defendant, the respective parties agreeing to convey their properties free and clear of all incumbrances. The contract contains various covenants and conditions, and also a provision—the one principally involved in this case—reading as follows:

"The parties hereto further mutually covenant and agree that they will each pay to Herman Eppinger, Jr., a commission of eighteen hundred and twenty-five dollars."

The contract was executed in triplicate, and a copy of it was left with Eppinger. It appears that this contract was entered into as a result of the efforts of Eppinger, but was never consummated by an exchange of the properties; notwithstanding which it is the claim of the plaintiff that he is entitled, as the assignee of Eppinger, to recover from the defendant the sum of \$1,825 under the clause of the contract above set out.

The evidence shows that the defendant was ready, able, and willing to carry out his part of the contract, and that he made several ineffectual efforts to that end, and on July 3, 1914, made a formal tender of his deed, and thereupon deposited it in the Oakland Bank of Savings, with instructions to deliver it to Fletcher at any time within ten days upon receipt of Fletcher's deed to the land agreed by him to be conveyed. Fletcher was immediately notified of this deposit, and like notice was given to plaintiff's assignor; but Fletcher, within the time limited by the contract or by the aforesaid notice or at all, made no conveyance to the defendant of the lands agreed by him to be transferred, nor any tender of a deed; and the evidence upon the trial showed that as to part of the land he possessed no title, and that subsequently Fletcher, by his attorney in fact, and the defendant entered into an agreement rescinding the contract of May 2, 1914, and reciting that Fletcher was unable to carry out its terms. The question to be decided is whether under these circumstances the defendant is entitled by virtue of the provision of the contract already set forth to recover from the defendant the sum of \$1,825. The trial court held, and we think correctly, that he could not.

[1, 2] There can be no doubt that if A. employs B. to procure from C. a binding agreement to exchange his property for that of A., B. has performed his contract and earned his compensation when he has procured such agreement, notwithstanding the fact that C.'s title proves to be defective, and no exchange of properties takes place. *Jauman v. McCusick*, 166 Cal. 517, 137 Pac. 254; *Roche v. Smith*, 176 Mass. 595, 53 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345; 19 Cyc. 270. But that is not this case.

While the theory of the plaintiff, as stated in his brief, is that there was an employment of Eppinger, by the defendant and Fletcher, the evidence discloses no such employment, and Eppinger's rights must depend entirely upon the contract actually entered into between the two contracting parties. Eppinger's connection with the matter is testified to by himself as follows:

"* * * I brought Dr. Jordan and Mr. Fletcher together and introduced them, and proposed different lines of trade to each one of them * * * and we finally got down to a basis of trade. Dr. Jordan wanted to go to see the land a second time. I told him I would go and make a trip the second time until they drew up a contract what they were going to do if the land was satisfactory, and also owing me where I would come in, that I wanted my commission. On the strength of it this contract was drawn up before we went the second trip."

The plaintiff's right to recover, then, must depend entirely upon the terms of the contract entered into between Fletcher and Jordan, to which Eppinger was not a party. Up to that point, so far as the evidence discloses, there was no obligation upon them to pay him anything. The object of the contract actually entered into was to provide for an exchange of the properties of the parties thereto, each agreeing to convey title free of incumbrances, and the provision therefor the payment of a commission to Eppinger must be construed in its relation to the whole contract. Quite apart from the defence of Jordan, one of the parties to it, it is to him it was not his intention that the commission should be paid unless the exchange of lands was actually effected, such would be the natural and logical construction of the instrument. Unless and until the exchange was consummated the parties could receive no benefit from Eppinger's efforts; and, as we have seen, there was no obligation existing to pay Eppinger anything except that arising from the written agreement under consideration. The provision relating to such payment is not separate from the remainder of the contract; certainly as to Jordan, when the other party to it found himself unable to comply with its terms and consented to its cancellation (Jordan already having a right to rescind it) the whole contract fell, the provision relating to Eppinger's compensation with it. If the broker should suffer any loss from such construction it is one inherent in the form of the contract entered into and which was the only means he chose for his protection. It would certainly be a great hardship upon the defendant to require him to pay \$1,825 for services from which he had received no benefit and which were for the greater part voluntarily rendered.

The case of *Jauman v. McCusick*, supra, cited by appellant, though very similar to the case at bar, contains one important difference, which renders the case inapplicable as an authority in plaintiff's favor. There the undertaking to pay the brokers was in terms for the procuring of a certain agreement of exchange which they in fact procured. In that case the court said (page 521 of 166 Cal., page 255 of 137 Pac.):

"It is no doubt the general rule that a broker authorized to sell real estate is not entitled to recover the agreed commission unless he shows that he has, in pursuance of his employment, and within the time limited therein, found a purchaser ready and willing to purchase the property on the terms specified (citing cases). Here, however, the defendant's agreement was not simply to pay a commission to the brokers upon their making a sale or exchange of the property. Her agreement was to pay \$1,850 for their services in securing the particular agreement which was secured."

There is another material distinction to be noted between the two cases. In the one cited there was merely a mutual abandonment of the contract of exchange because of differences arising between the parties to it; whereas in the case at bar, in addition to the evidence of mutual rescission, it was shown that Fletcher was unable to perform, the title to part of the land, to wit, 50 acres, agreed by him to be conveyed being in another person.

[3] As to this 50 acres, the appellant asserts that there was no showing that Fletcher did not have a conveyance from the parties in whom title was shown to be, and consequently no showing that he was unable to comply with the contract. It is true that a man may take an option on land and agree to sell the land while the title is in another; but that doctrine has no application to the facts of this case, for here the defendant introduced in evidence a deed dated October 28, 1913, showing the title to the 50 acres in question to be in one Josephine Collins, and the prima facie presumption is that the title remained in that person at the time when performance was due from Fletcher, less than a year later. Section 1963, subd. 32, Code Civ. Proc.; *Hohenshell v. South Riverside L. & W. Co.*, 128 Cal. 627, 631, 61 Pac. 371. It was incumbent upon the defendant to overcome the presumption. *Dyar v. Stone*, 23 Cal. App. 143, 145, 137 Pac. 269. It follows that no attempt having been made to do so the presumption is that Josephine Collins still held the title to that property, and the finding therefore of the court that Fletcher was unable to convey the 50 acres must be upheld.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

SHELTON v. MICHAEL et al. (Civ. 1452.)

(District Court of Appeal, Third District, California. Aug. 30, 1916.)

1. CONTRACTS — 184 — CONSTRUCTION CONTRACTS — JOINT AND SEVERAL LIABILITY.

A contract for the employment of a contractor to construct a road recited that "the parties of the first part" agreed to pay the contractor a specified compensation for building the road. The names of the persons who were to sign the contract as parties of the first part were not stated in the body thereof, and were only referred to as "settlers" of a named school district. It was signed by nine settlers, all of whom would be benefited by the construction of the road. *Held* that, under Civ. Code, § 1659, providing that where all the parties uniting in a promise receive some benefit from the consideration, their promise is presumptively joint and several, the contract was joint and several.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 789; Dec. Dig. —184.]

2. TRIAL — 250 — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

It is not reversible error to refuse a requested instruction not applicable to the evidence, or presenting an erroneous theory of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. —250.]

3. TRIAL — 252(12) — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where in an action on a joint and several contract signed by the 9 defendants, a witness testified that it was supposed that there would be about 12 who would sign, and one of the defendants told plaintiff, the other party to the contract, that he would not sign unless it was understood that 12 persons should sign, a requested instruction that if the writing was delivered by the 9 who signed it for the purpose of having plaintiff secure 12 signatures thereto, and it was the intention of the parties that the contract was not to become binding until 12 signatures were secured, there was no delivery, and the verdict must be for defendants, was properly refused because too broad under the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. —252(12).]

4. APPEAL AND ERROR — 216(1) — QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT.

The court on appeal need not inquire whether an instruction directed to one of several defendants should have been given, where no such instruction was asked, but an instruction applicable to all the defendants was requested and properly refused, at least as to some of them, for want of evidence to justify it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. —216(1); Trial, Cent. Dig. § 660.]

5. CONTRACTS — 183 — CONSTRUCTION CONTRACTS — AMOUNT OF LIABILITY OF PARTIES.

Where in the body of a contract for the construction by plaintiff of a road for defendants, defendants without limitation promised to pay for the work at a specified rate, the figures \$25 after the signature of one of the defendants and the words "for the swamped road" after the signatures of two other defendants were too indefinite to limit the liability of the defendants to plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 780-785, 788; Dec. Dig. —183.]

6. APPEAL AND ERROR — 197(4) — QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT.

Where the complaint, in an action on a contract, pleaded a contract to build a road and the answer did not allege a contract different from the one stated in the complaint, and when the contract was offered in evidence counsel for defendant objected on the ground of variance, in that the complaint alleged a joint and several contract, while the contract offered was joint, but said nothing about a variance because of a provision in the contract for building bridges, and no motion was made for nonsuit on the ground of variance, and no instruction was requested to the effect that plaintiff could not recover because he had not built bridges, the question of variance between the contract pleaded and the contract proved, which called for the building of a road and bridges, would not be considered because not sufficiently raised in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. —197(4); Pleading, Cent. Dig. §§ 1438, 1439, 1441.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by George Shelton against D. B. Michael and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles Kasch, of Ukiah, for appellants. Robert Duncan, of Ukiah, for respondent.

ELLISON, Judge pro tem. The complaint in this action sets forth: That in October, 1914, the defendants (there are 9 of them) entered into a written contract with plaintiff, in and by which he agreed to construct a wagon road in Mendocino county (describing it), and for his compensation therefor the defendants agreed to pay him \$2 per rod for all that portion thereof that had not been swamped out, and \$1.50 per rod for all that had been swamped. That in pursuance of said contract he built 489 rods of road that had been swamped out, and 316¼ rods of road which had not been swamped out, and that the agreed price therefor was \$1,367.50. That he had been paid on account thereof \$300, and there is still due and unpaid to him for constructing said road the sum of \$1,067.50, for which amount judgment was asked. The answer is: First, a general denial of all the allegations of the complaint. It then affirmatively alleges that defendant, on October 17, 1914, entered into a contract with plaintiff to build the road for the prices per rod stated in the complaint, and this is followed by:

"That it was expressly understood and agreed by and between the plaintiff and these defendants that before said contract should be made effective and binding on these defendants, or any of them, plaintiff should procure the signatures to said contract of A. E. Arens, Mrs. Ollie Sparks, and Mike Lynch, and it was an express condition and part of the consideration for the signatures of these defendants that plaintiff should secure 12 signatures to said agreement before these defendants, or any of them, should be bound by their said signatures; that it was never intended by plaintiff and these defendants that said contract should be made until at least 12 signatures were appended thereto."

It also alleged that the defendant did not construct the road in a good and workmanlike manner, and did not grade it seven feet wide, as provided in the contract. That large trees were left in the road, making it impossible for travel. Trial was had with a jury, which found a verdict in favor of the plaintiff for the amount sued for. This was followed by a judgment, from which this appeal was taken, as well as from an order denying a motion for a new trial.

No point is made on this appeal that defendants sustained the defense alleged of improper work being done, or that the roadbed was not graded according to contract. The principal point relied upon for a reversal is that defendants, by their evidence, sustained the defense set forth in their answer to the effect that the contract was not to be considered executed until at least 12 settlers had signed it, and that it was delivered to the plaintiff upon condition that it was not to be effective until such number of signatures had been obtained, and that the court erred in not giving certain instructions requested by them applicable to such defense.

For a proper understanding of counsel's position, and the ruling of the court in refusing to instruct as requested, it becomes necessary to consider the legal effect of the contract sued upon and the testimony bearing on its alleged execution and the instructions requested.

[1] 1. The contract appears in full in the record, and upon a reading of it, it is noticed: First, that the names of the persons who were to sign it as parties of the first part were not stated in the body thereof. They are only referred to in the first paragraph as "settlers" of a certain named school district Mendocino county. It contains no provision that it is not to become a binding contract until signed by at least twelve settlers. On this point it is silent. It creates a joint and several liability:

The parties of the first part agree to pay George Shelton, party of the second part, \$2.00 per rod for building the road," etc.

The record shows that there were some 12 more persons owning land in Mendocino county, upon which was timber suitable for making ties and tan bark. There was no road leading from any public highway to these lands, and no way to get the ties and bark out. All these settlers and landowners were interested in getting a road to these lands. Witness George Shelton testified:

"I know all the defendants. They own redwood lands in this county and some tanbark."

Some of these settlers met at the store of McFaul to take steps to get the road connected to these lands. All of the 9 persons who signed the contract were settlers, and would be benefited by the construction of the road. Section 1659 of the Civil Code provides:

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

From the facts disclosed by the record, considered in the light of this code provision, it must be held that the contract is joint and several.

[2-4] 2. The testimony bearing upon the execution of the contract may be summarized as follows: C. A. McFaul, a witness for the defendants, testified that the contract was drawn in his office, and first given to Mr. Michael, one of the defendants, to get signatures. He was to get particular signatures in a particular part of the county. Mrs. Olive Sparks was expected to sign. Mike Lynch was supposed to sign. After Mr. Michael succeeded in getting some signatures, the contract was turned over to Mr. Shelton. He was to get signers and see Mike Lynch. "It was supposed there should be 12 at least who would sign." The defendant, D. B. Michael, testified:

"I had an understanding with Mr. Shelton relative to getting signatures to it. We had a contract drawn up, and I signed it first, and was to take it and get all the signatures I could in my neighborhood, and he was to take it and get the rest down the coast. I secured the signatures I agreed to get. Mr. Shelton and I had a conversation relative to the number of people who should sign the contract before it would become binding. There were supposed to be 12 signatures. I said to Mr. Shelton that if we could not get over one half dozen, or something like that, I didn't want it, because I could not afford to pay that much for the road. After I procured the signatures I agreed to procure, I sent the contract to Mr. Shelton."

The defendant Ben Bond testified:

"I told him (plaintiff) that I would not put my name to the contract unless it was understood that all of 12 signers should be on the contract. That was agreeable to Mr. Shelton. Mr. Michael had the contract when I signed it, and Mr. Shelton was not present. There are 12 settlers in that country who would be benefited by the road, and I thought they probably all would sign it."

The above is the substance of all the evidence bearing upon this feature of the case.

3. Several instructions were asked by the defendants as to this phase of the case, but they were all refused; and this refusal is assigned as reversible error. The instructions were all similar to instruction 8, and a quotation of it will be sufficient. It is as follows:

"Gentlemen, a delivery on condition is not a complete delivery until the condition is fulfilled. If you find in this case that the writing in evidence was delivered by those who signed it for the purpose of having Mr. Shelton secure 12 signatures thereto, and that it was the intention of the parties that it was not to become binding until 12 signatures were secured, then I charge you, there was no delivery, and you must find for the defendants."

It is not reversible error to refuse a requested instruction that is not applicable to the evidence, or that presents an erroneous theory of the case.

Referring back to the testimony, it will be observed that the witness McFaul is not one

of the defendants. His testimony is not to the effect that there would be no contract unless so many as 12 signed it. His language is indefinite. "It was supposed there would be about 12 who would sign." The defendant Michael used no language as a witness from which the conclusion can be drawn that he signed it upon the condition that it was to be inoperative unless 12 signatures were obtained to it. The defendant Bond used language more definite and certain. No one of the other 7 defendants gave any testimony of any understanding or agreement as to the number of signatures it was expected there would be to the contract, or that any of them ever heard of the matter before the trial.

The instruction requested embraced all of the defendants. It is apparent from the evidence above referred to that the instruction was not applicable to it and was too broad. There was no evidence (as the instruction assumed) that any one of 8 of the defendants signed the paper for the purpose of having Mr. Shelton secure 12 signatures to it, and no evidence that it was the intention of said eight defendants, or any of them, that the contract was not to become binding until 12 had signed it. These 8 defendants signed a joint and several contract without any limitation or condition and it would have been error for the court to have instructed the jury as to them and their liability in the language of the refused instruction. Whether such an instruction directed to the defendant Bond alone should have been given, we need not inquire, as no such instruction was asked.

In the notes to *Benton Company v. Boddicker*, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310, is found quite a full collection of decisions upon the signing of contracts upon an understanding that they were not to be operative until signed by others. We make the following quotation therefrom:

"One who signs a joint and several bond cannot excuse himself from liability upon the ground that it appears on the face of the bond that it was intended to be signed by others who did not sign, unless he declared at the time that he would not be bound unless such signatures were obtained."

"The requirement that others shall sign must amount to a condition that the bond shall not take effect without its performance, as distinguished from a mere expectation that others shall sign."

See, also, *City of Los Angeles v. Mellus*, 59 Cal. 444.

4. There was no error in admitting the contract sued upon in evidence. The alleged error is predicated upon the assumption that the complaint alleges a joint and several contract, and that the contract introduced was not such. The complaint nowhere attempts to designate the contract as either joint or several or joint and several. We have already declared that, in our opinion, the contract was joint and several.

[5] It is claimed that as the figures "\$25" appear after the signature of the defendant Stevens and the words "for the swamped road" after the signatures of defendants Bond and Moller, the contract shows they had only assumed a limited liability, Stevens only for the sum of \$25 and the other two named defendants only for money to become due on the part of the road designated as "swamped." In the body of the contract, those defendants, without limitation, promised to pay for the construction of the road, and the words following their signatures are too indefinite to limit their liability. As counsel for respondent suggests, they may have been intended as mere memoranda to be used in some settlement to be made between the defendants.

The case is readily distinguishable from *Moss v. Willson*, 40 Cal. 162, relied upon by appellant. In that case the contract provided:

"The undersigned settlers * * * will pay the sum annexed to their names."

No such provision is found in this contract. In that case it does not appear that the signers had a joint interest in the act to be accomplished. The record in this case abundantly shows that all the signers were decidedly interested in having the road constructed.

[6] In the brief of appellant, it is stated:

"There is a variance in that a different contract was proved than the one alleged. The plaintiff pleaded a contract to build a road, and proved a contract to build a road and bridges. The plaintiff testified that he did not build any bridges, and that it was understood at the time that he was not to."

This is followed by the statement that the plaintiff did not prove performance of the contract he introduced in evidence.

No point is made in counsel's brief that the court erred in admitting proof that it was understood that plaintiff was not to build the bridges. He could not well make such claim, in view of the fact that most of the evidence along this line was brought out by him upon cross-examination of witnesses. Waiving the question whether the contract as to building road and as to building bridges is severable, we think appellant did not raise the point now contended for with sufficient seriousness in the trial court to permit him to ask for a decision upon it here. The answer set up two separate defenses, but in neither did it allege the contract was different from the one stated in the complaint. When the contract was offered in evidence, counsel objected on the ground of variance, in that the complaint alleged a joint and several contract, and the contract offered was joint, but said nothing about a variance because of the provision for building bridges. No motion was made for a nonsuit upon the ground of variance. No instruction was requested to the effect that plaintiff could not recover because he had not built the bridges. Neither court nor counsel

were in any way apprised that this point was relied upon or would be. If timely notice had been given thereof in some of the ways suggested, perhaps plaintiff would have asked leave to amend his complaint to show why he had not built the bridges. An examination of the record fails to disclose that the trial court ruled upon the point, or was asked to except by objections to two questions near the end of the trial, and counsel in his brief does not assign these rulings as error, and could not well do so, in view of the condition of the record at the time the objections were made. Besides, the evidence that was admitted without objection makes it clear that it was never intended the plaintiff should build the bridges, or if such intent existed at the time the contract was written, it was waived and abandoned by mutual consent. The plaintiff testified:

"I did not build the bridges. I had nothing to do with the bridges. It was the understanding that Michael was to put them in. All the parties said I was not to build the bridges. At the time the contract was signed, it was understood I was not to build the bridges."

The witness McFaul testified:

"Michael said he would build them [the bridges] the same day the contract was drawn up."

The defendant Michael testified:

"At the time the contract was drawn, I said I should have some arrangement made about these bridges, and said at the time I would build the bridges for \$300 if no one else wants. I heard Mr. Shelton say that he would have anything to do with the bridges. I've heard these others say they have heard me say so."

It was not error to admit evidence to prove that money was not deposited in bank as provided in the contract.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

BOARD OF COUNTY COM'RS OF GREELEY COUNTY v. DAVIS, Auditor of State.
(No. 21056.)

Supreme Court of Kansas. Nov. 1, 1916.)

(Syllabus by the Court.)

STATUTES \S 225½—CONSTRUCTION—SPECIAL AND GENERAL STATUTES.

Where a series of statutes dealing with a particular subject form a complete and independent method for guidance to official action, procedure therein prescribed must be substantially followed, and the failure to follow that procedure cannot be remedied by invoking general statutes which do not pertain to that particular subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 305; Dec. Dig. \S 225½.]

SCHOOLS AND SCHOOL DISTRICTS \S 97(4)—BOND ISSUE—COUNTY COMMISSIONERS—POWERS—STATUTORY PROVISIONS.

The authority of a board of county commissioners to call an election to vote bonds for a county high school in a county of less than 6,000 population is the statute (Gen. St. 1909, \S 784-7789) which deals with that particular act, and not the general statute (section

2078), conferring power on the county board to determine, at their discretion, the necessity for permanent county buildings and to call an election to vote bonds therefor.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 226; Dec. Dig. \S 97(4).]

3. SCHOOLS AND SCHOOL DISTRICTS \S 97(4)—BOND ISSUE—COUNTY COMMISSIONERS—POWERS—STATUTORY PROVISIONS.

Where a statute (Gen. St. 1909, \S 7802, 7803) provides that upon presentation of a petition of 25 per cent. of the legal voters of a county asking for an election on a proposed bond issue to build a county high school it shall become the duty of the board of county commissioners to call such election, the presentation of such petition is a condition precedent to lawful action by the board; and an election held on call of the county board without such petition is void, and the registration of bonds thus irregularly voted for cannot be compelled by a writ of mandamus.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 226; Dec. Dig. \S 97(4).]

Original application by the Board of County Commissioners of Greeley County, for mandamus to W. E. Davis, Auditor of State. Writ denied.

W. M. Glenn, of Tribune, for plaintiff.
S. M. Brewster, Atty. Gen., for defendant.

DAWSON, J. The board of county commissioners of Greeley county applies to this court for a writ of mandamus to require the state auditor to register a bond issue for \$10,000 to pay for a county high school building, recently erected in Greeley county, pursuant to a special election called by the plaintiff board on May 15, 1916, and which was held on August 1, 1916. Greeley county for some years past has maintained a county high school under the acts of 1897 (chapter 180) and 1903 (chapter 433), authorizing counties of less than 6,000 population to establish and maintain county high schools. The respondent auditor declines to register the bonds; and counsel for both parties have signed and filed the following stipulation:

"It is hereby stipulated and agreed by and between the parties hereto that the sole and only questions involved in the above-entitled action are as follows:

"First. Whether or not the board of county commissioners of Greeley county have authority under the provisions of sections 2078 to 2083 of the General Statutes of Kansas of 1909, to issue bonds for the purpose of erecting a county high school building for the use of a county high school legally established under the provisions of chapter 180 of the Laws of 1897 as amended by chapter 433 of the Laws of 1903 and sections 7784 to 7789, inclusive, of the General Statutes of Kansas of 1909.

"Second. It is further stipulated and agreed that the transcript leading up to the issuance of the bonds offered for registration shows a compliance with sections 7802 to 7806 of the General Statutes of Kansas of 1909, with the exception of the fact that no petition was ever presented to the board of county commissioners, as provided in section 7803, and that the question was submitted at a special election held on the first day of August, 1916, instead of the general election in November, 1916."

[1-3] Section 2078 of the General Statutes of 1909, under which the plaintiff board proceeded to act, provides:

"The board of county commissioners of any county may determine, in their discretion, when the erection of any permanent building or buildings for the use of the county is necessary, and they shall also determine the cost of the erection thereof, and the same shall be entered on the journal, but no tax shall be levied, bonds issued or other obligations incurred on account of the erection of such building or buildings until after the question has been submitted to the electors of said county at some general election or at a special election held for that purpose," etc.

It may well be doubted whether even the broad language of this statute would warrant us in saying that "any permanent building or buildings for the use of the county" would include a county high school building, if this statute stood alone and was not affected by other specific enactments pertaining to county high school buildings. We have been so accustomed in this state for half a century to consider the term "county buildings" to mean the courthouse, the poorhouse, and the jail that an illustration of any other sort of county building within the meaning of this statute does not readily suggest itself. But this statute does not stand alone. There is another statute, and that is one which deals with the specific subject of county high school buildings, particularly in counties like Greeley. The county high school in Greeley county was established by virtue of chapter 180 of the Laws of 1897, which provided that in sparsely settled counties (having less than 2,500 population) the county commissioners might enter into arrangements with the school district at the county seat for establishment of a county high school. As population in these sparsely settled counties increased, this act of 1897 was amended to provide that any county of less than 6,000 population could establish a county high school in connection with the district school at the county seat. Laws 1903, c. 433; Gen. Stat. 1909, §§ 7784-7789. By means of these statutes, county high schools became common and familiar institutions, but as population continued to increase and the county seat district schools came to need all their school accommodations for their own district pupils, it was considered by the Legislature that more adequate provision should be made for housing the pupils of these county high schools. To this end the Legislature in 1907 enacted:

"Section 1. That any county which has established a county high school under the provisions of chapter 180, Session Laws of 1897, as amended by chapter 433, Session Laws of 1903, is hereby authorized and empowered to issue and sell bonds of the county for the purpose of erecting, furnishing and equipping a building for the use of the county high school of the county; provided, that no bonds shall be issued as provided for in this section until the same has been submitted to the electors of the county at a general election, or at a special election called for that purpose, and a majority of the voters voting upon the proposition shall have voted in favor of the same.

"Sec. 2. When a petition signed by twenty-

five per cent. of the legal voters of the county, as shown by the latest official poll of the county, shall have been presented to the board of county commissioners of the county, asking that the question of issue of the bonds for the purpose named in this act be submitted to a vote of the people, it shall become the duty and is hereby made the duty of the board of county commissioners to make provisions to submit the question to a vote of the people: Provided, that if a general election is to be held within six months after the receipt of the petition, the board of county commissioners shall submit the question at the next general election; otherwise, the board of county commissioners shall call a special election for this purpose, by giving not less than thirty days' notice by publication in not less than four issues of a newspaper of general circulation in the county."

Laws 1907, c. 332, §§ 1, 2; Gen. Stat. 1909, §§ 7802, 7803.

It will be observed that the acts of 1897, 1903, and 1907 form a complete and independent program for the establishment of county high schools and for housing high school pupils in counties of less than 6,000 population. These acts need no aid from the general statute (section 2078 et seq.), authorizing boards of county commissioners to determine, at their discretion, the necessity for permanent county buildings and to call a bond election to provide funds therefor. And since the high school acts provide their own procedure for setting in motion the processes by which a county high school building may be procured, such processes are exclusive. One of these was the presentation of a petition to the board of county commissioners, "signed by twenty-five per cent. of the legal voters of the county." No such petition was submitted, consequently the statutory basis on which the county board called the election was wanting. The election was therefore called without lawful authority, and its result is void.

We have sought diligently, but without avail, to escape this conclusion. The necessity of a petition, and that it must sufficiently conform to statutory requirements, has often been held to be a condition precedent to the validity of an election if the statute provided that the authority or duty to call the election depended upon the presentation of a petition to invoke the election machinery. *State ex rel. v. Com'r's of Phillips County*, 26 Kan. 419; *State ex rel. v. Eggleston*, 34 Kan. 714, 10 Pac. 3; *State ex rel. v. Stock*, 38 Kan. 154, 16 Pac. 106; *State ex rel. v. Com'r's of Rawlins Co.*, 44 Kan. 538, 24 Pac. 955.

In *Com'r's of Wyandotte Co. v. Barker*, 45 Kan. 699, 703, 26 Pac. 591, 593, where the county board had assumed to establish a public road and to levy special assessments against the property benefited thereby, the statute provided that whenever a majority of the resident landholders should petition the county board, it was the duty of the board to proceed, etc. This court said:

"It would seem, on principle, that the requirement of this statute that a majority of the resident landholders within the limit must sign the petition for improvement is not only imperative and must be always complied with, but the

power of the board to order the improvement cannot be exercised unless the petition contains the names of that majority. The best reason for this is, because the statute says so, and if you depart from the plain letter of the act, and say that 5 landholders out of 21 can compel action by the board, then any number less than majority may do so."

In 15 Cyc. 319, it is said:

"Statutes of this description usually make the presentation of a petition to some local authority an initial step for holding such election; and, here a statute provides for the calling of a special local election to vote upon a proposition to determine some question, such as a subscription for corporate stock, an issue of bonds, the leasing and sale of spirituous liquors, whether a stock shall run at large, or the like, upon the presentation of a petition to a designated officer or authority, the presentation of such petition is a condition precedent to holding an election; and it must be signed by the number of qualified persons prescribed by the statute, otherwise the election will be void."

How disastrous is the failure to comply strictly with necessary conditions precedent to official action may be noted in *State v. Bentley*, 80 Kan. 227, 101 Pac. 1073, and cases there cited.

Another infirmity in the proceedings leading up to this proposed issue of bonds is urged. The action of the board of county commissioners calling the election was taken May 16, 1916. The statute provides that a general election is to be held within six months of the time when the board receives a petition, the proposition to issue the bonds shall be submitted at the general election. The general election occurred on November 7, 1916, and consequently within six months. The bond election was held in connection with the regular primary election, August 1, 1916. If we could surmount the much graver difficulty with this bond issue already discussed, we might be disposed to hold that the purpose of this provision of the statute was in the interest of economy, and that the electorate were not to be bothered with a special bond election if they were to meet within six months in the ordinary exercise and discharge of their suffrage privileges and duties, and that the regular biennial primary would answer the purpose of the statute in that regard. But, the want of the statutory petition to authorize the holding of the election being fatal to all the subsequent proceedings, this latter point need be positively decided.

We realize the unfortunate predicament in which this result leaves the parties interested, but neither the auditor nor this court can remedy it. It can do no harm, however, if it may help to cite *Lewis v. County of Gibson*, 12 Kan. 186, 220, and the effect of the act of February 25, 1868 (Gen. Stat. 1868, § 2). See, also, *Bank v. Reilly*, 97 Kan. 827, syl. par. 8, 156 Pac. 747; *State ex v. Deming*, 98 Kan. 420, 423, 426, 158 Pac. 34.

The writ is denied. All the Justices con-

TOOMEY v. CASEY et al.

(Supreme Court of Oregon. Oct. 24, 1916.)

1. EVIDENCE \S 186(2)—SECONDARY EVIDENCE—ADMISSIBILITY.

The contents of a written instrument which the opposite party did not produce on demand cannot be established by testimony as to the witnesses' conclusion as to its legal effect, but its language must be given so that the court may determine its legal effect.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 662, 663; Dec. Dig. \S 186(2).]

2. EVIDENCE \S 185(9)—DOCUMENTARY EVIDENCE—SECONDARY EVIDENCE.

L. O. L. \S 712, declares that there shall be no evidence of the contents of a writing other than the writing itself, save when the original is in possession of the party against whom the evidence is offered, and he withholds it after demand, etc., while section 782 declares that the original writing shall be produced and proved unless it be in the custody of the adverse party and he fails to produce it after reasonable notice, in which case evidence of the contents is admissible. Held that, in an action against his lessees, whom plaintiff claimed had assigned their lease to a third person, a notice on the lessees to produce the assignment does not warrant the introduction of secondary evidence, for it must be presumed that the assignment would be in the possession of the assignee.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 655; Dec. Dig. \S 185(9).]

3. LANDLORD AND TENANT \S 85—LESSEES—ASSIGNEES.

Under L. O. L. \S 705, declaring that the rights of a party cannot be prejudiced by the declaration, act, or omission of another except by virtue of a particular relation between them, lessees cannot be held to have exercised an option to extend a lease by reason of the acts of their alleged assignee, where the assignment was not established.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. \S 277; Dec. Dig. \S 85.]

4. LANDLORD AND TENANT \S 85—SUBLETTING—EFFECT.

Where lessees sublet premises under an instrument giving the sublessee the right to hold over for an extended period, in case the lessees should exercise their option to extend the lease, the sublessee cannot exercise the option and bind the lessees for the period of the extension.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. \S 277; Dec. Dig. \S 85.]

Department 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by J. M. Toomey against J. D. Casey and another. There was a judgment for plaintiff, and defendants appeal. Reversed and remanded.

This is a second appeal of this case, a judgment of the circuit court having been reversed by an opinion written by Mr. Justice Bean and reported in 72 Or. 290, 142 Pac. 621. It is admitted that at the dates of the transactions involved herein the plaintiff was the owner of an undivided half and the two defendants owned the other undivided half of a 25-year leasehold interest in some real property in Portland, upon which was situated a three-story and basement building known as the Barr Hotel. It is agreed that

on May 26, 1911, the plaintiff leased to his co-tenants his interest in the premises "to have and to hold the same to the parties of the second part for the term of six months from the first day of June, 1911, with the option and privilege upon the parties of the second part for forty-two months beginning with the expiration of the said six months' period" at the monthly rental of \$600 during said 6 months and at the same rate during the period of 42 months—

"provided the said parties of the second part shall elect to exercise such option and privilege hereby granted and keep, occupy and possess the same during the said forty-two months."

The complaint alleges:

"That in pursuance of said lease the defendants entered into possession of said premises and ever since have been and still are in possession thereof; that at the termination of the period of 6 months mentioned in said lease the defendants exercised the option and privilege given to them therein and renewed said lease for the remaining period of 42 months therein specified."

The plaintiff states what he claims has been paid by the defendants on account of the rent and, after deducting what he avers has accrued for the use of the premises under the contract, demands judgment for \$10,031.42, with interest and costs. The answer traverses the entire complaint except as otherwise stated. After setting out the tenancy in common existing between the plaintiff and themselves, the defendants claim to have overpaid him for the 6-month term named in the lease, and aver that prior to the expiration of that period they informed him that they would not exercise the privilege, or option, given to them in the lease to continue the same for the 42 months mentioned therein, or for any time after December 1, 1911. They also say they have never since that day occupied the premises under the terms or provisions of the lease between the parties, but that since the expiration of the 6-month term they have been in possession as tenants in common with the plaintiff, and at his request have managed the property to the best interests of all parties. They state an account of the income and expenses in that behalf. They declare also that on May 18, 1912, all the plaintiff's interest was sold under an execution against him, and deduce therefrom the conclusion that he is not entitled to any income from the premises since that date. The tenancy in common and the execution of the lease are admitted by the reply, but otherwise the allegations of the answer are materially traversed. The circuit court, hearing the case without a jury, found, among other things, that on or about November 1, 1911, and before the expiration of the 6-month period, the defendants each informed the plaintiff that they would not exercise the option given in the lease to renew the same, and would not hold his half interest under the terms of the demise after the end of the six months. There was also a finding to the effect that at this juncture the parties entered into negotiations for a new agreement

covering the 42 months mentioned, whereby the defendants should make certain improvements in the property, advancing the money therefor, plaintiff's part of which was to be deducted from the rentals coming to him, and that a new lease at \$500 per month for plaintiff's half interest should be executed, all on condition that the defendants furnish him satisfactory security for the payment of arrears of rent and what should accrue under the proposed arrangement, but that the condition as to the security was never met by the defendants, and the new lease was never executed. The court then made the following finding:

"That the defendants upon the expiration of the said 6-month period mentioned in said lease, elected to exercise, and did exercise, the option and privilege contained in said lease, to extend the said lease for a further period of 42 months, and did keep and occupy, and possess the said premises after the expiration of said 6-month period, and ever since, and during all the times involved in this action, have occupied and possessed the plaintiff's interest, in said premises described in said lease, under and by virtue of the same, and the extension thereof aforesaid."

From a judgment for the plaintiff the defendants appeal.

Leroy Lomax, of Portland, for appellants.
B. G. Skulason, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] On the former appeal the plaintiff based his contention upon the acts and declarations of Leroy Lomax to bind the defendants; but in default of proof that they had authorized him to act as their agent in the matter relied upon by the plaintiff, the decision of the circuit court was reversed in a well-written opinion by Mr. Justice Bean. The record at present before us reveals that at the second trial the plaintiff abandoned the theory of agency, and now counts upon showing that the defendants assigned to Lomax their interest in the lease, that he, as such assignee, held over after the expiration of the term, and that this amounts to an election on their behalf to continue the lease for the additional period of 42 months. The whole controversy turns upon whether there is any evidence to support finding No. 10 quoted above. As before, the plaintiff insists upon holding the defendants by virtue of the conduct of Lomax, and, in lieu of showing that the latter was the agent of the defendants, shifts his ground and undertakes to prove an assignment by them of their lease so as to make the actions of the assignee after the expiration of the term obligatory upon the tenants of the plaintiff. It seems that plaintiff served a notice on the defendants to produce the alleged assignment from them to Lomax of their interest under the lease, claiming that there was an instrument in writing of that purport. At the hearing, when the defendants were called upon to comply with the notice, they answered substantially that they had no such document, and that no such instrument had ever exist-

ed. They did, however, produce and put in evidence a lease of the premises dated May 27, 1911, from themselves to Lomax and one Taylor, having appended thereto a writing signed by the latter June 30, 1911, selling, assigning, and transferring all his interest therein to Lomax. The plaintiff then called witnesses, himself included, for the purpose not only of proving the existence of the alleged writing, but also the contents thereof. The utmost that any of them could say was that there was an assignment indorsed upon or attached to one of the copies of the lease, upon which plaintiff counts, transferring the interest of the defendants to Lomax. No one pretends to give the date or the language of the instrument. The most that can be said of the testimony on this point is that the witnesses gave their conclusion as to the legal effect of the document. What is required in instances of this sort is that the contents or language of the instrument shall be established, leaving to the court the duty, as in all such cases, of declaring what effect in law may be attributed to the document in question.

[2] Moreover, there was no showing that the assignment mentioned in the notice to be produced had ever been in the custody or control of the defendants after its execution, if, indeed, it was executed. Naturally it would be in possession of the assignee, who would be subject to a subpoena duces tecum for the purpose of getting it in evidence. Our Code has laid down these rules on that subject:

"There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases: (1) When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in section 782; (2) when the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default." L. O. L. § 712.

Section 782, L. O. L., referred to in the section just quoted, reads thus:

"The original writing shall be produced and proved except as provided in section 712. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss; but the notice to produce it is not necessary where the writing itself is a notice, or where it has been wrongfully obtained or withheld by the adverse party."

A litigant cannot evade these provisions of the statute by a mere notice to produce, unless there is something to be produced, which is in the custody of the adverse party. The Oregon precedents on this subject are collated by Mr. Justice McNary in *Jones v. Teller*, 65 Or. 328, 333, 133 Pac. 354. Mr. Justice Ramsey wrote to the same effect in *Parker v. Smith Lumber Co.*, 70 Or. 41, 138 Pac. 1061. There was no valid reason for showing the contents of the instrument by parol, even if the oral testimony had dis-

closed them. For these reasons, the alleged assignment and its after effect upon the defendants must be laid out of the case.

[3] This leads to the conclusion that there was an utter failure of proof that the defendants put Lomax into their place by conveying to him their interest in the lease. His actions, therefore, are devoid of the sanction of an assignment whereby they would affect the defendants and impute to them an election to extend the term of the lease. It is said in section 705, L. O. L., that:

"The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them."

The plaintiff has endeavored to establish this particular relation between the defendants and Lomax by charging that there was a writing, conveying to the latter the interest of the defendants in the lease they held from the plaintiff. In default of the production of the document he essayed to give evidence of its contents, but only went so far as to disclose the version given by the witnesses of its legal effect. The quest was not for the opinion of the witnesses concerning the construction to be given to the paper. They were called upon for its language. Characterizing it as an "assignment" falls short of proof of the contents of the instrument, and is not sufficient to establish it. Under these circumstances finding No. 10 is rather a conclusion of law than a finding of fact. With the plaintiff's failure to establish the contents of the transfer from the defendants to Lomax, if any there was, falls his effort to charge the defendants with his acts and conduct. In the absence of further showing, his doings amount to no more than those of an interloper or trespasser.

[4] Besides the original lease from the plaintiff to the defendants there is in evidence a lease from the latter as parties of the first part, to Lomax and Taylor, as parties of the second part, for the premises in question, the habendum clause of which reads thus:

"To have and to hold the same unto the parties of the second part for the term of six months from the first day of June, 1911, with the option and privilege upon the parties of the second part for forty-two months beginning with the expiration of the said six months' period, provided always that the said parties of the first part [defendants here] elect to keep and hold said building for the said forty-two month period under their lease for a half interest from one J. M. Toomey."

Without dispute the evidence shows that Taylor assigned his interest to his cotenant, Lomax. This admitted lease describes the relationship existing between the defendants and Lomax. It clearly shows that his right to continue in the premises depended entirely upon their election to renew the lease. The court expressly found that they had declined to do this. Their refusal to continue the lease after the expiration of the 6 months

of itself cut off all authority or right of Lomax to bind them by remaining in possession himself if he did so. His tenancy could not rise higher than its source, nor be continued in contradiction of the terms of the instrument under which he held. In considering the undisputed documentary evidence before him the learned circuit judge drew from the actions of Lomax an erroneous conclusion embodied in finding No. 10, which, as already stated, is really one of law rather than of fact. The conduct of the defendants was referable to their character as tenants in common as stated by Mr. Justice Bean in the former opinion, which is the law of the case. The burden was upon the plaintiff to establish a different relationship. This he did not succeed in doing, and there is no evidence legally to support the finding of fact No. 10, already mentioned. The judgment is reversed, and the cause remanded for further proceedings.

MOORE, C. J., and BEAN and HARRIS, J.J., concur.

BOYD et al. v. LAMBERT et al. (No. 5913.)
(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. INJUNCTION \S 148(1)—BOND—CONSTRUCTION—"DEFENDANT."

In an action upon an undertaking, given under section 4132, Stat. 1893, as amended by Laws 1905, p. 319 (section 4877, Rev. Laws 1910) to make effective a temporary restraining order, running to "the defendants," instead of, as required by said section of the statute, to secure the parties injured, the term "defendants" include not only the nominal defendants, but all other parties against whom injunctive relief is asked and obtained to their direct and immediate or necessary and natural injury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. $\S\S$ 323-330, 333; Dec. Dig. \S 148(1).]

For other definitions, see Words and Phrases, First and Second Series, Defendant.]

2. INJUNCTION \S 148(1)—BOND—CONSTRUCTION—PARTIES—"AGENTS, EMPLOYEES, OR PERSONS WORKING BY, THROUGH, OR UNDER THEM."

Where, in an action upon an undertaking, given under section 4132, Stat. 1893, as amended by Laws 1905, p. 319 (section 4877, Rev. Laws 1910) to make effective a temporary restraining order, the prayer of the petition and the order made is against certain specifically named defendants, their agents, employees, or any person or persons whomsoever acting or working by, through, or under them, and where such order is served upon and obeyed by independent contractors, who are not specifically named as defendants, but who are engaged in the work sought to be enjoined, this court, following the construction of the parties themselves thus placed upon such order, will hold that such independent contractors are, within the meaning of the terms of such order, parties against whom injunctive relief is asked and obtained.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. $\S\S$ 323-330, 333; Dec. Dig. \S 148(1).]

Error from County Court, Nowata County; Wm. F. Gilluly, Judge.

Action by W. J. Lambert and another, doing business under the firm name and style of Lambert & Birdsell, against F. S. Boyd and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Tillotson & Elliott and A. C. Hough, all of Nowata, for plaintiffs in error. Bert Van Leuven, of Nowata, for defendants in error.

THACKER, J. The plaintiffs in error will be designated as defendants, except that James Boyd, who departed this life after the trial below, instead of his administrator, who is one of the plaintiffs in error, is included in this designation, and the defendants in error will be designated as plaintiffs, in accord with the respective positions of these parties in the trial court.

This is an action commenced before a justice of the peace and prosecuted, on defendant's appeal, in the county court of Nowata county by the plaintiffs, to recover of the defendants damages to the amount of \$145 upon an undertaking given under section 4132, Statutes 1893, as amended by Laws 1905, p. 319 (section 4877, Rev. Laws 1910), for an injunction, upon which undertaking the said James Boyd was principal and his codefendants his sureties. This section of the statute reads as follows:

"Unless otherwise provided by special statute, no injunction shall operate until the party obtaining the same shall give an undertaking with sufficient surety, to be approved by the clerk of the court granting such injunction in an amount to be fixed by the court or judge allowing the same, to secure the party injured the damages he may sustain, including reasonable attorney's fees, if it be finally decided that the injunction ought not to have been granted."

The aforesaid undertaking now sued on reads as follows:

"In the District Court of Nowata County,
State of Oklahoma.

"James Boyd, a Taxpayer and on the Tax Rolls of School District No. 27, Nowata County, Oklahoma, Plaintiff, v. Chas. White, Henry Daniels, and W. M. Wood, Composing School District Board of School District No. 27, Nowata County, Oklahoma, et al., Defendants.

"Injunction Bond.

"Know All Men by These Presents:

"Whereas, the plaintiff above mentioned in the above-entitled cause has commenced an action against the defendants in the district court of Nowata county, for an injunction against said defendants:

"Now, therefore, we, James Boyd, as principal, and Charles Childers and F. David, as sureties, hereby undertake to the said defendants in the penal sum of three-hundred dollars; that said plaintiffs shall pay to the defendants all damages said defendants, or either of them, may sustain, including reasonable attorney's fees, if it be finally decided that the injunction ought not to have been granted.

"Witness our hands this 12th day of August.

A. D. 1911. James Boyd, Principal. C. W. Childers, F. David, Sureties.
 "Approved August 14, 1911. J. A. Burns, Clerk, by W. H. Thompson, Deputy."

The number of the injunction suit in which this undertaking was given, and the fact of its filing therein on August 14, 1911, was indorsed upon the back of the same.

The suit in which this undertaking was executed was brought by the defendant Boyd, as plaintiff, against a public school district and the director, clerk, and treasurer, as its official board, to enjoin the construction of a schoolhouse for the district upon a certain site, upon which the plaintiffs in the instant case, as independent contractors with the district, had theretofore undertaken and commenced and were then engaged in constructing such schoolhouse.

Before the giving of this undertaking, but on the same day, August 14, 1911, a temporary restraining order was made, and on the next following day served not only upon the defendants specifically named in that suit, but upon the plaintiffs in the instant case, in orders, conforming to the prayer of the petition in that suit and so far as here pertinent, as follows:

"And the court being fully advised in the premises, doth order, adjudge, and decree that Charles White, Henry Daniels, and W. M. Woods, composing school district board of school district No. 27, of Nowata county, Oklahoma, and school district No. 27 of Nowata county, Oklahoma, their agents, employees, or any person or persons whomsoever acting or working, through or under said defendants, be, and hereby are restrained from building, erecting, completing said school building in school district No. 27, upon the site selected by the said school district board, or in any manner working upon said building until further ordered by this court."

The plaintiffs in the instant case, having been so served with this order, yielded obedience to the same by discontinuing and abstaining from their work of constructing said schoolhouse until, upon the trial of that case, on August 30, 1911, it was finally decided and adjudged that Boyd was not entitled to an injunction, and that the temporary restraining order ought not to have been entered.

In the meantime 14 days had elapsed, and the plaintiffs in the instant case, conceiving themselves to have been damaged by this delay in their work of construction of the schoolhouse, brought this action upon the resaid undertaking and recovered a judgment for \$141.50 before a justice of the peace, and for \$112, upon defendant's appeal, the county court.

1, 2) The only questions in this case are whether the plaintiffs here were "defendants" in the injunction suit within the meaning of this word in the undertaking here given; and, if not, (2) whether the statute so enlarges the terms and obligations of an undertaking that the latter should in every event be construed as being for the benefit of and creating an obligation to these

plaintiffs as a "party injured" under this section of the statute, notwithstanding "defendants" alone are named as obligees in the bond.

A few general observations and a somewhat extended quotation of authorities in respect to the nature of such undertakings and the extent of the liability of parties obtaining the benefit of the statutes by executing and filing the same should perhaps precede any attempt to answer either of these questions.

It should be borne in mind that the obligees in such undertakings have no part in their formulation, but are presumably unwilling parties to the same (1 Joyce on Injunctions, § 184a, p. 304), and that the purpose of statutes requiring such undertaking, to prevent the injustice which, prior to the enactment of such statutes, so often resulted, to the parties enjoined, from hasty orders at the suits of petitioners from whom damages could not be collected for one reason or another, should not be allowed to be defeated by any mere imperfection in the conformity of the terms of the undertaking with those required by the statute, where the obligors had had the full benefit of the statute to the injury of the party enjoined (1 Joyce on Injunctions, § 158, p. 269).

It appears that it should be assumed, and that the obligors in such undertakings are estopped to deny, that their intent was to give an undertaking conditioned as required by the statute under which they filed the bond and obtained the benefit thereby given.

In 1 Joyce on Injunctions, § 170, p. 284, it is said:

"The statute and its construction enter into and form part of the bond so as to determine the liability of the sureties, and that liability cannot be extended by the stipulations of the parties to the injunction suit."

And in *Id.* § 172a, p. 287, it is said:

"And though the conditions of an injunction bond are not so extensive as the statute requires, yet, if it contains a material part of the condition required, the bond is not void, but binds the obligors to the extent of such condition or conditions. * * *"

In 2 High on Injunctions, § 1622, p. 1578, it is said:

"So although the condition of the bond is less extensive than as required by the statute, yet if it contains a material part of the conditions required it will be held obligatory to the extent of such conditions."

In *Underhill v. Spencer*, 25 Kan. 71, where the undertaking was to pay "all costs and damages which may be awarded * * * on the final hearing in this cause by the court," instead of all damages "sustained," as required by the statute, it is said:

"The bond was given under section 242 of the Code, which requires the parties obtaining an injunction order to give an undertaking 'to secure to the party injured the damages he may sustain, if it be finally decided that the injunction ought not to have been granted.' If the language of the bond or undertaking had followed the statute, there would be no doubt as to the liability. But it must be presumed to

have been under that statute, as there is none other applicable; and the plaintiff brought and obtained by means of such bond, the injunction. Even a void bond has been enforced against the obligors, when they have received the full benefit thereof, and this upon the doctrine of estoppel. *Daniels v. Tearney*, 11 Reporter, 113 [102 U. S. 415, 26 L. Ed. 187]. In that case it appeared that the bond was given in compliance with a statute of Virginia made to aid in the insurrectionary movements of 1861. The bond was therefore under an unconstitutional statute, and void. But inasmuch as the principal in the bond had by means thereof obtained all the benefits attempted to be conferred by such statute, it was held that the obligors were estopped to deny its validity. Now the principal in this undertaking obtained by means thereof the restraining order. Can the obligors thereafter say that this bond was outside the statute; that the restraining order was improperly issued thereon, and that they are not bound for all damages sustained by the defendant?"

In the case of *Hutchins v. Munn*, 209 U. S. 246, 28 Sup. Ct. 504, 52 L. Ed. 776, where the undertaking was "to make good to the defendant all damages by him suffered," although there were four defendants named in the bill or petition, Mrs. Munn, one of the four defendants, who was absent in Europe and was not served with notice or any process, and, being a female, was not within the terms of the bond in that it described the obligee as "him," and as the "defendant" instead of the "defendants," but who suffered the principal injury from the injunction, was allowed to recover upon the bond, the court saying:

"It is contended that the undertaking does not, by its terms, include Mrs. Munn in its protection, because it is expressed to be an undertaking 'to make good to the defendant all damages by him suffered.'"

"Little pains need be expended on the argument which arises out of the letter of the bond. The undertaking was exacted by the court, it was offered by the complainant at a time when none of the defendants knew of the pendency of the suit, and it was entitled 'No. 23463, Equity Docket, Stilson Hutchins, Complainant, v. Chas. A. Munn et al., Defendants.' It accompanied a restraining order directed against 'the defendants and each of them,' and we think it should be held to run to all the defendants who were included in that order.

"It is further contended that, as Mrs. Munn was never served with a subpoena or notice either of the order to show cause or of the restraining order, she is not entitled to the benefits of the undertaking. The order of the court was served immediately upon the architect and the builder, and the work was instantly stopped. No injury from the wrongful use of the injunction was inflicted upon either of the defendants served with the court's order, but only upon the owner of the house (Mrs. Munn). It is now said that, although the court had, as a condition of issuing the restraining order, exacted an undertaking to indemnify her, she cannot recover upon it, because she was beyond the reach of the process of the court. But this view is based upon a misconception of a restraining order and the undertaking to make good the injury resulting from its wrongful use. * * * In the case at bar the order accomplished its purpose and instantly arrested the progress of the work by restraining those who were engaged in it. The injury against which the undertaking was designed to indemnify was incurred by Mrs. Munn, and we find

nothing in the facts of this case which takes away the remedy on the undertaking exacted by the court for her protection. * * * It is enough that the order was obtained without notice to her, that it was wrongfully sued out, that it was observed until dissolved, and that it inflicted injury upon her rights."

Boyd's petition in the injunction suit, in which the undertaking sued on in the instant case was given, was filed on August 12, 1911, the temporary restraining order was made and this undertaking executed on August 14, 1911, and the order was served upon the nominal defendants in that suit and the plaintiffs in the instant case on August 15, 1911. In view of these facts and of the further fact that temporary restraining orders are made without notice to the adverse parties, it will be assumed that this order was obtained without notice to the plaintiffs in the instant case, as was done in the *Munn* Case.

In *New England Box Co. v. Prentiss et al.*, 76 N. H. 313, 82 Atl. 531, where an order enjoining the sale of all "planks, lumber, and timber" on a certain lot was determined to be wrongful in respect to all such "planks, lumber, and timber," and where it appears the party enjoined might reasonably have assumed that certain railroad ties on said lot, not actually involved in the controversy, were not intentionally included in the order or, at least, might at once have obtained a modification of the order so as to exclude such ties from its effect, it was held in an action on the bond that the party enjoined was "entitled to recover for the loss sustained upon the entire amount of lumber (including such railroad ties) by reason of his implicit obedience of the order of the court." Also see, as in point in principle, *Southwestern Surety Ins. Co. v. Davis*, 156 Pac. 213. In 22 Cyc. 1043, 1044, it is said:

"At the common law, the rule is that actions upon injunction bonds are required to be prosecuted in the name of the obligee in the bond. In some jurisdictions, however, such a suit may be brought by the real party in interest. * * * The action, it has been decided, may be brought by an injunction defendant not named in the bond, by one not served in the injunction suit, or by one of a class enjoined; but one who is not a defendant is not named in the undertaking, and does not belong to a class who ought to have been made defendants, cannot maintain an action on the bond."

Where, in a suit for an injunction, parties executed and filed an undertaking less extensive in the terms of its obligations than this section of our statute requires, but for the purpose of obtaining the benefit of the statute, and do obtain the same to the direct and immediate injury of another party, it seems obvious that they must be liable, either for their wrongful omission or failure to comply with the statute or upon the bond, to the same extent that they would be if they had executed an undertaking in the terms of the statute, especially if such other party had no opportunity to object to the sufficiency of the undertaking before the injunctive re-

relief was obtained; but, as it is not easy to conceive how anything not expressed can be read into such an undertaking, it is not easy to understand how, if it be conceded that an action is strictly upon and limited to the terms of an undertaking, there can be any recovery beyond such terms, although we deem it unnecessary to decide, and do not here decide, this or any question other than that of the liability of the defendants under the terms of the undertaking here sued on.

The term "defendant," as used in the courts of common law, originally meant "a person who was sued in a court of law, and who attempted to resist such suit." *Brower v. Nellis*, 6 Ind. App. 823, 33 N. E. 672; *Sewett Car Co. v. Kirkpatrick Const. Co.* (Ct.) 107 Fed. 622. Also see *Hull v. Garner*, 1 Miss. 145; *Barnes v. Michigan Air Line Co.*, 54 Mich. 243, 20 N. W. 36; *Adamson v. Landby*, 51 Minn. 460, 53 N. W. 761. In *Ouvier's Law Dictionary* the word "defendant" is defined as "a party sued in a person-action." 13 Cyc. 762. In *Malley v. Altman*, 14 Wis. 22, and *Almy v. Platt*, 16 Wis. 9, it was held:

"A statute authorizing the granting of an injunction when, during the litigation, it appears that the defendant in the action is doing or threatening to do some act in violation of plaintiff's rights should be construed to include a 'misfeasance'."

In an action upon an undertaking for an injunction running to "the defendants" in an injunction suit as obligees, we think the term "defendants" includes all parties against whom injunctive relief is asked and obtained to their direct and immediate or necessary and natural injury whether specifically named defendants or merely shown to be within the designated class against whom the injunctive suit is aimed, as, for instance, in the instant case against defendants "Charles White, Harry Daniels, and W. M. Woods, composing school district board of school district No. 27, Nowata county, Oklahoma, and school district No. 27 of Nowata county, Oklahoma, their agents, employes, or any person or persons whomsoever acting or working by or through or under said defendants."

It may be doubted whether the plaintiffs, being independent contractors, were technically "agents, employes, or persons working, through, or under" the specifically named defendants within the meaning of the aver in the petition for injunction and of the temporary restraining order in the instant case; but these terms are very broad; and, since they were construed by all the courts to that suit to include the plaintiffs, they will be so construed here.

The statute, under which this undertaking was given, requires an undertaking, in effect, secure to all parties injured the damages they may sustain; and this requirement must be read into the terms of the bond as expressive of its purpose.

This consideration aids the construction we have given this bond as including all parties against whom injunctive relief is asked and obtained to their direct or immediate or necessary and natural injury. The propositions upon which defendants ask a reversal in this case are supported by a few cases from other jurisdictions precisely in point; but these cases seem inconsistent with the principles that usually are and should be applied in construing such undertakings.

For the reasons stated, the judgment of the trial court is affirmed.

TURNER, SHARP, and HARDY, JJ., concur. KANE, C. J., not participating.

WAUGH v. DIBBENS et al. (No. 7424.)
(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. DEPOSITIONS § 71—REFUSAL TO TESTIFY—PUNISHMENT—POWER OF COURT.

A judge of the county court, while taking depositions, has power to commit a witness for contempt for refusing to answer a material question.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 132; Dec. Dig. § 71.]

2. JUDGES § 36—LIABILITY—JUDICIAL ACTS.

An action will not lie against a judicial officer for a judicial act, where there is jurisdiction of the person and the subject-matter, although it be alleged and proved that such act was done maliciously, or even corruptly.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.]

3. JUDGES § 36—LIABILITY—JUDICIAL ACTS.

The same protection extends to judges of courts of inferior and limited as to those of general jurisdiction; the law exempts all judicial officers alike.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 165-173, 178, 179; Dec. Dig. § 36.]

4. ATTORNEY AND CLIENT § 26—LIABILITIES OF ATTORNEYS—GOOD FAITH.

Attorneys at law, in the exercise of their proper functions as such, are not liable for their acts, if such acts are in good faith and pertinent to the matter in question.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 38, 39; Dec. Dig. § 26.]

Commissioners' Opinion, Division No. 3. Error from District Court, Logan County; A. H. Huston, Judge.

Action by Le Roy E. Waugh against W. J. Dibbens and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Joseph Wisby, of Guthrie, and Milton Brown, of Oklahoma City, for plaintiff in error. Dale & Bierer and C. O. Smith, all of Guthrie, for defendants in error.

RITTENHOUSE, C. Le Roy E. Waugh brought an action against the Guthrie Gas, Light, Fuel & Improvement Company for injuries alleged to have been received on ac-

count of an explosion. After the petition was filed the defendant served notice to take depositions before Hon. J. C. Strang, judge of the county court of Logan county, at which hearing the plaintiff, Le Roy E. Waugh, was sworn as a witness and testified to certain matter. When asked as to the name of the physician, living in Missouri, who attended him during his injuries, he refused to testify, whereupon Frank Dale, attorney for the company, requested and procured an order punishing him for contempt. The defendant was subsequently discharged by this court in *Ex parte Waugh*, 40 Okl. 188, 137 Pac. 105, wherein it was held that in cases of contempt, where a mandatory statute (section 5061, R. L. 1910) requires that the questions propounded be set out in the order of commitment, and such is not done, the commitment is void, and the prisoner should be discharged. On July 11, 1914, this action was brought against J. C. Strang, who was the judge of the county court of Logan county, and issued the commitment, Frank Dale, who was the attorney for the company, for whom the depositions were taken for use in the case of *Le Roy E. Waugh v. Guthrie Gas, Light, Fuel & Improvement Company*, and W. J. Dibbens, who was general manager of said company, asking judgment in the sum of \$16,347, for an alleged false imprisonment, occasioned by his refusal to testify in the original action.

It is alleged that Frank Dale and W. J. Dibbens were present at the time the commitment was issued, advising, urging, soliciting, counseling, and procuring the court to cause the unlawful imprisonment, and that such wrongful acts were done willfully, knowingly, maliciously, wantonly, and oppressively on the part of said defendants. At the close of the evidence the court sustained the demurrer of J. C. Strang on the ground that he was acting in a judicial capacity at the time the commitment was issued, and within the jurisdiction conferred upon him by law. The court instructed the jury to return a verdict in favor of the remaining defendants, on the ground that the proof failed to establish a cause of action against them. The evidence offered by the plaintiff in the instant case, which would, in the least, connect W. J. Dibbens with this controversy was that he was the manager of the Guthrie Gas, Light, Fuel & Improvement Company, that he was in the courtroom at the time the commitment was issued, and that prior to the taking of the depositions he had sworn to an affidavit, stating that the depositions were being taken in good faith. This evidence was insufficient to constitute a cause of action for false imprisonment, and the court properly instructed the jury.

The argument contained in the brief of plaintiff in error does not refer to any particular assignment of error, but we gather from such brief that there are three questions for our determination: (1) In taking

depositions under authority of section 5075, Rev. Laws 1910, does the judge of the county court take the depositions as a judicial officer with power to commit for contempt, or merely as a ministerial act? (2) Will an action lie against a judicial officer for false imprisonment where such officer acts within the scope of his judicial authority, even though it is alleged that such imprisonment was done willfully, knowingly, maliciously, wantonly, and oppressively? (3) Is an attorney at law, while acting in good faith, liable for damages for false imprisonment upon a showing that, while conducting a judicial hearing, he requested the court to punish a witness for contempt of court in refusing to answer a question which was material and pertinent to the issues involved in the suit?

[1] We are asked to hold that the order committing the witness for contempt was without authority of law. Section 5075, Rev. Laws 1910, confers upon judges of courts of record authority to take depositions. Section 5057, Rev. Laws 1910, gives such officer power to punish a witness for contempt in refusing to answer as a witness, or to subscribe a deposition, when lawfully ordered. These identical sections were under consideration in 1898 in the case of *Ex parte Abbott*, 7 Okl. 78, 54 Pac. 319, wherein it was held that a judge of the probate court had power to punish for contempt a witness who refused to be sworn or to give his depositions. It is insisted that under section 1, art. 7, of the Constitution the judicial power of the state is vested in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions, or boards inferior to the Supreme Court as may be established by law, and therefore the judges of courts of record have no judicial powers, other than those mentioned in subsequent sections of the Constitution. In this argument we cannot agree. The wording of the Constitution is practically the same as section 9 of the Organic Act, which was construed in the *Abbott Case*. That section provided that the judicial power of the territory was vested in a Supreme Court, district courts, probate courts, and justices of the peace, and in construing that section this court held that such courts and the judges thereof were by the Organic Act vested with judicial power, and it was further held that where, by constitutional provisions, judicial power is vested in certain courts, the judges thereof may, by legislative enactment, be authorized to perform acts that are in their nature judicial.

[2] The evidence offered by the plaintiff disclosed that the officer taking the deposition had jurisdiction of the person and the subject-matter, and where this condition exists, a judicial officer is not liable in a civil action for false imprisonment for an erroneous exercise of judicial power. *Comstock*

v. Eagleton, 11 Okl. 487, 69 Pac. 955; Flint v. Lonsdale, 41 Okl. 448, 139 Pac. 268. But it is contended that there was not only proof of an act in excess of jurisdiction, but proof that such act was done willfully, knowingly, maliciously, wantonly, and oppressively. From the evidence we are not willing to say that such proof was made. If it be conceded, however, that the proof is sufficient to sustain the contention, the position is not well taken; an action will not lie against a judicial officer for a judicial act when there is jurisdiction of the persons and the subject-matter, though it be alleged and proved that such act was done maliciously, or even corruptly. In *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646, in discussing the question, Mr. Justice Field said:

"If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons, sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

And, again, in the same opinion, it is said:

"The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made; and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

See, also, *Coleman et al. v. Roberts*, 113 Ala. 323, 21 South. 449, 36 L. R. A. 84, 59 Am. St. Rep. 111; *Irion et al. v. Lewis*, 56 Ala. 190; *Lacey v. Hendricks*, 164 Ala. 280, 51 South. 157, 137 Am. St. Rep. 45; *Broom v. Douglass et al.*, 175 Ala. 268, 57 South. 860, 44 L. R. A. (N. S.) 164, Ann. Cas. 1914C, 1155; *Cooke v. Bangs, Jr. (C. C.)* 31 Fed. 640; *Busted v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80. From these cases and those collated in the notes thereto, it is obvious that upon existence or nonexistence of jurisdiction and not upon malice or corruption, rests the question of immunity from liability from acts done in a judicial capacity; where there is jurisdiction of the person and of the subject-matter, no civil liability can attach. In the case of *Flint v. Lonsdale*, supra, it was said:

"A judicial officer will not be held liable in a civil action for the false imprisonment for an erroneous exercise of judicial power, nor for acting in excess of his jurisdiction, where he has jurisdiction over the person and subject-matter, where he has not acted maliciously and corruptly."

And in so far as the expression, "Where he has not acted maliciously and corruptly," is in conflict with this opinion, it is disapproved, as this question could only be presented where there is an entire want of jurisdiction and the good faith of the officer came into question. The Supreme Court of the United States in the case of *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285, used a similar expression, which was disapproved in *Bradley v. Fisher*, supra, wherein the court said that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts are not liable in civil actions for their judicial acts, even when such acts are alleged to have been done maliciously and corruptly.

[3] The plaintiff advances the argument that while the foregoing rule may apply to judges of the courts of general jurisdiction, it does not apply to those of inferior and limited jurisdiction. In this we cannot concur. The same protection extends to judges of courts inferior and limited as to those of general jurisdiction; the law exempts all judicial officers alike. In *Robertson v. Hale*, 68 N. H. 588, 44 Atl. 695, it is said:

"It is a general rule that courts and judges are not liable to civil actions for their judicial acts within the scope of their jurisdiction, and this protection extends to magistrates exercising an inferior and limited jurisdiction, as justices of the peace. For the purpose of securing a fearless and impartial administration of justice, the law exempts all judicial officers, from the highest to the lowest, from civil liability in the performance of their judicial duties within their jurisdiction; and, to guard against an oppressive abuse of legal authority, makes them liable to impeachment or indictment for official misconduct."

See, also, *Coleman v. Roberts*, supra; *Early v. Fitzpatrick*, 161 Ala. 171, 49 South. 686, 135 Am. St. Rep. 123; *Lund v. Hennessey*, 67 Ill. App. 233; *Broom v. Douglass*, supra; *Flint v. Lonsdale*, supra; *Johnston v. Moorman*, 80 Va. 131; *Comstock v. Eagleton*, supra.

[4] We now come to the question of the liability of an attorney for an alleged false imprisonment. The facts as developed at the trial show that an action for damages caused by an explosion was pending against the Guthrie Gas, Light, Fuel & Improvement Company; that Frank Dale, the attorney representing such company, was attempting to take the deposition of the plaintiff in that case, for use in the subsequent trial, which resulted in a judgment against his client. That he had the right to take the plaintiff's deposition cannot be controverted. Section 5048, R. L. 1910, construed in *Re Abbott*, supra, is ample authority for such proceeding. It became material in the trial of the damage suit to ascertain the facts

connected with the plaintiff's injuries, and the company through its attorney was attempting to elicit from the witness the name of the physician who attended him during his confinement resulting from such injuries, this the witness refused to answer, whereupon the attorney requested that he be punished for contempt. There was no evidence of bad faith or malicious motive. *Anderson et al. v. Canaday*, 37 Okl. 171, 131 Pac. 697, L. R. A. 1915A, 1186, Ann. Cas. 1915B, 714. He was merely representing his client in his capacity as an attorney at law, requesting an order which he was entitled to have, but which was held to be void because the order of commitment failed to show the question propounded to the witness, and that such question was pertinent and material to the issue in the action for damages. Upon a thorough examination of the authorities, we are convinced that the general rule is that attorneys at law, in the exercise of their proper functions as such, are not liable for their acts, if such acts are made in good faith and pertinent to the matter in question, and when in the course of a judicial proceeding a witness refuses to answer a question which is pertinent and material to the issue involved, and the attorney requests that such witness be punished for contempt, the attorney is not liable in damages for false imprisonment. In the case of *Campbell v. Brown et al.*, 2 Woods, 349, Fed. Cas. No. 2855, it is said:

"If it is a general rule that attorneys at law, in the exercise of their proper functions as such, are not liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients. The public interest demands this. If attorneys cannot act and advise freely and without constant fear of being harassed by suits and actions of law, parties could not obtain their legal rights. If not free to advise and defend those who seek their aid, the laws are made in vain. Injustice and oppression would rule high-handed in the land. The untrammelled freedom and zeal, no less than the learning and ability of the members of the legal profession, are necessary to make them what they really are—the great body guard of men's rights in society. It is as necessary to the public seal that they should be privileged from molestation by actions and suits in the courageous performance of their duty as it is that the representatives of the people in the Legislature or the judges of the court should be thus privileged. *Hastings v. Lusk*, 22 Wend. (N. Y.) 410 [34 Am. Dec. 330]; *Hogsdon v. Scarlett*, 1 Barn. & A. 232; *Wright v. State*, 18 Ga. 383; *Hunt v. Printup*, 28 Ga. 297; *Wigg v. Simonton*, 12 Rich. [S. C.] 583; *Hargrave v. Le Breton*, 4 Burrows, 2423; *Youmans v. Smith et al.*, 153 N. Y. 214, 47 N. E. 265; *Hollis v. Meux*, 69 Cal. 628, 11 Pac. 243, 53 Am. Rep. 574; *Rice v. Coolidge et al.*, 121 Mass. 393, 23 Am. Rep. 279; *Hartung v. Shaw et al.*, 130 Mich. 177, 89 N. W. 701; *Ring v. Wheeler*, 7 Cow. (N. Y.) 725; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410, 34 Am. Dec. 330; *Moore v. Manufacturing National Bank*, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

CABELL v. McLISH et al. (No. 7005.)
(Supreme Court of Oklahoma. June 21, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. PLEADING §417—DEMURRER—WAIVER—PLEADING OVER.

Where a demurrer is interposed to a pleading and such demurrer sustained by the trial court and leave granted to amend, and thereafter an amendment made, such action is a waiver of the demurrer. In order to take advantage of the ruling on a demurrer when it is sustained, the party must stand upon his pleading, held to be defective, and appeal from the action of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1401, 1402; Dec. Dig. §417.]

2. GUARDIAN AND WARD §56—ADMINISTRATION OF ESTATE—LOANS.

Where the guardian of a minor takes notes, with personal security only, without authority from the county court to make the particular loan, and without the loan being approved by the county court, and thereafter offers such notes in settlement with his successor, and they are refused and suit instituted under the direction of the county court, a tender of such notes in settlement is insufficient.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 255-260; Dec. Dig. §56.]

3. GUARDIAN AND WARD §180—LIABILITY ON BOND—JUDGMENT AGAINST PRINCIPAL—COLLATERAL ATTACK.

When the county court finds a guardian indebted to his ward in a specific sum, and directs the payment of the same, and further directs the newly appointed guardian to bring suit against the former guardian and his bondsmen, the judgment of said court rendered in said suit is final and binding upon the guardian and his sureties, and cannot be collaterally attacked when no appeal has been taken therefrom.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 621; Dec. Dig. §180.]

Commissioners' Opinion, Division No. 5.
Error from District Court, Carter County;
A. Eddleman, Judge.

Action by Reuben McLish and others against J. V. Cabell and others. Judgment for plaintiffs, and defendant Cabell brings error. Affirmed.

H. A. Ledbetter, of Ardmore, for plaintiff in error. Harreld & Ward and J. B. Moore, all of Ardmore, for defendants in error.

CLAY, C. This action was brought by Reuben McLish, a minor, by his guardian, J. E. McCarty, in the district court of Carter county, Okl., against J. V. Cabell, a former guardian, and J. S. Mullen, J. P. Mullen, E. Dunlap, L. V. Mullen, and the Southern Surety Company, as sureties on certain bonds executed by said J. V. Cabell, as guardian, alleging that Cabell, as guardian of Reuben McLish, became possessed of certain funds belonging to said minor; that on July 22, 1912, an order of the county court of Carter county was entered, requiring the said J. V. Cabell to pay to his successor, J. E. McCarty, guardian of said minor, the sum of \$4,349.18, the amount found due said minor's

estate; that \$850 of said amount was paid, and plaintiff prays judgment for \$3,574.41. Defendants answered: First, by a general denial; second, setting up the sale of certain of the minor's lands and the receipt of moneys found due, and allege certain notes were reported to the county court of Carter county; that the report of said Cabell, as guardian, was approved, attaching the report, and pleading the judgment of the county court of Carter county, and alleging tender of cash on hand and certain notes as alleged compliance with said judgment. A demurrer was sustained to the second paragraph of this answer and defendant excepted. Trial was had to a jury, a verdict found for plaintiff, judgment entered thereon, and the defendant excepts, and brings the case to this court for review.

In considering this case the parties will be referred to as they appeared in the trial court, plaintiff and defendants, respectively.

Defendants complain of the action of the trial court in sustaining the demurrer to the answer, to the first amended answer, to the second amended answer, and to the answer filed May 12, 1914. Upon sustaining the demurrers to the answer, the first amended answer, and the second amended answer, the defendants on each occasion amended.

[1] It is well settled by numerous decisions of this court that where a demurrer is sustained to a pleading in the trial court, and such pleading is thereafter amended, the error of the court, if any, in sustaining the demurrer, is waived. In *Berry v. Barton*, 12 Okl. 221, 71 Pac. 1074, 66 L. R. A. 513, it is said:

"It is also contended by the defendants that the court erred in sustaining the demurrer interposed by the plaintiff, even as against the second defense. It is not necessary to decide in this case as to whether the second count in the answer stated a defense, for the reason that when the demurrer was sustained the defendants were granted leave to amend, and by taking leave to amend they waived the error, if any, in the sustaining of the demurrer. In order to take advantage of the ruling on a demurrer when it is sustained, the party must stand upon his pleading, held to be defective, and not amend."

To the same effect are: *Kingman & Co. v. Pixley*, 7 Okl. 351, 54 Pac. 494; *Berry et al. v. Barton et al.*, 12 Okl. 221, 71 Pac. 1074, 66 L. R. A. 513; *Morrill et al. v. Casper et al.*, 13 Okl. 835, 73 Pac. 1102; *Carle et al. v. Okl. Wooden Mills*, 16 Okl. 515, 86 Pac. 66; *County Com'rs v. Beauchamp*, 18 Okl. 1, 88 Pac. 1124; *Pattee Plow Co. v. Beard*, 27 Okl. 239, 110 Pac. 752, Ann. Cas. 1912B, 704; *Chidsey et al. v. Ellis et al.*, 31 Okl. 107, 125 Pac. 464; *Insurance Co. v. O'Neil*, 36 Okl. 792, 130 Pac. 270; *Wallace v. Blasingame*, 155 Pac. 1143.

We have examined the answers filed, and think the trial court did not err in sustaining the demurrers complained of by the defendants.

[2] Defendants next complain of the action

of the trial court in excluding certain testimony offered by them and receiving certain testimony over objections. It appears that J. V. Cabell, while he was guardian of plaintiff minor, came into possession of certain moneys of his ward by selling his ward's land for reinvestment and education, upon order of the county court for this purpose; that upon making his report to the county court, after being cited so to do, he reported one note, known as the Bass note, for \$750, with accrued interest in the sum of \$177.50, and one note known as the Timmons note for \$2,500, and accrued interest in the sum of \$200, and reported that he held himself responsible to his successor in the sum of \$4,349.18. The county court on July 22, 1912, approved this report, but found J. V. Cabell indebted to the estate of said minor in the sum of \$4,349.18, and ordered the same to be paid said minor, and directed J. E. McCarty, as guardian, upon failure to collect said sum, to bring suit upon the bond of said J. V. Cabell. Defendants allege that Cabell offered to settle with his successor by tendering the Bass and Timmons notes, claiming that said notes were good and their makers solvent, but the court excluded this testimony, and defendants excepted. These notes were taken by the guardian, Cabell, without any direction from the county court to make such investment, and were never presented to the county court for approval. When a guardian loans his ward's money without an order of the county court, or its approval, he does so at his own risk and is held to strict account. He was required to settle with his successor, and cannot complain that such successor refused to be satisfied with the notes made upon personal security. The court was correct in excluding evidence of the tender of the notes, of the solvency of the makers, or anything in connection with such notes, unless there was evidence of approval by the county court. These loans were made upon personal security only, and it is generally held that such loans could not be made except by leave of the guardianship court. See cases to Bunn's Ann. Sup. Code 1910, § 6569; *Estate & Guardianship of Bennett Wood*, 159 Cal. 406, 114 Pac. 992, 36 L. R. A. (N. S.) 252, and note, for discussion of the subject; In re *Averill's Estate*, 66 Pac. 15; In re *Schandoney's Estate*, 133 Cal. 887, 65 Pac. 878; In re *Carver's Estate*, 118 Cal. 73, 50 Pac. 22.

[3] The judgment of the county court finding the defendant, Cabell, indebted to the estate of his ward and directing the collection of the amount found due, is a final judgment, and cannot be collaterally attacked, no appeal having been taken from such judgment. *Southern Surety Co. v. Burney*, 34 Okl. 552, 126 Pac. 743, 43 L. R. A. (N. S.) 308; *Shipman v. Brown*, 36 Okl. 623, 130 Pac. 603; *Title*

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 133 Cal. xix.

Guaranty & Surety Co. v. Slinker, 35 Okl. 128, 128 Pac. 696.

We have carefully examined the record and evidence excluded and received, and find no error in the case. We, therefore, recommend that the judgment of the trial court be affirmed.

PER CURIAM. Adopted in whole.

UNDERWOOD TYPEWRITER CO. v. MARCH. (No. 7727.)

(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

COURTS \Leftrightarrow 120 — COUNTY COURT — JURISDICTION.

"Const. art. 7, § 12, and Act approved March 9, 1910 (Rev. Laws 1910, § 1816), construed together, and held to vest the county court with no jurisdiction of civil cases involving \$200 or less." *Musser v. Baker*, 158 Pac. 442.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. \Leftrightarrow 120.]

Commissioners' Opinion, Division No. 3. Error from County Court, Marshall County; J. I. Henshaw, Judge.

Action by George S. March against the Underwood Typewriter Company. Judgment for plaintiff, and defendant brings error. Dismissed.

Hainer, Burns & Toney, of Oklahoma City, for plaintiff in error. Geo. S. March, of Madrid, for defendant in error.

BLEAKMORE, C. This case presents error from the county court of Marshall county. On January 21, 1915, George S. March, as plaintiff, commenced action in said court against the Underwood Typewriter Company, as defendant, seeking recovery in damages, in the sum of \$55.50. On March 28, 1915, judgment was rendered in favor of plaintiff for that amount; to reverse which judgment defendant has prosecuted this proceeding in error upon transcript of the record.

By virtue of article 7, § 12, of the Constitution, providing:

"The county court, co-extensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest * * *"

—and the provisions of section 1816, R. L. 1910, that:

"The county court * * * shall have concurrent jurisdiction with the district court in civil cases in any amount over two hundred dollars and not exceeding one thousand dollars, exclusive of interest * * *"

—county courts of this state have no jurisdiction in civil cases involving \$200, or less.

In *Musser et ux. v. Ed Baker*, County Judge, et al. 158 Pac. 442 (No. 7484, not yet officially reported), it is held:

"Const. art. 7, § 12, and Act approved March 9, 1910 (Rev. Laws 1910, § 1816) construed together and held to vest the county court with no jurisdiction of civil cases involving \$200 or less."

The amount involved in the instant case being less than \$200, the county court of Marshall county was without jurisdiction to entertain the case and render therein the judgment here sought to be reversed, and this court is also without jurisdiction to consider or review the errors assigned.

The case is therefore dismissed.

PER CURIAM. Adopted in whole.

MISSOURI, K. & T. RY. CO. v. BLUE. (No. 7113.)

(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 773(5)—BRIEFS—EFFECT OF FAILURE TO FILE—REVERSAL.

Where a plaintiff has prepared, served, and filed a brief, and there is no brief filed and no reason given or excuse offered for its absence on the part of the defendant in error, this court is not required to search the record to find some theory on which the judgment below may be sustained, but when the brief appears reasonably to sustain the assignments of error the court may reverse the judgment in accordance with the prayer of the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110; Dec. Dig. \Leftrightarrow 773(5).]

Commissioners' Opinion, Division No. 2. Error from County Court, Osage County; Paul B. Mason, Judge.

Action by G. W. Blue against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error.

BRUNSON, C. The defendant in error has failed to file a brief in this court in support of his judgment in compliance with the rules and orders of this court. The brief of the plaintiff in error appears to sustain its contention, and where the plaintiff in error has prepared, served, and filed its brief as provided by the rules of this court, and there is no brief filed by the defendant in error nor reason given nor excuse offered for not doing so, and the same is long overdue, this court is not required to search the record to find some theory on which the judgment below may be sustained; but when the brief filed by the plaintiff in error appears reasonably to sustain and support the assignments of error, this court may reverse the judgment in compliance with the prayer of the petition. *C., R. I. & P. Ry. Co. et al. v. Sewell*, 158 Pac. 1142; *Bryan et al., State Board of Agriculture, v. State ex rel. Holt, County Attorney, et al.*, 44 Okl. 653, 146 Pac. 32.

The judgment should therefore be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

STATE v. GOODALL

(Supreme Court of Oregon. Nov. 28, 1916.
On Rehearing, Dec. 12, 1916.)

On Rehearing.

CRIMINAL LAW § 90(2)—JUSTICES OF THE PEACE—JURISDICTION—STATUTES.

The justice of the peace has jurisdiction to try one charged with cruelty to animals contrary to L. O. L. § 2103, which was sections 1 and 2 of the act passed in 1885 (Laws 1885, p. 1), the eighth section of which survives as L. O. L. § 5642, which gives justices of the peace "jurisdiction over all offenses committed under this act."

Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 132; Dec. Dig. § 90(2).]

CRIMINAL LAW § 252(3)—TRIAL BEFORE JUSTICE OF THE PEACE—COMPLAINT—SUFFICIENCY—LANGUAGE OF STATUTE.

A complaint before a justice of the peace charging that defendant cruelly tormented and killed a cow, which is the language used in the statute, is sufficient where not specifically denied to on the ground that it does not set out the acts constituting the cruelty with the particularity required by Cr. Code, tit. 18, c. 7 O. L. §§ 1435-1460).

Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526, 528, 529; Dec. Dig. § 252(3).]

CRIMINAL LAW § 252(1)—DEMURRER TO COMPLAINT—WAIVER OF OBJECTIONS.

Under L. O. L. § 1499, providing that the demurrer shall distinctly specify the ground of objection, a defendant charged with cruelty to animals who demurs to the complaint only on the ground that it does not state facts sufficient to constitute a crime waives the objection that facts are not set forth with sufficient particularity, and cannot on appeal from a conviction before a justice of the peace file in the circuit court a demurrer based on the latter ground.

Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526, 530, 534-536; Dec. Dig. § 252(1).]

Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Scott Goodall was convicted of cruelty to animals in the circuit court on appeal from the justice of the peace, and he appeals. Affirmed on rehearing.

On a trial before a justice of the peace, defendant was convicted of the crime defined by section 2103, L. O. L., from which defendant he took an appeal to the circuit court where, upon a trial being had, he was convicted and sentenced, and now comes his appeal to this court.

Turner Oliver, of La Grande (Joel H. Richardson, of La Grande, on the brief), for appellant. Colon R. Eberhard, Dist. Atty., of La Grande, and Geo. M. Brown, Atty. Gen., for the State.

BENSON, J. The jurisdiction of a justice of the peace to try criminal cases is limited by sections 2411 and 2412, L. O. L., to the crimes enumerated in the former and the maximum penalties named in the latter. Cruelty to animals is not included in the sections mentioned in section 2411, and the maximum penalties named in section 2103 exceed the limit prescribed in section 2412. The power of the justice in this case was confined to conducting a preliminary examination with a view to a subsequent investigation of the charge by a grand jury. The only jurisdiction acquired by the circuit court was simply that of an appellate tribunal. In *Evans v. Christian*, 4 Or. 375, this court says:

"If the court below had no jurisdiction to proceed, this court, which possesses only appellate jurisdiction, could acquire none by the appeal. And when a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the court has no jurisdiction, either over the parties or the subject-matter of the cause, it is the duty of the court, on its own motion, to refuse to proceed further. Any attempt to exercise judicial functions otherwise than as authorized by law would be a nullity, and an idle waste of time."

Nor can the lack of jurisdiction of the subject-matter be waived, 12 Cyc. 229. It follows that the judgment of the lower court must be reversed, and the cause dismissed; and it is so ordered.

On Rehearing.

[1] In the former opinion herein we dismissed the action upon the theory that the justice of the peace before whom the trial was originally had was without other jurisdiction in the premises than that of a committing magistrate, and we did not then consider any other of the questions raised upon the appeal. Since then our attention has been called to the fact that section 2103, L. O. L., upon which the complaint is based, is composed of sections 1 and 2 of an act passed by the Legislature in 1885, and that section 8 of that act survives as section 5642, L. O. L., and reads thus:

"Justices of the peace and police judges shall have concurrent jurisdiction over all offenses committed under this act."

Our former opinion, therefore, was clearly erroneous, and we shall now consider the assignments of error upon which the appeal is based. The charging part of the complaint under which the defendant was tried and convicted reads as follows:

"The said Scott Goodall on the 21st day of September, 1915, in Union county, state of

Oregon, did then and there cruelly torment and torture a cow then and there being in said county and state, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Oregon."

To this complaint the defendant interposed a demurrer in the following language:

"Comes now the defendant in the above-entitled case and demurs to the information filed herein for the reason that the same does not state facts sufficient to constitute a crime."

The demurrer was overruled, and a trial was had resulting in the conviction of the defendant. He then appealed to the circuit court, where the same was again argued, submitted, and overruled, whereupon the defendant, without leave of court, filed another demurrer based upon the ground that the complaint does not substantially conform to the requirements of chapter 7 of title 18 of the Code of Procedure in criminal actions, which, upon motion of the district attorney, was stricken from the files.

[2] Defendant first insists that it was error to overrule the demurrer filed in the justice's court, but this contention is not tenable. The complaint is in the language of the statute, and, as has been well said by the learned circuit judge:

"The facts stated in the complaint show that the defendant has done something that the law prohibited."

His criticism of the pleading appears to be that the acts constituting the alleged cruelty are not set out with such particularity as is required by chapter 7 of title 18 of the Code, an objection which is waived by a failure to demur specifically upon that ground. As is said in *State v. Bruce*, 5 Or. 68, 20 Am. Rep. 734:

"But having slept upon his rights by failing to demand, by demurrer, a fuller specification of the facts and circumstances necessary to the complete identification of the transaction charged against him as a crime, he cannot be heard to object to the indictment after a trial upon the merits, when it substantially charges a crime in the language of the statute."

[3] It is next urged that the court erred in striking from the files the "special demurrer." It may be remarked in passing that special demurrers, as known to the common law, are now abolished, but the principle survives that "the demurrer shall distinctly specify the grounds of objection to the complaint," and the statute contemplates but one demurrer to a pleading, and objections not specified therein are waived unless they go to the jurisdiction of the court or to the point that the facts stated do not constitute a crime. Section 1499, L. O. L. It follows that the filing of the demurrer in the justice's court waived the objections sought to be raised by the second demurrer, and it was then too late to bring them into the record, for which reason the circuit court did not err in striking it from the files. *State v. Mack*,

20 Or. 234, 25 Pac. 639; *Byers v. Ferguson*, 41 Or. 77, 65 Pac. 1067, 68 Pac. 5.

It is also contended that the court erred in overruling defendant's objection to the admission of evidence for the reason that the complaint is insufficient. There is no bill of exceptions in the record, and so this question is not properly before us, but, if it were, what has been said as to the other assignments would dispose of it also.

The judgment should be affirmed; and it is so ordered.

HARRIS v. OWENBY. (No. 6898.)

(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. BROKERS \S 88(2, 3)—ACTION FOR COMPENSATION—QUESTIONS FOR JURY.

In an action by a real estate broker to recover commission for the sale of real estate where the evidence is conflicting as to whether the property was listed with the agent and whether his services were the procuring cause of the sale, this question should be submitted to the jury under proper instruction.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. \S 123, 129; Dec. Dig. \S 88(2, 3).]

2. BROKERS \S 51—COMPENSATION—PERFORMANCE OF CONTRACT.

Where property is listed with a real estate agent for sale, and the agent introduces or discloses the name of the purchaser to the vendor for such purpose, and through such introduction or disclosure negotiations are begun for the sale of the property, which results in a sale by the owner, the agent will be entitled to his commission therefor.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. \S 69; Dec. Dig. \S 51.]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by M. K. Owenby against Sam Harris. Judgment for plaintiff, and defendant brings error. Affirmed.

G. A. Paul, of Oklahoma City, for plaintiff in error. E. C. Stanard, J. H. Wahl, and C. H. Ennis, all of Shawnee, for defendant in error.

HARDY, J. Defendant in error, as plaintiff, commenced this action to recover certain commissions alleged to be due for the sale of certain real estate in the city of Shawnee, and recovered judgment, from which defendant prosecutes error.

[1] The principal question urged is that there was no evidence upon which to submit the case to the jury, or to sustain their verdict. The plaintiffs' testimony tended to show that the property in question had been listed with him for sale at a price of \$18,000 in trade, with an understanding that if a cash customer was found a less price would be made, but no cash price was agreed upon;

that plaintiff had showed the property to one Quirin, but did not place any cash price thereon; that he arranged for a meeting between the owner and the prospective buyer at the Light and Day Bank in Oklahoma City, at which time the sale of the property was discussed, but no agreement reached; that immediately thereafter defendant and Quirin came to Shawnee, and in company with plaintiff viewed the property, when defendant told plaintiff to turn Quirin over to him (defendant); that he knew better how to handle the transaction. No sale was consummated at this time, Quirin returning to his home in Ohio, from which place a desultory correspondence is kept up with defendant, finally culminating in a sale of the property by the defendant. The evidence offered by defendant comports in all material particulars with that of the plaintiff and tended to prove a different state of facts. There being evidence reasonably tending to support a verdict for plaintiff, the court committed no error in overruling the demurrer thereto. *Reynolds v. Brooks*, 152 Pac. 411.

And under the well-established rule in this state, where the evidence is conflicting, it is proper to submit to the jury under proper instructions for their determination the questions whether the property had been listed with the plaintiff for sale as claimed by him, and whether his services were the procuring cause of the sale thereof. See *Wheeler et al. v. Hunt*, 87 Okl. 528, 133 Pac. 52; *Hoff v. Russell*, 149 Pac. 146; *Schlegel v. Ler*, 149 Pac. 1118.

[J] The jury having found the facts in favor of the plaintiff, we have here a case where the property had been listed by the owner with a broker who had introduced to the owner a prospective buyer, with whom negotiations were begun, which finally resulted in a sale of the property by the owner. The question as to whether the property was listed and whether the plaintiff's services were the procuring cause of the sale were both submitted to the jury by proper instructions found in his favor, and, there being evidence reasonably tending to support their verdict, we are not at liberty to disturb the verdict.

The rule as to the right of a broker to receive compensation for his services under such circumstances is stated in *Roberts v. Ham et al.*, 28 Okl. 387, 109 Pac. 127, as follows:

"after the lot or realty is placed in the agent's hands for sale, it is brought about and secured by his advertisements or exertions, he is entitled to his commission, or if the agent induces or discloses the name of the purchaser to the vendor for such purpose, and through introduction or disclosure negotiations for the sale of the property are begun, and then effected by the vendor, the agent is entitled to his commission."

It is admitted that instruction No. 6 given by the court correctly states the law, but this instruction is said to be objectionable in that

it gives the jury the right to determine, as a question of fact, that which plaintiff himself admitted did not occur. We understand counsel to mean by this that said instruction was improper because upon the state of the record it was the duty of the court to declare as a matter of law that plaintiff was not entitled to recover. This was not true, for we have seen that there was ample evidence to raise an issue of fact, and to require the submission of the case to the jury, and there was no error in giving said instruction.

No complaint is made of the other instructions given by the court, and we think they fairly present the law of the case, and this is all that it was necessary for the court to do. The instructions requested by defendant were based principally upon the theory that no sale was in fact consummated, or that plaintiff did nothing in the way of performing services, by commencing negotiations, nor by means of an introduction or otherwise, and before he would be entitled to recover it would be necessary for him to produce a binding contract with a person who was ready, willing, and able to purchase the property upon the precise terms prescribed by the owner. In its seventh instruction, which was given upon request of the defendant, the court specifically directed the jury that if defendant and Quirin became acquainted without an introduction by plaintiff and by means of such acquaintance, and without any act performed by plaintiff, began negotiations which resulted in a sale by defendant, the plaintiff could recover. This instruction presented every question embraced in defendant's third request, which could properly have been given. Request No. 4 embraced the proposition that before plaintiff was entitled to recover it was necessary for him to produce a written contract with a purchaser who was ready, willing, and able to buy the property upon the owner's terms. A similar request was refused in *First National Bank v. Brumbaugh*, 154 Pac. 1172, where it was said:

"This instruction is correct when an agent is suing for a commission, where the sale was never consummated, but has no application to the facts in the case at bar, and it would have been error for the court to have given it. * * * But in the case at bar the sale was actually effectuated, and the fact that there was a lapse of time between the beginning of the negotiations, and the final consummation of the deal, is immaterial, since the evidence showed the deal was never dropped."

In the instant case a sale was actually made by the owner, and the only issues involved were whether the property had been listed with the plaintiff, and whether his services were the procuring cause of the sale, both of which have been decided, upon competent evidence against the defendant, and had the court given the instruction as requested, same would not have been applicable to the facts, and would have constituted error. *Oklahoma Ry. Co. v. Christenson*, 148 Pac. 94.

Request No. 5 was but another form of stating the same proposition embodied in the other requests which have been noticed, and is referred to by counsel as being advisory to the jury in that it states the law to be that if defendant met the purchaser without introduction from plaintiff or without his being the procuring cause of the meeting the owner had a right to negotiate sale of his property, and plaintiff would not be entitled to a commission. This principle was covered by the instructions given, and it was not necessary for the court to repeat it in different form or verbiage, for to do so would be giving this question undue prominence.

There being no prejudicial error in the record, the judgment is affirmed. All the Justices concur.

CONTINENTAL GIN CO. v. PANNELL et al.
(No. 7647.)

(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

1. REPLEVIN \Leftrightarrow 68—PLEADING—AMENDMENT.

The amendment of pleadings is largely a discretionary matter, and it is not error to allow an amendment to a petition in an action in replevin, which changes the allegations of plaintiff's ownership in the property from that of absolute ownership to a special ownership, based upon the indebtedness evidenced by promissory notes and chattel mortgages securing the same, and by adding a count setting up a conversion of the property and praying for the value thereof in case a delivery cannot be had.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 251-256; Dec. Dig. \Leftrightarrow 68.]

2. CHATTEL MORTGAGES \Leftrightarrow 261 — RIGHTS OF PARTIES—SALE BY MORTGAGEE.

Under the laws of the state of Arkansas, in force in Indian Territory prior to statehood, a chattel mortgage conveyed title to the mortgagee, subject only to the mortgagor's right of redemption, and under such law a mortgagee, on condition broken, had the right, pursuant to the terms of the mortgage, to sell the mortgaged property, although the property was at the time in adverse possession of another.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 531, 537; Dec. Dig. \Leftrightarrow 261.]

3. CHATTEL MORTGAGES \Leftrightarrow 263 — RIGHTS OF PARTIES—ACTION FOR POSSESSION—RIGHT OF ACTION.

After such sale of mortgaged property by a mortgagee out of possession, such mortgagee or the purchaser at the mortgage sale was entitled to recover possession of such property by appropriate action, the mortgagee to deliver possession to the purchaser, or the purchaser in his own right.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 532, 538-541, 544; Dec. Dig. \Leftrightarrow 263.]

Commissioners' Opinion, Division No. 4. Error from Superior Court, Jefferson County; Will Linn, Judge.

Action by the Continental Gin Company against J. M. Pannell and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Chas. H. Garnett, of Oklahoma City, for plaintiff in error. Guy Green and Jos. T. Dillard, both of Waurika, for defendants in error.

EDWARDS, C. This case involves the ownership of certain gin property. The record discloses that the plaintiff held two chattel mortgages upon such property, securing the payment of two certain notes. The first note was dated September 13, 1906, due November 15, 1907. Various payments had been made, the last being on December 16, 1908. The second note was dated October 1, 1907, due October 1, 1908, no payments having been made thereon. Chattel mortgages were executed, securing each of said notes. On January 15, 1913, the plaintiff posted notices advertising the property covered by said chattel mortgages for sale on February 1, 1913, and on said last date plaintiff offered the said property for sale and purchased the same at such sale. At the time of sale the defendant J. M. Pannell was in possession of said property, claiming to be the owner thereof by purchase from the First National Bank of Ryan, and was present and forbade the sale. On December 13, 1913, the plaintiff filed this action in replevin in the ordinary form against J. M. Pannell and the first National Bank of Ryan, Okl. On July 25, 1914, the plaintiff filed an amended petition, making additional parties defendant, and adding to its action in replevin a count alleging the wrongful detention and conversion of the property by defendants, and praying a return of the property or its value. On February 22, 1915, plaintiff filed a second amended petition, bringing forward the counts of the first amended petition and pleading more in detail the said causes of action and for the first time setting out the notes and mortgages. The defendants, for answer, deny that there was ever any valid or legal foreclosure or sale of the property described in plaintiff's petition, whereby any right, title, or interest in and to said property was vested in the plaintiff, and, further, that if the plaintiff ever had any cause of action, the same was barred by the statute of limitations. Upon the trial of the case in the lower court the plaintiff offered in evidence its notes and chattel mortgages, together with numerous other exhibits, including considerable correspondence between the plaintiff and the bank, through which the defendant Pannell claimed to derive his title. At the conclusion of plaintiff's evidence the defendant demurred, which demurrer was by the court sustained.

[1] It is argued by the defendants in error that the pleading of the notes and mortgages in the amended petition, and the count praying for the value of the property in case delivery could not be had, changed the cause of action, and sets up a new and independent ground for recovery. But we construe the

pleadings on the part of the plaintiff in error, plaintiff below, to state a cause of action in replevin based on the notes and mortgages for the possession of, or for the value of, the property described in the mortgages in case a delivery could not be had. As to the matter of amendment in alleging the notes and mortgages, this being discretionary with the trial court, the action of the court will not be interfered with, in the absence of clear showing of abuse of discretion. *Swope v. Son v. Burnham, Hanna, Munger & Co.*, 6 Okl. 736, 52 Pac. 924; *Hawkins v. Overstreet*, 7 Okl. 277, 54 Pac. 472; *Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co.*, 26 Okl. 13, 108 Pac. 386; *Robinson v. Tiner*, 26 Okl. 272, 109 Pac. 238; *Culp v. Teere*, 47 Kan. 746, 28 Pac. 987; *Snider v. Windsor*, 77 Kan. 67, 93 Pac. 600.

The case then resolves itself into this: Was the mortgage sale valid or invalid? If valid, the statute of limitations had barred the note falling due on October 1, 1908, and upon which no payment had been made, and the plaintiff would be entitled, at the time filing his suit, on December 15, 1913, to a lien only for the amount evidenced by the note upon which the last payment was made December 16, 1908; and this, we think, would be true, although the notes were not pleaded the original petition, but were first set up in the amended petition. On the other hand, the mortgage sale was valid and the plaintiff, as purchaser, took good title, it would be two years from the date of the conversion of the property within which to bring an action for such conversion.

2, 3] Plaintiff in error contends that the chattel mortgage sale of February 1, 1913, was valid, notwithstanding the fact that at the time of the sale the property was in the adverse possession of Pannell. The defendant in error, on the contrary, argues that where mortgaged personal property is held adverse before sale of such property can be legal made by the mortgagee, he must first obtain possession of the property; that a sale of chattels by a mortgagee out of possession is void. The parties also differ as to whether notes and mortgages are Indian Territory Texas contracts, on the theory that if Indian Territory contracts, the Arkansas law in effect before statehood will control, and if as contracts, the laws of that state govern, and, not being pleaded nor proven, will be presumed to be the same as the laws of that state. But, we do not regard this distinction as vital, for the reason that a different rule prevails for the construction of chattel mortgages where the contracts are executed in one state upon property in another. In such case the general rule is that the lex situs governs. The rule is stated in 6 Cyc. 1062, in these words:

"Sometimes happens that the nature, valid construction and effect of a mortgage has to be determined in a jurisdiction other than that in which the contract was made. Where the place of contract and the locus of the property mort-

gaged coincide, the laws of that jurisdiction will govern the interpretation of the mortgage on the doctrine of comity. In cases where the property is situated in one jurisdiction and the mortgage is executed in another, the law of the place where the property is situated will usually govern."

In *Jones on Chattel Mortgages*, § 305, it is said that:

"The *lex situs* governs when a mortgage is executed in a state other than that in which the property is situated. * * * As a general rule, personal property is governed by the law of the domicile of the owner, and not by the law of the situs of the property; but a transfer of such property by way of mortgage is an exception to the rule, and the *lex situs* and not the *lex domicilii*, governs chattel mortgages. The theory that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and, as Judge Story says, 'yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined.'"

In *Third National Bank v. National Bank of Commerce* (Texas Civ. App.) 139 S. W. 665, where a chattel mortgage executed in Missouri, upon property situated in Texas, was under consideration, the court says:

"It is well settled that the *lex situs* governs when a chattel mortgage is executed in a state other than that in which the property is situated. *Jones on Chattel Mortgages*, § 305; *Wharton on Conflict of Laws*, § 817."

In *Re Brannock* (D. C.) 131 Fed. 819, where the question was as to the effect of a chattel mortgage executed in Nebraska upon property situated in Iowa, the court says:

"Such a mortgage is governed by the law of the place where the chattels are situated at the time it is made, and the question of its priority, as between different lienholders, is to be determined by the law of such place. *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Harrison v. Sterry*, 5 Cranch, 289, 3 L. Ed. 104; *Aultman & Taylor Co. v. Kennedy*, 114 Iowa, 444, 87 N. W. 435, 89 Am. St. Rep. 373."

In *Mackey v. Pettijohn*, 6 Kan. App. 57, 49 Pac. 636, where the question before the court was as to what law would govern in the construction of a chattel mortgage given in Missouri, where mortgagor and mortgagee both resided, upon property situated in Kansas, it was held that the law of Kansas must apply. In support of his holding a voluminous citation of authorities is given. The rule is stated in the syllabus, as follows:

"A chattel mortgage made in Missouri by a person domiciled there, to a citizen of this state, upon property situated in this state, is governed by the law of Kansas, and not by the law of Missouri, as the place of contract."

In *Pyeatt v. Powell*, 51 Fed. 551, 2 C. C. A. 367, 10 U. S. App. 200, which arose in Indian Territory, and where the effect of a chattel mortgage executed in the state of Kansas by a resident of Indian Territory upon property then situated in Indian Territory was involved, the court says:

"As to the second ground, it must be borne in mind that the owner of the property mortgaged resided, and the mortgaged property itself was situated, in the Indian Territory. * * * The mortgage and these rights of creditors were governed by the *lex domicilii* of the owner who mortgaged the property, and by the law of the place where the property was situated. They were governed by the law of the Indian Territory. *Green v. Van Buskirk*, 7 Wall. 139 [19 L. Ed. 109]; *Clark v. Tarbell*, 58 N. H. 88; *Guillander v. Howell*, 35 N. Y. 657; *Whitman v. Conner*, 40 N. Y. Super. Ct. 339, 346; *Iron Works v. Warren*, 76 Ind. 512 [40 Am. Rep. 258]; *Martin v. Potter*, 34 Vt. 87; *Tied. Sales*, § 239; *Jones, Chat. Mortg.* § 305."

Upon the question of the effect of a chattel mortgage in the Indian Territory, the court says further in this case:

"Under the common law, whose rules must govern here, a mortgage of personal property vests the title in the mortgagee subject to be defeated upon compliance with its conditions, and upon a failure to comply therewith such title becomes absolute. *Story, Bailm.* § 287, and cases cited; *Stewart v. Hanson*, 35 Me. 506; *Talbot v. De Forest*, 3 G. Greene [Iowa] 586; *Flanders v. Barstow*, 18 Me. 357."

See, also, *Aultman v. Kennedy*, 114 Iowa, 444, 87 N. W. 435, 89 Am. St. Rep. 373; *Pleasanton v. Johnson*, 91 Md. 673, 47 Atl. 1025; *Denny v. Faulkner*, 22 Kan. 89, 98; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003.

Under the Arkansas law in force in the Indian Territory at the time the contracts were made, a chattel mortgage conveyed the title to the mortgaged property, subject to the mortgagor's right to redeem. In *Johnson v. Clark*, 5 Ark. 321-335, the court says:

"A mortgage is the conveyance of an estate by way of pledge for the security of a debt, and to become void on the payment of it. The legal ownership is vested in the creditor, but in equity the mortgagor remains the actual owner until he is debarred by his own default or by judicial decree."

Under these authorities it is evident that the Arkansas law is controlling, and it is then necessary to determine whether or not under this law a mortgagee out of possession, where the property is adversely held, may make a valid sale of the property covered by the mortgage. In the mortgages involved in this action the mortgagee is authorized and empowered to enter upon the premises where the property is located or may be found, without demand, to take possession, advertise, and sell. The property in this case was not capable of manual delivery, but was advertised and sold according to the terms of the mortgage at the place where the property was then located. The owner of personal property may make a valid sale of the same when out of possession, and even when the property is held adversely. 35 Cyc. 47; *Benj. on Sales* (7th Ed.) 41. In those states in which a chattel mortgage conveys title to the mortgagee, subject to the right

of redemption, it is by the weight of authority held that the mortgagee may sell the mortgaged property without at the time, having possession of the same. *Jones on Chattel Mortgages* (5th Ed.) § 706, says:

"After forfeiture a mortgagee, being entitled to possession, may maintain replevin or detinue for the mortgaged property against one who has tortiously taken it from the mortgagor, or against a creditor who has levied upon it. He may also bring replevin or detinue for the goods against the mortgagor himself, or trover against him for selling the mortgaged property. He may maintain this action, provided any portion of the indebtedness secured by the mortgage is still due and owing to him; and it is no defense to the action to show that a portion of the indebtedness has been paid, either before or after the bringing of the suit; but proof that the entire indebtedness has been discharged is such a defense. He may maintain the action after he has advertised and sold the property under a power in the mortgage; for he is entitled to possession so that he may deliver the property to the purchaser."

In *Lacey v. Giboney*, 86 Mo. 320, 88 Am. Dec. 145, an action involving personal property under a deed of trust in the nature of a mortgage, a sale was made by the mortgagee, though forbidden by the agent of the defendant at the time. The court held that the plaintiff as trustee in the deed clearly had the right to take the property into his possession, so that he could give possession to those to whom he might sell, and that he could maintain the action in his own name whether the sale were valid or not.

"For if it were not a sale, the trustee is still the legal owner and may maintain the action under the first averment in his petition; and if there was a sale, then he is still entitled to the possession as against a stranger, for the purpose of delivering the possession over to the purchasers and might maintain the action under the second averment in the petition."

In *Pace v. Pierce*, 49 Mo. 393, the holding of the court is stated in the syllabus as follows:

"A trustee in a chattel deed of trust has a right to the possession of the property even after sale, for the purpose of delivering it to the purchaser. And in case possession is withheld, the trustee may sue in replevin, or, so far as defendant is concerned, in damages for conversion of the property."

In *Rust v. Electric Lighting Co.*, 124 Ala. 202, 27 South. 263, an action was brought by plaintiff to recover possession of certain personal property which he had purchased at a chattel mortgage foreclosure sale. The defendant averred that:

"It was in the open, notorious, and adverse possession of the property in controversy at the time the plaintiff purchased it at a foreclosure sale, and that it still was holding the same."

This averment was established by the evidence, but the court held that the purchaser at the foreclosure sale took a good title, and could maintain the action against defendant for possession of the property.

See, also, *Brant v. Lane*, 64 Tex. Civ. App. 425, 118 S. W. 229, 139 S. W. 768; *Ames Iron Works v. Chinn*, 15 Tex. Civ. App. 88, 38 S. W. 247; *Barron v. San Angelo Nat. Bank* (Tex. Civ. App.) 138 S. W. 142.

We are not unmindful of the statement in the case of *Edinisson v. Drumm-Flato Com. Co.*, 13 Okl. 440, 73 Pac. 958, as follows:

"In order to enforce the lien, the company must first get possession, and then divest title, after which they must account for the proceeds."

But that statement, if not mere obiter, states the rule as applicable to the laws of the state of Oklahoma, under which a chattel mortgage does not pass title, but creates only a lien.

We, therefore, conclude that the mortgagee, though out of possession, had the right, under the laws of the state of Arkansas, applicable in this case, to sell the mortgaged property, and that his action thereafter to recover possession is not barred by the state of limitations.

The cause is reversed and remanded.

PER CURIAM. Adopted in whole.

CHILSON v. CAVANAGH. (No. 7851.)
Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

CORPORATIONS \Leftrightarrow 244(1)—STOCKHOLDERS—LIABILITY.

By section 39, art. 9, of the Constitution, providing that "No corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof," it is intended that a corporation shall receive, and the shareholder from whom the same is issued shall pay and be bound to, the full par value of its stock, in this manner making the assets of the corporation worth the face value of its shares of stock when issued. The liability thus imposed upon one who, accepting corporate stock, as an original shareholder, obligated himself to pay the corporation therefor in money, labor done, or property, is not discharged, at least so far as creditors of the corporation in good faith are concerned, by the mere transfer of such stock to innocent holder. It is the duty of the courts to construe and enforce this provision of the constitution so as to render it effectively remedial of the evil against which it is directed.

Ed. Note.—For other cases, see Corporations, 1st. Dig. §§ 960, 961, 964, 977; Dec. Dig. \Leftrightarrow (1).]

LANDLORD AND TENANT \Leftrightarrow 76(1)—LEASE—CONSTRUCTION AND OPERATION—SUBLEASE. A clause in a lease restricting the right of lessee to assign or sublet the premises is the benefit of the lessor, and can be set up by him.

Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225-227; Dec. Dig. \Leftrightarrow (1).]

CORPORATIONS \Leftrightarrow 268(1)—STOCKHOLDERS—LIABILITY—PLEADING.

Petition examined, and held not to state a cause of action.

Ed. Note.—For other cases, see Corporations, 1st. Dig. §§ 1129, 1133-1139, 1141½, 2276; Dec. Dig. \Leftrightarrow 268(1).]

Commissioners' Opinion, Division No. 3, or from District Court, Pittsburg County; V. Higgins, Judge.

Action by Frank M. Chilson, trustee in bankruptcy of the Alderson Coal Company,

against J. E. Cavanagh. Judgment sustaining a demurrer to the petition, and plaintiff brings error. Affirmed.

Wm. H. Fuller and George M. Porter, both of McAlester, for plaintiff in error. Gordon & McInnis, of McAlester, for defendant in error.

BLEAKMORE, C. This action was commenced in the superior court of Pittsburg county by Frank M. Chilson, trustee in bankruptcy, of the Alderson Coal Company, seeking to recover judgment against J. E. Cavanagh, an original stockholder of said company, for a portion of the alleged unpaid amount of the par value of certain shares of its capital stock, in the sum of \$4,297.28 and interest, being the difference between the total assets and liabilities of the bankrupt company. Demurrer to the petition was sustained, and plaintiff has appealed.

By the petition it is alleged, in substance, that the Alderson Coal Company was a corporation, organized under the laws of this state, for the purpose of leasing and owning coal lands and mining coal, etc.; that defendant Cavanagh was the owner of an undivided one-half interest in a certain coal mining lease held by him under the Indian Coal & Mining Company, by the terms of which he was to produce coal from said lease, and pay a stipulated royalty therefor, which lease contained a covenant against its assignment without the consent of the lessor; that on September 1, 1910, defendant proposed to the Alderson Coal Company to exchange his interest in said lease, properly transferred, for 305 shares of its capital stock, of the par value of \$15,250, fully paid up and nonassessable; that at a meeting of the directors of the Alderson Coal Company held on September 8, 1910, said proposition was duly accepted by said company, and its president and secretary empowered to accept the assignment of such lease, and to issue to defendant such shares of its capital stock; that on the same day defendant, in writing, upon the back thereof, assigned his interest in said lease to the Alderson Coal Company, and received in exchange therefor 305 shares of its capital stock, of the par value of \$15,250; that the Indian Coal & Mining Company had no knowledge of the existence of the Alderson Coal Company, or of said transaction; that long thereafter, in April, 1911, the Indian Coal & Mining Company conditionally consented to such assignment of said lease, on the back thereof, by the following indorsement:

"Approval of Transfer.

"The above and foregoing assignment of the within lease from J. E. Cavanagh to F. J. McFarland, and from McFarland and J. E. Cavanagh to the Alderson Coal Company, of Alderson, Okl., is hereby consented to and approved, conditioned that the Alderson Coal Company execute and maintain in favor of the Indian

Coal & Mining Company, a ten thousand dollar surety bond, conditioned for the faithful performance of the terms of the said lease by the Alderson Coal Company, and upon failure to give and maintain such bond the consent hereby given to said transfer and assignment may be withdrawn, and the said J. E. Cavanagh shall be held bound according to the original lease. "Done this 14th day of April, 1911. Indian Coal & Mining Company, by C. R. Craig, Vice President. Attest: J. A. Nichols, Secretary. [Seal]"

That no bond was ever executed by the Alderson Coal Company, and that no other or further consent of the Indian Coal & Mining Company to such assignment was ever given, and possession of the property covered by said lease was never obtained by the Alderson Coal Company with the knowledge or consent of the Indian Coal & Mining Company; that the pretended assignment of said lease to the Alderson Coal Company was void, and by reason thereof said company never acquired any interest in said lease, of the value of \$15,250, or any other sum; that said company did not receive from defendant, or other persons, any money, labor done, or property of any kind, for said shares of its stock, and had not received back said stock; that if the pretended assignment of the interest of defendant in said lease had been consented to and approved by the Indian Coal & Mining Company, the Alderson Coal Company would have thereby obtained and had a valuable asset, worth approximately \$15,000, out of which the plaintiff, as trustee in bankruptcy, could have realized sufficient funds to pay its creditors in full; "that defendant herein received and had issued to him stock of the Alderson Coal Company in the amount of 305 shares of the capital stock of said company at \$50 per share, of the par value of \$15,250, without any consideration whatever being paid therefor to the Alderson Coal Company."

1. It will be noted that it is not specifically alleged, and plaintiff does not in his brief insist, that defendant was the owner or holder of said stock of the Alderson Coal Company at the commencement of this action; but recovery is sought by reason of the original issue of the shares to him. By section 1263, R. L. 1910, it is provided:

"Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions against any of its stockholders that have not wholly paid for the capital stock held by him, and in such action the court must ascertain the amount that is unpaid upon the stock held by each stockholder and for which he is liable, and several judgment must be rendered against each in conformity therewith. The liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. And in no other case shall the stockholders be individually and personally liable for the debts of the corporation. The term, 'stockholder,' as used in this section, shall apply not only to such persons as

appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another."

In aid of this contention that, notwithstanding the statute, supra, defendant is liable to the creditors of the bankrupt corporation, plaintiff invokes the provisions of section 39, art. 9, of our Constitution (section 256, Williams' Annotated Constitution), viz.:

"No corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof, and all fictitious increase of stock or indebtedness shall be void, and the Legislature shall prescribe the necessary regulations to prevent the issue of fictitious stock or indebtedness."

In Webster v. Webster Refining Company, 38 Okl. 168, 128 Pac. 261, 47 L. R. A. (N. S.) 697, construing the foregoing section of the Constitution, this court, in an opinion by Judge Ames, said:

"The evil which this constitutional provision was designed to stop was the so-called practice of watering stock of a corporation; and it is both our duty and our disposition to give this statute its natural construction—the meaning which its words plainly disclose. The corporation is prohibited from issuing stock except for money, for labor done, or for property actually received to the amount of the par value thereof. These words have a very plain significance. They mean just what they say."

The manifest purpose of the framers of our Constitution was to protect the public against the well-known, deceitful, and fraudulent practice indulged by some corporations of issuing shares of capital stock without receiving the par value therefor either in money or its equivalent. Obviously it was intended by the section quoted to provide that a corporation should receive, and the shareholders to whom the same was issued should be bound for the full par value of its stock, thus making the assets of the corporation worth the face value of its shares of stock when issued. The liability thus imposed upon one who, by accepting corporate stock, as an original shareholder, obligates himself to pay the corporation therefor in money, labor done, or property is a continuing one, at least so far as the creditors of the corporation in good faith are concerned, and is not discharged by the mere transfer of such stock to an innocent holder; otherwise one who had contributed little or nothing to the capital stock of a corporation might obtain shares of its stock, dispose thereof profitably, and entirely escape liability to corporate creditors. It is the plain duty of the courts to construe and enforce this provision so as to render it effectively remedial of the evil against which it is directed.

The Texas Constitution contains a provision in language almost identical with that of section 39, art. 9, of the Oklahoma Constitution. In construing such provision, in an action by a creditor of an insolvent corporation against a stockholder, the Supreme Court of that state held:

"One receiving stock in a corporation for a consideration forbidden by the Constitution, is liable to us creditors for the face value of his shares"

and in the body of the opinion it is said:

"Section 6, art. 12, of our state Constitution in this language: 'No corporation shall issue stock or bonds except for money paid, labor done, or property actually received.' The purpose of the convention in enacting that provision of the Constitution was to secure creditors as well as stockholders of corporations against a practice, which was too common, of corporations issuing fictitious stock and stock upon insufficient consideration, whereby the actual capital was much less than the amount represented by the shares issued and sold by the corporation. The terms in which this section of the Constitution is expressed indicates the purpose that the assets of the corporation should be something substantial, and of such a character that they could be subjected to the payment of claims against the corporation as well as to secure the shareholders in their rights in a capital stock." *O'Bear-Nester Glass Co. v. Atiexplo Co.*, 101 Tex. 431, 108 S. W. 967, 9 S. W. 931, 16 L. R. A. (N. S.) 520.

See, also, *Mathis v. Pridham*, 1 Tex. Civ. p. 53, 20 S. W. 1015.

The Constitution of Missouri, 1875, contains a similar provision. In *Van Cleve v. Rkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. 593, it is said by the Supreme Court of that state:

"Upon a review of all the cases decided by appellate courts of this state since the adoption of the Constitution of 1875, the rulings in some of which will be found to be in harmony, it is impossible to escape the conviction that in this state, whatever may be the case in some of the other states, the 'American trust doctrine,' suggested by Mr. Justice Harlan, has indeed been reinforced by its Constitution and statutes, and that the proposition that the stock of a corporation must be paid for 'in meal or in money,' in money or in money's value, is not a mere figure of speech, but really has the significance of its terms; it may be paid for in property, but in such case the property must be the equivalent in value to the par value of the stock issued therefor; that it is the duty of the stockholders to see that it possesses such value; that when a corporation is sent forth into the commercial world, accredited by them as possessor of a capital in money, or its equivalent property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid for, and that the money, or equivalent in property, will be forthcoming to respond to their legitimate demands; and in that that it is the duty of the stockholder, and of the creditor, to see that it is so paid."

See, also, *Scoville v. Thayer*, 105 U. S. 143, 2 L. Ed. 968; *Fogg v. Blair*, 139 U. S. 118, 3 Sup. Ct. 476, 35 L. Ed. 104.

2. The proposal of the defendant was to transfer in exchange for the 305 shares of stock issued, fully paid up and nonassessable, to the defendant, the Alderson Coal Company, his undivided one-half interest in the same.

It is alleged that, although the 305 shares of stock were issued and delivered to him, the defendant attempted assignment of his interest in the same. The lease did not operate to transfer the same, for the reason that the consent of the Indian Coal & Mining Company thereto was

not obtained, and therefore the Alderson Coal Company received, and the defendant parted with, nothing on account of the issuance of such stock. The lease from the Indian Coal & Mining Company, his interest in which defendant assigned, provides:

"That they [defendant] will not at any time during the term hereby granted, assign, transfer or sublet their interest in said lease without the consent of party of the first part," and, "it is further agreed that, should the party of the second part violate any of the covenants of this lease, or fail for the period of thirty days to pay the stipulated monthly payment, royalty provided for herein, then the party of the first part, shall be at liberty, in their discretion, to avoid this indenture of lease, and cause the same to be annulled, when all the rights, franchises and privileges of party of the second part shall cease, and end without further proceedings."

It will be observed, by the terms of the lease, supra, it was not contemplated that the mere assignment thereof by Cavanagh, without the consent of the Indian Coal & Mining Company, should, ipso facto, avoid the same and forfeit the rights of all parties thereunder; but, on the other hand, it was expressly provided that in the event of such assignment, the lease might be avoided alone at the instance and in the discretion of the lessor. It is not alleged that the Indian Coal & Mining Company exercised its right to so avoid the lease, but, on the contrary, it is specifically alleged that it did consent to the assignment as made by Cavanagh upon condition that the Alderson Coal Company execute and maintain a bond, and that upon the failure to give and maintain such bond, the consent so given might be withdrawn and Cavanagh held according to the terms of the lease. It thus appears that the required consent was in fact given, subject to the power of the lessor to withdraw same and hold Cavanagh personally liable. That such consent was ever in fact withdrawn or that the Indian Coal & Mining Company took any steps looking to the forfeiture of said lease, is not pleaded. In *Jones v. Moncrief-Cook Co.*, 25 Okl. 856, 108 Pac. 403, it is held:

"The lessor may waive a breach of the restriction against the assignment or subletting imposed by the terms of the lease, in which event the matter stands as if the lessor had given his consent to the assignment or underletting."

"(a) A clause in a lease, restricting the right of the lessee to assign or sublet the premises, is for the benefit of the lessor, and can be set up alone by him."

In *Holman v. De Lin*, etc., 30 Or. 428, 47 Pac. 708, it is said:

"It is argued that, as the lease contains covenants against an assignment or a subletting by the lessees without the consent of the lessors, it was rendered void by reason of the assignment and the occupancy by the defendant company under De Lin; but these covenants were made for the benefit of the lessors, and it was incumbent upon them to re-enter in order to terminate the lease or re-vest the estate in them. * * * It is not shown that they did this, and hence were not re-vested of their old estate."

See, also, *Linn Woolen Co. v. Brown*, 110 Me. 88, 85 Atl. 404; *Attachment Company v. Sewing Machine Co.*, 83 Ill. App. 362; *Id.*, 25 N. E. 669; *Jones on Landlord & Tenant*, § 495. In *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684, it is said:

"It seems to be the law that where there is a clause in the lease that it shall not be assigned without the previous consent of the lessor, and there is a breach of the covenant not to assign, the lessor has only the option to forfeit the lease for breach of the condition, and that the assignment is not void, but passes the term, and the only remedy is for breach of the covenant."

"After such a breach the lessor has only the option of forfeiting the lease for breach of condition, and he has not the option of declaring the assignment void." *Jones, Landlord & Tenant*, § 495.

See, also, *Tiffany on Landlord and Tenant*, § 152, subd. "J."

In our opinion it cannot be successfully maintained that the *Alderson Coal & Mining Company* issued, and defendant accepted, its stock in violation of the provisions of section 39, art. 9, of the Constitution, for as between it and defendant the assignment of said lease was duly accepted, was valid, and operated to pass the term; and it is specifically averred that the interest of defendant in such lease was in fact of the approximate value of the stock received by him in exchange therefor. The *Indian Coal & Mining Company* alone was authorized to declare a forfeiture and avoid the lease for breach of the covenant not to assign same without its consent; and in the light of the facts alleged it must be held that neither the *Alderson Coal Company*, nor the plaintiff as trustee in bankruptcy, may set up the breach of such covenant in avoidance of the lease.

[3] It follows that the demurrer was properly sustained, and the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

HEDGPATH v. HUDSON et al. (No. 7325.)
(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

1. HOMESTEAD §90—LIABILITIES ENFORCEABLE—CONSTITUTIONAL PROVISION.

The homestead exemption in the Oklahoma Constitution (section 303, Williams' Okl. Const.) protects the homestead of the family from forced sale for the payment of debts and from judgment liens, except for the purchase money, taxes, and work and material, and a debt created by mortgage executed by the husband and wife.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 128, 130-135; Dec. Dig. §90.]

2. HOMESTEAD §128—TRANSFER—RIGHTS OF PURCHASERS.

The homestead may be sold and conveyed by the husband and wife jointly, and the purchasers will take the title free and clear from all judgment liens or debts, except those enumerated in the homestead exemption clause of the Constitution.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 224-232; Dec. Dig. §128.]

3. HOMESTEAD §66—EXTENT—VALUE.

Under section 302, Williams' Ann. Const., the limitation in value to \$5,000, placed on the urban homestead, does not apply to the rural homestead, and the rural homestead is exempt from forced sale without regard to its value.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 93, 96, 97; Dec. Dig. §66.]

Commissioners' Opinion, Division No. 2. Error from District Court, Caddo County; Will Linn, Judge.

Action by J. F. Hudson and another against M. B. Hedgpeth. Judgment for plaintiffs, and defendant brings error. Affirmed.

Louie E. McKnight, of Anadarko, for plaintiff in error. Bristow & McFayden, of Anadarko, for defendants in error.

GALBRAITH, C. This was an action for an injunction to restrain the sale of real estate on execution. Wm. F. Means and Mattie L. Means were the owners of 160 acres of land in Caddo county, and resided upon the same as their homestead. The plaintiff in error, M. B. Hedgpeth, sued them in an action of debt and secured a judgment. This judgment was unsatisfied, and the Means sold their homestead, and it was conveyed to the defendants in error. Hedgpeth caused an execution to be issued upon his judgment and levied upon the land, and caused the same to be advertised for sale. The owners of the land brought action to restrain the sale. The judgment creditor answered in this action, admitting the sale and conveyance of the land, but contended that it was of the value of \$10,000, and that the excess in the valuation of the homestead above \$5,000 was subject to his judgment lien and the payment of his debt. A demurrer was interposed to the answer and sustained. To review that ruling the cause has been appealed to this court.

[3] The one assignment of error is whether or not, under the Constitution of the state, the homestead in the country is limited in value to \$5,000. Section 1, art. 12, of the Constitution (section 302, Williams' Const.), reads as follows:

"The homestead of any family in this state, not within any city, town or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: Provided, that the same shall not exceed in value the sum of five thousand dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; and provided further, that in case said homestead is used for both residence and business purposes, the homestead interests therein shall not exceed in value the sum of five thousand dollars: Provided, that nothing in the laws of the United States, or any treaties with the Indian Tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state: And provided further, that any temporary renting of the homestead shall not change

the character of the same when no other homestead has been acquired."

It will be observed that two classes or kinds of homesteads are provided for in the above section; one in the country, rural, the other in the city, town or village, urban. The first sentence in the section defines the rural homestead, prescribing its area, but does not fix any limitation on its value. The second sentence in the section and the two provisos therein contained refer to the urban homestead, and a maximum valuation is placed thereon. The third proviso in the section extends the benefit of the homestead exemptions to Indian allottees. The fourth proviso obviously refers to both kinds of homesteads.

It is scarcely necessary to refer to the rules of construction in order to ascertain the meaning of the above section of the Constitution, since its meaning is reasonably clear upon its face. However, if reference is made to the debates of the constitutional convention when this section was under consideration, conclusive evidence will be found that it was the express purpose of the convention to leave the rural homestead without restriction as to valuation, and to place a limitation only on the value of the urban homestead. The reason given for this apparent discrimination in favor of the rural over the urban homestead was the great value that city homesteads might attain under favorable conditions, and, if unrestricted in value, the opportunity thereby afforded the dishonest debtor to defraud his creditors.

Whatever may be said of the sufficiency of the reason given for limiting the value of one kind of homestead and leaving the other one without limitation as to value the court has nothing to do. That was a matter of public policy, clearly within the jurisdiction of the constitutional convention, and the only thing the court has to do when the question is raised is to ascertain with certainty, if possible, the intention of the framers of the Constitution and to so declare it. In this instance there seems to be no doubt that it was the intention of the framers of the Constitution that there should be no limitation of value on the rural homestead. Section 303, Williams' Okl. Const., protects the homestead from forced sale except for debts therein specified.

[1,2] In the case of *Gray v. Deal et al.*, 151 Pac. 206, it was decided that the homestead was exempt from judgment lien for debts other than those enumerated in section 303, and that the homestead might be sold and clear title conveyed free from all other judgment liens. The second and third paragraphs of the syllabus in that case are as follows:

"The homestead exemption in the Oklahoma Constitution (section 303, Williams' Okl. Const.) protects the homestead of the family from forced sale for the payment of debts and from judg-

ment liens, except for the purchase money, taxes, and work and material, and a debt created by mortgage executed by husband and wife.

"The homestead may be sold and conveyed by the husband and wife jointly, and the purchasers will take the title free and clear from all judgment liens or debts, except those enumerated in the homestead exemption clause of the Constitution."

We conclude that the trial court was right in sustaining the demurrer to the answer in the instant case, and that the exceptions should be overruled, and the judgment appealed from affirmed.

PER CURIAM. Adopted in whole.

HART et al. v. NEW STATE BANK. (No. 8060.)

(Supreme Court of Oklahoma. Oct. 10, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 567(1) — RECORD — CASE-MADE—TIME FOR SETTLEMENT.

In the absence of a waiver by defendant in error, a case-made, settled and signed before the expiration of the time allowed for suggesting amendments, is a nullity, and confers no jurisdiction upon the Supreme Court to review alleged errors presented thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2515-2518, 2520-2522; Dec. Dig. \S 567(1).]

Error from District Court, Woodward County; James B. Cullison, Judge.

Action between Essie Hart and others and the New State Bank. From the judgment, Essie Hart and others bring error. Dismissed.

C. W. Herod, of Woodward, and E. C. Gray, of Higgins, Tex., for plaintiffs in error. Chas. R. Alexander, of Woodward, for defendant in error.

PER CURIAM. Motion to dismiss appeal herein is based upon the ground that the case-made was signed and settled before the expiration of the time given defendant in error to suggest amendments. The order overruling motion for new trial and from which this appeal is taken was made on October 29, 1915, and plaintiffs in error were granted "90 days' additional time" within which to make and serve case-made, 10 days allowed defendant in error for suggesting amendments, and the case-made to be settled and signed upon 5 days' notice. In pursuance to this order, plaintiffs in error had 100 days in addition to the 15 days allowed by statute, making in all 115 days, within which to serve case-made and for the suggestion of amendments thereto; the time expiring on February 21, 1916. The time for suggesting amendments to case-made by defendant in error began to run on February 11th, and expired on February 21st. The case-made was served upon defendant in error on the 18th day

of November, 1915, and notice that the case-made would be presented to the trial judge for settling and signing on the 11th day of February, 1916, was served upon defendant in error on the — day of —, 1915. The case-made was signed and settled on February 11, 1916. It therefore clearly appears that the case-made was signed and settled before the expiration of the time given defendant in error to suggest amendments, and upon authority of *Frey v. McCune et al.*, 153 Pac. 109, *Cummings v. Tate*, 147 Pac. 304, and *Memphis Steel Const. Co. v. Hutchinson*, 147 Pac. 771, the case-made is a nullity, and confers no jurisdiction upon this court to review alleged errors presented thereby.

The appeal is therefore dismissed.

LEEPER BROS. LUMBER CO. v. GUNTER.
(No. 7807.)

(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

CONTRACTS — 214 — CONSTRUCTION — SUBJECT-MATTER.

Contract examined, and it is held, that no liability was created against Gunter until he collected the note, and the demurrer to the petition properly sustained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 980-995; Dec. Dig. — 214.]

Commissioners' Opinion. Division No. 3. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by the Leeper Brothers Lumber Company against Charles W. Gunter. Judgment for defendant, and plaintiff brings error. Affirmed.

Giddings & Dortch, of Oklahoma City, for plaintiff in error. Stephen C. Treadwell and William P. Harper, both of Oklahoma City, for defendant in error.

HOOKE, C. In May, 1912, Hathaway Harper, being indebted to Leeper Bros. Lumber Company, a corporation, attempted to secure the same by entering into the following contract with said company, the essential part of it being as follows:

"During the month of April, 1912, policy No. 509094, Patterson, having been converted from the term plan to the ordinary life plan by party of the first part, the commission arising from said conversion being due party of the first part, upon payment being made by L. E. Patterson of the amount required to make said conversion, either to be paid within 30 days from the date of this instrument, or if note be given by said Patterson, payable to Chas. W. Gunter, or the Penn Mutual Life Insurance Company, said note maturing on or before — by November 1, 1912, and party of the first part being desirous of assigning said commission due thereunder, not to exceed \$170 to the party of the second part, delivers to the party of the second part the said amount of commission on the date as above written.

"It is further understood and agreed that C. W. Gunter, or the Penn Mutual Life Insurance Company, is hereby directed, upon payment of the above amount by the said Patterson, to

pay and deliver to the said party of the second part the above amount."

At the bottom of which appears the following acceptance:

"I accept the above as per conditions therein expressed.
Chas. W. Gunter."

In the bill of particulars filed herein it is alleged that the said Patterson executed a note for the amount of said commission to said Harper, and delivered the same to the defendant, Gunter, who accepted said note and still retains the same, and that by reason thereof the liability named in said contract accrued to the plaintiff in error and against said Gunter. In other words, the contention of the plaintiff in error that the mere acceptance of this note executed by Patterson to Gunter for the commission due to Harper on said insurance policy and the retention thereof made Gunter immediately liable to the plaintiff in error, whether said note was ever collected by Gunter. In this contention we cannot agree. The contract, as we construe it, is unambiguous, and it has but one meaning. The provision of the first paragraph was merely reciting the option which permitted Patterson either to pay the premium within 30 days, or to execute a note therefor to Gunter or the Penn Mutual Life Insurance Company. The second paragraph, which to our minds clearly expresses the intention of the parties at the time, directs Gunter, upon payment of the above amount by the said Patterson, to pay and deliver said amount to said party of the second part. As we view this contract, no liability was created against Gunter until he collected this note; and, inasmuch as the bill of particulars does not allege that he has collected it, we are of opinion that the demurrer was properly sustained.

The judgment of the lower court is affirmed.

PER OURIAM. Adopted in whole.

DAY et al. v. CHARLTON et al. (No. 6304.)
(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

1. INDIANS — 15(2) — LANDS — ASSIGNMENT OF ROYALTIES — VALIDITY.

An attempted assignment, by a full-blood Cherokee Indian, of accruing royalties under a departmental oil and gas lease upon his allotment, is void, unless such assignment be approved by the Secretary of the Interior.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 39; Dec. Dig. — 15(2).]

2. ASSIGNMENTS — 50(2) — EQUITABLE ASSIGNMENT — WHAT CONSTITUTES.

An order or request in writing upon a third person to deliver to the maker thereof for his indorsement certain checks thereafter to be drawn against an accruing fund of the maker in the hands of another, such checks, after receiving such indorsement, to be delivered by another third person to the beneficiary of such order or request, does not operate as an equita-

the assignment of the fund against which such checks are to be drawn; the maker of the order or request not having relinquished full control over such fund.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50(2).]

Commissioners' Opinion. Division No. 3. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by J. R. Charlton against Katie Day and others. Judgment for plaintiff against all the defendants, and for Katie Day for contribution from defendant C. M. Keefer. Defendants Katie Day and others bring error, and defendant Keefer brings error by cross-petition against the other parties. Reversed and remanded, with directions.

Geo. S. Hill and P. A. Sompayrac, both of Bartlesville, for plaintiff in error Day. H. H. Montgomery, of Bartlesville, for plaintiff in error Keefer. James A. Veasey and J. P. O'Meara, both of Tulsa, for defendant in error Charlton.

JOHNSON, C. This suit was commenced in the district court of Washington county by J. R. Charlton, defendant in error, as plaintiff, against James Day, Katie Day, and C. M. Keefer, plaintiffs in error, and the Prairie Oil & Gas Company, defendant in error, as defendants. The material facts are as follows, viz.:

Harrison Day, a full-blood Cherokee Indian, during his lifetime, received as a portion of his allotment as a Cherokee citizen 80 acres of land described in the petition of plaintiff. On October 15, 1909, the said allottee, as lessor, executed to William V. Thraves and Alex Lewis, as lessees, an oil and gas lease upon the said lands, reserving to the lessor, as royalties under such lease, 12½ per centum of the gross proceeds of all crude oil which might be produced from such lands under the said lease. This lease was approved by the Secretary of the Interior of the United States. The interests of the lessees were subsequently assigned to one John A. Bell, the assignments being approved by the Secretary of the Interior. Under the lease, the land was prospected and became productive of crude oil in paying quantities. The part of the oil produced from the lease, which represented the royalties of lessor, was run into the pipe lines of, and purchased by, the defendant the Prairie Oil & Gas Company, the latter company during the lifetime of the allottee paying the proceeds hereof in money to the United States Indian superintendent, at Muskogee, Okl., to be handled and disbursed by such Indian superintendent under the rules of the Department of the Interior, in accordance with the provisions of the lease. During the year 1911, Harrison Day was prosecuted upon various criminal charges, and was represented in the criminal cases by the plaintiff J. R.

Charlton, who is an attorney at law. Upon October 30, 1911, as a method of providing for the payment of the attorney's fees of the said Charlton in such criminal causes, the said Harrison Day executed an instrument in writing, which is as follows:

"I, Harrison Day, of lawful age, a citizen of Washington county, Okl., being first duly sworn, according to law, depose and say that I am a full-blood Delaware Indian, regularly enrolled as a citizen of the Cherokee Nation; that I am the owner of 80 acres of land, included in the approved oil and gas mining lease from which there will, from time to time, accrue certain royalties.

"I further state that there have been filed against me in the district court of Washington county, Okl., four felony charges; that I was tried upon one of said charges, and convicted and sentenced to serve a term of 10 years in the Oklahoma State Penitentiary, at McAlester, said sentence being the minimum sentence for the charge upon which I was convicted.

"I further state that for a certain consideration, my attorney, Mr. J. R. Charlton, has succeeded in having the three felony charges against me dismissed, so that when my sentence expires, I will be discharged from the state prison with no charge against me.

"I acknowledge indebtedness to my attorney, Mr. J. R. Charlton, for services rendered, in the sum of \$1,000. In order to make payment of said indebtedness, I respectfully request the United States Indian superintendent of the Indian agency, Muskogee, Okl., and the cashier of said agency, to mail all vouchers and checks representing oil royalties on my land, to the district Indian agent at McAlester, Okl.; that said district agent may obtain my signature thereto and transmit said checks to my attorney, J. R. Charlton, of Bartlesville, Okl., this procedure to continue until the full amount of the above-mentioned fee of \$1,000 is paid.

"I further state that I make this statement on my own free will and in the presence of Frank B. Long, district Indian agent.

"[Signed] Harrison Day.

"Witnesses: Smith Lonsberry, Bartlesville, Okl. John McMullen, Bartlesville, Okl."

The above instrument, together with a favorable report thereon by the local United States district Indian agent at Nowata, Okl., was filed by the said Charlton with the United States Indian superintendent, at Muskogee, Okl., who wrote to Charlton, acknowledging receipt of the instrument and report, the letter of the Indian superintendent containing the following expression, viz.:

"You are advised that in accordance with this report, the policy herein outlined (referring to the directions of the allottee contained in the written instrument of the allottee) will be followed in future and as rapidly as the royalties accrue, the signature of the indorsement of the lessor will be obtained on the checks and the same will be forwarded to you." (Parentheses ours.)

In pursuit of the plan outlined in the Harrison Day agreement and the letter of the Indian superintendent, the Indian superintendent, during the lifetime of Harrison Day, forwarded checks for these royalties to the local Indian agent at McAlester, Okl., where Harrison Day was confined in the state penitentiary, for the indorsement of Day. Day, at first refused to sign any of the checks for delivery unless he should be turned out of

prison. The Indian agent informed Charlton of this refusal, and advised him to go to McAlester and take the matter up in person with Day. Charlton went to McAlester and saw Day, and as a result of this conference, Day indorsed a part of the checks, upon which \$200 was paid to Charlton. However, Charlton did not collect the full face value of these checks, and Day did not indorse all of the checks, but refused to do so. The \$200, above mentioned was the only amount collected by Charlton during the lifetime of Day.

Subsequently, Harrison Day died intestate, leaving as his sole heirs at law the plaintiffs in error James Day and Katie Day, his father and mother, respectively, who inherited each an undivided one-half interest in this land. By warranty deed, joined in by his wife, Katie Day, James Day conveyed his undivided one-half interest in the land to the plaintiff in error C. M. Keefer. After the death of the allottee, the Department of the Interior released its supervision of the lease, and the Prairie Oil & Gas Company continued to run the royalty oil through its pipe lines, paying the proceeds to the then owners of the fee in the land. This suit was brought by the plaintiff Charlton, on the purported assignment from Harrison Day, the allottee, to compel an accounting and payment out of the accruing royalties of the unpaid part of his fee under the contract with the allottee. Prior to the suit, the administrator of the deceased allottee paid to Charlton the sum of \$110, leaving a balance on the attorney fee of \$690, due at the time of the beginning of the action. It was agreed that C. M. Keefer was an innocent purchaser of the James Day interest in the land, without notice of the Harrison Day purported assignment.

The lower court ordered an accounting, adjudged that the unpaid part of the attorney's fee be paid out of the interest of Katie Day in the royalties, and that defendant Keefer contribute to the payment of the fee in a sum equivalent to the part thereof due out of his interest in the royalties. Katie Day, James Day, and C. M. Keefer appeal from the general judgment, and Keefer appeals by separate cross-petition in error from the part of the judgment ordering contribution by himself.

It is contended by plaintiffs in error: (1) That, if the Harrison Day writing, by its terms, constituted what ordinarily in law is an assignment, it was not approved by the Secretary of the Interior, and therefore was void as being violative of the restrictions imposed upon said land by the acts of Congress; and (2) that the said writing was not in its terms an assignment. We are of the opinion that both contentions are correct.

[1] 1. It was contended by plaintiffs in error that the Harrison Day writing, if in its terms an assignment, was void for the rea-

son that it was not approved by the Secretary of the Interior. The act of Congress of May 27, 1908 (35 Stat. 312, c. 199) which removed certain restrictions, and reimposed and continued other restrictions, upon the lands of allottees of the Five Civilized Tribes, of which the Cherokee Tribe is one, contained the following provision, viz.:

"* * * All allotted lands of enrolled full bloods, and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." Section 1.

The same act further provided that leases of restricted lands for oil, gas, or other mining purposes, might be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise. Under this act, it is clear that Harrison Day, being a full-blood Cherokee Indian, could neither convey nor incumber, nor lease for oil and gas purposes any part of his allotment, without the approval of the Secretary of the Interior. In this case, we are called upon to determine whether, after leasing his lands for oil and gas mining purposes, with the approval of the Secretary of the Interior, he could then assign the royalties to accrue under such lease without the approval of the Secretary of the Interior. Under the acts of Congress providing for methods of dealing with allotted lands of the members of the Quapaw Nation of Indians, a Quapaw Indian was restricted from alienating his land, but was permitted to lease his lands for mining purposes for a term of ten years, without the supervision of any governmental agency.

In the case of the United States v. Noble, decided upon April 5, 1915, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844, the Supreme Court of the United States held that the royalty reservation in an oil and gas lease of a Quapaw Indian was a part of the fee in the land, and that the Indian lessor was without power, under the congressional restriction upon alienation of the fee, to assign such royalties, without the approval of the Secretary of the Interior. In that case, the principle was enunciated that rents and royalties to accrue on such a lease are profits issuing out of the land, and as such are a part of the restricted estate remaining in the Indian allottee. The estate or interest represented by the royalties, and reserved by the lease to the lessor, was held to be restricted and unassignable by the Indian lessor, without the approval of the Secretary of the Interior, although the original creation of the lessee's leasehold estate was without restriction. The conclusion of the Su-

reme Court of the United States in the Noble Case was contrary to the earlier conclusions of this court in the following cases, *z.*: *Wah-tah-noh-zhe v. Moore*, 36 Okl. 631, 9 Pac. 877; *Tidwell v. Dobson et al.*, 37 Okl. 180, 131 Pac. 693—and reversed the decision of the United States Circuit Court Appeals in the Noble Case itself, as reported in 197 Fed. 292, 116 C. C. A. 654; and, so far as the conflict goes, is controlling on this court as an interpretation of the acts of Congress with reference to Indian lands.

The restrictions upon the power of the allottees of the Cherokee Nation, which we are dealing with in the present case, are much more stringent than existed in the Quapaw Nation, as illustrated in the Noble Case. In the Quapaw Nation, the allottee had the power to lease his lands for oil, without original supervision, and yet, in the Noble Case, the United States Supreme Court held that the reserved royalties in such a lease were a part of the restricted fee, and assignable without departmental approval. A Cherokee full-blood allottee could not release the original lease, without the approval of the Secretary of the Interior. He could not convey the original leasehold interest of the lessee, without such approval. The original lease in this case, by its own terms, provided that it should be subject to rules and regulations of the Secretary of the Interior, all of which rules and regulations were made a part of the lease, with the stipulation that no regulations thereafter made should affect the term of the lease or the rates of royalties or payments thereon. The lease further provided that assignments of any interest in the land might be made with the approval of the Secretary of the Interior. The record does not show that such rules and regulations were. The disposition of royalties, already accrued at the time of the Harrison Day purported assignment, as well as those to accrue thereafter, might depend somewhat upon these rules and regulations, which are not before us, and the effect of which we are therefore unable to determine.

It is contended by the defendant in error, Charlton, that the letter of the United States Indian superintendent, at Muskogee, and the action of the superintendent, and subordinates, in forwarding the checks, which were forwarded, and to this extent complying with recognizing the Harrison Day writing as an assignment, constituted an approval of the instrument by the Secretary of the Interior, as an assignment of the royalties. To this contention we cannot agree. The act of Congress does not give to the Indian superintendent, or his subordinates the power to approve such leases, or assignments thereof. The power is vested in the Secretary of the Interior. A consideration of the question of the authority of the Indian superintendent and his subordinates to deal with

accrued royalties, as distinguished from royalties to accrue after an assignment, might be influenced by the provisions of the rules and regulations of the Secretary of the Interior, pertaining to such matters. But, such rules and regulations are not in the record. We are not justified in indulging the presumption that such rules and regulations gave authority to the Indian superintendent, here sought to be established to have existed in him, from the mere fact of his having agreed to forward the checks in compliance with the request of the allottee, and of some of such checks having been so forwarded. However, there was no proof of the existence of royalties already accrued at the time of the execution of the purported assignment. The letter and actions of the superintendent did not tend to approve or recognize an assignment, but merely to recognize, and assist in carrying out, the intentions and promise of the allottee to pay his debt from funds which might be allowed to him by the department, in its supervision of his affairs.

Following the conclusions of the Supreme Court of the United States in the Noble Case, so far as they are applicable to this case, and, bearing in mind the act of Congress governing the relations of the Cherokee allottees and their lands, as well as the specific terms of the oil and gas lease in this case, we are bound to conclude that the Harrison Day writing, here contended to be an assignment of the royalties under his departmental oil and gas lease, was in violation of the restrictions imposed by the acts of Congress, and void.

[2] 2. It is also contended that the Harrison Day writing did not, in its terms, constitute an assignment, and such is the opinion of this court. The departmental officials were the agents of the allottee, as well as of the government, in the handling of these royalties. The writing simply directed or requested one of the maker's agents, the Indian superintendent, to forward certain checks to another of the maker's agents, the local Indian agent at McAlester, the checks then to be indorsed by the said Harrison Day, and then to be delivered by the Indian agent to Charlton. The fund itself was not to be paid to Charlton, but individual checks were to be delivered to him, after they should have passed under the supervision and control of Day himself. This plan was recognized and followed by all the interested parties, and checks were not delivered when Day objected to the delivery or refused to execute the indorsements. Day retained and exercised complete control over the final delivery of the checks.

In order to operate, even as an equitable assignment, a written instrument, of such a nature, must make an absolute appropriation of the fund sought to be assigned to the use of the assignee. The intention of the assignor must be to transfer a present interest

in the fund, to the exclusion of all control by the assignor over the fund. The transfer must be of such a character that the fundholder can, not only safely pay, but is compellable to do so, though he may be forbidden by the assignor. 5 Corpus Juris, 909, and notes, and 913; 4 Cyc. 45, 47; 3 Pomeroy, Eq. Jur. § 1280; Christmas v. Gains, 14 Wall. 69, 20 L. Ed. 762; Silent Friend Mining Co. v. Abbott, 7 Colo. App. 73, 42 Pac. 318; Christmas' Adm'r v. Griswold, 8 Ohio St. 558.

The Indian officials could not have been compelled to have delivered the checks in question under the Harrison Day writing, without the exercise by Day of the control which he reserved over them, and would not have been safe in doing so. The Day writing was not an assignment, legal or equitable, but merely a promise to pay out of a specific fund.

Other propositions are raised in the case, but the conclusions hereinabove reached are decisive of the issues, as between all of the parties.

The judgment of the lower court is reversed, and the cause remanded, with directions to the lower court to proceed in accordance herewith.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. TALIAFERRO. (No. 7694.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §556—NATURE OF PROCEEDINGS—STATUTORY REQUIREMENTS.

Article 25, c. 60, Rev. Laws 1910, contains complete provisions prescribing the requirements and regulating the procedure for bringing a case to this court by petition in error with case-made attached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §556.]

2. APPEAL AND ERROR §559 — RECORD — SCOPE AND CONTENTS—CASE-MADE.

Only those matters essential to present the errors complained of need be brought up. The party under this procedure may make a case containing a statement of so much of the proceedings and evidence, or other matters in the action as may be necessary to clearly present the points involved, eliminating all unnecessary or irrelevant matter; and, when served and settled as therein authorized, it will be sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2483-2489; Dec. Dig. §559.]

3. APPEAL AND ERROR §562 — RECORD — SCOPE AND CONTENTS—CASE-MADE.

Section 5317, requiring orders made out of court to be forthwith entered on the journal of the court by the clerk, is directory, and compliance with said requirement that such orders be so entered is not essential to the validity of such orders, nor is it necessary that the case-made show affirmatively the recording thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2495-2499; Dec. Dig. §562.]

4. APPEAL AND ERROR §614 — RECORD — CASE-MADE.

The certificate of the judge who settles and certifies to a case-made is prima facie evidence of the facts therein recited, and cannot be impeached except in the manner authorized by statute (Rev. Laws 1910, § 5248).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2708-2713; Dec. Dig. §614.]

5. APPEAL AND ERROR §564(3)—RECORD—CASE-MADE—SUFFICIENCY.

A recital in a case-made, duly certified to by the judge, that an order was made extending the time in which to prepare and serve case, where the substance of the order is contained in the case-made, is sufficient, and motion to dismiss because it does not affirmatively appear in the case-made that such order of extension has been recorded upon the journal will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2503, 2556; Dec. Dig. §564(3).]

Error from County Court, Marshall County; J. I. Henshaw, Judge.

Action between the St. Louis & San Francisco Railroad Company and W. N. Taliaferro. From the judgment, the railroad company brings error. Motion to dismiss overruled.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmitt and E. H. Foster, both of Oklahoma City, and Kennamer & Coakley, of Madill, for plaintiff in error. Minter & Falkner, of Madill, and P. T. McVay, of Oklahoma City, for defendant in error.

HARDY, J. Motion is filed to dismiss this appeal because the case-made does not affirmatively show that the order extending the time to make and serve case-made, dated May 20, 1915, has been entered on the journal of the court as required by section 5317, art. 28, c. 60, and section 5324, art. 29, c. 60, Revised Laws 1910; which sections are as follows:

"Sec. 5317. Orders, made out of court, shall be forthwith entered by the clerk in the journal of the court, in the same manner as orders made in term."

"Sec. 5324. On the journal shall be entered the proceedings of the court of each day, and all orders of the judge in vacation or at chambers, and also all judgments entered on confession or default."

Undoubtedly these sections require that such order be entered on the journal of the court, but the question here is whether the statutes require the fact of their having been recorded to affirmatively appear in the case-made.

[1, 2] The law regulating appeals by petition in error with case-made attached is found in article 25, c. 60, Revised Laws 1910. Section 5241 of said article is as follows:

"A party desiring to have any judgment or order of the county, superior or district court, or a judge thereof, reversed by the Supreme Court, may make a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the Supreme Court."

And the following sections contain complete procedure for service, amendment, settlement, and correction of the case-made, and nowhere in this article is there any requirement that the case shall show the condition of the record or the performance by the clerk of any ministerial duties imposed upon him by other provisions of the statute. Whatever may be the requirement where a case is brought here on a transcript of the record, the requirements as to a case-made are embraced within this article. A case-made was intended to be shorter and less expensive than a transcript, and only those matters essential to present the errors complained of need be brought up. The party may make a case containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of, and all that this requires is just a plain, concise statement of what was done in the action, and then only such parts as are necessary to present the errors complained of need be included. When prepared, it is served upon the opposite party who may suggest any amendments which he thinks proper, and it is then upon notice of the time and place thereof presented to the judge for settlement. Section 5244, provides:

"* * * And if no amendments are suggested by the opposing party, as above provided, said case shall be taken as true and containing a full record of the cause, and certified accordingly."

[4] And by section 5248 it is declared:

"The certificate of the judge who settles and certifies the case-made shall be prima facie evidence of the facts therein recited, unless the case-made on its face shows affirmatively that such certificate is in some material respect incorrect, or the said certificate be proven incorrect by affidavits or other competent evidence introduced in the appellate court in connection with a motion to correct the record or case-made."

These statutes provide the method by which a party desiring to have a judgment or order reversed may present in an abridged form enough of the proceedings to enable the appellate court to clearly understand the questions involved and declare that the judge's certificate shall be prima facie evidence of the facts therein recited, and the correctness of such recitals may not be questioned unless the case-made shows on its face that such certificate is in some material respect incorrect or it may be proven incorrect by affidavits or other evidence in connection with a motion to correct the case-made. The statute does not authorize the certificate or the correctness of the recitals therein contained to be impeached on motion to dismiss as is here attempted.

In *Holmberg v. Will*, 152 Pac. 357, motion was made to dismiss because the case did not show a final order overruling the motion for a new trial, or that an order extending the time to make and serve case-made had been entered on the journal. The case contained

a copy of the original judgment and a copy of motion for new trial, and a recital that the motion was overruled and exceptions saved, and also contained a recital that an extension of time was granted to make and serve case-made, and motion to dismiss was overruled. The opinion quotes section 5241, *supra*, and then says:

"Counsel have cited us to no decision of this court, or of any other court, holding that a failure to copy in the case-made the order of the trial court overruling the motion for a new trial is a fatal defect therein, when it contains a copy of such motion and a recital showing the same was overruled and exceptions taken, and we know of no such decision."

This is the only opinion of this court, so far as we know, that cites this statute or undertakes to construe it. In discussing what was necessary for a case-made to contain, it was said in *Thompson et al. v. Fulton*, 29 Okl. 700, 119 Pac. 244, in the first paragraph of the syllabus:

"A 'case-made,' otherwise called a 'case settled,' or a 'case agreed upon,' or, more frequently, a 'case,' is a statutory method of preparing a 'record' for appellate review. It is a written statement of the facts in a case, agreed to by the parties, and duly authenticated by the judge who tried the case, and submitted to an appellate court for the purpose of obtaining a review of the alleged errors of law occurring in the proceedings of the court below, as shown in the record thus presented."

And in the body of the opinion it was said:

"To present errors for review, the case-made must embody a statement of so much of the issue, proceedings, and evidence, or other matters in the action, as may be necessary to bring to the notice of the appellate court, from an examination of the papers settled and authenticated as a case-made, the errors complained of. The object of the case-made is to reduce the size of the record, eliminating all matters immaterial to the question sought to have reviewed."

This section of the statute was originally taken from Kansas, and was construed by the Supreme Court of that state prior to its adoption here. The original act of 1877 (Laws 1877, c. 185) relating to a case-made in that state was entitled "An act reducing the expense of litigation in the Supreme Court."

In *Shumaker et al. v. O'Brien*, 19 Kan. 476, the Supreme Court of Kansas said:

"To comply with the statute, to present errors for review, it must embody a statement of so much of the issue, proceedings, and evidence, or other matters in the action, as may be necessary to bring to our notice, from an examination of the paper settled and authenticated as a case-made, the errors complained of. Again, one object, we know, of a case-made, an object not always appreciated by counsel, is to reduce the size of the record. It was thought that all matters immaterial to the questions sought to have decided might be left out, and only a short, concise statement of the question, and the facts upon which it arose, presented."

And again in *Neiswender v. James*, 41 Kan. 463, 21 Pac. 573, the court said:

"There are two methods of bringing a civil case up for review: One upon a case-made, and the other upon a transcript. In no other way can the appellate jurisdiction of the court to review such cases be invoked or exercised. The case-made may be very brief, much more so

than a transcript, and the first named was devised mainly for the purpose of abridging the record and lessening the expense of review. All that it needs to contain is a brief statement of the issues in the case, and so much of the evidence or proceedings as is necessary to a full understanding of the errors assigned."

And in *L. N. & S. Ry. Co. v. Herley*, 45 Kan. 535, 26 Pac. 23, we find this statement:

"The proceeding in this court is founded upon a case-made in the district court for the Supreme Court, and in such a case thus made and brought to this court it is not necessary that the entire record of the case in the district court, or indeed any portion of the record thereof, copied literally, should be brought to the Supreme Court. All that is necessary is that the case-made for the Supreme Court should include therein a statement of so much of what occurred in the case in the district court as will be necessary to present to the Supreme Court the errors complained of. Civ. Code, § 547."

So, it appears that the purpose of a case-made is to abridge the record and reduce the expense of proceedings in the Supreme Court, enabling litigants to present a brief and condensed statement of the proceedings at the trial, showing only such matters as are necessary to clearly present the questions urged for review, eliminating all unnecessary and irrelevant parts. Indeed, it appears that it is not necessary that any part of the record be literally copied into the case-made, it being sufficient to include such parts as will clearly apprise the Supreme Court of the questions involved.

[3] A number of decisions basing their conclusion upon sections 5317 and 5324, Rev. Laws 1910, have held that it is necessary for the case-made to affirmatively show that both orders of the court and vacation or chambers orders have been entered on the journal. These sections are not a part of the procedure regulating appeals by petition in error with case-made attached, but prescribe duties of a ministerial nature to be performed by the clerk, and, had it been the intention of the Legislature that a case-made should show the performance of these duties by the clerk, they would have been included in the statutes regulating the procedure in such cases.

The first decision to declare this rule was *Insurance Co. v. Gish*, 23 Okl. 824, 102 Pac. 708. In that case the record contained no recital that the order was made and failed to identify the order as an order in the case, and also failed to show that it was filed or recorded. The parent case of this class of cases is *Fife v. Cornelous*, 35 Okl. 402, 124 Pac. 957, and is based solely upon the case of *Insurance Company v. Gish*.

[5] *Holmberg v. Will*, supra, determines that it was not necessary for the case-made to affirmatively show that an order made by the court had been entered on the journal, and in effect overturned all previous decisions holding to the contrary where court orders were involved. The opinion in that case, however, by way of dictum says:

"We do not wish to be understood as holding that, where an order extending the time to

make and serve a case-made is made by the trial judge in chambers or otherwise than in open court, it is unnecessary to copy such order in the minutes or journal of the court. The statute requires this to be done, and in such case the order should be copied in the case-made."

The language just quoted was not necessary to the decision of that case, and, while it comments upon the fact that orders other than those made in open court should be copied on the minutes or journal of the court, the opinion does not say that it is necessary for this fact to affirmatively appear in the case-made. The statute does require that such orders be entered on the journal, and also requires all judgments and orders to be entered on the journal of the court. Section 5143. The fact, however, that the judgment is not entered, does not prevent it from being effective so that an appeal would lie therefrom. In *Cockrell et al. v. Schmitt*, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737, after quoting section 4603 of *Wilson's Rev. & Ann. Stat.*, which is the same as section 5143, Rev. Laws 1910, it was said:

"It is clear that under this * * * provision it was the duty of the probate judge or his clerk to have entered the judgment in that case upon the journal of the court. It seems that they did not do so, as the only evidence offered to prove it was the appearance docket and journal entry aforesaid, and the question presented to us upon this alleged error is whether said judgment, having been rendered in said court and not entered upon its records, can be proved by the character of evidence offered as above. We must answer the question in the negative. A judgment rendered by the court, although not entered as required by law, is valid as between the parties; but the record entry of the judgment itself must be introduced in evidence when made the basis of a claim in another action."

Chapter 18, Session Laws 1911, p. 35, requires that proceedings for reversing, vacating, or modifying judgments or final orders be commenced within six months from the rendition of the judgment or final order complained of. This court has uniformly held that, where petition in error was not filed within the statutory time from the date of the rendition of such judgment or final order, the appeal will be dismissed. *Powell et al. v. Johnson Larimer D. G. Co. et al.*, 35 Okl. 644, 130 Pac. 945; *Thorne v. Harris*, 35 Okl. 645, 139 Pac. 906; *Anderson et al. v. Limerick et al.*, 43 Okl. 484, 143 Pac. 183; *Bodovitz v. Campbell et al.*, 43 Okl. 644, 143 Pac. 661; *Storm v. Richart*, 153 Pac. 562. And this time commences to run from the date of the rendition of the judgment, and not the entry thereof. *Powell v. Johnson Larimer D. G. Co.*, supra; *Brown v. Clark, Adm'r*, 31 Kan. 521, 3 Pac. 415. Where the judgment or final order is pronounced and its terms prescribed, it is a valid judgment, although not transcribed on the journal until after the close of the term. *Cockrell et al. v. Schmitt*, supra; *Powell et al. v. Johnson Larimer D. G. Co. et al.*, supra; *Hiff v. Arnott*, 31 Kan. 672, 3 Pac. 525. There are decisions to the con-

ary, but such are based upon statutes providing that an appeal may be taken from judgment "entered" against the party or within a certain time after the judgment is entered."

Had the Legislature intended that an order or judgment should be recorded on the journal before an appeal would lie therefrom, it would have required proceedings in error to be commenced within the statutory time from the "entry" or recording thereof. The statute does not fix any time during which orders and judgments shall be recorded, and it is a matter of common knowledge and observation, to the profession, that the court clerks of the state, especially during term time, are frequently behind in the work of writing up the journal of the court. No control over the clerk is given to litigants, and their rights ought not to depend upon the performance by him of his duties in the absence of a clear expression in the statute to that effect.

The statutes relied upon require the proceedings of the court, likewise all orders in vacation or chambers and all judgments entered on confession or default, and all orders made out of court, to be entered on the journal. There is no distinction in this requirement between orders made in open court and those made in vacation or at chambers, except that orders made out of court are required to be entered on the journal forthwith. Each and all of them are required to be entered on the journal. Section 5323 requires an abstract of all judgments and orders to be entered on the appearance docket, and section 5325 requires all judgments to be immediately entered on the judgment docket. These sections are a part of article 29, c. 60, and there is as much reason for saying that the case-made must affirmatively show the performance of these duties by the clerk as there is to show the recording of judgments and orders on the journal. Thus, if it is a fatal defect for a case-made not to show affirmatively that a chambers order has been recorded, it is equally fatal when it fails to show the recording of a court order. It was held in *Holmberg v. Will*, supra, that it was unnecessary for it to appear in a case-made that a court order had been so recorded, and a distinction has grown up in the decisions between the two classes of cases. Such a distinction is without reason and was not intended by the statute.

In *Champion et al. v. Oklahoma City Land & Development Co.*, 156 Pac. 342, it was held that:

"A recital in the case-made of due extension of time and of the filing of such orders, together with the orders themselves, signed and filed, although one of such orders does not show the date of filing, is a substantial compliance with the law."

In *Midland Savings & Loan Co. v. Miller*, 155 Pac. 864, it was held that the appeal should be dismissed because the case-made failed to show affirmatively the recording of

chambers orders. This opinion cited decisions rendered previous to *Holmberg v. Will*, and also cited that case in support of the conclusion reached. After the decision in *Midland Savings & Loan Co. v. Miller*, 155 Pac. 864, the case of *Graham et al. v. Graham*, 157 Pac. 740 (not yet officially reported), announced the rule that it was necessary for the case-made to affirmatively show that a court order had been entered upon the journal.

There is a conflict in the decisions as to the necessity for a showing in the case-made as to the recording of both classes of orders and a distinction drawn in other decisions between the necessity for such showing as to court orders and orders made in vacation or chambers. Such a distinction has never been recognized in Kansas.

In *German Ins. Co. v. Kirkendahl et al.*, 64 Kan. 884, 67 Pac. 443, it was held:

"Although no record was made of an order extending the time in which to make a 'case,' the appeal will not be dismissed where the testimony sufficiently shows that such order was made."

In *K. C. L. Ry. Co. v. Langley*, 70 Kan. 463, 78 Pac. 858, the court had under consideration an order of extension made after chapter 380 of the Laws of 1903 became effective. The order was not filed as provided by that chapter, and it was claimed that the requirements thereof were mandatory and the failure to do so rendered further proceedings in the matter of settlement and signing the case-made void and ineffectual. The court declined to take this view, saying:

"There is nothing in this act which indicates that the filing of the order is an essential prerequisite to its becoming operative. Ordinarily the paper on which the order of a court or of a judge at chambers is written need not be deposited in the clerk's office to make it effective. It is well, as a measure of publicity and for its preservation, that it should be; but, unless it appear that such disposition is a prerequisite to its becoming effective, the requirement that it should be so filed must be held to be directory, and not mandatory. The rule, as stated by this court in *Jones v. State of Kansas ex rel. Atherby and Kingsbury*, 1 Kan. 273, 279, and reiterated in *State v. Yordie*, 30 Kan. 221, 223, 2 Pac. 162, is: 'Unless a fair consideration of the statute shows that the Legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely.' We do not think that it can be fairly said that the provision relative to the filing of the order of extension of time was intended to be essential to the validity of such extension. The proviso in which this requirement is embedded is merely incidental. No duty is imposed upon the party obtaining the extension to file such order. Indeed, it does not appear that the order is to come to his hands. It apparently serves no purpose except to give notice to any one interested that the extension has been granted. We can say, at least, that in the absence of any showing of prejudice to the opposite party by the failure to file it, the case-made is not invalidated thereby."

The statute declares that the certificate of the trial judge shall be prima facie evidence of the facts therein stated, and the case-made in the case at bar contains a certificate

of the trial judge that the same is a true and correct case-made, and we are justified and in fact required to presume that everything therein recited as having been done was done, and that if such were not so the defendant in error would have caused same to be corrected upon suggestion of amendments, or same would have been corrected by the judge, and, this not having been done at the time and in the manner provided by statute, defendant in error cannot in this court in this manner show such recitals to be untrue. This could only be done upon motion to correct case-made supported by affidavit or other competent evidence. In other words, the presumption that the case-made is correct will prevail until overcome by an affirmative showing in the manner pointed out by statute, which has not been done in this case. *A., T. & S. F. Ry. Co. v. Davis*, 64 Kan. 127, 67 Pac. 441.

In view of the conflict in the decisions above disclosed, we again state the views of this court to be that the rule announced in *Holmberg v. Will* is the correct rule and is here reaffirmed, and will be adhered to, and decisions to the contrary are, in so far as they conflict with the views therein expressed, and here reaffirmed, overruled.

It further appears that there is no distinction in the statute, and none in principle, between the requirements as to the showing of a case-made in reference to an order made by the court and one made in vacation or at chambers, and we now express the view that where a case-made contains a recital showing that an order was made by the judge, extending the time to prepare and serve case-made, and the substance of said order is embraced therein, this will be a sufficient showing until overcome in the manner pointed out by statute.

The motion to dismiss the appeal is overruled. All the Justices concur.

WINGATE et al. v. RENDER. (No. 5888.)
(Supreme Court of Oklahoma. Feb. 29, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1170(1) — REVIEW — HARMLESS ERROR—STATUTORY PROVISIONS.

The Supreme Court, in every stage of action, is required by statute (sections 4791 and 6006, Rev. Laws 1910) to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4082, 4066, 4454, 4540; Dec. Dig. §1170(1).]

2. CONTRACTS §94(1), 274—FRAUD—EFFECT.

Contracts induced by fraud are not void, but voidable. The defrauded party may elect, with knowledge of the facts concerning the fraud, to treat the contract as valid, and if he does so, he cannot thereafter change his position and insist that it is invalid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 420; Dec. Dig. §94(1), 274.]

3. FRAUD §58(1)—ACTIONS—EVIDENCE.

A wide latitude is allowed in cases of fraud, and circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 55; Dec. Dig. §58(1).]

4. FRAUD §9—ELEMENTS IN GENERAL.

To constitute actionable fraud, it must be made to appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; (6) that he thereby suffered injury; and (7) that all these facts must be proven with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them would be fatal to a recovery.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. §9.

For other definitions, see Words and Phrases, First and Second Series, Fraud.]

5. BILLS AND NOTES §537(4) — ACTIONS — QUESTIONS FOR JURY.

Evidence examined, and held, that there was sufficient evidence adduced at the trial to take the case to the jury on the questions of fraud, and whether the defendant with knowledge thereof executed the promissory note sued upon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1865; Dec. Dig. §537(4).]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by C. S. Wingate and another against S. P. Render. Judgment for defendant, and plaintiffs bring error. Affirmed.

Stevens & Myers, of Lawton, and Wright & Boyd, of McAlester, for plaintiffs in error. Lydick & Eggerman, of Shawnee, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendant in error.

KANE, C. J. This was an action upon a promissory note, commenced by the plaintiffs in error, plaintiffs below, against the defendant in error, defendant below. The petition is in the usual form. The answer, after admitting the execution of the note, set up as defenses: (1) Failure of consideration; (2) fraud on the part of plaintiffs in the procurement of the note; and (3) by way of counterclaim, that by reason of the fraud perpetrated upon him, defendant was damaged in the sum of \$1,390.78, for which he prayed judgment.

Upon trial to a jury there was verdict for the defendant as follows:

"We, the jury, impaneled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find for the defendant, S. P. Render, and assess his damages at \$1.00, one dollar, and cancellation of the note dated October 1, 1908, for \$7,836 and 35/100."

Thereafter judgment was rendered upon this verdict, to reverse which this proceeding was commenced. Hereafter the parties will be designated "plaintiffs" and "defendant."

respectively, as they appeared in the trial court; and the Arkansas Valley Coal Company, Limited, will be called "the company."

[1] From the form of the verdict returned by the jury, it is apparent that they found in favor of the defendant upon the defense of fraud, and it is from that standpoint that we will review the proceedings of the court below. Counsel for plaintiffs present a great many grounds for reversal, many of them based upon misdirection of the jury, or the improper rejection or admission of evidence, or upon errors in matter of pleading or procedure, and all of them requiring such exhaustive examination of the record as to necessitate a review of all the evidence adduced at the trial. If we fail to notice in detail the assignments of error predicated upon errors of this class, it is not because they have escaped our notice, but because we are of the opinion, after an examination of the entire record, that it does not appear that the errors complained of have probably resulted in a miscarriage of justice, or constitute a substantial violation of any of the constitutional or statutory rights of the plaintiffs. The Supreme Court in every stage of an action is required by statute (sections 4791 and 6005, Rev. Laws 1910) to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. *Mullen v. Thaxton*, 24 Okl. 643, 104 Pac. 359.

The controversy herein arose out of the sale by the plaintiffs to the defendant of the good will and assets of a coal brokerage business which, prior to the sale, was conducted by the plaintiffs under the name of Arkansas Valley Coal Company, Limited. There seems to be some controversy between counsel as to whether this company was a corporation or a partnership, but in the view we take of the case, we deem that question immaterial. It seems that the physical assets of the company consisted entirely of a small amount of office furniture and fixtures, and certain accounts which were due and owing to it by certain of its customers, which appeared upon the books as open accounts, while its liabilities consisted of sums due from it to certain individuals, banks and other business concerns. Before the sale was consummated, the plaintiffs furnished the defendant an itemized statement of its assets and liabilities, which showed that its assets amounted to the sum of \$20,572.41, and its liabilities to the sum of \$18,504.41. By the terms of the sale, the defendant acquired the good will of the company and all of its physical assets, in consideration for which he paid \$1,750, in cash, gave a promissory note for \$8,494.45, and assumed the payment of accounts due by the company to various banks, persons and business concerns in the sum of \$10,128.94, the plaintiffs agreeing to pay the balance of such accounts in the sum of \$8,494.45, the exact amount of the promissory note above men-

tioned. This note was dated Hartshorne, I. T., June 14, 1907, and was due on or before one year after date. Immediately upon the completion of the foregoing preliminaries the business of the company was transferred to the defendant, who thereupon turned the same over to one E. G. Hickey, who theretofore had been sales manager and vice president for the company, to take full charge thereof for and on behalf of defendant, he being a resident of Norman, Okl., and not purposing to give it his personal care and attention. After Hickey took charge of the business for the defendant he proceeded to transact its business for the defendant in the usual manner. He also collected part of the accounts which were transferred to the defendant as assets, made some payments upon the note, and paid off the liabilities which were assumed by the defendant. In the meantime, certain of the accounts transferred to the defendant as assets remained uncollected, much to his dissatisfaction, and payments upon the note were not being made to the satisfaction of the plaintiffs. The defendant in one of his letters to Mr. Wingate, who always acted as spokesman for the plaintiffs, which was written in response to a letter requesting payment of the note, states his attitude toward these accounts as follows:

"Really, I am sure that you must have forgotten your signed statement to me with regard to these accounts. This statement was made at the time of the giving of the note. In this statement you certify as to the correctness of each and every one of these accounts. Of course, I had not kept the books, and had no way of knowing as to the accuracy of the accounts, or what claims might bob up against any of them. For this reason I had you certify as to the correctness of all of them. Now, as a matter of fact, under this statement, I think I could turn the whole batch back to you and have you to establish their correctness, as the burden is always on the one who asserts. But to protect all parties and show absolute good faith in the matter I have done what I thought best to establish the correctness of the accounts as you certified them to me. With this state of affairs you would hardly ask and expect us to pay out money and take chances on establishing the correctness of the account."

The plaintiffs' attitude toward the transaction generally is indicated by a letter written to the defendant by Mr. Wingate as follows:

"I have your letter of the 25th and am somewhat surprised at the position you assume in regard to the note due me from the Ark. Valley Coal Co. I would beg to remind you that I did not sell you any accounts. What I sold you was our stock in the Ark. Valley Coal Co., carrying with it all the assets and liabilities of the company as relating to such stock the same as if you were buying stock in any other corporation, and there is no similarity whatever between such a transaction and the land deals you compare it with."

The matter now had narrowed down to the foregoing accounts; all the other phases of the trade between the plaintiffs and defendant having been satisfactorily adjusted.

Shortly after the passage between the parties of the letters from which the foregoing excerpts were taken, the defendant discovered that the general financial affairs of the company in other respects were not in a satisfactory condition and decided to liquidate the same. In pursuance of this resolution, he intrusted the matter of liquidation to a Mr. Beatty, a man of considerable experience in that class of business.

At this time the payment of the promissory note and the collectability of the accounts again came on for consideration more acutely between the plaintiffs and the defendant, the defendant insisting as formerly that the payment of the note should not be pressed until the accounts were collected, and the plaintiffs insisting that the accounts were collectable, and that they could have been collected before, except for the carelessness and negligence of Mr. Hickey in the management of the affairs of the company. Finally, after many conferences between the plaintiffs and the defendant, the latter executed the note sued on herein for the exact amount of the uncollected accounts and accrued interest on the former note. The alleged fraud upon which defendant relied for a defense was that the plaintiffs represented to him that the accounts of the company transferred to him as assets were all valid existing accounts against solvent customers of the company, whereas the part thereof that remained uncollected at the time the last note was executed were false and fictitious and were carried upon the books of the company and into the statement of its affairs furnished the defendant for the purpose of deceiving him and inducing him to enter into the trade with plaintiffs. That these false and fraudulent representations were reiterated by the plaintiffs from time to time from the date of the trade until the second note was executed and that up to that time the defendant believed such statements to be true, and was thereby induced not only to make the trade originally, but also to execute the note which is now in controversy.

The only assignments of error going directly to the merits of the case are stated by counsel for plaintiffs in their brief as follows:

"We contend that demurrer to the evidence should have been sustained for two reasons: (1) Because if there was any fraudulent practices or false representations made at the time of the giving of the first note, the testimony of the defendant conclusively shows that he had full knowledge of it at the time he executed the renewal contract or note sued on, and therefore cannot set up fraud as a defense for the reasons heretofore stated; and, second, because the evidence produced by the defendant in support of his defense utterly fails to show fraud or false representations, and the most that can be said of it is that it shows a dispute about the amounts due on the accounts which he sets out in his answer as list No. 8."

[2] There is no controversy between the parties as to the law governing the first sub-

division of the assignment of error as stated above. They all agree that contracts induced by fraud are not void, but voidable, and that the defrauded party may elect, with knowledge of the facts concerning the fraud, to treat the contract as valid, and that if he does so, he cannot thereafter change his position and insist that it is invalid. *Skinner et ux. v. Scott et ux.*, 29 Okl. 364, 118 Pac. 394.

Therefore, the first question is: Was there any evidence adduced at the trial reasonably tending to show that the defendant did not know of the fraud of which he complained at the time he signed the second note, for it is settled that if he did, he will be regarded as having purged the contract of the fraud and cannot now rely upon it as a defense. 1 Daniel on Negotiable Instruments (5th Ed.) § 205.

[3-5] After a careful review of the entire record we are of the opinion that this question must be answered in the affirmative. It may seem strange that during the more than 15 months which transpired between the execution of the first and second notes the defendant did not discover the alleged fraud, if any existed; but we think there are special circumstances connected with this case which in a measure explain his unusual credulity. In the first place, the defendant and Mr. Wingate, who acted for both plaintiffs in the trade, were friends of many years' standing, and on that account the details of the business seem not to have been inquired into with that degree of care which usually accompanies a business transaction between parties with each other dealing at arm's length.

Another matter which evidently tended to allay any suspicion on the part of the defendant as to the good faith of the plaintiffs was that during the time Mr. Hickey was in charge of the business for the defendant he had come to the conclusion—justly we think—that Mr. Hickey was not only inefficient, but dishonest, and that a great deal of the trouble in relation to these accounts arose out of his dishonesty and mismanagement of the affairs of the company. That this impression was fostered and encouraged by Mr. Wingate is apparent by a conversation which took place between the defendant and Mr. Wingate about the time the second note was executed, of which the defendant testified as follows:

"I told Mr. Wingate here over this note—I said here is ample funds from solvent concerns to secure it and if you will extend it I will collect this money, and he stated that Mr. Hickey had been drinking and gambling around in Eastern Oklahoma, and that if he had attended to your business all of these would be collected, and I says, 'I will assure you, Mr. Wingate, if you will treat me right and give me time on this I will collect these and make up the payment.'" "Q. And when Mr. Wingate reassured you at the time you made the note they were correct and you found out Mr. Hickey was a crook, you believed Mr. Wingate? A. I absolutely believed Mr. Wingate; he was my friend and associate and had no reason not to rely on him."

All of this evidence and a great deal more the same effect tends to show that at the time the second note was executed the defendant entertained the belief that the collection of the accounts had been neglected by Mr. Hickey, and that while some of them were disputed and had become stale, they all could be collected, by the exercise of proper care and attention. The defendant's unfamiliarity with the affairs of the company and lack of knowledge as to these accounts is further explained by his evidence to the effect that immediately after taking over the business he placed the same in full charge of Mr. Hickey and did not exercise any supervision over it himself until immediately after the execution of the second note. We think the most that can be said of the evidence up to this point is that it tends to show that the defendant knew that some of the accounts were in dispute, not that they were false and fictitious, or that the defendant saw the books of the company and the statement furnished him had been padded. We will now examine the second subdivision of this assignment of error and see if, if any, evidence there was to support the verdict of the jury on the question of fraud. That at the time the trade was made plaintiffs represented the accounts to be correct and continued to do so up to the time the second note was made, and that they could have been collected, had it not been for the shortcomings of Mr. Hickey, there can be no doubt. The record shows that immediately after the execution of the second note, and after the defendant had placed Mr. Hickey in charge of the affairs of the company as liquidating agent, he personally instituted a vigorous campaign for the collection of the accounts which resulted in failure.

He testified that it was during this attempt to collect that he discovered that the accounts were fictitious and fraudulent, and thereupon he informed Mr. Wingate of his discovery. He says:

"I told Mr. Wingate that a personal investigation of these accounts after seeing reliable parties indicated to me the most of them were fictitious and they were not good."

In other words, the investigation developed that the accounts were not genuine, that the parties who appeared from the books and statement of assets and liabilities to be creditors of the company were not indebted to it and that in some instances the company was indebted to them. The evidence tending to show fraud on the part of the plaintiffs in using the books of the company and the statement of their assets made for the inflation of the defendant is very voluminous and covers a wide range. It is true that it was introduced over objection by the plaintiffs, but as, in our judgment, it was properly admitted, no useful purpose would be subserved by reviewing it at length. A wide latitude is allowed in cases of fraud,

and circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Castle et al. v. Bullard*, 23 How. 172, 16 L. Ed. 424; *Leedom et al. v. Earls Fur. & Car. Co.*, 12 Utah, 172, 42 Pac. 208; 6 Enc. Ev. 22.

On the whole, we are entirely satisfied that there was sufficient evidence adduced at the trial to support the verdict of the jury and the judgment of the trial court entered thereon on the question of fraud. In reaching this conclusion we assume the soundness of the rule contended for by the plaintiffs, that to constitute actionable fraud, it must be made to appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; (6) that he thereby suffered injury; and (7) that all these facts must be proven with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them would be fatal to a recovery. 20 Cyc. 13.

Finding no reversible error in the record, the judgment of the court below is affirmed. All the Justices concur.

SOUTHERN SURETY CO. v. MUNICIPAL EXCAVATOR CO. et al. (No. 7342.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 216(2)—EXHIBITS—EFFECT.

The allegations of a petition challenged by a general demurrer must be construed in connection with the exhibits attached to the petition.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. \S 537, 538; Dec. Dig. \S 216(2).]

2. MUNICIPAL CORPORATIONS \S 347(1)—PUBLIC IMPROVEMENTS—BOND OF CONTRACTOR—CONSTRUCTION.

A claim for rentals due for the use of certain trenching machines let to a contractor in charge of the construction of a waterworks system, for a municipal government, is not "labor and material furnished in the construction of such public improvement," and is not protected by the bond required by section 3881, Rev. L. 1910, and the surety on such bond is not liable for such indebtedness.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 876; Dec. Dig. \S 347(1).]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by the Municipal Excavator Company against the Southern Surety Company and another. Judgment for plaintiff, and the

Surety Company brings error. Reversed and remanded, with directions.

E. C. Stanard, J. H. Wahl, and C. H. Ennis, all of Shawnee, for plaintiff in error. Twyford & Smith, of Oklahoma City, for defendants in error.

GALBRAITH, C. This cause was decided on demurrer in the court below. It was held that no cause of action was stated by the plaintiff, and judgment was rendered accordingly. The plaintiff brought action against the Southern Surety Company and Nick Peay, upon a bond given in pursuance to sections 3881 and 3882, Rev. L. 1910. The allegations of the petition, so far as important to be noticed here, are: That the Southern Surety Company does a general bonding business throughout the state of Oklahoma. That Nick Peay, doing business under the name of Nick Peay Construction Company, as principal, and the Southern Surety Company, as surety, executed and filed with the clerk of the district court of McIntosh county a certain bond in writing, a copy of which is attached as "Exhibit A." That said bond was for the sum of \$63,000 and recited that whereas the Nick Peay Construction Company had entered into a written contract with the city of Eufaula, Okla., for the construction of a sanitary sewer system and the further extension of the waterworks system, now, therefore, "if the said principal shall well and truly pay all indebtedness incurred for any and all labor and material, furnished in the construction of said extension in the performance of, said contract, then this obligation to be null and void, otherwise to remain in full force and effect." That prior to making and filing the bond the plaintiff entered into a certain contract in writing with the defendant Nick Peay, conditioned for supplying and furnishing certain labor and material to be used in the execution of the terms of said contract of the said Nick Peay with the city of Eufaula. A copy of said contract was attached to the petition, and further alleged: "That the said Nick Peay, doing business as the Nick Peay Construction Company, became indebted to and incurred certain indebtedness with the plaintiff for work and material furnished by plaintiff to said Nick Peay in the construction of said sewer system and extension provided for and under the terms of the contract marked 'Exhibit C,' and to cover which indebtedness the said bond marked 'Exhibit —' was made and filed by the defendants, and each of them. That the labor and material furnished by plaintiff to said defendant aforesaid was under and by virtue of the said subcontract hereto attached marked 'Exhibit B.' That said labor and material was furnished and the indebtedness incurred therefor between the 25th day of January, 1913, and June 12, 1913, and was of the contract price and value of \$3,394.51, and on which amount the plaintiff

received payment of \$850, leaving a balance due and unpaid of \$2,544.51 for such labor and material so furnished and indebtedness incurred as aforesaid and for which said surety bond was given by said defendants." And that demand for the payment of the balance due on said account for labor and material had been made and payment refused, and that said action was brought within six months as provided by statute, and attached a statement of the account for labor and material, as claimed, as "Exhibit B," and prayed for judgment in the amount of the account.

The statement of the account attached to the petition was as follows:

Oklahoma City, Okla., August, 1913.	
Nick Peay, doing business as the Nick Peay Construction Company, To Municipal Excavator Company, Dr.	
February 28, 1913, statement rendered	\$ 894 23
February 28, 1913, statement rendered	483 36
April 6, 1913, statement rendered....	409 21
April 6, 1913, statement rendered....	19 74
June 12, 1913, statement rendered....	1,443 53
June 12, 1913, statement rendered....	144 44
	<hr/> \$3,394 51
Credits.	
March 1, 1913, by cash.....	850 00
Balance due.....	<hr/> \$2,544 51

The pertinent parts of the contract between plaintiff and Nick Peay, under which plaintiff's claim arose, are as follows:

"Clause 1. That said first party (plaintiff) hereby agrees to furnish said second party (the construction company) with two of its trenching machines for a minimum term of sixty working days, without respect to delays, Sundays and legal holidays excepted. * * *

"Clause 3. Said first party hereby agrees to furnish one operator who shall be in full charge of said machine during such time as second party desires to operate said machine, and shall also have the right to employ an engineer and fireman to operate the engine and do firing. Said operator, engineer and fireman to be the employees of and to be paid by the second party.

"Clause 5. Said second party shall pay to said first party a minimum rental of \$30 for No. 43 and \$20 for No. 58 per day * * * and in addition to pay five (5) cents per cubic yard for all excavation in trenches less than eight (8) feet in depth, and ten (10) cents per cubic yard for all excavation in trenches (8) feet or more in depth."

The surety company filed a general demurrer to the petition which was by the court overruled, and the surety company, refusing to amend but electing to stand upon its demurrer, refused to plead further, and the court rendered judgment against it for the amount claimed in plaintiff's petition. To review that judgment an appeal has been duly perfected to this court.

[1, 2] The error assigned is the order of the court overruling the demurrer to the petition. It is insisted by the plaintiff in error that, inasmuch as it appeared from the face of the petition that the account sued upon was not for "labor and material" furnished in connection with the execution of the con-

tract for a public improvement, but arose out of a claim for rentals for trenching machines furnished by the plaintiff to the contractor, this indebtedness is not within the condition of the bond, and therefore the petition failed to state a liability against the surety company. It is contended on behalf of the defendant in error that inasmuch as the petition alleged that the account was for "labor and material furnished the contractor in the execution of the public improvement," and that the demurrer admitted the truth of these allegations, therefore the petition stated an indebtedness within the conditions of the bond, and the court was therefore right in overruling the demurrer.

It may be conceded that, so far as the allegations of the petition are concerned, considered alone an indebtedness within the terms of the bond is declared upon, since the claim is alleged to be due for labor and material furnished the contractor in the execution of his contract; but, when taken in connection with the exhibits attached to the petition, it clearly appears that the indebtedness sued upon was for the rentals for the trenching machines that the plaintiff furnished the contractor. However, the rule is that in construing the petition upon a demurrer the exhibits attached thereto must be considered in connection with the allegations thereof. In the case of *Whiteacre v. Nichols*, 17 Okl. 387, 87 Pac. 865, it is said:

"On demurrer to a petition, as defective, in that it does not state facts sufficient to constitute a cause of action, the petition should be liberally construed with a view to substantial justice between the parties; and a demurrer will only be sustained where the petition presents defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever."

In *Calman v. Kreipke*, 40 Okl. 516, 139 Pac. 698, the *Nichols* Case, *supra*, is approved, and the first paragraph of the syllabus of that case reads:

"In an action on account where the petition upon its face states facts sufficient to constitute a cause of action against the defendant, but certain exhibits attached thereto suggest a doubt as to whether the defendant, in making the purchase, acted in a representative capacity, or as an individual, a general demurrer thereto should be overruled."

See, also, *Davis et al. v. Board of Commissioners of Choctaw Co.*, 158 Pac. 294, not officially reported.

Under the rule announced in these decisions, the allegations of the petition in the instant case must be construed in connection with the exhibits attached thereto. So construed, it clearly appears that the claim in suit is due entirely for rentals on machines furnished by the excavator company to the contractor. This presents the question squarely whether or not a claim for rentals due for a machine, independent of any claim for labor for operating it, can properly be said to be "labor and material furnished"

within the condition of the bond in suit. Upon the answer returned to this question depends the correctness of the ruling of the trial court. If the claim for rentals were either labor or material, then the ruling of the trial court was right; but, if such claim cannot be held to be either labor or material, then the ruling was wrong.

We are reminded at the outset of this investigation that the industry of counsel has not discovered a single decision holding that rentals for machines furnished a contractor engaged in construction work were either labor or material within the terms of a statute permitting liens against improvements for labor and material furnished therefor, or that such a claim is within the protection of a bond required of a public contractor, conditioned that all labor and material furnished shall be paid for by him. It seems that this question is one of first impression in this jurisdiction, although analogous questions have been adjudicated by the courts of other states having a similar statute to our own.

Section 3881, Rev. L. 1910, requires any public officer before entering into a contract for any public works costing to exceed \$100 to take from the contractor a sufficient bond, payable to the state of Oklahoma, conditioned that the contractor "shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements."

In the state of Washington the statute requiring a public contractor to give bond was broader than the statute in this state, inasmuch as it required the condition of the bond to be that the contractor "shall pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply said principal or subcontractors with provisions and supplies for the carrying on of said work, all just debts, dues and demands incurred in the performance of said work."

Hurley-Mason Co. v. American Bonding Co., 79 Wash. 584, 140 Pac. 575, was an action for the rental value of a pump and hoist derrick furnished to the contractor, constructing a waterworks system for a city in the state of Washington. The action was against the contractor and the surety company on a bond conditioned as provided in the statute above quoted. The court held that this claim for rentals was "supplies" and within the condition of the bond, and that the surety company was liable therefor. The court said in the course of its opinion:

"It must be conceded that this approaches very close to the line between secured and unsecured items under this statute and bonds given in pursuance thereof."

It will be observed that the conditions of the bond given under the statute of the state of Washington were broader than the conditions of the bond in suit in the instant case. It cannot be claimed that this decision is

an authority justifying the holding that the claim for rentals involved in the instant case were either labor or material within the conditions of the bond in suit.

In the state of Michigan there was a statute similar to section 3881 of our Rev. L. 1910. The case of *City of Alpena v. Title Guaranty & Surety Company*, 159 Mich. 329, 123 N. W. 1126, was an action for labor and material furnished in repair work performed on the pumps and machines used in connection with a waterworks contract. The question presented was whether or not this claim was within the conditions of the bond requiring the payment of labor and material furnished. The court held that it was not, and in part said:

"The provision of the bond upon which the claim of the use plaintiff is based is the promise of the defendant to save harmless the city of Alpena, etc., from unpaid claims for 'labor and material furnished under the contract.' To give to this provision the construction claimed for it by the plaintiff would render the surety liable, not only for the cost of small and incidental repairs to the machinery and plant used in construction (which is the extent of the use plaintiff's claim in the case at bar), but also for all large changes and improvements in equipment, more or less permanent in character, and perhaps long surviving in usefulness the completion of the contract upon which the equipment was being used at the time the repairs were made. And by a parity of reasoning it might even be said that the surety became responsible for the original cost of the plant, because it was purchased by the contractor to be used upon the contract. We are of opinion that this contention is not tenable, but, on the contrary, think that the term 'labor and material, furnished under the contract,' means such labor and materials as are necessary to construct the work in accordance with the contract. This view is supported by reason and authority."

Kansas City v. Youmans, 213 Mo. 151, 112 S. W. 225, was an action against the surety on a bond having a similar condition as that in the instant case, and the court in holding that a claim for explosives sold to a contractor and used in the construction of the waterworks system was within the protection of the bond, and that steam shovels, engines, boilers, shovels, crowbars, and other like tools were not within its provisions, in part said:

"A steam shovel, an engine, and boiler, picks, shovels, crowbars, and the like, are tools and appliances, which, while used in the doing of the work, survive its performance and remain the property of their owner. Not so, however, with materials that are used up in the performance of the work, and are therefore invisible except as they survive in tangible results. We think that explosives, when used as substitutes for other recognized 'materials,' are covered by the same principle. They enter into and form a part of the permanent structure quite as much as the earth, rails, ties, culverts, and bridges that we can see and feel."

McAuliffe v. Jorgenson, 107 Wis. 132, 82 N. W. 706, was an action seeking to establish a lien for rentals due for the use of a well-

boring machine used by the contractor in drilling a well. The court in denying the claim, in part, said:

The "plaintiff's right to a lien is based upon the fact that he hired his well-boring machine to * * * who had the contract to bore the well. * * * Under no permissible theory can it be said the plaintiff has furnished any 'material' that entered into or became a component part of the well. Whatever right he has, if any, arises from the use of his machine. When he hired it to * * * (the contractor) to all intents and purposes it became the latter's machine, the same as if he had purchased it outright. The plaintiff did no manual labor, either by himself or his servants, toward the construction of the well. The machine was used by * * * (the contractor) as though it was his own. For its use in connection with his own labors he would have been entitled to a lien; not for the use of the machine alone, but because, with his labors in the use and operation of the machine, the well was drilled."

In *Wood Curtis & Co. v. El Dorado Lumber Co.*, 153 Cal. 230, 94 Pac. 877, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80, 15 Ann. Cas. 382, it was held by the Supreme Court of California:

"One who merely rents horses and harness to the contractor, to be used in the prosecution of railroad construction, does not bestow labor on the road within the meaning of a statute giving a lien to one so doing."

In *Potter Mfg. Co. v. Meyer & Co.*, 171 Ind. 513, 86 N. E. 837, 131 Am. St. Rep. 267, the Supreme Court of Indiana, in denying a lien claimed for the rental value of a trenching machine, under a statute giving lien for machinery furnished for the construction of public improvements, in part, said:

"A lien is authorized in favor of a laborer to the extent of the value of the work done by him. This trench machine owned by appellant did not work automatically, but was operated only by men in the employ and under direction of the lessee of the machine, J. J. Smith & Co. There could be no question that the contractor, J. J. Smith & Co., might have acquired a lien to the extent of the value of the work done * * * by this labor-saving machine. Appellant, however, did not perform * * * any labor upon the structure to be erected. Its claim is not for the value of work actually done, but compensation at an agreed price for a specified time as the rental value of the machine without regard to whether it was idle or in use upon this work. But, waiving any technical questions as to the theory of the cross-complaint, and assuming that, if the evidence so warranted, appellant might recover thereon to the extent of the value of work done by it, we are clearly of opinion that appellant is not shown to have performed any work, and, as the mere lessor of this machine, cannot be regarded as one performing labor within the meaning of the statute under consideration."

United States, for use, v. Conkling et al., 135 Fed. 508, 68 C. C. A. 220, was an action to recover a claim for per diem charged for a certain scow let to the contractor engaged in public works against the surety and his bondsmen on a bond given under the federal statute conditioned for the payment of all labor and material furnished on the ground that the rental for this scow was labor and material supplied in the prosecution of said work. The court, denying the

claim, held that it was not within the conditions of the bond.

In *United States v. American Surety Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, it was admitted that the claimant had furnished labor on a public improvement for which he had not been paid, but it was contended that he had furnished this labor to the subcontractor, and that the liability on the bond required by the federal statutes from a contractor on public works extended only to claims for labor and material furnished to the contractor. The court said, in effect, that the object of requiring the bond under the law was to make sure that labor and material entering into public improvements for the federal government should be paid for, and that, while the literal terms of the obligation of the bond only covered labor and material furnished to the contractor, still the labor and material sued for in that case entered into the public structure and was within the spirit and therefore within the protection of the bond. This case, however, does not hold, and is not an authority for the contention, that a claim for rentals on a machine furnished to the contractor, used upon public works, was either labor or material within the protection of the obligation of such a bond as that in suit.

Under the foregoing authorities, and many others cited and discussed in those decisions, we are constrained to the view that only "a strong arm" construction of the statutes would bring the claim involved in this suit within the protection of the bond. It cannot be said that the excavator company furnished either labor or material for the public works, or that it sustained any contract relation to such public works. It merely furnished two machines to the contractor that he employed in the construction of this public work. It is true that the excavator company furnished the skilled operator and retained the right in its contract to furnish an engineer and fireman, but it expressly stipulated that such employees should be the employees of the contractor, and should be paid for by him. It therefore performed no labor in connection with the operation of the machine. Its claim is only for a stipulated rental for the use of the machine. Such a claim was not within the letter or spirit of the bond and was not protected thereby.

The court was therefore in error in overruling the demurrer to the petition, on account of which the judgment appealed from should be reversed, and the cause remanded, with directions to the trial court to vacate the order overruling the demurrer and to enter an order sustaining the same, and for such further proceedings as may be necessary not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

HUME et al. v. CRAGIN et al. (No. 6898.)
(Supreme Court of Oklahoma. June 27, 1916.
Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

VENUE ~~§~~84—OBJECTIONS—WAIVER.

Where an action which, under the terms of section 4673, Revised Laws 1910, should have been commenced in a county in which the cause, or some part thereof, arose is improperly commenced in some other county a question of venue arises, which may be waived, and if the defendants thus improperly sued in the wrong county, instead of confining their objection to that of having been sued in the wrong county, file demurrers presenting other grounds than that of the venue they thereby waive the objection that they have been improperly sued in the wrong county and submit themselves to the jurisdiction of the court of the county in which the action was commenced, that court having jurisdiction of the action in other respects.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 146-148; Dec. Dig. ~~§~~84.]

Commissioners' Opinion, Division No. 5.
Error from District Court, Noble County;
W. M. Bowles, Judge.

Action by F. E. Cragin against Elsworth Hume and others. Judgment for plaintiff, and certain defendants bring error. Affirmed.

H. J. Sturgis, of Enid, for plaintiffs in error.
Dale & Bierer, of Guthrie, for defendant in error.

WILSON, C. Defendant in error F. E. Cragin, as plaintiff, sued the plaintiff in error Elsworth Hume and others, for the recovery of a money judgment, alleging, in substance, that on and subsequent to August 3, 1910, Samuel C. Campbell was sheriff of Garfield county, Okl.; that on said 3d day of August, 1910, the plaintiff sued another in the district court of Noble county, Okl., to recover a money judgment, and that in said action an attachment was issued out of the office of the clerk of that court, commanding the sheriff of Garfield county to levy the same on the property of the defendant; that pursuant to said order said Campbell, as sheriff, levied on 300 bushels of wheat of the value of \$234, belonging to the defendant in Garfield county, and made due return of his proceedings to the court; that thereafter the defendant in this action, Tony Wright, and another, intervened in said action claiming to own said wheat; that thereafter judgment was rendered in said action in favor of the plaintiff and adverse to the defendant therein and to the interveners and sustaining the attachment and ordering the attached wheat sold by the sheriff of Garfield county. It was further alleged that the defendant Elsworth Hume was elected sheriff of Garfield county at the fall election in 1910 and qualified as such and assumed the office in January, 1911; that in July, 1912, an order of sale was issued out of the office of the clerk of the district court of Noble county in said action, commanding the sheriff of Garfield county to

sell the said 800 bushels of wheat, and placed the same in the hands of Elsworth Hume, as sheriff of Garfield county, for execution; that said Elsworth Hume, as sheriff, made return of said order of sale to the effect that he had gone on the land on which said wheat had been located and did not find the property; and that no sale thereof had been made. It was further alleged that at the time said Hume assumed the office of sheriff the wheat was in the bin in Garfield county and was in good condition; that it was the duty of said former sheriff, Samuel Campbell, while he was sheriff, to take care of, protect, and keep said attached wheat to abide the judgment of the court and to turn the same over to said Hume on his assuming said office, and that it was the duty of said Hume to receive said wheat and safely keep it subject to the order of the court; that said Campbell, as sheriff, and said Hume, as sheriff, being obligated as aforesaid, did, on or about the — day of January, 1912, fail and neglect to properly care for said wheat and hold the same as by the said writ of attachment required and as they were required by the law to do; that said defendant Tony M. Wright was, by said Samuel C. Campbell and said E. Hume, sheriffs as aforesaid, and by their neglect to perform their duty, permitted and enabled to and did take and remove the said wheat and dispose of it and convert it to his own use and deprive the plaintiff thereof.

To this petition the defendant Hume filed his demurrer on the alleged grounds: First, that the court was "without jurisdiction of the person of said defendant Elsworth Hume and his bondsmen and without jurisdiction of the subject-matter of the above-entitled action to hear, determine, or try the same"; and, second, that there was a "misjoinder of parties defendant." The other defendants, except Campbell and Wright, filed similar demurrers. The court overruled the demurrers, and it is from the order overruling the demurrers and rendering judgment for the plaintiff that this appeal is instituted.

Section 4673, Revised Laws 1910, provides:

"Actions for the following causes must be brought in the county where the cause, or some part thereof, arose: * * *

"Second, an action against a public officer for an act done by him in virtue, or under color of his office, or for neglect of his official duties.

"Third, an action on the official bond or undertaking of a public officer."

The action was one which came within the terms of subsections 2 and 3 of the section of the statute partly quoted above; and could have been properly commenced only in Garfield county; but the question raised by this appeal is one of venue, rather than one of jurisdiction of the subject-matter of the action or of the jurisdiction of the court to render a judgment of the nature of the one sought to be recovered. The defendant Hume and his bondsmen had the right to object to

being sued in Noble county, but their right to so object was a personal one which could be waived by them and did not involve the jurisdiction of the court to render the judgment sought to be recovered in the action after having been vested with jurisdiction over the persons of the defendants, to wit, Hume and his bondsmen. 40 Cyc. 111.

Had the defendants availed themselves, in the proper manner, of their privilege not to be sued in Noble county, a different question would have been presented, and the court would probably have erred had it attempted to retain jurisdiction to try and determine the case as against the objecting defendants; but instead of confining themselves to an objection to the district court of Noble county taking jurisdiction of the case because it had not been brought in the county in which the cause, or some part thereof, arose, the defendants filed a demurrer presenting other grounds than that of the venue of the action, thereby waiving the objection that they had been improperly sued in Noble county, and conferring jurisdiction on the court, of their persons, to hear and determine the cause and render the judgment appealed from. 40 Cyc. 118; *Lindley v. Kelly*, 147 Pac. 1015.

The only question presented for the consideration of this court by the plaintiff in error in his brief being that of the venue of the court which tried the case, and it appearing, as we have seen, that the defendants waived in the lower court their right not to be sued in Noble county and submitted themselves to the jurisdiction of the court, we recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

SHAWNEE LIFE INS. CO. v. TAYLOR et al.
(No. 5898.)

(Supreme Court of Oklahoma. July 25, 1916.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS \S 180(2)—PLEADING—DEMURRER.

Where a petition upon its face does not show that the cause of action is barred by the statute of limitations, a demurrer thereto, urged specially upon that ground, should be overruled.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 671; Dec. Dig. \S 180(2).]

2. PLEADING \S 367(1)—MOTIONS—MAKING MORE DEFINITE AND CERTAIN.

Where a motion to make more definite and certain a paragraph of the petition seeks to raise a question presentable only by demurrer, the same should be overruled.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. \S 367(1).]

3. APPEAL AND ERROR \S 1042(4)—REVIEW—HARMLESS ERROR—PLEADING.

Petition examined, and held, that it was harmless error, if any, to overrule a motion to

strike as surplusage certain allegations complained of in the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4113; Dec. Dig. 1042(4); Pleading, Cent. Dig. § 1172.]

4. CANCELLATION OF INSTRUMENTS 24(1)—CONDITIONS PRECEDENT — RESTORATION OF CONSIDERATION.

Where, in a suit to rescind a contract for the sale of stock and to cancel certain deeds purporting to convey certain lands executed in payment therefor and certain mortgages and a deed subsequently executed by the grantee in the first deeds, it appeared that the sale was fraudulent and the stock of no value and that plaintiffs had parted with their title and possession thereto and they could not restore, Rev. Laws 1910, § 986, construed, and *held*, that, as it is "everything of value" only that need be restored, the court did not err in decreeing a rescission and cancellation of the deeds and mortgage complained of.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 33; Dec. Dig. 24(1).]

Error from District Court, Alfalfa County; James W. Steen, Judge.

Action by Peter Taylor and others against the Shawnee Life Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lydick & Eggerman, of Shawnee, and Titus & Talbot, of Cherokee, for plaintiff in error. A. C. Beeman, of Cherokee, for defendants in error.

TURNER, J. On January 7, 1913, Peter Taylor and Nancy Taylor, his wife, defendants in error, in the district court of Alfalfa county, sued J. C. Parker, the Shawnee Life Insurance Company, plaintiff in error, and A. M. Dicks for rescission, on the ground of fraud, of a sale to them of certain stock by the life insurance company and for the cancellation of certain deeds, made, executed, and delivered by them, purporting to convey certain lots, the property of plaintiffs, in payment therefor; also, to cancel certain mortgages on the property subsequently executed by Parker to the company and a deed from him to Dicks. After a demurrer to the petition was overruled, the company answered in effect a general denial, and, further, a specific denial of the sale of the stock to plaintiffs. There was trial to a jury upon the issues joined and judgment for plaintiffs, whereupon the Shawnee Life Insurance Company brings the case here, making Parker and Dicks, who do not complain of the judgment, parties defendant in error.

It is assigned that the court erred in overruling the demurrer. The petition substantially states that, prior to the transaction sought to be set aside, plaintiffs were the owners of certain lots in the town of Cherokee; that in November, 1910, defendant Parker and another, Stewart, agents of the defendant company, opened negotiations with plaintiffs the object of which was to sell them

stock in the company, which they did by means of false and fraudulent statements, in effect, that the stock was worth at least \$20 a share, had a regular market value of that price, was selling readily and rapidly advancing, was limited in quantity, so that only a small portion remained unsold; and that in a few days the stock would be worth at least \$30 a share. It is further alleged that the agents "guaranteed" to plaintiffs that if they would buy the stock, defendant would repurchase the same from them at any time for at least that much a share; and that one of the agents stated he would be willing at any time to repurchase the stock for that much a share, stating that the same would soon be worth \$100. The petition further states that said agents "guaranteed" that said company would, at the end of the first year, pay a cash dividend of not less than 10 per cent. or more; that the company was on a sound financial basis and its officers were men of high financial and moral standing; that the investment proposed would be of the best; that plaintiffs could not possibly lose in making it, but, on the contrary, would receive large and prompt dividends upon the stock. It was further alleged that plaintiffs relied upon said false and fraudulent representations; that the stock was worthless and was being sold at much less than \$20 a share; that the company was not on a sound financial basis, but, on the contrary, was organized for the purpose of obtaining money by false and fraudulent pretenses from the unsuspecting; that, by reason of said false and fraudulent representations, plaintiffs were, on November 12, 1910, induced to subscribe for 325 shares of the stock of the defendant company at \$20 a share, which was issued to them, and in payment to execute the deeds sought to be set aside. It is further alleged that in May or June, 1912, plaintiffs were approached by the president of the company and another, representing the Amalgamated Insurance Corporations of Indianapolis, and were told by them that the defendant company and said Amalgamated Corporations had merged into a stronger and better company; that the stock of the latter company was more valuable than the stock of the former, and, by reason thereof, induced plaintiffs to exchange their stock in the former for stock in the latter company, which they brought in court and tendered to the defendant company. They further alleged they were deceived by the false and fraudulent representations of the company, through its agents, Parker and Stewart, and would not have executed and delivered to the company their deeds, aforesaid, had they believed the certificates of stock for the 325 shares in defendant company to have been worth less than \$7,500 cash and would pay dividends of at least 10 per cent. as represented by

the agents who procured the deeds. The petition further states that the land given in exchange for the stock was conveyed to defendant's agent Parker and by him mortgaged to the defendant company, and thereafter by him sold and by warranty deed conveyed to the defendant Dicks, and prays for a rescission of the contract of sale and a cancellation of said deeds.

[1] Assuming for the sake of the demurrer the allegations sufficient to impeach the transaction for fraud in the sale of the stock and the procurement of the deeds, as that transaction took place on November 12, 1910, and this suit was not filed until January, 1913, it is urged that the demurrer should have been sustained for the reason the petition discloses the action is barred by the statute (Rev. Laws 1910, § 4657), which reads:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: * * * Third. Within two years: * * * An action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

And we might so hold did not the petition further disclose that in May or June thereafter plaintiffs were informed by the president of the defendant company and another, who was agent for the Amalgamated Insurance Corporations of Indianapolis, that the two companies had merged into a stronger company, and that the stock of the latter company was more valuable than the stock of the former, and thereby induced plaintiffs to exchange their stock for stock in the latter company, equally as worthless. Construing the allegations of the petition together with a view to substantial justice, it may fairly be inferred that this exchange of stock was a part of the original scheme to defraud, and was intended to complicate the transaction and render recovery more difficult, which it did as we shall see. We are therefore of opinion that the court did right when he, in effect, held that the statute began to run against the action, not from November 12, 1910, the date when the 325 shares of stock in the defendant company were sold and the deeds executed conveying the land in exchange therefor, but from the date when that stock was exchanged for stock in the Amalgamated Corporations, and hence the court did not err in overruling the demurrer to the petition. For we said in *Tucker v. Hudson*, 38 Okl. 790, 134 Pac. 21:

"Where a petition upon its face does not show that the cause of action is barred by the statute of limitations, a demurrer thereto, urged specially upon that ground, should be overruled."

[2, 3] Since the object of the suit was obviously as stated, there is no merit in the assignment that the court erred in overruling defendant's motion to make certain parts of the petition more definite and certain so

as to show whether or not the suit was one upon any of the guaranties therein set forth, or was one for rescission and cancellation, and, if not upon the former, to strike the allegations concerning the same as misleading. Neither is there merit in the assignment that the court erred in refusing to strike from said petition paragraph No. 14, "for the reason that said paragraph contains no allegation of fact entitling plaintiffs or either of them to recover of defendants," and for the further reason "that the same is surplusage." In support of that part of the motion first quoted, it is urged, in effect, that the paragraph at which it is leveled contains nothing but alleged statements of prophecy and opinion made by defendant's agent to plaintiffs to induce them to buy the stock, and hence were not "actionable fraudulent representations," as such, it is contended, "must relate to existing facts or facts claimed to exist and not to future possibilities or probabilities, opinions, guaranties, warranties or promises." Just so; but, as this question, which is, in effect, whether the pleading states facts sufficient to constitute a cause of action, should have been raised by demurrer but was not, the same cannot be done by motion to strike. And if any part of the paragraph is surplusage, the error, if any in overruling the motion to strike, was harmless.

[4] On a trial of the cause to the court three witnesses testified; that is, plaintiff, who was 83 years old and his wife and one Stewart, who together with one Parker, was acting as agent for the defendant company in making the sale of the stock. The evidence discloses that on November 10, 1912, Stewart and Parker, acting as agents aforesaid and under immediate instructions from the president of the company went to plaintiffs' home for the purpose of selling them stock in the company; that the company at no time ever had issued to it a certificate granting to it a right to do business in the state; that upon the strength of the false and fraudulent representations set forth in the petition they sold to plaintiffs at \$20 per share, in all \$7,500, 325 shares of its stock, and on the same day in payment therefor they, for the reason that defendant company was a corporation and forbidden by law to take title to real estate, made, executed, and delivered to said Parker a warranty deed to lots 7, 9, and 10 in block 31, also a warranty deed to lots 1, 2, and 3 in block 55, also a warranty deed to lot 9 in block 2, all in the town of Cherokee; after which Parker and wife executed two mortgages, covering the entire property to the defendant company for \$3,750 each, thereby securing to it its share in the profits of the deal, and later conveyed the land to the defendant Dicks. The evidence further discloses that Stewart, the agent of defendant company, but acting for himself only, at the time plaintiffs bought the stock took back from them \$1,000 worth

of it in exchange for \$1,000 worth of stock in the Northwestern Land & Iron Company belonging to him, which he afterwards turned in to the defendant company in exchange for stock in the Amalgamated Insurance Corporations. And in May or June following, plaintiffs were induced by the president of defendant company and another to exchange the remainder of their 325 shares of stock for stock in the same company, which nobody claims to be of any value whatever.

Upon this evidence it is urged that the court erred in decreeing a rescission of the sale and a cancellation of the deeds, which he did, because, they say, while plaintiffs properly pleaded a tender of the stock received in exchange, which was ordered turned over to defendant company, yet, as the evidence discloses that they had parted with the title and possession of all the 325 shares sold them by the defendant company and could not restore it and thus put the defendant company in statu quo, the court had no right to decree as he did. In support of this contention they quote 9 Cyc. 437, which reads:

"The contract can only be rescinded where it is possible to put the parties back in their original position and with their original rights. A contract voidable for fraud cannot be avoided when the other party cannot be restored to its status quo, for a contract cannot be rescinded in part and stand good for the residue. It cannot be rescinded in toto, it cannot be rescinded at all; but the party complaining of a nonperformance, or the fraud, must resort to an action for damages."

And they rely upon Rev. Laws 1910, § 986, which reads:

"Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: First, he must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, disability, and is aware of his right to rescind. And, second, he must restore to the other party everything of value which he has received from him under the contract; or must endeavor to restore the same, upon condition that each party shall do likewise, unless the latter is unable, or positively refuses to do so."

And so we might hold, were it not for the fact that the stock of the defendant company which cannot be restored, we repeat, was of value. As it is only everything of value that plaintiffs were bound to restore, the court did not err in decreeing a rescission of the contract of sale and a cancellation of the deeds and mortgages complained of and, in effect, clearing the title of plaintiffs to the property, especially as the court at the same time ordered turned over to the defendant company the stock of the Amalgamated Company taken in exchange for their stock. It will not do to say that the court in his findings of fact failed to find fraud in the sale. It is for the reason that his findings of fact are not requested by either party. When this is the state of the record, the judgment

being a general finding in favor of plaintiffs, it amounts to a finding of every fact in their favor necessary to support the judgment.

Finding no error in the remaining assignments, the judgment of the trial court is affirmed. All the Justices concur.

THOMPSON v. VAUGHT et al. (No. 5593.)

(Supreme Court of Oklahoma. Oct. 3, 1916.)

Rehearing Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. CONTRACTS § 99(2)—FRAUD—ADMISSIBILITY OF EVIDENCE.

Where a written instrument is attacked for fraud, all the circumstances and transactions leading up to and surrounding the execution of the same, as well as the motives and intentions that prompted the maker to execute it, may be shown.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 449-453, 1193, 1799, 1800; Dec. Dig. § 99(2).]

2. APPEAL AND ERROR § 1005(2)—REVIEW—QUESTIONS OF FACT—VERDICT.

Where the verdict is approved by the trial court, and even though the evidence is conflicting and contradictory, but there is competent and positive evidence to sustain it, the judgment of the trial court will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1005(2).]

3. APPEAL AND ERROR § 1064(1)—REVIEW—PREJUDICIAL EFFECT OF ERROR—BURDEN OF PROOF.

It must clearly appear that the instructions complained of probably caused a miscarriage of justice before a reversal will be ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064(1); Trial, Cent. Dig. § 525.]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by W. J. Thompson against Ed. S. Vaught and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Warren K. Snyder and S. A. Horton, both of Oklahoma City, for plaintiff in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendants in error.

BRUNSON, C. The parties to this suit will be designated here as they were in the trial court. This suit was instituted on the 28th day of March, A. D. 1912. It is alleged in substance:

That the defendants are indebted to the plaintiff for the purchase price of certain real estate mentioned and described in the petition. That on the 28th day of December, A. D. 1910, the defendants entered into a verbal agreement with the plaintiff whereby he was to sell to them certain real estate amounting to 160 acres of land located in Oklahoma county, and that, at the instance and request of said defendants, he made, executed, and delivered a deed to said real

estate conveying it to the said J. L. Francis. That the said J. L. Francis directed him to deliver the deed to the defendant Ed. S. Vaught, stating that said Ed. S. Vaught had authority to represent, act for, and bind him in said transaction, and that thereupon he took said deed, together with an abstract, to the real estate, to the office of the said Ed. S. Vaught, and delivered the same to him. That he accepted the same, and at the same time, acting for himself and the said J. L. Francis, he made, executed, and delivered to the plaintiff the following written memorandum:

"Received of W. J. Thompson a warranty deed executed by him and his wife, Martha Thompson, on the 29th day of September, 1910, covering lots three (3) and four (4) and south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section one (1), township twelve (12) north and range three (3) west I. M., containing 160 acres more or less, according to the government survey thereof.

"It is understood that the said Ed. S. Vaught and J. L. Francis, upon the signing of said capitol bill passed by the extra session of the last Legislature just adjourned, and now in the hands of Gov. C. N. Haskell, will pay to the said W. J. Thompson the sum of \$5,000.00 in cash, and the balance of \$17,000.00 will be paid in three equal payments, one, two, and three years from date; notes to be executed for deferred payments at 8 per cent. to be secured to the satisfaction of the said W. J. Thompson; said Thompson to provide a clear title to the said land.

Ed. S. Vaught.

"Dated Dec. 28, 1910."

That at the same time said Ed. S. Vaught stated to him that he desired that the land be conveyed by him to the State Capitol Building Company. That a special form of deed making the State Capitol Building Company the grantee was handed to him by the said Ed. S. Vaught to be executed in lieu of the deed he had just delivered. That the plaintiff and his wife executed the same and delivered it to the said Ed. S. Vaught. That the capitol bill named in the memorandum was signed by Gov. C. N. Haskell on the 29th day of December, 1910, and the plaintiff thereafter demanded payment from the defendants and each of them and full compliance with their contract as set out in said memorandum, but that they failed, neglected and refused to pay the \$5,000 mentioned therein, or to pay any part of it, or to otherwise comply with said contract.

It is further alleged that the plaintiff has done and performed all the conditions required of him under said contract, and it is also alleged that the State Capitol Building Company has or claims some right, title, or interest in and to said real estate, and it is asked in the petition that said company be required to set out what interest it has in said lands. Judgment is demanded against the defendants in the sum of \$22,000.

After demurrers filed by the defendants and the State Capitol Building Company were overruled by the court each of them filed separate answers. The answer of J. L. Francis denies generally every allegation set forth

in the petition, and then denies specifically that he ever entered into a verbal agreement with the plaintiff to buy said real estate from him; denies that the plaintiff ever delivered to him a deed executed by himself and his wife conveying the real estate to him, or that he ever directed the plaintiff to deliver said deed and abstract to the defendant, Ed. S. Vaught; denies that he ever stated to the plaintiff that the said Ed. S. Vaught had authority to act for, represent, or bind him in said transaction.

The defendant Ed. S. Vaught in his answer denies generally all of the allegations contained in said plaintiff's petition, except those admitted, and then denies specifically that he had any authority, either written or oral, from the said J. L. Francis, to act for, represent, or bind him in said transaction. He does admit that he executed the written memorandum in question but alleges that he was induced to do so by the false and fraudulent representations of the plaintiff; that the plaintiff represented and stated to him that he had just seen the said J. L. Francis, and had an understanding and agreement with him that, in the event said capitol bill was signed by Gov. C. N. Haskell, the defendants would take the real estate and pay for it in the manner set out in said memorandum; that he executed the said memorandum believing such statements and representations to be true, but that in truth and in fact said statements and representations were false and fraudulent, and that the said J. L. Francis had not entered into such agreement with the plaintiff, and that, had he not believed the same to be true, he would not have signed it; that, because of said deception so practiced on him, said memorandum is void; that in said written memorandum it is stated that the plaintiff shall provide a clear title to said real estate, that the same was free and clear from all incumbrance, but that said statement was and is false and untrue; that at the time there was a mortgage, a valid subsisting lien, on the same for \$6,000; that the said mortgage is recorded in the office of the register of deeds of Oklahoma county; that it has not been paid off, satisfied, or discharged; that subsequently said mortgage was foreclosed in the superior court of Oklahoma county, and judgment was obtained for \$5,000 and cost, and fixing it as a lien against said land; that said judgment has not been paid off, satisfied, or discharged; that said real estate was intended as a donation to the State Capitol Building Company, and that the proceeds arising from the sale of said real estate were to be used in the erection of a state capitol building for the state of Oklahoma; that it was not intended that the deed making the State Capitol Building Company grantee should be placed of record until the same was accepted and approved by the said company, but that by mistake of the office or employees of the said company it was recorded; that

after it was discovered by said company that the title to the said real estate was not clear and that it was incumbered it caused a deed in due form to be executed conveying the land back to said plaintiff; that said deed was duly recorded in the office of the register of deeds of Oklahoma county; and that therefore the consideration for the execution of said memorandum has failed.

The State Capitol Building Company also filed its answer, which is a general denial, and, among other things, it alleged that the deed executed by the plaintiff to said real estate was delivered to it by the said Ed. S. Vaught subject to its approval and acceptance, and that at the same time he instructed the company that said deed was not to be placed of record until it was so approved and accepted, but that by an error of one of the employes of said company said deed was placed of record, but as soon as this mistake was discovered the company immediately caused a quitclaim deed to be executed conveying the title to said land back to the plaintiff, and after the deed was recorded it was delivered to the plaintiff; that said company disclaims any right, title, or interest in or to said real estate, and confessed that the title is in the plaintiff.

The record does not disclose that a judgment was rendered in the trial court against the State Capitol Building Company, and hence it is not a party to this appeal.

After some motions and demurrers were filed to said answers and overruled, the plaintiff filed a reply to the answer of the defendant Ed. S. Vaught, but filed no reply to the answer of the defendant J. L. Francis. The reply denies all of the affirmative allegations contained in said answer, and then pleads that the plaintiff tendered said defendants a good and sufficient release of the mortgage, but that they refused to accept the title or pay for the land, and that plaintiff is now ready, willing, and able to tender a release of said mortgage. It is also denied that the judgment sought to be pleaded in the answer of the defendant Ed. S. Vaught is a general judgment against the plaintiff, but alleges that said judgment was one partitioning the land between parties.

The trial resulted in a verdict and judgment for the defendants, Ed. S. Vaught and J. L. Francis. Motions for a new trial as to said defendants were filed in due time and overruled, exceptions were duly saved, and the case is before us on appeal.

In the first and second assignments of error it is contended that the evidence does not reasonably tend to support the verdict and judgment. And in the third and fourth assignment of error it is contended that the court erred in not directing a verdict for the plaintiff.

It appears from the record that there were a good many preliminary negotiations between the parties to this suit concerning the purchase of said real estate. The defendants

were seeking to obtain deeds and options on lands to the amount of 650 acres from various persons for the purpose of providing a site and funds for the erection of a state capitol building for the state of Oklahoma, at or near the intersection of Twenty-Second street and Lincoln boulevard, in Oklahoma City; that before said land could be accepted as a site for the location of the capitol it, together with donations for said purpose, was to amount to a certain sum of money; that the said Ed. S. Vaught had agreed to donate 5 acres of land of the value of \$10,000, J. L. Francis had agreed to donate $2\frac{1}{2}$ acres of land of the value of \$16,000, and Levy Bros. had agreed to donate \$5,000 in money. And it appears that the donations were of sufficient value, but the lands donated were not of sufficient acreage, and it became necessary to obtain additional lands to bring it up to 650 acres, and that said defendants were given authority from the State Capitol Building Company to use their donations and the \$5,000 donated by Levy Bros. with which to procure additional lands, and that these facts were made known by said defendants to the plaintiff in their negotiations with him, and with full knowledge of said facts the plaintiff executed said deed conveying the title to said lands to the State Capitol Building Company, subject to its approval and acceptance; that the State Capitol Building Company was incorporated for the purpose and intent of holding all deeds, options, and donations in trust for the donors and for the state of Oklahoma, and that it had no power other or different than that of trustee for the donors and the state of Oklahoma.

It appears that the defendant Ed. S. Vaught testified in part that the plaintiff came to his office and represented to him that he had made and entered into a verbal agreement with the defendant J. L. Francis whereby he had sold said real estate to the defendants, and that he had executed a deed to said real estate conveying it to the defendant J. L. Francis, and that he was directed by the said J. L. Francis to come to his office and state to him the agreement so made and entered into, and that he did state to him the terms of the agreement. Plaintiff also stated to him that said J. L. Francis said that the said Ed. S. Vaught had authority to act for, represent, and bind him in said transaction, and for him to draw the necessary papers covering said agreement; that he believed the statements so made to be true, and in compliance with the same he executed said written memorandum; that at the same time he furnished the plaintiff a blank form of deed in which the State Capitol Building Company is grantee, and directed him to fill it out and sign it, thereby conveying the lands to said company; that the plaintiff and his wife executed the same and returned it to him, and within a short time thereafter he delivered

said deed to the State Capitol Building Company, and instructed it not to place the same of record until it was accepted and approved by the company. He further testified that said statements and representations as to said agreement were false and fraudulent, and that because of the same he was induced to prepare and sign said written memorandum; that if he had not been so deceived by said false and fraudulent statements he would not have signed the memorandum.

The defendant J. L. Francis testified that he did not enter into the agreement mentioned and set out in the written memorandum; that Ed. S. Vaught never at any time had authority, either oral or written, to represent or bind him in said transaction, and that he did not tell the plaintiff that said Ed. S. Vaught had authority to represent, act for, or bind him in the same; that the plaintiff endeavored to get him to execute notes and secure them to cover the deferred payments, but that he informed said plaintiff that under no circumstances would he execute or secure said notes, and that thereupon he left said defendants' office, and that he had no other or further conversation or understanding with him about said land, and that he had no knowledge of the execution of the memorandum until some months thereafter, and in the spring of 1911; that the first knowledge he had of the same was when Ed. S. Vaught telephoned him to come to his office, that the plaintiff was there, claiming that they were indebted to him on the written memorandum for the purchase price of the land; that he immediately went to the office of the said Ed. S. Vaught, and then and there informed him and the plaintiff that he had not entered into such an agreement with the plaintiff, and that Ed. S. Vaught had no authority to represent, act for, or bind him in said transaction to pay for said land.

The plaintiff testified in part that, in pursuance to a verbal agreement made and entered into by and between himself and the defendants, he made and executed a deed conveying said land to said J. L. Francis; that when he went to deliver it the said J. L. Francis informed him that Ed. S. Vaught had authority to represent, act for, and bind him in said transaction, and he instructed him to take the deed and abstract to Ed. S. Vaught, and that he would draw the necessary papers; that thereupon he went to the office of the said Ed. S. Vaught, and explained the agreement to him; that thereupon he drew and executed said written memorandum and furnished him a blank form of deed to be executed by himself and wife, conveying the lands to the State Capitol Building Company; that thereafter he and his wife signed, executed, and delivered said deed to Ed. S. Vaught.

[2] It appears that at the time the alleged agreement was made and entered into be-

tween the plaintiff and J. L. Francis, and at the time the memorandum was signed, there were no other persons present except the parties to this suit. There is a sharp conflict in the testimony of the plaintiff, on the one hand, and the testimony of the defendants, on the other, and under the well-settled rule established by the decision of this court a case will not be reversed and remanded on account of conflicting evidence where there is any evidence reasonably tending to support the judgment. For a time so long that the memory of man runneth not to the contrary the jury and trial court have passed upon conflicting testimony and decided the issues in favor of one of the contending parties.

In the case of *Tulsa St. Ry. Co. v. Jacobson*, 40 Okl. 118, 136 Pac. 410, it is held that this court will not disturb on appeal a verdict on conflicting evidence where the verdict is approved by the trial court.

In the case of *Iowa Dairy Separator Co. v. Sanders*, 40 Okl. 656, 140 Pac. 406, it is said:

"If there is any testimony reasonably tending to support the verdict of the jury, and the verdict has been approved by the trial court, the judgment will not be disturbed on appeal."

In the case of *St. L. & S. F. Ry. Co. v. Isenberg*, 150 Pac. 123, the court said:

"Where a cause is tried to a jury, and a general verdict returned, and judgment rendered on the verdict, and the evidence is conflicting and contradictory, and there is competent evidence to sustain the verdict, this court will not undertake to weigh the evidence or determine its preponderance, but will sustain the verdict of the jury. *Kuhl v. Supreme Lodge, S. K. & L.*, 18 Okl. 383, 89 Pac. 1126; *Grant v. Milam*, 20 Okl. 672, 95 Pac. 424; *Wade v. Cornish*, 23 Okl. 40, 99 Pac. 643."

[1] It is also contended that the court erred in admitting incompetent and irrelevant evidence over proper objections and exceptions as to the fraud alleged to have been practiced by the plaintiff concerning the written memorandum. Where a written instrument is attacked for fraud, all the circumstances, negotiations and transactions leading up to and surrounding the execution of the instrument, as well as the motives and intentions that prompted the maker to execute it, may be shown.

In the case of *Hankins v. Farmers' & Merchants' Bank*, 42 Okl. 330, 141 Pac. 272, it is said:

"In determining the existence of fraud, any evidence, direct or circumstantial, which is competent by other rules of law, and which in the opinion of the court has a legitimate tendency to prove or disprove the allegations in the issue, is admissible. Great latitude is allowed in the introduction of evidence, the extent of the investigation being largely in the discretion of the trial court, and objections to circumstantial evidence on the ground of irrelevancy are not favored. Circumstantial evidence to show fraud may well be admissible when taken as a whole, although some of the circumstances, considered separately, would be incompetent. The whole transaction involving the alleged fraud may be given in evidence."

It is also contended that the court erred in permitting the defendants to prove said real estate was incumbered. It appears from the record that the court did admit evidence over proper objections and exceptions to this effect, but that thereafter it sustained a demurrer to that part of the answer of the defendants alleging said incumbrance, and withdrew this evidence from the consideration of the jury. If admission of such evidence was error, such error is cured by withdrawing it from the consideration of the jury.

[3] It is contended that the court erred in giving and refusing to give certain instructions to the jury. The court instructed the jury that the memorandum sued on is a contract and promise to pay, and that it is a binding obligation on the defendant Ed. S. Vaught, if no fraud was practiced on him, in obtaining his signature thereto, and that it is also binding upon the defendant J. L. Francis if the defendant Ed. S. Vaught had authority to execute said instrument in his behalf and act for him in said transaction. It is a well-settled rule that the instructions of the trial court to the jury are to be construed as a whole, and if the instructions as a whole fairly present the issues to the jury the case will not be reversed. After examination of the instructions and considering them as a whole, it appears to us that they fairly presented the issues to the jury. It must clearly appear that the instructions complained of probably caused a miscarriage of justice before a reversal will be ordered. *C., R. L. & P. Ry. Co. v. Newbern*, 39 Okl. 804, 136 Pac. 174; *Chickasha St. Ry. Co. v. Marshall*, 48 Okl. 192, 141 Pac. 1172; section 6005, Revised Laws 1910.

Finding no error in the record, the judgment below is affirmed.

PER CURIAM. Adopted in whole.

EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES et al. v. WEIGHTMAN. (No. 7787.)

(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

1. INSURANCE §585(1)—RIGHT TO PROCEEDS—WRONGFUL ACT OF BENEFICIARY.

A beneficiary in a policy of life insurance, who murders the assured, is thereby barred from collecting the insurance money.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1150; Dec. Dig. §585(1).]

2. INSURANCE §594—ASSIGNMENT—RIGHTS OF ASSIGNEE.

The insurance policy being a nonnegotiable instrument, the assignee of such a beneficiary has no better claim upon the insurance money than his assignor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1455-1458, 1483, 1485; Dec. Dig. §594.]

3. INSURANCE §585(1)—RIGHT TO PROCEEDS—JOINT POLICIES.

Provisions of a life insurance policy upon the lives of two persons, providing for the payment of the insurance fund to the survivor of the first decedent, examined, and *held*, that the policy in question, so far as the insurance fund payable on such contingency is involved, is a several policy upon the life of each of the assured, and that the interest of the assured persons in such expectancy is not a joint tenancy, by reason of which one takes by the right of survivorship upon the death of the other, but that the survivor takes, if at all, under the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1461, 1464, 1466, 1468; Dec. Dig. §585(1).]

4. INSURANCE §585(1)—RIGHT TO PROCEEDS—ESTATE OF INSURED.

Where no alternative beneficiary is designated in a contract of life insurance, and the designated beneficiary becomes barred from taking the benefits of the policy by reason of the fact that she has murdered the assured, in the absence of a statute which provides an alternative beneficiary, by operation of law a trust arises in favor of the estate of the assured, by virtue of which the representative of the assured is entitled to recover the insurance fund.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1461, 1464, 1466, 1468; Dec. Dig. §585(1).]

5. JUDGMENT FOR INTERVENOR — NEW TRIAL REFUSED.

Held, no error in rendering judgment for intervenor and overruling motion for new trial.

(Additional Syllabus by Editorial Staff.)

6. JOINT TENANCY §1—NATURE AND INCIDENTS IN GENERAL.

To the existence of a joint tenancy, four unities must exist in the tenants, viz.: (1) Unity of interest; (2) unity of title; (3) unity of time; and (4) unity of possession.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 1; Dec. Dig. §1.

For other definitions, see Words and Phrases, First and Second Series, Joint Tenancy.

Commissioners' Opinion, Division No. 3. Error from District Court, Cleveland County; F. B. Swank, Judge.

Action by Ben F. Williams against the Equitable Life Assurance Society of the United States, and J. T. Weightman, administrator of the estate of Thomas J. Gentry, intervenes. Judgment for intervenor, and plaintiff and defendant bring error. Affirmed.

Alexander & Green, of New York City, Stephen C. Treadwell, of Oklahoma City, and Locke & Locke, of Dallas, Tex., for plaintiff in error Equitable Life Assur. Soc. Lydick & Eggerman, of Shawnee, for plaintiff in error Williams. Kittle C. Sturdevant, of Shawnee, and Dorset Carter, of Oklahoma City, for defendant in error.

JOHNSON, C. This action was filed upon January 4, 1913, in the district court of Cleveland county, by Ben F. Williams, as plaintiff, against the Equitable Life Assurance Society of the United States, as defendant, for the recovery of \$2,000 upon a policy of life insurance on the life of Thomas J. Gentry, deceased, the plaintiff having

become the owner by assignment of the rights of the beneficiary in the policy. The defendant resisted recovery upon the ground that, as contended by it, there was no liability under the policy for the reason that the beneficiary, Alverta B. Gentry, had murdered the insured, who was her husband, and thereby forfeited her right to the insurance and terminated all liability of the insurance company. J. T. Weightman, as administrator of the estate of the insured, Thomas J. Gentry, deceased, intervened in the cause, alleging that Alverta B. Gentry, the beneficiary named in the policy, had murdered the insured, and thereby forfeited her right to the insurance, but that he, as such administrator, was entitled to the insurance. The case was tried to the court upon the pleadings and an agreed statement of facts. The lower court rendered judgment in favor of the intervener, J. T. Weightman, administrator of Thomas J. Gentry, and against the plaintiff and defendant, awarding the insurance to the administrator. Plaintiff and defendant bring the case here on appeal.

The policy in question was issued upon April 7, 1910, covering and insuring the lives of both Thomas J. Gentry and Alverta B. Gentry, husband and wife, respectively, in the sum of \$2,000. The principal insuring clause of the policy reads as follows, to wit:

"In consideration of the payment in advance of sixty-nine $74/100$ dollars, and of the payment annually thereafter of a like sum upon each fifteenth day of March until the death of either Thomas J. Gentry, of Oklahoma, Okla., or his wife, Alverta B. Gentry of Oklahoma, Okla. (hereinafter jointly called the insured) the Equitable Life Assurance Society of the United States agrees to pay at its home office in the city of New York two thousand dollars upon receipt of due proofs of the death of either one of the insured, provided this policy is then in force and is then surrendered properly released, to the survivor of the said Thomas J. Gentry and Alverta B. Gentry, beneficiaries, with the right on the part of the insured to change the beneficiary."

The policy also contained the further clause, with reference to change of beneficiary, as follows, to wit:

"*Change of Beneficiary.* If the right to change the beneficiary has been reserved, and there is no written assignment of this policy on file with the society, the insured may from time to time during the continuance of this policy, change the beneficiary or beneficiaries by a written request (upon the society's blank) filed at its home office, but such change shall take effect only upon the indorsement of the same hereon by the society."

And the policy contained the further clause as follows, to wit:

"*Incontestability.* This policy shall be incontestable after one year from its date of issue, provided premiums have been duly paid. Self-destruction, sane or insane, within one year from said date of issue is a risk not assumed under this policy."

The policy contained other provisions usual in such instruments. There was no provision, specifically affecting liability in the event of the murder of either of the insured

by the beneficiary of his or her insurance. The instrument provided for certain cash values after the payment of specified numbers of annual premiums.

It was agreed between the parties that, on or about the 6th of January, 1912, the said Alverta B. Gentry had willfully, unlawfully, and feloniously caused the death of the said Thomas J. Gentry by murdering him with malice aforethought, and had been legally convicted of murder, under a charge therefor, and sentenced to the Oklahoma State Penitentiary for the term of her natural life. It was also conceded that the premiums on the policy had been duly paid, and that the plaintiff Ben F. Williams by assignment was the owner of the rights of Alverta B. Gentry in the policy, whatever such rights may be; and it was agreed that the intervener was the duly qualified administrator of the estate of Thomas J. Gentry, and had properly intervened in the cause, and that the said Thomas J. Gentry died intestate, leaving as his sole heirs at law the said Alverta B. Gentry, his wife, and Theodore B. Gentry, the minor son of both of such insured. The insurance company made no contest upon formal grounds, and relied upon the contentions herein mentioned.

Plaintiff in error the insurance company contends: (1) That Alverta B. Gentry, the beneficiary in the policy, having murdered her husband, by that act forfeited her right to collect the insurance on his life. (2) That the plaintiff Ben F. Williams, as assignee of Alverta B. Gentry, has no better claim upon the insurance than she would have, and cannot take the money because of her crime. (3) That under the laws of Oklahoma a man and his wife may own property as joint tenants and upon the death of either that property will be owned by the survivor, not by inheritance, but by survivorship, and that the insurance policy prior to the death of Thomas J. Gentry was a chose in action owned by him and his wife as joint tenants, and on the death of Thomas J. Gentry the benefits accruing under the policy vested, if at all, in Alverta B. Gentry: (a) By the terms of the policy itself; (b) by survivorship. That Alverta B. Gentry forfeited the right to take this benefit by her crime, and the law at the time the murder was committed failed to designate who should take it in her stead. (4) That Alverta B. Gentry, being the survivor of the two lives insured, was the only person entitled by the terms of the contract to collect the insurance. That her right and that of her assignee were forfeited by her crime, and, there being no trust created by statute or contract, and there being no alternative payee according to the terms of the contract, there could be no resulting trust in favor of the estate of Thomas J. Gentry, deceased, and that it necessarily follows that the administrator, J. T. Weightman, has neither statutory nor contractual right to

recover. And (5) that the court erred in rendering judgment for intervener and in overruling its motion for a new trial.

Plaintiff in error Ben F. Williams, in his brief states that he is inclined to believe, without so confessing, that the law is as contended for by defendant in error, but contends that, if this court finds that Thomas J. Gentry and Alverta B. Gentry were joint tenants as to the policy and liability thereunder, as contended by the insurance company, in that event the benefits of the policy went to Alverta B. Gentry, as the survivor of such joint tenancy, and that he, as the assignee of such survivor, should take such benefits.

Defendant in error, the administrator of Thomas J. Gentry, deceased, admits that, by her act of murdering insured, the beneficiary forfeited her right and the right of her assignee to take and hold the benefits of the policy, and contends that the policy was not joint, but a several policy upon the lives of each of the insured, and that for this reason no rule of joint tenancy and survivorship can be invoked; and that, when the right of the nominal beneficiary, Alverta B. Gentry, to take under the policy was forfeited by her act of murder, a resulting trust arose by operation of law under which the rights of the beneficiary were vested in the estate of Thomas J. Gentry.

Since the accrual of the rights of these parties, the Legislature of this state has enacted a statute (Session Laws of Oklahoma of 1915, p. 225) which provides that in such a case as this the benefits of the policy would go to the decedent's heirs, who are innocent of the murder. However, this statute has no application to these facts, which occurred before its enactment.

We shall take up the various propositions involved here in the order above set forth.

[1] 1. Did Alverta B. Gentry, the beneficiary, forfeit or lose the contractual right to take and keep the benefits of the policy, by her act of murdering the insured? We are of an affirmative opinion.

It is an established rule in this court that, in the absence of a statute to the contrary, one does not lose his right of inheritance from a decedent by reason of his having murdered the decedent. However, a beneficiary in a policy of life insurance takes the benefits of the policy by reason of the contract of insurance, constituted by the policy, and not by inheritance from the insured decedent; and this principle is conceded by all of the parties in this cause. This being true, the rights of the plaintiff, as the assignee of the beneficiary, must necessarily be determined from the effect of the legal and contractual relations which have been sustained by the beneficiary toward the policy, and without reference to the laws of inheritance.

The policy itself made no provision for a disposition of the liability, nor of its benefits,

in the event of the murder of the insured by the beneficiary. In the absence of such a specific provision by the parties in their contract, the status of the parties must be ascertained by reference to the rules of law and equity applicable to the situation. The inherent essence and vitality of every contract are drawn from the legal and equitable atmosphere surrounding it. The law writes between the lines of every contract its own innumerable inhibitions and requirements. Where the contracting parties fall short in expression the law goes on, and where the parties go too far it calls a halt. When one person becomes the beneficiary of the contract of others, such beneficiary is an implied party to the agreement. Before he may accept the benefits of the contract, he must accept all of its implied, as well as express, obligations. In this case, Alverta B. Gentry was an express party. It is our conception of the law that, when she accepted the position of beneficiary in the life insurance of Thomas J. Gentry, the law infused into the contract, as an essential part of it, an implied obligation upon her part that she would respect the intentions of the contract. The very strongest implied inhibition of the law was that she should not mature the benefits by her own criminal act. Every moment of the life of the contract, obedience to this inhibition was her obligation. When she criminally destroyed the life of her husband, she violated every intent of the contract. She abandoned the contract, and cannot claim its benefits. In the strict sense, she does not forfeit these benefits: she abandons them. Human law is the offspring of divine law. One of the strongest principles of that law is compensation. Every man compensates his own wrong. He cannot claim the benefits of it.

It is a matter of universal judicial interpretation that one may not insure his house against fire, mature the risk by his own criminal act of arson, and collect his insurance. It would be no less a violation of the infinite spirit of the law that the beneficiary of a life insurance policy might murder the insured, by his own criminal act mature the risk, and then collect from an innocent party the fruits and benefits of his own wrong. The following authorities support the theory that, by her act of murdering insured, the beneficiary has forfeited or surrendered any right to take the benefits of the policy, viz.: 25 Cyc. 195 (d); Mutual Life Insurance Co. v. Armstrong, 117 U. S. 599, 6 Sup. Ct. 877, 29 L. Ed. 997; Riggs et al. v. Palmer et al., 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819; Schmidt v. Northern Life Association, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; Richards on Insurance, p. 81; Vance on Insurance, p. 392; Kerr on Insurance, p. 685. In the Armstrong Case, supra, the Su-

preme Court of the United States used this expression:

"It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired."

In the *Schmidt Case*, supra, the Supreme Court of Iowa made this language its own, and said:

"Indeed, the unbroken voice of authority is to the effect that a beneficiary in an insurance policy who murders the insured forfeits his rights thereunder."

In the *Schmidt Case*, and in the text-books above cited, long lists of authorities are cited in support of this principle, which it is not necessary to more than refer to here. We find no authority to the contrary, and must hold to the theory that by her act of murder Alverta B. Gentry is barred from claiming the benefits of the policy. Under a later assignment, we quote from additional authorities on the subject.

[2] 2. It is contended by the insurance company and administrator that the plaintiff, as the assignee of Alverta B. Gentry, has no better claim to the insurance than she had. The policy in its terms is a non-negotiable instrument; and it is unquestionably the law that the assignee takes no greater interest than the assignor has. 25 Cyc. 765; Conn. Mut. L. Ins. Co. v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725; Stevens v. Germania Life Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824; Schmidt v. Northern Life Ins. Ass'n, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; Mutual Life Ins. Co. v. Armstrong, 117 U. S. 599, 6 Sup. Ct. 877, 29 L. Ed. 997; Cooley's Ins. Briefs, p. 3811, and cases there cited.

[3] 3. Plaintiff in error, the insurance company, further contends: That the insurance policy was a chose in action, owned by Thomas J. Gentry and Alverta B. Gentry as joint tenants. That on the death of Thomas J. Gentry the benefits of the policy vested, if at all, in Alverta B. Gentry: (a) By the terms of the policy itself; (b) by survivorship. That Alverta B. Gentry by her crime forfeited the right to take by survivorship. That, as the law, at the time of the murder, failed to designate who should take in her stead, the policy lapsed to the insurer.

Under the discussion of this assignment, we shall deal with the questions of the alleged joint tenancy, survivorship, and forfeiture of rights of survivorship, leaving to a discussion of the next assignment the question of what ultimate disposition the law may make of the benefits of the policy.

Upon this proposition, we find no exact precedent, and none is cited in the briefs before us. The insurance company contends that the policy was a joint one; that the interest of the insured was joint; that the

policy was expressed as being a joint policy; that under the terms of the policy the ownership of cash values which might have accrued during the lifetime of both insured would have been joint, and that this condition creates such a joint tenancy between husband and wife as would put in operation the law of survivorship, so that the wife could only take by survivorship; that she forfeited this right by the murder, causing a complete termination of liability of the company. With this contention we are unable to agree. In the insuring clause of the policy, the Gentrys were referred to as "hereinafter jointly called the insured," and they are thereafter jointly referred to as "the insured." The policy provides for certain benefits which might have accrued during the lifetime of both insured, providing a joint enjoyment of such lifetime benefits; for instance, cash values on the policy to accrue during the lives of both of the insured. And yet, while it insured both lives, and for the purposes of convenience adopted a joint expression by which to designate both of the insured without circumspection, and provided for joint enjoyment of the benefits intermediate to the maturity of the principal liability, the very essence and gist of the contract was that it was a separate policy upon the life of each of the insured, for the wholly separate benefit of each of the insured.

[6] To the existence of a joint tenancy, it is conceded by all of the parties, and is the law, that four unities must exist in the tenants, viz.: (1) Unity of interest; (2) unity of title; (3) unity of time; and (4) unity of possession. These unities do not coincide in this matter, particularly as to the principal subject-matter of the contract, the insurance fund, or the right of expectancy in it. The interest of Alverta B. Gentry in the ultimate and principal benefit was wholly dependent upon the happening of one contingency, viz. the death of Thomas J. Gentry; and the interest of Thomas J. Gentry was just as dependent upon another and entirely different contingency, viz. the death of Alverta B. Gentry. The interests of both could not be the same, and could not vest at the same time, for the vesting of one interest would terminate the expectancy and interest of the other; and the unities would necessarily be broken.

It seems to us that the four unities might concur in the benefits which might have arisen under the policy during the lives of both parties, aside from the benefit of expectancy, but the expectancies, which constituted the principal subject-matter, were wholly contrary, each to the other, and different in the essentials. To technically analyze the contract, as to the estates created by it, it brought into being at least two entities of ownership: (1) An ownership or estate in the benefits which might have accrued during the lives of both parties exclusive of the principal expectancy in the

insurance fund, which was a present, joint estate, which would lapse on the death of either of insured; and (2) an estate severally to each of the insured in the principal expectancy in the insurance fund of \$2,000, which was in the nature of a contingent remainder, depending upon a contingent determination of the preceding estate; it remaining uncertain whether the estate limited in the future would ever vest. In the orderly course of events, if the premiums had been kept paid, it was certain that one or the other estates, designated as being in the nature of an estate in remainder, was certain to vest, and yet neither owner possessed any certainty that his particular interest would vest.

If the contention of the insurer that the two insured persons owned all rights under the policy as joint tenants be correct and Alverta B. Gentry succeeded to such rights as survivor, by virtue of the provisions of the statute, then such taking would have come by virtue of the statute, and then following out our rule that, in the absence of a statute, the murderer did not forfeit his inheritance, Alverta B. Gentry would recover the insurance fund. Thus, it will be seen that the contentions of the insurance company, in this particular, are in themselves not consistent.

It is our conclusion that the estates in the expectancy were not a joint tenancy, and that she did not take as survivor.

[4] 4. It is contended by plaintiff in error the insurance company that Alverta B. Gentry, being the survivor of the two lives insured, was the only person entitled by the express terms of the contract to collect the insurance; that her right and those of her assignee, being forfeited by her crime, no trust was created by statute or contract, and, there being no alternative payee according to the terms of the contract, there could be no resulting trust in favor of the estate of Thomas J. Gentry; that it necessarily follows that the administrator, J. T. Weightman, has not the right to recover; and that, as a consequence of this situation, liability of the insurer is at an end. The administrator of the estate of Thomas J. Gentry, deceased, contends that, as a result of the existing situation, a resulting or constructive trust has arisen by operation of law, under which the beneficial rights of the policy are vested in the said estate of Thomas J. Gentry, deceased. There is no question of fraud in the inception of the contract raised, and the policy is expressly incontestable after one year from its date, which time had expired. The policy contains no provision for an alternative beneficiary, in the event of the disqualification of either beneficiary. It has no provision that it should be forfeited, in the event of the murder of the insured, and no condition of any kind against murder. Neither the beneficiary, nor her assignee, can recover because of the wrong perpetrated by

her; but does her wrong absolve the insurer from liability? We are of a contrary opinion. To so hold would avoid the policy, and sweep out of existence the obligations which the contract created as between the insurer and Thomas J. Gentry, who has committed no wrong, but who has been the victim of the utmost wrong. Thomas J. Gentry paid the premiums upon this policy, and was as essentially a party to the contract of insurance upon his own life as either the insurer or the beneficiary. He is as innocent of the crime against himself and against the contractual relations of the parties as is the insurer. His murder was an event over which he had no more control than did the insurance company. His homicide was the highest degree of murder, which means that he was wholly without fault in bringing it about. So far as he is concerned, the event which matured the policy, if it be held to have so done, was as free of his fault as if he had been stricken down by the germs of some deadly disease, instead of by the hand of his wife. Can it be gainsaid that he had rights under his contract? Can we hold that those rights have been obliterated without his consent, without his fault? We do not think that the law of contracts, public policy, or equity would demand such a consummation.

If Alverta B. Gentry had inflicted the fatal injury upon her husband, and he had lingered, and she had died of natural causes prior to his death, her act, resulting in the death of her husband, would have been none the less murder because she preceded him in death, and yet could we say that her act could have deprived her husband of the insurance upon her life, she having died first of natural causes, and at the same time have deprived the husband's estate of the insurance upon his life? Again, let us assume that the policy may have been an expressly separate one upon the life of the husband, for the benefit of the wife; that after the fatal injury at the hands of the wife the husband lingered for some time, too weak to consider making a change in beneficiary; that during the lingering of the assured the annual premium on the policy had become due; and that, during a moment of consciousness, the assured had called to some one at his bedside to take his money and attend to his insurance premium: Would we say that the criminal act of the beneficiary had already terminated the policy, and that insurer could refuse the premiums of the stricken man? Could the wife abandon the rights of the husband for him? These illustrations serve to show us that the rights of the murdered man are wrapped up in this litigation.

We have found no decisions from other courts involving this question under a policy exactly like this one, one policy upon two lives. However, we have concluded in this opinion that this policy partakes of the na-

ture of two separate policies upon the life of each of the insured. As to individual policies, there is abundant authority from other courts, and it seems almost unanimous, to the effect that if the insured be murdered by his beneficiary, or if for any other reason the beneficiary be disqualified, the policy and the law not specifically providing an alternative beneficiary, a resulting or constructive trust arises by operation of law, by which the benefits of the policy vest in the insured, or in his estate in event of his death. 25 Cyc. 895 (d), and authorities in footnote 6; Richards on Insurance (3d Ed.) p. 81; Vance on Insurance, p. 393; Kerr on Insurance, p. 685; Cooley on Insurance, pp. 3753-3760; Schmidt v. Northern Life Ass'n, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; Continental Life Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 531; Smith v. Metropolitan Life, 222 Pa. 226, 71 Atl. 11, 20 L. R. A. (N. S.) 928, 128 Am. St. Rep. 799; Cleaver v. Mutual Res. Fund. Life Ass'n, 122 Q. B. 147 (Canada); Standard Life Assurance Co. v. Trudeau, 9 Quebec Q. B. 499 (Canada); Ryan v. Rothweller, 50 Ohio St. 595, 35 N. E. 679. All of the text-writers whose works we have been able to survey have written this theory into their books, and those above referred to furnish in their notes most extensive citations of cases supporting this doctrine. Richards on Insurance, supra, lays down the rule thus:

"It need hardly be stated that the beneficiary will not be permitted to recover if he intentionally brings about the death of the insured. But in such an event, if the insured has committed no breach of contract, a resulting trust in the insurance money is inferred in favor of his estate, since it would be harsh indeed to adjudge a contract void when the contracting party himself has violated none of its terms."

Vance on Insurance, supra, states the rule thus:

"But while the felonious act of the beneficiary will defeat his rights under the policy, it seems that it will not serve as a defense to the insurer, who must pay the amount of the insurance to the representatives of the insured, to whom the property in the policy is deemed to revert."

Kerr on Insurance, supra, says:

"A beneficiary in an insurance policy, who murders the insured, forfeits all rights under the policy, but the liability of the company is not thereby terminated. The benefits revert to, and become a part of the estate of the insured, and his administrator can recover them, for the benefit of those who would have been entitled to the insurance, had no beneficiary been designated."

In Ryan v. Rothweller, supra, the beneficiary died before the death of the insured, and the Supreme Court of Ohio said:

"The question is not governed so much by the principles of choses in action and vested rights as by the principles, aims, and well-known objects of life insurance. The cases which hold the insurance money to be a trust fund, which reverts to the estate of the assured in case of the death of all the named beneficiaries during the lifetime of the assured, give different reasons for the result arrived at. * * * The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action, so strongly urged by * * * plaintiff in error.

We regard the doctrine of choses in action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. * * * On principle, therefore, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig [the assured] and at his death became a part of his estate. It seems to us that this was the manifest intention and understanding of all of the parties interested, and that the result is just and equitable."

The case of Schmidt v. Northern Life Association, supra, by the Supreme Court of Iowa, is one of the best-reasoned cases upon this subject, and contains an extensive citation of precedents. In that case, which was a case in which the wife as beneficiary in the policy had murdered her husband, who was the insured, the court said:

"Defendant obligated itself to pay on the death of the assured, and it ought not to be held that the act of the beneficiary forfeited all claim under the policy. The wife cannot recover, because it is contrary to public policy to allow her to enforce the claim. But this rule of public policy ought not to be extended so as to defeat all claims on the policy. We have seen that when there has been no designation, or an illegal designation, or a designation of a person as a beneficiary who dies before the death of the assured, the association holds the money in trust for the * * * estate of the assured. Following this doctrine to its logical conclusion, it seems to us that, when the beneficiary named is prohibited from taking because of her own wrong, a trust arises that will be enforced in a proper case. This trust is created in favor of the husband's estate, and takes effect by reason of the crime of the wife, which destroys the trust in her favor. In so far as she is concerned, the trust is destroyed by her crime, and in consequence a resulting trust in favor of the husband's estate is allowed. If we treat the designation of the beneficiary as akin to a bequest, the same result follows; for a lapsed legacy descends to the heirs of the testator."

Plaintiff in error has cited several cases, which held to the theory that if the assured is murdered by the beneficiary, the liability is terminated; but the great burden of authority, including the cases which we have cited and quoted from, and the cases listed in the authorities we have cited, holds to the contrary doctrine, which seems to us consistent with every principle of right and equity, as well as of law. We cannot reason ourselves away from the rights of the assured. The insurer assumed the risk of death, without any reservation, and death has occurred. The company received every consideration for its unreserved risk, received them from Thomas J. Gentry, who has done no wrong and has received no return. If such rights exist, the law does not strike down the rights of an innocent person, but finds a way, if one there be, to sustain these rights.

Plaintiff in error contends that, to hold that the liability does not cease, but vests in the estate of the assured, would be to hold that the law reads this contingency into the original contract, and that this would be putting a premium upon murder and contrary to public policy. The Supreme Court of Illinois, in the case of Supreme Lodge of

Knights and Ladies of Honor v. Menkhause, 209 Ill. 277, 70 N. E. 567, 85 L. R. A. 508, 101 Am. St. Rep. 239, upon a similar contention, said:

"The only reason in favor of appellant's contention that seems to us of weight is found in the act that the beneficiary might be incited to commit murder by the fact that, if unable to collect he benefit himself, it would be payable to some other person or persons in whose welfare he was interested. Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few a number that consideration thereof becomes well-nigh inconsequential. But, even were it otherwise, if the rule suggested by appellant were established, it is perceived that the society could then profit by the murder, and an incentive be created for the destruction of the life of the insured that the interest of the insurer might be advanced."

It is thus seen that the rule, contended for by plaintiff in error, would be just as susceptible of perversion as the rule it contends against, and, in addition, would be too harsh or application by equity, in that it would harshly eliminate from consideration the rights of an assured person, who is without wrong.

It happens that, in this case, if the insurance money is adjudged to the administrator of the assured, Alverta B. Gentry will inherit a part of it as his heir, if it is not otherwise disposed of by the administrator; or, under the laws in force at the time of the murder, her criminal act would not bar her rights of inheritance. But, this coincidence cannot interfere with the reason of the general rule. We are of the opinion that, when, by her act of murder, Alverta B. Gentry forfeited her rights as beneficiary under his contract of insurance, a resulting trust arose by operation of law in favor of the estate of the assured, and that the administrator has properly recovered judgment for the insurance.

[6] 5. The last proposition of plaintiff in error is that the lower court erred in rendering judgment for intervener and in overruling its motion for a new trial; but this proposition involves only the matters hereabove considered.

The judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

GILBERT v. CITIZENS' NAT. BANK OF CHICKASHA. (No. 5363.)

Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

EVIDENCE §450(5)—PAROL EVIDENCE AFFECTING WRITINGS — AMBIGUITY OF CONTRACT.

Where the words employed to express a particular condition in a contract in writing are ambiguous and cannot be satisfactorily explained reference to other portions thereof, it is not error to admit parol evidence to show the mean-

ing intended by the parties as to the use of the words employed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2071; Dec. Dig. §450(5).]

2. BANKS AND BANKING §261(3)—NATIONAL BANKS—POWERS AND LIABILITIES.

A plea of ultra vires is available to a national bank in a suit upon, or for the enforcement of, a contract beyond the powers of such bank, under the National Banking Act (Act Cong. June 3, 1864, c. 106, 13 Stat. 99), but if the bank has received the money or property of the plaintiff under an ultra vires contract, not malum in se, and refuses to return the same, he may maintain an action for the recovery of so much of such money or property by which the bank has actually benefited, but in an action of tort, even though an ultra vires contract was an incident leading up to the tort, the plea of ultra vires is not available to such bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 998, 997; Dec. Dig. §261(3).]

3. CUSTOMS AND USAGES §18—EVIDENCE—ADMISSIBILITY UNDER PLEADING.

A local custom or usage applying to a special or particular class of business may not be proven to explain the ambiguous terms of a contract, unless the existence of such custom or usage is pleaded.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 40; Dec. Dig. §18.]

4. TRIAL §83(2)—RECEPTION OF EVIDENCE—SUFFICIENCY OF OBJECTION.

An objection to the introduction of such testimony that the same is "incompetent, irrelevant, and immaterial," is sufficient in the absence of an inquiry by court or counsel as to the specific grounds of the objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 199; Dec. Dig. §83(2).]

Commissioners' Opinion, Division No. 2. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action for conversion by N. T. Gilbert, as trustee, against the Citizens' National Bank of Chickasha. Judgment for defendant, and plaintiff brings error. Reversed.

Stevens & Myers, of Lawton, and Burwell, Crockett & Johnson, of Oklahoma City, for plaintiff in error. R. D. Welborne, of Chickasha, and Stuart, Cruse & Cruse, and S. W. Hayes, all of Oklahoma City, for defendant in error.

BURFORD, C. It appears from the record in this case that during the cotton buying season of 1910-11, L. M. Potts, who resided at Chickasha, Okl., was engaged in the buying and selling of cotton upon a large scale, throughout the country tributary to Chickasha; that in order to finance his operations he made arrangements with various banks, among them the Lawton State Bank of Lawton, Okl. The effect of the arrangement with the Lawton bank was that Potts was to buy cotton at various inland towns surrounding Lawton, and that the purchasers of said cotton would ship the same to Potts, at Chickasha, Altus, and Hobart, but principally to Chickasha, for concentration, compression, and reshipment, there being cotton compress-

es located at the points named, but none at Lawton. Bills of lading for the cotton were attached to a draft drawn by the shipper against Potts and transmitted to the Lawton State Bank, and were there accepted by Potts or his agent, and paid by the Lawton bank, which bank then took the bills of lading, detached them from the paid drafts, and transmitted them to the Citizens' National Bank of Chickasha. It is agreed that the whole contract between the Lawton bank and the Chickasha bank was contained in the correspondence. After the first three letters transmitting the bills of lading, the form used by the Lawton bank was the same, except for the names and amounts therein contained, and was as follows:

"Citizens National Bank, Chickasha, Okla.

"Gentlemen: We beg to inclose you herein shipper's order bill of lading, No. D-9, covering twenty-five bales of cotton shipped from Snyder, Oklahoma, and signed by J. A. Kreuger, as shipper, and consigned to the order of M. L. Potts, Chickasha, Oklahoma.

"Please hold same in trust for us, notifying Mr. Potts and receipting to us.

"Very truly yours,

Cashier."

The Chickasha bank acknowledged receipt of these bills of lading upon a form which stated:

"We hold in trust for your account with L. M. Potts, bills of lading or compress ticket for — bales of cotton."

It was undisputed at the trial that the cotton bought by Potts at the various inland towns was of widely varying kinds and grades, and that in the cotton business when cotton was resold to Eastern buyers or to exporters, it was not only usual, but absolutely necessary, in order to make a sale, to reclassify the cotton, inasmuch as the purchasers would buy so many bales of cotton of approximately the same grade and class. In order that this might be done the Chickasha bank turned over to Potts the various bills of lading sent it by the Lawton bank. Potts paid the freight upon the bills of lading, had the cotton transferred to the compress, there compressed and reclassified, receiving from the compress company what were known as cotton tickets, one representing each bale of cotton sold and delivered, and identified by a number, and that after he had reclassified and sold the cotton he made up a new bill of lading which was attached to the draft against the purchaser for the amount of the cotton so sold, and that these drafts were regarded as cash. Necessarily in the prosecution of such a business the cotton paid for by the Lawton bank was not, and could not, be sold in lots which contained only cotton paid for by that bank, but the natural and necessary result of the business was that each draft upon the exporter was for cotton which was paid for not only by the Lawton bank, but by the Chickasha bank, which was also advancing Potts' money, and by various other banks throughout Texas and Oklahoma, which banks were advancing him funds in the same manner as the Lawton bank.

Payments were made from time to time to the creditors of Potts by means of these different drafts, and at the close of the season there was unpaid to the Lawton bank the proceeds of 536 bales of cotton, and Potts was indebted to said bank in excess of \$24,000. It was agreed that the value of the 536 bales of cotton not accounted for was much in excess of the amount owed by Potts.

Under this state of affairs N. T. Gilbert, as trustee of the Lawton bank, which had meanwhile gone into voluntary liquidation in order to reorganize as a National Bank, brought this action against the Chickasha bank, alleging the delivery of the bills of lading under the contract as aforesaid, and that the Chickasha bank had converted the proceeds of the 536 bales of cotton to their own account and had applied the proceeds of the same to the payment and discharge of the obligations of Potts to the Chickasha bank, with knowledge of the source from which the same was derived. The Chickasha bank alleged various defenses, of which the principal ones urged at the trial were that if its conduct in turning the bills of lading over to Potts were in violation of the contract, the Lawton bank knew of the way the drafts were being handled and had received the proceeds of drafts, which included the proceeds not only cotton paid for by it, but cotton paid for by the various other banks, and had thus acquiesced in the actions of the Chickasha bank; further, that the contract made with the Lawton bank was ultra vires and void, and also denying generally the allegations of the plaintiff's petition.

Upon the issues thus formed a trial was had to a jury who returned a verdict for the defendant. From the judgment on such verdict, a motion for new trial having been overruled, the plaintiff prosecutes error to this court.

[1] The question to be first determined is whether or not the trial court erred in admitting testimony tending to explain the contract made between the two banks. After a careful examination of the whole record we are satisfied that in so doing the trial court did not commit any error. It is true, as contended by the plaintiff, that in some cases the words "hold in trust" might have a definite, legal meaning, and that parol evidence to attempt to vary or explain such meaning would not be competent, but in construing any contract the necessary facts and surrounding circumstances which must have been and were known by the parties, must be taken into consideration. Here it must have been known to any man of ordinary business intelligence that the cotton represented by the bills of lading sent to the Chickasha bank was on the cars; that actual possession of it could not be obtained without the surrender of the bills of lading, which it is to be here noted were what is known as "shipper's order" bills of lading, and that the freight must be paid; that if these things

were not done the cotton was subject to heavy demurrage charges, and ultimately, if not taken up, would be sold by the railroad company for the payment of its freight. It must have been known to the Chickasha bank that the Lawton bank had some special interest in these bills of lading, very probably as creditors of Potts. Under these circumstances, we think, it cannot be said that the Chickasha bank was bound to look only at the ordinary meaning of the words "hold in trust," and to simply take and keep the bills of lading until such time as the Lawton bank should demand their return. Especially is this true in view of the words contained in the letter, to the effect that the Chickasha bank was to notify Potts. If the Chickasha bank was simply to act as trustee for the Lawton bank, why notify Potts? In what way would he be concerned in such transactions? Clearly it was implied from the face of the letters themselves that Potts had something to do with the transaction. Clearly from the nature of the business which must have been and was known to both banks, the interest of Potts in the bills of lading, which called for notification to him, must have something to do with his making or assisting in making some disposition of the cotton represented by the bills of lading. What was that interest of Potts? What was the duty of the Chickasha bank under such a letter? The letter itself does not state. It is admitted that these letters and the receipt above set out constitute the whole contract. Under such circumstances we have no hesitancy in saying that the contract was ambiguous upon its face, and, if it was, it is apparent that between the parties parol evidence was competent, not to vary, but to explain, the contract and show what the meaning of such parties was when they entered into it. *James v. Citizens' National Bank of North Enid*, 9 Okl. 546, 60 Pac. 290; *Cohoe v. Turner et al.*, 87 Okl. 778, 182 Pac. 1082; *First National Bank v. Womack*, 156 Pac. 208; *Barricklow et al. v. Boice et al.*, 150 Pac. 1094. As to this meaning there was wide variance between the plaintiff Gilbert, who was president of the Lawton bank, and the cashier of the Lawton bank, on the one hand, and the officers of the Chickasha bank, and the assistant cashier of the Lawton bank, who wrote the letters in question, on the other hand. Taking the testimony of the plaintiff in the case, the witness Gilbert, explaining the meaning of the contract, testified as follows:

"Q. Did you ever at any time give the Chickasha bank specific instructions and directions not to turn these bills of lading over to Mr. Potts until they got the cotton tickets? That they should not turn over these bills of lading to Potts until he surrendered the cotton tickets? A. I would say not, that no specific instructions were given to them. I would qualify it by saying that along with these bills of lading these letters were sent to them which have been introduced, asking that they be held in trust for us. Q. Did any of those letters state how long the bills of lading should be held in trust? A. I

think not. Q. Did you intend the Chickasha bank should hold the bills of lading for any specified time, and then send the bills of lading back to you? A. I would hardly say that it was the intention that the bills of lading should be sent back. Q. Did you intend that they should hold the bills of lading forever? A. No, sir. Q. You intended that those bills of lading should be turned over to Mr. Potts? A. No, sir. Q. Whom did you expect them to be delivered to? A. We expected them to be surrendered to the railroad company in return for compress tickets, covering the same cotton. Q. That is what you intended? A. Yes, sir. Q. Did you intend that this cotton should be reshipped from Chickasha? A. Yes, sir. Q. By whom? A. By Mr. Potts. * * * Q. How much were you paying the Chickasha bank for holding those bills of lading in trust? A. We did not pay them anything. Q. Did you agree to pay them anything? A. No, sir; we did not. Q. Did you expect to pay them anything? A. No, sir; we did not. * * * Q. Did he (meaning Potts) have a right to ship it? A. Certainly. * * * Q. You expected them (meaning the Chickasha bank) to go to the depot and surrender the bills of lading? A. Yes, sir. Q. And get the compress tickets? A. Let me testify and I will answer the questions. I don't want you to testify for me. Q. Go ahead. A. We expected the bank or the runner to go to the agent of the railroad company and exchange the bills of lading for compress tickets and hold the tickets until Mr. Potts was ready to ship the cotton out. Potts knows from his records just what particular bales of cotton are covered by these particular tickets. When he sells the cotton he can make out an invoice and sell a certain number of bales of cotton, weigh so much, and list them and fix up the bill of lading, and then attach to it the draft which he has drawn with a new bill of lading and have the bank make the transfer again, which would be an opposite transfer from the other one, exchanging the compress tickets for the new outgoing bill of lading. Q. What transfer would that be? A. He would have the bank transfer the compress tickets for the new bill of lading. Q. You expected the bank at Chickasha would first take the bills of lading to the railroad company and get the compress tickets? A. Yes, sir. Q. And Potts would make out an outgoing bill of lading? A. Yes, sir. Q. And Potts would bring that bill of lading signed by the bank and surrender for the tickets? A. I don't think Potts would get the bills of lading signed until the compress tickets were delivered. The bank would send their runner again to the agent, and the agent would sign the bill of lading and receive the compress tickets. * * * Q. Did you tell the bank that you would pay them for their runner to go make these exchanges? A. No, sir. Q. And you did not expect to pay them for it? A. No, sir. Q. If you had sent them (meaning the bank) a bill of lading with draft attached, or if you had sent the bills of lading and written them the amount of the draft, it would have notified them that he owed you on that cotton? A. Yes, sir. Q. And you did not do that in a single instance? A. No, sir."

It seems also from the record that some of the cotton was shipped to other points than Chickasha for concentration and compression.

[2] Upon this testimony we are confronted with the contention on behalf of the defendant that any errors made in the trial court were immaterial for the reason that the contract of the Chickasha bank was ultra vires and void, and that therefore the plaintiff could not recover upon the undisputed

evidence in the case, and that any error committed by the trial court was immaterial.

It is urged by counsel for defendant in error that in our decision of this question we ought to be governed by the decisions of the Supreme Court of the United States. We have no hesitancy in following this suggestion, not only by reason of the high learning and authority of that court, and that upon questions involving the power of national banks, our decisions may in certain cases be reviewable in that court, but also by reason of that decent comity between the courts of the states and those of the nation which the Supreme Court of the United States itself affords to decisions of the state courts upon questions of local law, and which in turn we should afford to that court upon questions peculiarly within its province. This we have consistently done, beginning with *Johnston Fife Hat Co. v. National Bank of Guthrie*, 4 Okl. 17, 44 Pac. 192, through *Shawnee National Bank v. Purcell Wholesale Grocery Co.*, 34 Okl. 34, 124 Pac. 603, 41 L. R. A. (N. S.) 494, and *Crowder State Bank v. Aetna Power Co.*, 41 Okl. 395, 138 Pac. 392, down to the recent case of *First National Bank v. Womack*, 156 Pac. 208, not yet officially reported. But upon principles announced in the decisions of the Supreme Court of the United States itself, it seems that we may concede, without deciding, that the contract in this case, as defined by the plaintiff, is beyond the scope of the powers conferred upon national banks, without the result contended for by defendant following such a concession. The Supreme Court of the United States, without deviating from the principle as stated in *De La Vergne v. German Savings Inst.*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65, that where the suit is upon an executed contract the corporation may set up ultra vires to defeat a recovery, has still held, as stated in that case, that, if the action be upon a quantum meruit for the money or benefit actually received by the bank, and the transaction was not malum in se, the action may be maintained and have followed the doctrine of *De La Vergne v. German Savings Inst.*, supra, through many decisions, the most recent of which are *Aldridge v. Chemical National Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611, *Citizens' National Bank v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, and *Rankin v. Emigh*, 218 U. S. 27, 30 Sup. Ct. 672, 54 L. Ed. 915, where recoveries were had as for money had and received, the court saying, as in *Central Trans. Co. v. Pullman Co.*, 139 U. S. 24-60, 11 Sup. Ct. 478, 488 (35 L. Ed. 55), that:

"To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

These principles have had the concurrence of this court in *Shawnee National Bank v. Grocery Co.*, *Crowder Bank v. Aetna Power Co.*, and *First National Bank v. Womack*, supra. The Supreme Court of the United States has also held to the broad principle

applicable to this case, that where the action is for a tort the defense of ultra vires does not apply. This doctrine was stated in *Merchants' Bank v. State Bank*, 10 Wall. 604, 645 (19 L. Ed. 1008), where the court said:

"Corporations are liable for every wrong of which they are guilty, and in such cases, the doctrine of ultra vires has no application."

The doctrine was applied to a case of conversion the same as the case at bar in *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750. There a bank as a gratuitous bailee had received certain bonds, the interest on which the officers would collect and place to the credit of the depositor. The bonds were entirely lost by gross negligence, no benefit accruing to the bank or any other person, except the thief who obtained them. There was no charge of collusion. The bank pleaded ultra vires. The court said:

"Conceding for the moment that the contract was illegal and void for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow. There was no moral turpitude on either side—certainly none on the part of the depositor. She was entitled at any time to reclaim the securities. The bank was bound in good faith and in law to return them, or to keep them, without gross negligence until they were called for. If, when applied for, they were refused, it cannot be doubted that they, or their value, according to the form of action adopted, might have been recovered. *White v. Franklin Bank*, 22 Pick. (Mass.) 181. If the bank had destroyed them or had thrown them into the street, whereby they were lost to the plaintiff, the liability of the bank would have been the same. To have kept them with gross negligence, whereby the same consequence to the plaintiff was incurred, involved necessarily the same result to the depository. The only way of escape from liability open to the latter would have been to return the property to the owner, or to get rid of its possession otherwise in some lawful way. Gross negligence on the part of the gratuitous bailee, though not a fraud, is in legal effect the same thing. *Foster v. Essex Bank*, 17 Mass. 479 [9 Am. Dec. 168]. It is a tort, and an action on the case is the appropriate remedy for such a wrong. In many cases where there is a valid contract it may be regarded only as an inducement and as raising a duty, for the breach of which an action may be brought ex contractu or ex delicto, at the option of the injured party. 1 Chitt. Pl. 151. Corporations are liable for every wrong they commit, and in such cases the doctrine of ultra vires has no application."

It seems from these decisions that a clear distinction must be made according to the form of action brought by plaintiff, and that where the action is and can be maintained ex delicto, the question of a benefit received by the bank has nothing to do with the determination of the liability, nor is ultra vires a defense. As is said by Mr. Morse in his work on *Banks and Banking*, § 728:

"A distinction must be made at the outset between ultra vires transactions which constitute a tort and those involving matters of contract. No plea of ultra vires can ever avail to ward off liability for a tort. A tort is always ultra vires. It would be a lamentable state of law in which a court would allow a defendant to say, 'I exceeded my power, and as the law will not recognize any transaction which involves its own violation, you cannot recover.' The law will recognize its own violation to punish it and

compel justice, and prevent a wrongdoer from taking advantage of his own wrong."

In *First National Bank of Grand Forks v. Anderson*, 172 U. S. 573, 19 Sup. Ct. 284, 43 Ed. 558, the Supreme Court of the United States again denied the right to plead ultra vires, as against an action for conversion. The second paragraph of the syllabus to that case reads:

"A national bank which, being authorized by the owner of notes in its possession to sell them to a third party, purchases them itself and converts them to its own use, is liable to their owners for their value, as for a conversion, even though it was not within its power to sell them to the owner's agent."

We do not understand that any of the more recent decisions of the Supreme Court of the United States in any way weaken the force of these decisions. In this jurisdiction the doctrine of *National Bank v. Graham*, supra, was followed by the Supreme Court of the territory in *Johnston Fife Hat Co. v. Bank of Guthrie*, 4 Okl. 17, 26, 35, 44 Pac. 22, 198. The conduct of the bank in that case, "amounted to a conversion," and after a lengthy review of the authorities it was held that the bank was liable, regardless of the plea of ultra vires.

Applying these principles to the case at bar, it seems that if the Chickasha bank, under the construction of the contract given by the plaintiff, turned over the bills of lading to Potts, by gross or ordinary negligence depending upon whether or not it was a gratuitous bailee, and failed to either return them to the Lawton bank upon demand, or to account for their proceeds, it would be liable to the Lawton bank in an action for conversion, regardless of the receipt of any benefit by the Chickasha bank, since in an action of tort the limitation of recovery if the benefit received does not apply, and conversion lies as well where the wrongful act is for the benefit of a third party as where it is for the benefit of the tort-feasor. See *Adison on Torts*, § 82; *Cooley on Torts*, 9-861; *Street on Foundations of Legal Liability*, vol. 1, p. 235 et seq., and cases cited. It is to be noted that in this case there is involved the element of a positive act in delivering the bills to Potts, distinguishing it from those cases holding that conversion does not lie for a loss by a bailee through mere negligence, such as negligently allowing the stock to die, etc.

We are far from determining that plaintiff's construction of the contract was true, but that the Lawton bank did not acquiesce in the construction or the conduct in relation to the contract by the Chickasha bank, and we are of the opinion that the trial judge was correct in sending the case to the jury rather than in disposing of it upon the plea of ultra vires.

[3] Passing to the assignments of error made by the plaintiff, the most serious appears to be the admission over the objection and exception of the plaintiff of certain tes-

timony tending to show a custom in and around Chickasha, existing between the banks and cotton buyers to allow the cotton buyer to take bills of lading, held as collateral security, for the purpose of enabling such buyer to reship and reclassify the cotton, have it compressed and transact the other business necessary to its sale. This custom was not pleaded by the defendant. His five defenses were: First, the general issue; second, the authority of the cashier; third, ultra vires; fourth, that Potts represented himself to be the agent of the Lawton bank to receive these bills of lading, and, believing him to be such, the Chickasha bank turned them over to him, and that the Lawton bank knowingly accepted the proceeds of the acts of Potts, and thereby ratified his agency, and was estopped to deny it; and, fifth, that if there was any liability, that it did not exceed the amount owing by Potts to the Lawton bank. None of these defenses put the plaintiff upon notice that the defendant would attempt to explain the terms of the contract itself by testimony as to a local custom, applicable only to the cotton business.

In *Smith v. Stewart*, 29 Okl. 26, 118 Pac. 182, plaintiff alleged that he bought certain cotton of defendant, and that defendant guaranteed the weights at the compress. Upon the trial he attempted to prove not an express guaranty, but that there was a custom that the seller should guarantee the weight. The evidence in this regard was rejected by the trial court because not pleaded, and upon appeal this court said:

"There are probably several reasons why this evidence was not properly admissible under the state of the case at the time it was offered. A sufficient reason is that it is generally the rule that, before a local custom or usage applying to a special or particular class of business may be made the basis of recovery, it must be pleaded by the party relying on it. *Harnett v. Holdrege*, 5 Neb. [Unof.] 114, 97 N. W. 443; *First Nat. Bank of Hastings v. Farmers' & Merchants' Bank*, 56 Neb. 149, 76 N. W. 430; *Mobile Fruit, etc., Co. v. Judy*, 91 Ill. App. 82; *Norwood v. Insurance Co.*, 18 Tex. Civ. App. 475, 35 S. W. 717; *Oriental L. Co. v. Blades L. Co.*, 103 Va. 730, 50 S. E. 270; 22 Ency. of Plead. & Pr. p. 408. Some courts have recognized exceptions to the general rule, but it is not necessary to notice them here."

That case and the one at bar are very similar. This possible distinction may be noted that in *Smith v. Stewart* the evidence offered was for the purpose of establishing a term of the contract, whereas in the case at bar it is said that the evidence but tends to explain and make clear a term already a part of the agreement. It is important therefore to ascertain whether or not there are any exceptions to the rule stated in *Smith v. Stewart*, within which the case at bar falls. As to the general doctrine there stated it might be as logically said that the rule is as applicable where the evidence is offered as the basis of a defense as of a recovery.

The possible exception to which reference

in *Smith v. Stewart*, *supra*, is doubtless that suggested by the language of 22 Ency. of Pl. & Pr. 406-408, cited in the opinion. It is there said:

"It has been held in numerous cases that a general and well-established usage or custom, or one actually known to the parties to a contract, constitutes the common understanding of the parties, and should be resorted to as aiding in the interpretation of the contract in an action thereon, and that the evidence of such usage or custom, though local, may be admitted without being specially pleaded, at least where it does not contradict or vary the contract unreasonably and does not violate established law."

A number of cases are cited in support of this statement of the text. Considering them and others bearing upon the subject we find in *Fish v. Crawford Mfg. Co.*, 120 Mich. 500, 79 N. W. 793, the question was whether the seller of lumber was liable for certain inspection charges upon an alleged implied contract to pay such charges. It was there held that evidence that a custom existed that the seller should pay such charges was admissible without being pleaded, since it was "only a matter of evidence, adduced for the purpose of showing what the implied contract between the defendant and plaintiff was."

In *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755, evidence of a local custom as to how measurement of certain stone sold should be made by the "square yard" was admitted without being pleaded. There was a definite contract for the sale of the stone, payment to be made at so much per square yard, and the controversy was as to whether such measurement was to be made in the completed work for which the stone was sold, or by taking the aggregate measurement of the faces of the stone blocks. Here apparently the evidence was admitted to explain an ambiguity in the written contract, but the court does not put it upon any exception to the general rule, but says:

"We are of the opinion that a custom in its proper sense, even though local, need not ordinarily be pleaded."

The doctrine is squarely contrary to the decision of this court in *Smith v. Stewart*, *supra*, and to the great weight of authority.

Miller v. Insurance Co., 1 Abb. N. C. (N. Y.) 470, somewhat supports the rule suggested in 22 Ency. Pl. & Pr. *supra*. That case involved a suit for commissions. There was an agreement as to the amount, but not as to the time of payment. Evidence was admitted as to a custom covering the time when payment of such commission was due. The court held the evidence admissible under a general denial, saying:

"We think, also, that evidence of the custom was admissible under the general denial contained in the answer. When proved, it became one of the constituents of the contract, and the statement thereof in the complaint, therefore varied from the one actually made. The provision of the Code (section 149) which requires new matter to be specially pleaded applies only to matters of defense arising after the contract was made."

This case, however, gives the question here involved little consideration, and neither cites nor considers any of the authorities on the proposition. *Lowe v. Lehman*, 15 Ohio St. 179, involved a custom as to measuring brick. It was held the evidence as to custom might be admitted without being pleaded. The court there, without considering the general subject, simply holds the rule inapplicable in that case, saying:

"It would be impractical to apply the rule that special customs must be specially pleaded, to cases like the present. No authority for such application of the rule is shown by counsel. Pleadings would be almost endless, if parties were bound to set out in them all the shades and variations in the meaning of terms employed in contracts. The rule seems to be to require each party to come to the trial prepared to meet questions of that kind without special notice."

But the same court in *Palmer v. Humiston*, 87 Ohio St. 401, 101 N. E. 283, 45 L. R. A. (N. S.) 460, in a case involving a custom of physicians and surgeons, said:

"If he is relying upon a professional custom or usage obtaining among good surgeons at the time and in the place where the operation is performed, which would avoid the liability charged, he must specially plead that particular usage or custom."

In that case the surgeon had admitted a contract to perform an operation, and alleged that the use of certain sponges was necessary, but upon the trial sought to avoid liability for leaving one of the sponges in the patient's body by proving a custom to the effect that the nurse in attendance had charge of the sponges, and was responsible for their being properly accounted for, after the operation. This testimony would in effect explain and modify the terms of the contract, in the performance which it was alleged the use of the sponges was necessary. But as above stated the Ohio court in the later decision holds that such a custom must be specially pleaded.

Hansbrough v. Neal, 94 Va. 722, 27 S. E. 593, considered a case where there was no contract between the parties, except what the law implied, and where the action was brought to recover what the services performed were reasonably worth. In such a case the court said:

"There does not seem to be any good reason why he should set up in his pleadings a local usage or custom by which the value of the services are fixed, since he is entitled to recover what is usual and customary for like services."

The decision can hardly be said to be an authority for the exception claimed, especially in view of *Oriental L. Co. v. Blades L. Co.*, 103 Va. 730, 50 S. E. 270, where the court apparently limited the doctrine of the *Hansbrough* Case to the facts of that case, saying:

"There is some conflict among the authorities as to the necessity of pleading a custom or usage of trade. See 12 Cyc. 1097, and notes, 22 Am. & Eng. Encl. Pl. & Pr. 403, and cases cited. But whenever the question has been raised in this court, except in the case of *Hansbrough v. Neal*, 94 Va. 722 [27 S. E. 593], which was thought to be an exception to the

general rule, it has been considered necessary for the party relying on such custom or usage to set it up in his pleadings. Jackson, Adm'r, v. Henderson, 3 Leigh [Va.] 196; Governor, etc., v. Withers, 5 Grat. [Va.] 24 [50 Am. Dec. 95]."

Coyle v. Gozzler, 2 Cranch, C. C. 625, Fed. Cas. No. 3,812, also cited is not available to us.

On the other hand, the adjudicated cases in great number supporting the doctrine of *Smith v. Stewart*, supra, hold that as a general rule proof of a local custom, or one applicable to a particular trade or business, must be pleaded in order to be proved. See as examples: *First Nat. Bank v. Farmers' Bank*, 56 Neb. 149, 76 N. W. 430; *Norwood v. Alamo Ins. Co.*, 13 Tex. Civ. App. 475, 35 S. W. 717; *Society, etc., Co. v. Haight*, 1 N. J. Eq. 393; *Templeman v. Biddle*, 1 Har. (Del.) 522; *Lindley v. Waterloo Bank*, 76 Iowa, 629, 41 N. W. 381, 2 L. R. A. 709, 14 Am. St. Rep. 254; *Turner v. Fish*, 28 Miss. 306; *Hayden v. Grillo*, 42 Mo. App. 1; *Dommerich v. Garfunkel*, 82 Misc. Rep. 740, 65 N. Y. Supp. 564; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

Upon the particular branch of the case under consideration, *Elmore, Quillian & Co. v. Parrish Bros.*, 170 Ala. 499-505, 54 South. 203, 204, is closely in point. There the parties had contracted for the sale of 500 bales of cotton at so much per pound. It was sought to introduce a usage to determine the weight of a bale of cotton. The court said:

"Nor do we know, in the absence of averment, how much cotton the parties intended when they used the word 'bales.' It may be that this was determined for the parties by a custom with reference to which they ought to be held to have contracted, or it may have been determined by a supplemental agreement defining the term, or by a course of dealing between the parties from which a definition by agreement was to be implied. In connection with the written contracts, it would be competent to prove any or all these things, in a case properly presented by the pleading, without transcending the rule which denies the right to alter contracts in writing by parol evidence. Appellants cite cases which hold with respect to commercial contracts—the rule, however, is not limited to contracts of a strictly mercantile character—that evidence of a usage of trade, which the parties knew, or may be reasonably presumed to have known, is admissible for the purpose of explaining the meaning of contracts; and they argue *id certum est*, etc. But the question here is a question of pleading, not of evidence. There is no averment of a usage or custom of the cotton trade by which a bale of cotton is taken to mean 500—as appellants suggested—or other number of pounds, and in respect to which the parties may be held to have contracted. Nor is there averment in those counts which undertake to set out the contracts according to their legal effect that they contracted for the sale of bales of cotton of any certain weight—an averment which might have been sustained by proof of a supplemental agreement, express or implied, or of a custom or usage fixing for the parties the weight of a bale."

The court reached the conclusion that:

"A custom or usage in the cotton business as to the weight of a bale of cotton must be pleaded in order to be relied on to show that a

bale of cotton has a certain weight in such transaction."

In *Mobile Fruit & Trading Co. v. Judy & Son*, 91 Ill. App. 82-90, the plaintiff had sold some fruit to defendant. The fruit spoiled in transit. Testimony was admitted to establish a custom at the point of receipt to the effect that the loss should be borne by the shipper. The court said:

"The rule is well recognized that where a commercial contract is in any respect ambiguous, and the necessities of the particular line of commerce render a particular custom or usage so indispensably necessary as to commend itself to enforce itself upon all those engaged in that line of commerce, there may be great propriety in allowing such custom or usage to be proved when it has become universal, well understood, and acquiesced in by all, in order to explain the intention of the parties upon the points as to which the contract itself is not explicit, although without such custom or usage, the law might give it a different construction. This is allowed upon the same principle which allows other extraneous facts to be proven, in view of which parties have entered into contract, and by the aid of which their intentions are ascertained, where otherwise they might be doubtful. Such custom or usage will not, however, be admitted to vary or control the express terms of a contract, but will be permitted to determine that which by the contract is left undetermined for the purpose of interpreting a contract when both parties thereto are supposed to have been acquainted with it, and to have contracted with reference to it. *Dixon v. Dunham*, 14 Ill. 324, *Gilbert v. McGinnis et al.*, 114 Ill. 28 [28 N. E. 382], and *C. C. & St. L. Ry. Co. v. Jenkins*, 174 Ill. 398 [51 N. E. 811, 62 L. R. A. 922, 66 Am. St. Rep. 296].

"But such a particular custom or usage in order to be invoked and proved by a party to such a contract must be specially pleaded, evidence thereof not being admissible under the general issue. *Leggat et al. v. Sanders' Ale Brewing Co.*, 60 Ill. 158, and *1 Sanders' Pl. & Ev.* 884-886.

"And while we are of opinion that a custom or usage such as counsel for appellees attempted to show in this case, if one existed when the contract sued upon was made, could be shown, if properly pleaded, yet the general issue being the only plea that appellees interposed to the declaration, the court improperly admitted the testimony concerning such custom under the pleadings."

In view of these cases we think it can hardly be said that there is such a weight of authority in the courts of the nation establishing an exception to the rule in *Smith v. Stewart*, supra, to the effect that evidence of a local custom, applicable to a particular business, may be introduced to explain a contract relating to such business, without first being pleaded, as to impel us to adopt such exception as to the law of this jurisdiction. Rather in view of the conflict in the cases, we feel free to determine the question of practice upon what we deem to be the underlying principles and to the end that ultimate justice not only in this, but in the cases to come, shall be accomplished. The primary object of pleading is to notify the adversary of that which he has to meet. Necessarily the evidence is ordinarily not a proper part of a pleading, but the allegation of a material fact is. Where a custom is general, long established, and well known, it is held that it

need not be pleaded, since all are presumed to know of it. It is one of the common facts of life which enter into every case and which the parties are assumed to be ready to meet. But the same cannot be said of a special local custom applicable to a particular business. As to such a custom we think that the interests of general justice demand it should be properly pleaded and the opposing party notified of what he has to meet. Although we think this evidence admissible, if pleaded, to explain the contract under the authority of *C. R. I. & P. R. Co. v. Dodson & Williams*, 25 Okl. 822, 107 Pac. 921, its admission without being pleaded was prejudicial error. It tended to show what the contract was, and, taking it into consideration, the jury might well have said that the Chickasha bank had been guilty of no breach of the contract, whereas, without this testimony, the result might have been entirely different. Merely because the question of waiver was submitted to the jury we cannot say that the verdict was upon it alone, since the court also submitted to the jury the question of what the contract was.

[4] It is argued by defendant that no objection was properly made. The repeated objections were upon the ground that the evidence was "incompetent, irrelevant, and immaterial." After the close of the testimony plaintiff moved to strike out this testimony in relation to custom because not pleaded. This motion was overruled, and an exception saved. We think the question is properly before us for review. Rev. L. 1910, § 5070, being the same as the law in force at the trial, provides:

"An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness. Where any party desires to object to any question put to a witness, either before a court or tribunal or upon the taking of depositions upon notice, the ordinary objection of incompetency, irrelevancy, or immateriality shall be deemed to cover all matters ordinarily embraced within such objections, and it shall not be necessary to specify further the grounds of such objections or to state the specific reasons whereby the question is so objectionable; but the court or opposing counsel may inquire of the objector wherein the question is so objection-

able, and the objector shall thereupon state specifically his reasons or grounds for such objections."

The evidence as to the custom was irrelevant under the issues as formed, and, in the absence of an inquiry by the court of counsel as to the specific grounds, the objection was sufficient. Certainly after the particular ground of objection was called to the court's attention by the motion to strike all the requirements of the statute were fulfilled.

The case of *Enid & Anadarko R. Co. v. Wiley*, 14 Okl. 310, 78 Pac. 96, and *Sparks v. Territory*, 16 Okl. 127, 83 Pac. 712, on appeal 146 Fed. 372, 76 C. C. A. 594, support the contention of defendant, but these cases were decided upon cases arising when the statute contained only the first sentence of the section above quoted. The succeeding part of the section was later added by the Legislature, perhaps because of the decision in *Railway Co. v. Wiley*, supra. These cases are clearly inapplicable to the present statute. Nor do we find anything in the later decisions of this court in conflict with the views herein expressed. In *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 332, 129 Pac. 16, the objection held insufficient was merely "we object." In *Diamond et al. v. Perry*, 148 Pac. 89, though reference is made to *Railway Co. v. Wiley*, supra, the general objection was held insufficient because the evidence admitted was competent, relevant, and material upon one issue in the case, though perhaps not as to all the issues.

In *St. L. & S. F. R. Co. v. Murray*, 150 Pac. 884, a motion to strike the "testimony of the witness along that line" was held insufficient to advise the court to what testimony reference was made. None of these cases decided the question before us now.

Upon the whole we are of the view that the testimony above referred to was improperly admitted under the state of the pleadings, and that the objections thereto were sufficient.

For the reasons given the cause should be reversed for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

FAUCETT v. NORTHERN CLAY CO.

(Supreme Court of Washington. Oct. 28, 1918.)

1. CANCELLATION OF INSTRUMENTS ⇨47 — CONTRACT—FRAUD.

In an action to cancel a contract on the ground of fraud in its procurement, which allowed plaintiff's tenant to sublease part of the land covered by the lease near defendant's factory to the defendant, with right to renew or purchase on the expiration of the lease, evidence held not to show that defendant's representatives were guilty of any conscious fraud upon the rights of plaintiff.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. ⇨47.]

2. CANCELLATION OF INSTRUMENTS ⇨47 — FRAUD — PRESUMPTION AND BURDEN OF PROOF.

One seeking to set aside and cancel his formal written contract on the ground of fraud must sustain his case upon clear and satisfactory proof, as fraud is never presumed, but must be proved by the party alleging it.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. ⇨47.]

3. CANCELLATION OF INSTRUMENTS ⇨47 — CONTRACT — GROUNDS—WANT OF UNDERSTANDING.

Evidence held not to sustain the trial court's finding that plaintiff, was a man of advanced years, with poor sight, very hard of hearing, dull of comprehension, with meager training, worn out by the importunities of defendant's representatives, and that the contract as read to him by them was not understood by him.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. ⇨47.]

4. CANCELLATION OF INSTRUMENTS ⇨34(1)—RIGHT OF ACTION—GOOD FAITH.

Where plaintiff, in such case, did not read the contract, which was written in duplicate, though it was read in his presence, and put it in his trunk without asking any one to look it over, exchanged his copy for a recorded one, put it away, and never consulted it until the defendant claimed its right to purchase four years after the contract was executed, knowing that defendant had paid the lessee for a sublease, and accepting rent which he knew came from the defendant, and knowing that defendant was making valuable and permanent improvements on adjacent property, he did not repudiate with promptness consistent with good faith.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49, 50, 52; Dec. Dig. ⇨34(1).]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by James E. Faucett against the Northern Clay Company. Decree for plaintiff, and defendant appeals. Reversed and remanded, with instructions to enter a decree in accordance with the Supreme Court's former opinion.

See, also, 84 Wash. 382, 146 Pac. 857.

Nilo A. Root, of Seattle, I. B. Knickerbocker, of Auburn, and Paul B. Phillips, of Seattle, for appellant. M. E. Brewer, of Auburn, and Jno. Mills Day, of Seattle, for respondent.

CHADWICK, J. This case was considered by this court, and opinion rendered that the contract relied on by appellant, and sought to be canceled and set aside upon the ground of fraud in its procurement, was not void for uncertainty. The case was remanded for judgment unless respondent, upon the issues joined, sustained his charge of fraud. 84 Wash. 382, 146 Pac. 857. The contract is fully set out in our former opinion. The case came on for trial. A jury was called to advise the court by its verdict. A verdict in favor of respondent and for \$250 damages was returned. The court adopted the verdict in so far as it declared the ultimate fact, and made findings and conclusions. A decree was entered canceling the contract.

[1] The case is here for trial de novo. Appellant contends that respondent has failed to sustain the burden of proof, or to show, by even a bare preponderance of the testimony, that it was guilty of any fraud in the procurement of the contract. The facts, in so far as we shall discuss them, should be considered in the light of the holding of the court when overruling a motion for judgment non obstante. The court said:

"* * * The court being fully advised in the premises; and the court having announced its finding that the plaintiff did not prove all of his allegations of fraud in the amended complaint, and that there was in fact no willful or conscious fraud perpetrated upon the plaintiff on January 24, 1910, either by Paul S. MacMichael, the defendant corporation's president, or Paul B. Phillips, its attorney, in obtaining the contract between the plaintiff and the defendant of that date, and that the contracts in evidence as 'Plaintiff's Exhibit A' and 'Defendant's Exhibit 4' are the contracts actually signed by the plaintiff on January 24, 1910, and that there was no forgery or alteration of said contracts embodied in said exhibits by the defendant, or any one on its behalf; and the court finding that the contract of January 24, 1910, was fully read to the plaintiff prior to the execution of the same; and the court finding that the plaintiff is a man of low mentality, and that on January 24, 1910, he gave his consent to the terms of said contract because he was worn out by the importunities of defendant and did not meet the defendant's representatives on equal terms, and was thus overreached by defendant, and would not have signed the contract embodied in said exhibits if he had consulted an attorney at the time he signed said instruments; and the court deeming that such was the interpretation of the evidence also adopted by the jury; and the court deeming that said motion for judgment for the defendant should be denied: Now, therefore," etc.

—and in the light of the formal findings of fact:

"That on said January 24, 1910, said MacMichael and said Phillips representing the defendant corporation, called upon plaintiff and represented to the plaintiff that said defendant corporation needed about four acres of the ground covered by said lease to said Itabashi, for use in connection with its said plant, and requested plaintiff to consent to allow said Itabashi to sublease such amount of land near the factory of defendant to defendant. That plaintiff thereupon agreed to permit said Itabashi to sublease about four acres of land to

the defendant corporation, and the said MacMichael and said Phillips prepared an instrument in writing. That said instrument was prepared in duplicate in longhand by the said Phillips, and was then and there signed by the plaintiff in person and by the said Paul S. MacMichael on behalf of the said defendant. That before said papers were so signed the said Paul B. Phillips undertook to read the said papers and explain the same to the plaintiff. That the papers were signed at about the hour of 9 o'clock in the evening of said day. That the said Paul B. Phillips and the said MacMichael had spent the whole of said day from about the hour of 9 a. m. until the signing of said papers with the plaintiff and with his mother, who was a woman of advanced years, at their home, and that the said Paul B. Phillips and the said Paul S. MacMichael had gained the confidence of the said plaintiff and his said mother during said time. That the plaintiff did not read the same. That he was at said time, and is, as appears from the evidence and from his appearance and conduct upon the witness stand, a man of advanced years, poor eyesight, very hard of hearing, dull of comprehension, and with meager training, and that he was worn out by the importunities of said Phillips and the said MacMichael, and that the said papers as read to him by the said Phillips were not understood in their full purport, purpose, and meaning by him. That the plaintiff did not understand that he was required to sell said real estate to the defendant at any time. That he did not understand that he was required by said papers to submit any question to arbitration. That he did not understand that he could be compelled to lease the said real estate to the defendant for a term subsequent to the lease of the Japanese Itabashi. That the said plaintiff did not intend by the signing of said papers that the defendant should have the right to purchase said real estate or to lease said real estate for any term of years beyond the lease of the said Itabashi without his further assent to such subsequent lease. That after the signing of said papers one copy of the same was left with the said plaintiff and the other taken by the said Phillips for the purpose of placing his notarial seal thereon. That within a few days thereafter the said Phillips, having placed his seal upon the paper taken by him and having had the same recorded, returned a copy of said paper to the said plaintiff and procured from the plaintiff the copy of the paper left with him. That the said plaintiff at all times believed, and had good cause to believe, that the paper signed by him contained only the matters and things to which he had agreed and assented, and that he did not have cause to believe, and did not believe, that said papers required him to sell the real estate therein described, or to lease it for a term subsequent to the lease to said Itabashi. That when said paper was returned to the plaintiff, the plaintiff deposited the same in a trunk in his home, and did not, at said time, or prior to said time, or subsequent to said time, know or learn of the true and real contents of said instrument until in or about the month of February, 1914, and that said pretended agreement was and is therefore in fraud of plaintiff's rights."

We have read the record with unusual care because of the novel features presented, and we agree with the trial judge that neither the president of appellant nor his attorney was guilty of any conscious fraud upon the rights of respondent. They were seeking to obtain control of land that would, in all probability, be necessary in the future development of appellant's business. The con-

tract seems fair on its face. It insures respondent a fair rental value so long as it is held under a lease, and a fair price if taken under the option to purchase. Taking the contract by its four corners, it cannot be said that it is unfair, or is, in any respect, such a contract as a man of ordinary, or even more than ordinary, capacity, having regard for his own business welfare, would not have entered into. Nor is it urged that the contract is improvident.

[2] Considering the elementary principles of equity, no reason whatever is shown for the overturning of the contract unless it be found in the finding that:

Respondent " * * * as appears from the evidence and from his appearance and conduct upon the witness stand [is] a man of advanced years, poor eyesight, very hard of hearing, dull of comprehension, with meager training, and that he was worn out by the importunities of said Phillips and the said MacMichael, and the said papers as read to him by the said Phillips were not understood in their full purport, purpose, and meaning."

When one seeks to set aside a formal written contract upon the ground of fraud, he must, as the court in the instant case told the jury, sustain his case by clear and satisfactory proof. We find no better statement of the law in any of the books than was made by the trial judge when instructing the jury:

"Fraud is the foundation of this action. The law presumes, which is a fact, that people, dealing with one another, deal honestly and fairly, and you are to go into this case with that presumption that the parties have dealt fairly and honestly with each other. In other words, never to presume that fraud has taken place. It must be proved to you by the party alleging it; that is, by the plaintiff in this case; by clear and satisfactory proof."

[3] We will consider the findings upon which the decree must rest in detail. Respondent was "a man of advanced years." There is no testimony to sustain this finding. Respondent had lived on the land since 1865. We do not find that his age is fixed definitely in the record, but he attended the district school from about 1867 or 1868 to 1872 or 1873. Respondent was in the courtroom at the time of the argument of this case, and we, too, have had the benefit of judging "from his appearance." He appears to be a man of about 50 to 55 years of age. There is nothing in the record or his appearance to suggest senility. "Advanced years" mean nothing. Many of the world's greatest men have turned the supreme accomplishment of their lives at a time when years measured by numbers sat heavily upon them. No neighbor, or friend, or observer from the wayside, has come with word, or fact, or opinion, to sustain the inference the finding bears that respondent, because of "advanced years," is weakened in body or mind, or is incapable of attending to his own affairs.

Neither do we find that respondent had "poor eyesight," or is "very hard of hearing."

or "is dull of comprehension," or that "he was worn out with importunities." There is nothing in the record about poor eyesight, although there is some evidence from which it may be inferred that he is slightly deficient in hearing. But he makes no complaint that he did not hear all that was said, or that he did not comprehend the contract because he could not see. He says he cannot read. It, therefore, makes no difference whether his eyesight was good or bad. His complaint is that that part of the contract which provides for a renewal of the lease, for sale, and for arbitration was not read to him at all.

Nor do we find respondent to be a man of low mentality, or dull of comprehension. He makes a fair witness; follows carefully, and in detail, the theory of his counsel. His testimony is not confused. He seems to appreciate the "finer points" of his case, and can "spar" for advantage. He is the owner of, and in the active management of, a valuable farm, a part, or possibly all of which, he has leased to his profit. He has sold two rights of way over his land, one to the county, and one to a railroad company, in which all his legal rights were preserved. No one comes, testifying that respondent is of low mentality or dull of comprehension, or otherwise incapable of attending to his business in a shrewd and careful manner. No guardian has ever been applied for to manage his affairs.

We would pervert every rule of evidence if we were to hold that the finding of low mentality or dullness of comprehension is sustained. Neither do we find anything to sustain the finding that respondent was worn out by the importunities of the president of appellant and his attorney. They were negotiating over a period of 12 hours it is true, but there is as much force in this circumstance to sustain the theory that respondent was not rushed off his feet as that he was overcome and worn out by importunities. Much of the negotiations were with his mother. If he had attended to the matter, the whole thing might have been settled in an hour or two. That he did not, and that the whole of the 12 hours was not devoted to negotiations and importunities calculated to wear out this supposedly weak man is evidenced by his own account of the day.

"They came at about 9 or 10 o'clock in the morning, and stayed there all day long and had dinner and supper. They talked with me a little and with my mother—all through the day with her. I was working around the place, and would come in once in a while and talk. The result was my mother said: 'For God's sake, Jim, don't be hard on them. They want to lease that little piece of land, and you have got it leased to this Japanese and ought to let them have it, if you can fix it with the Jap.' I told them the Jap would not stand for it. MacMichael asked if he could fix it up with the Jap if I would lease it, and I said all right, and that was all the talk MacMichael and I had. * * * It was immediately after noon that I agreed to let him lease it from the Jap. I went out to work, and MacMichael went up town,

and when he got back he had the papers on the table and Phillips was writing at one end of the table and MacMichael was writing at the other, and talking among themselves there. About between 8 and 9 o'clock at night Phillips said, 'We have got these papers ready now,' and he told me to go out and bring in the Japanese, and he would get him to sign."

The court admitted a great deal of hearsay testimony, tending to show that it was the "settled policy" of respondent not to sell any of his land during his lifetime. This would be error calling for a reversal if the decree depended on the verdict alone. We refer to it only because of the holding of the court that respondent would have repudiated his contract if he had consulted a lawyer. His only hope if he had consulted a lawyer was in the two things now relied on; that he was worn out by importunities, and that it was his fixed policy not to sell any of his land. If he had made a full disclosure of the facts, a lawyer would have advised him that the testimony relied on to show a wearing out of the will by importunities would be insufficient to overcome a written instrument, and that the settled policy theory would not afford a legal ground for rescission.

[4] The case then, when reduced to its lowest terms, comes within two very simple rules. The one, that fraud alleged to have occurred in the procurement of a contract between competent persons must be proved by strong and convincing evidence, and that one who would repudiate a formal written contract as not evidencing the agreement of the parties must do so promptly, and under circumstances consistent with good faith. The first rule is so obviously applicable that it needs no further discussion. The contract was written in duplicate. It is admitted that respondent did not read it, but it was read in his presence. Now, granting that respondent was advanced in years, and had very poor eyesight, and was very hard of hearing, and was of low mentality, and was dull of comprehension, and could not read, he knew his infirmities at the time. Yet he put the contract, drawn, as he now contends by parties with whom he did not want to deal, and with whom he was impatient, and who had admittedly talked about a sale and arbitration, in his trunk without asking any one to look it over. After 10 days he exchanged his copy for the one that had been recorded, put it in his trunk, and never consulted it until appellant claimed its option 4 years after the contract was executed. Yet all the time he knew appellant had paid \$250 to the Japanese for a sublease, and he was accepting rent for the property which he knew came from appellant. He knew that appellant was making valuable and permanent improvements on its adjacent property. He was no stranger to lawyers. He dealt through, and with, lawyers when he sold the rights of way over his land. One of the attorneys in the instant case who lived in the town a quarter of a mile away has, since

1911, "performed various legal duties" for respondent.

As against the failure to show a "conscious" intent to defraud, the failure of proof, and all the other circumstances bearing against the contentions of respondent, we have the one fact, if it be a fact, that he cannot read, and the contract was not read, in its entirety, to him. His testimony is overcome by the evidence of his adversaries, as well as by the circumstances and probabilities of the case. As we said in *Sahlin v. Gregson*, 46 Wash. 452, 90 Pac. 592:

"If this judgment is permitted to stand, deeds and other written instruments have lost their chief virtue"

—and in *Golle v. State Bank of Wilson Creek*, 52 Wash. 437-439, 100 Pac. 984:

"Furthermore, the failure of the respondent to read the deed or have the same read to him, under the circumstances disclosed by this record, shows such negligence on his part as to place him beyond legal or equitable relief. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955."

Chaffee v. Hawkins, 89 Wash. 130, 154 Pac. 143, and *Id.*, 89 Wash. 130, 157 Pac. 35, are also in point.

Reversed and remanded, with instructions to enter a decree in accordance with our former opinion.

MORRIS, C. J., and PARKER and HOLCOMB, JJ., concur.

LANGLEY et al. v. DEVLIN et al.

(No. 13434.)

(Supreme Court of Washington. Oct. 24, 1916.)

1. APPEAL AND ERROR § 424—NOTICE OF APPEAL—PURPOSE.

The requirement of service of notice of appeal on any party having interest identical with appellant is to enable all parties similarly affected by the judgment or order appealed from to join in the appeal by an independent notice, thus avoiding successive appeals in the same action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2152-2154; Dec. Dig. § 424.]

2. APPEAL AND ERROR § 424—NOTICE OF APPEAL—SERVICE ON COST SURETY—NECESSITY.

Nonresident plaintiffs, who had given a cost bond and against whom a judgment was rendered, which did not include a judgment against the surety on the cost bond, need not serve notice of appeal on the surety, since the surety has no interest in securing either the affirmance or reversal of the judgment, and is not a party thereto, and therefore would not be entitled to join in the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2152-2154; Dec. Dig. § 424.]

En Banc. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by W. J. Langley and another against A. J. Devlin and another. Judgment for the defendants, and plaintiffs appeal.

Motion of defendants to dismiss the appeal denied.

See, also, 87 Wash. 592, 151 Pac. 1184.

Cannon & Ferris, of Spokane, for appellants. Robertson & Miller, of Spokane, John P. Gray, of Coeur D'Alene, Idaho, and Post, Avery & Higgins, of Spokane, for respondents.

ELLIS, J. This action was brought by nonresident plaintiffs, seeking among other things, to enjoin the sale of certain stocks. They were compelled to furnish a bond for costs, upon demand of the defendants, as required by Rem. & Bal. Code, § 495. The trial court entered a decree vacating the injunction. No judgment was entered against the surety upon the costs bond. Plaintiffs appealed. The notice of appeal was served upon the defendants, but not upon the surety in the plaintiffs' costs bond. Defendants, respondents here, seeking to invoke the rule announced in *Shippen v. Shippen*, 158 Pac. 247, have moved that the appeal be dismissed. That decision, however, is not controlling upon the record here. It is obvious that the interest of the appellants and that of the surety on their costs bond, so far as the latter ever had any interest as a contractual party to the action, are precisely the same.

[1] The requirement of service of notice of appeal on any party having interest identical with appellant is only to enable all parties, "similarly affected by the judgment or order appealed from" and who might have joined in the original notice of appeal, to join in the appeal by an independent notice within ten days after service on them of the original notice, thus avoiding successive appeals in the same action. Rem. & Bal. Code, § 1720; *Peck v. Peck*, 76 Wash. 548, 562, 137 Pac. 137.

[2] But the plaintiffs, appellants here, and the surety are not similarly affected by the judgment or order appealed from. No judgment was entered against the surety. It is in no manner affected by the judgment as rendered, and, in the nature of the case, cannot be injuriously affected either by an affirmance or reversal of that judgment in this court. If the judgment be affirmed on the merits, respondents can only secure a judgment against the surety on the non-residents' bond for costs by an independent action on that bond, if, indeed, all right to such a judgment has not been lost by the failure to take judgment on the bond at the time prescribed by the statute, namely, "at the same time" when the judgment was entered against the party "primarily liable." Rem. & Bal. Code, § 496. As to whether that right is lost, we express no opinion. The question is not before us, and would not be before us even had appellants served their notice of appeal upon the surety.

If, on the other hand, the judgment be reversed, the surety will be conclusively re-

lied of all liability upon the costs bond. Herein lies the plain distinction between this case and the case of Shippen v. Shippen, supra. There the party in whose favor the costs bond ran, having suffered defeat in the trial court, could only entitle herself to a judgment for costs in the trial court, either as against the plaintiff or the surety on plaintiffs' costs bond, by a reversal of the judgment. The surety was therefore directly interested in having the judgment sustained on the appeal. On the record here, the surety has no such interest in the appeal, and, not being a party to the judgment, even conceding that it was a party to the action, it had no right to join in the appeal; hence it was not entitled to notice of the appeal. Sipes v. Puget Sound Electric R. Co., 50 Wash. 585, 97 Pac. 723. See especially concurring opinion of Judge Rudkin, 50 Wash. 595, 97 Pac. 723, and other cases there cited. See, also, Wilson v. Puget Sound Electric R. Co., 50 Wash. 596, 97 Pac. 727, and Iverson v. Bradrick, 54 Wash. 633, 104 Pac. 130.

A service of notice of appeal upon the surety here would have been an idle formality. It could not have joined in the appeal because it was not a party to the judgment; hence the evil of successive appeals, which the statute (Rem. & Bal. Code, § 1720) was enacted to avoid, was not imminent. Respondents would have gained no right by such a service, and have lost no right by its absence.

Some suggestion was made in argument that certain other parties in interest were not served with notice of the appeal. The motion before us, however, is addressed solely to the failure to serve the surety upon the costs bond.

The motion is denied.

MORRIS, C. J., and MOUNT, HOLCOMB, MAIN, PARKER, OHADWICK and FULLERTON, JJ., concur.

WIESNER v. BONNERS FERRY LUMBER CO.

(Supreme Court of Idaho. March 24, 1916.
On Rehearing, Oct. 24, 1916.)

1. MASTER AND SERVANT ⇨216(1)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Where servants are employed for the prosecution of a lawful but hazardous business, they assume the risks of such employment arising from the negligence of coemployees, subject, however, to the exception that the master is liable for such injuries as accrue to the servant from the negligence of a fellow servant in the selection of whom the master has been culpably negligent. But when the master exercises ordinary care, having regard to the hazards of the service, to provide the servant with a reasonably safe working place, machinery, tools, and appliances, and to maintain them in a reasonably safe condition

of repair, and adopts adequate and efficient rules and regulations, and uses reasonable care to enforce such rules and regulations by employing fit and competent servants, devolving upon them the positive duty to carry out and enforce the rules for the protection of the workmen—the failure of the servant to give a signal under such circumstances, in an isolated instance, which results in an injury to a fellow servant, is in no sense the negligence of the master for which he would be liable, but is the carelessness and negligence of a coservant in the same common employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567, 569; Dec. Dig. ⇨216(1).]

2. MASTER AND SERVANT ⇨101, 102(8), 170—INJURIES TO SERVANT—DUTY OF MASTER.

The legal measure of the master's duty or liability is the exercise of ordinary care, having regard to the hazards of the service, to provide the servant with reasonably safe working places, machinery, and appliances, and the exercise of ordinary care to maintain them in a reasonably safe condition of repair, and use due diligence in the employment of competent servants to whom may be intrusted the duty of giving proper signals which is part of the work of operation; and it is not the master's fault if such servant fails to give such proper signals, and as a consequence injury results to a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 174, 336; Dec. Dig. ⇨101, 102(8), 170.]

3. MASTER AND SERVANT ⇨177—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Held, under the facts in this case, that where the master used due diligence in the selection of a competent servant to give warning signals, and adopted a reasonably safe signal system, and used reasonable care to see that the signal system was enforced, his nondelegable duties were complied with, and he could not be held answerable in damages for injuries to a servant caused by the negligence of a fellow servant in failing to give the proper signal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. ⇨177.]

4. MASTER AND SERVANT ⇨183—INJURIES TO SERVANT—NONDELEGABLE DUTIES.

The case of Lucey v. Stack-Gibbs Lumber Co., 23 Idaho, 628, 131 Pac. 897, 46 L. R. A. (N. S.) 86, followed and approved, except wherein it is held that it is the absolute duty of the master to give warning signals, and the failure to do so, though the failure be the neglect of an employé, renders the master liable to a servant who is injured in consequence of such neglect, and that the duty to give proper signals is nondelegable—and to that extent it is hereby overruled.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 268; Dec. Dig. ⇨183.]

5. MASTER AND SERVANT ⇨286(35) — INJURIES TO SERVANT—EVIDENCE.

Held, that the court erred in giving instruction No. 6, and in refusing to give appellant's requested instruction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1036; Dec. Dig. ⇨286(35).]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by Adolph J. Wiesner against the Bonners Ferry Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Cannon & Ferris, of Spokane, Wash., and Herman H. Taylor, of Sandpoint, for appellant. John P. Gray, of Coeur D'Alene, and Allen P. Asher, of Sandpoint, for respondent.

BUDGE, J. This is an action to recover for personal injuries alleged to have been sustained by respondent while in the employ of the appellant. The cause was tried by the court with a jury, which resulted in a verdict and judgment in favor of the respondent for the sum of \$12,000.

The facts, briefly stated, are: The respondent was employed by the appellant corporation to assist in the construction of a logging roadway. While so engaged he received the injuries complained of, which were caused by the explosion of dynamite used by his coemployees in blowing out stumps along the roadway under construction. At the time respondent received these injuries, he was assisting in the sawing of trees lying along this roadway, for the purpose of facilitating their removal. A gang of his fellow workmen had preceded him and was removing the brush, and another gang, engaged in the blowing out of the stumps, was following at some distance.

It is charged in the complaint that no proper warning or notice was given respondent immediately prior to the discharge or explosion of the dynamite which resulted in his being struck by quantities of wood or other hard substances, causing his injuries; that the discharge of such a large quantity of explosive in the vicinity of where respondent was employed constituted a new and increased danger at the time and place where he was working, of which he had no knowledge, and changed the dangers and risks of the place where he was working without his knowledge and without warning to him; that it was the duty of appellant to give him warning that such explosive would be set off and discharged in the vicinity of where he was working, so that he could have an opportunity of saving himself from injury; that appellant was negligent in permitting said explosive to be discharged near where respondent was working without giving him warning of the danger he was in, and that by the exercise of reasonable care on the part of appellant, such warning could have been given and respondent could have escaped; and that appellant did not adopt any rules or regulations for the conduct of its business so as to afford reasonable or any protection to respondent, or, that if it did adopt any such rules, it did not use reasonable care to see that they were enforced or complied with. The complaint also sets out the earning capacity of respondent, the nature and result of the alleged injury, the age of respondent, his life expectancy, and the invalidity of the settlement in satisfaction of the injury.

Appellant assigns and relies for a reversal of this case upon eleven specifications of er-

ror, but for convenience discusses all of these assignments under the following subdivisions, and in our determination of this case we will, as far as necessary, pursue this order of discussion:

First. Appellant is not liable for the alleged negligence of the powder man in failing to give the usual warning signal.

Second. The evidence establishes conclusively that appellant used reasonable care to enforce the giving of the warning signal.

Third. The court erred in admitting the deposition of Stewart.

Fourth. A new trial must be granted because the birth record was false in a material part.

Fifth. The verdict is excessive in view of respondent's prior condition.

[1-3] It is first contended that the record shows conclusively that appellant had adopted a reasonably safe method of conducting its blasting operations; that reasonable care had been used to enforce such blasting methods; that the man in charge of the blasting was a thoroughly competent man, with years of experience in that class of work; and that the court instructed the jury that this powder man was competent. Whether or not the powder man gave the warning signal is a disputed fact, but it is contended by appellant that even if there was no evidence that it was in fact given, the case should not have been submitted to the jury, for the reason that the negligence of the powder man in failing to give the signal would not in law be the negligence of the master. In other words, the master having furnished a competent servant to give the signals, having adopted a reasonably safe signal system and having used reasonable care to see that the signal system was enforced, its nondelegable duties were complied with, and the giving of the signal was a mere detail of the work which could be delegated to a competent servant.

Counsel for appellant, in support of their contention that appellant is not liable for the alleged negligence of the powder man in failing to give the usual warning signal, cite the case of *Armour Co. v. Russell*, 144 Fed. 614, 75 C. C. A. 418, 6 L. R. A. (N. S.) 602. This was an action by a servant against his master for damages for negligence in the construction and maintenance of elevators and shaft in which they operated. At the close of the evidence counsel for defendant requested the court to instruct the jury that all that was required of the master was that it should have exercised ordinary care to provide reasonably safe and suitable elevators and appliances for the use of its servant. The court denied this request, and charged the jury that it was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work, reasonably safe tools, implements, or appliances with which to do his work, and to keep them in a reasonably

safe condition of repair during the service. On appeal the court said:

"But actionable negligence is nothing but a breach of the duty to exercise reasonable care. It is not a breach of a guaranty of the character of place or of appliances. If a duty to provide a reasonably safe place or reasonably safe appliances were imposed upon the master, he would become in effect a guarantor of their reasonable safety, because his failure in any respect to make and keep them reasonably safe would be a breach of that duty and would cast him in damages, however great were his watchfulness and diligence. This is not the legal measure of the master's duty or liability. The limit of his duty is to exercise ordinary care, having regard to the hazards of the service, to provide the servant with reasonably safe working places, machinery, tools, and appliances, and to exercise ordinary care to maintain them in a reasonably safe condition of repair."

See other cases cited therein.

The case of *Maine & N. H. Granite Corp. v. Hachey*, 173 Fed. 784, 97 C. C. A. 508, is directly in point with the case at bar. In that case Hachey was employed by the Granite Corporation in its quarry. He was engaged in breaking up waste rock, or "grout," beside a large pile of grout about 30 feet in height. Pieces of waste rock were deposited upon this grout pile from time to time by a derrick. The danger from falling stones was such as to require that the men working at or near the grout pile should receive a warning whenever rock was to be dropped from the derrick upon the slanting grout pile. The derrick was operated by machinery, and was in charge of a boss derrick man, whose duty it was to see that the stones were properly raised, swung, and deposited upon the grout pile, to give proper signals to the engineer, and also to give warning to the workmen in the vicinity of the grout pile in time to enable them to go to a place of safety while stones were dropped upon the pile. The boss derrick man usually had one or two men under him as helpers. It was agreed that it was the duty of the boss derrick man to give timely warnings, either personally or by sending one of his helpers to do it. The warning was given by shouting, or at times by rolling a small stone near the men at the foot of the pile. The men working at or near the grout pile were accustomed to reply upon receiving a signal before the dumping of rock. The pile of grout obstructed the view of the derrick, and the attention of the men at work breaking up rock was so engaged that the giving of signals to them was required as a regular accompaniment of the operation of the derrick. It was customary for the derrick man to give the signals personally or through one of his helpers. Upon the record in that case it was assumed that the boss derrick man was guilty of negligence in dropping a heavy stone on the grout pile without giving warning. The stone slid and fell upon Hachey, inflicting serious injury. Hachey was without fault in the matter. The Granite Corporation, plaintiff in error, conceded the neg-

ligence of the boss derrick man, but contended that his failure to give warning of the movement of the derrick and of the dropping of stone was a negligent performance of the duties of a fellow servant of Hachey. The defendant in error, however, contended that under the circumstances the master, in order to make the place at the side of the grout pile a reasonably safe working place, was bound to give warning, and that the person employed to give warning was performing a part of the master's nondelegable duty. The court, among other things, said:

"The general proposition that it is the duty of the master to give warning is not to be so extended as to require him to give in person or to insure the giving by others of all those special signals or shouts which are so associated with the work of operation as to become part of it. The employment of different men in different parts of the general work requires under many circumstances the giving of signals as an accompaniment of the work itself, in order that there may be co-operation in the movement of the men. The giving of such signals is a part of the work of operation. Such signals are rather the giving of information of what one workman is about to do, in order that his fellow workmen may have knowledge of it and conduct themselves accordingly, than the giving of orders which are to be considered as the orders of a master. *Standard Oil Co. v. Anderson*, 212 U. S. 216-226, 29 Sup. Ct. 252, 58 L. Ed. 480. The master may intrust to a competent servant the work of shouting or otherwise signaling when he is about to hoist or to lower away, and it is not the master's fault if such a servant fails to inform his fellow servants of the movement of the machine under his charge."

In *Alaska Treadwell Gold Mining Co. v. Whelan*, 163 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, the Supreme Court of the United States had before it a case where the plaintiff was working at the top of a chute, breaking rock fine enough so it would go through the chute. At the bottom of the chute was a gate which was closed, and which was not opened until the foreman had notified the men to that effect. On the occasion when plaintiff was injured it was claimed by plaintiff that the chute was opened without giving him warning. It was contended that the failure to warn the plaintiff was the negligence of the master. The court held that the negligence of Finley, the foreman, was the negligence of a fellow servant, and in its opinion said:

"Finley was not a vice principal nor a representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not the authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men."

In the case of *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344, the plaintiff was injured through the omission of the

foreman to inform him that a dynamite cart-ridge had failed to explode. The court held that this negligence was the negligence of a fellow servant, and in its opinion said:

"It was the absolute duty of the master to use reasonable care to employ ordinarily careful and suitable servants. * * * It was the duty of the master to use reasonable care and diligence to furnish a safe place for the defendant in error to perform his service in. * * * But the duty of the master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress. It was the duty of each workman to use reasonable care to so render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. It was the duty of the foreman to so direct the work of the excavating, of laying the pipe, and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master. The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. If the safe place originally furnished by the city became unsafe in the progress of the work, it was rendered so not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible. Each employé assumed the risk of this negligence of his fellow servants when he entered the common employment. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433 [28 L. Ed. 440]; *Bunt v. Mining Co.*, 138 U. S. 483, 11 Sup. Ct. 464 [34 L. Ed. 108]; *Killea v. Faxon*, 125 Mass. 486."

In the case of *Donovan v. Ferris*, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25, the facts are similar in many respects to those in the case at bar. There the Supreme Court of California held that the negligence of a foreman in failing to notify plaintiff that a blast was about to be fired was the negligence of a fellow servant, and plaintiff could not recover. In that case it was contended by counsel for plaintiff that it was the absolute duty of defendant to warn plaintiff of the approaching danger, the same as it was his duty to furnish him a safe place in which to work and safe and proper machinery and appliances. The court held that the defendant was under no legal duty to give the plaintiff personal warning, but that it was his legal duty to employ a competent servant to give such warning, and when he had employed a competent servant to give the warning his liability ceased. This conclusion was based upon the theory that in most cases it would be impracticable for the employer to perform such duty personally.

In the case at bar it will be conceded that the master did not personally give the warning, and it must also be conceded that the master provided a competent servant for that purpose, and that respondent knew the means employed by appellant for the purpose of notifying him of the explosions of dynamite, and he assumed the risk incident to such employment. That the system followed by appellant of having the warning given the workmen by calling "fire" had always been carried out and had proved efficient during all the time respondent was in appellant's employ prior to the date of the accident, we think was clearly established by the evidence.

But the theory of respondent is that, by reason of the fact that the warning was not given upon the occasion of the accident, the appellant is liable in damages, irrespective of the fact that it exercised ordinary care, having regard to the hazard of the service, in providing a reasonably safe place and reasonably safe appliance for the performance of the work, in the selection of a competent servant to perform the duty of giving the warning, and had adopted a proper system of rules and regulations with positive instructions that every precaution be taken in order to avoid accident; in short, if the servant failed to give the warning, the appellant company under no circumstances could escape liability.

This, we think, is carrying the rule a step too far. The enforcement of such a principle, in view of the rapid development of this state and the great number of men employed, would be detrimental to the employé as well as the employer. There must be some reasonable limitation placed upon both the employer and the employé, in the matter of fixing the liability of the former for negligence and the assumption of risk by the latter.

In the case of *Hermann v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853, which was cited by the court in the case of *Donovan v. Ferris*, supra, it appeared that a chute led from the wharf to a port in the vessel's side. Plaintiff was engaged with a gang of men between the decks loading lumber. Pieces of lumber were being passed in the chute by another set of men under the charge of a foreman. It was the duty of one of the men on the wharf to give a warning cry when a piece of lumber was placed in the chute, in order to enable those below to get out of the way. The place in which the men below were working was safe, provided the warning cry was given. The man to whom the duty of giving the warning cry was intrusted was a competent and proper person. He omitted to give the warning cry when a large piece of lumber was sent down the chute, and plaintiff was struck by it and injured. The learned opinion of the circuit judge reviews the authorities fully, citing many state and federal cases, and holds that the negligence was

that of a fellow servant, and that plaintiff could not recover.

In *Labatt's Master & Servant*, vol. 4 (2d Ed.) § 1537, the rule announced by that author is as follows:

"Frequent attempts have been made to bring the negligence of servants deputed to give signals within the scope of the principle that the duty to maintain a safe place of work is non-delegable. But this contention is rejected [except in Washington, where a servant who has been designated to give signals which control the movements of machinery, is, while so acting, held to be doing the work of the master]."

The author in a footnote to section 1537, supra, cites a great many decisions of various state and federal courts sustaining the rule laid down there. He evidently overlooked the cases of *Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 334, and *Ondis' Adm'x v. Great A. & P. Tea Co.*, 82 N. J. Law, 511, 81 Atl. 856, 46 L. R. A. (N. S.) 777, both of which cases, as we understand them, announce the same rule as has been established in the state of Washington. The Supreme Courts of Minnesota and Wisconsin also adhere to that rule. See *Anderson v. Pittsburgh Coal Co.*, 108 Minn. 155, 122 N. W. 794, 26 L. R. A. (N. S.) 624, and note; *Burke v. Ash*, 120 Minn. 388, 139 N. W. 705, 44 L. R. A. (N. S.) 609; *Elenduck v. Crookston Lumber Co.*, 121 Minn. 53, 140 N. W. 125; *Gussart v. Greenleaf Stone Co.*, 34 Wis. 418, 114 N. W. 799. However, several of these cases have been decided since *Labatt's Master & Servant* (2d Ed.) was prepared for the press.

In addition to the foregoing authorities, counsel for appellant cite in their brief the cases of *Grady v. South. Ry. Co.*, 92 Fed. 491, 4 C. C. A. 494, *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 49 Pac. 559, N. P. Ry. v. Charless, 162 U. S. 359, 16 Sup. Ct. 18, 40 L. Ed. 999, *American Bridge Co. v. Eeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041, *McDonald v. Buckley*, 109 Fed. 30, 48 C. C. A. 372, in support of their contention.

This court held in *Larsen v. Le Doux*, 11 Idaho, 49, 81 Pac. 600, that if the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of performance by the servant to whom it is trusted; but if it is one pertaining only to the duty of an operative, the employé is a fellow servant with his collaborators of whatever his rank, for whose negligence the master is not liable; that, in short, the master is liable for the negligence of an employé who represents him in the discharge of his personal duties to his servants, and beyond that he is liable only for his own personal negligence.

By the great weight of authority, the master may intrust to a competent servant the work of giving signals where it is necessary for the safety of the workmen in the operation of the work, and it is not the master's fault if such competent servant fails to give

the proper signal. Nor is respondent's contention that the master is an insurer of the sufficiency of the means which he selects for giving signals supported by the preponderance of authority.

[4] Counsel for respondent cite as authority supporting their contention the case of *Lucey v. Stack-Gibbs Lumber Co.*, 23 Idaho, 628, 131 Pac. 897, 46 L. R. A. (N. S.) 86, and insist that this court has definitely and deliberately adopted the doctrine that the duty to warn is the nondelegable duty of the master, and that negligence in the giving of warning or in the failure to warn where it is necessary is not the negligence of the fellow servant, but of the master.

But the facts in that case are different from those in the case we are now considering. They show that plaintiff Lucey was a powder man and had been engaged in using powder in blowing out stumps in the course of his employment. Upon the occasion of the accident he was directed by the foreman of the lumber company to cease working as a powder man, and to go to another place, which was an unsafe place to work, and put in a bridge to be used as a turnout. He and another laborer were working under the immediate direction of the foreman in performing that work, and while he was engaged in that service, deeply engrossed in his work, other workmen felled a tree about 12 inches in diameter and 60 feet long, without giving any warning whatever, and the tree struck plaintiff and broke his leg. Plaintiff was unaware of the fact that the tree was being cut. In the case at bar, respondent was not unaware of the fact that the stumps were being blown. Lucey was struck by a tree 60 feet long, and was therefore in the immediate vicinity of his fellow workmen. We think the evidence in the case at bar supports the statement that the respondent was between 500 and 600 feet away from the stumps which were being blown out at the time of his injury, and that between him and the stump was one of the men who had been engaged in preparing the stump, blasting, spitting the fuse, and attending to the lighting of the same to bring about the explosion of the dynamite. We think, also, that the testimony supports the proposition that a person between 300 and 400 feet away from the point of the explosion of dynamite in the quantity and of the quality usually used for blasting stumps would ordinarily be considered safe; and that the injury to respondent was caused by one of those unfortunate and unpreventable accidents.

Another difference between the facts of these two cases is that in the *Lucey v. Stack-Gibbs Lumber Co.* case it is clear the defendant lumber company had not furnished the workmen with a safe place in which to work, and it does not appear that ordinary care had been used in providing a system of warning for the protection of the employés; while in the case at bar, appellant had used

ordinary care in providing a reasonably safe place for its employes to work and had made efficient rules and regulations for the warning and protection of its workmen, and furnished a competent servant to give signals.

This court in the case of *Lucey v. Stack-Gibbs Lumber Co.*, supra, held that it was the duty of the master to furnish a reasonably safe place for the servant to work, and, it is true, further stated that if it required signals to be given to protect a servant from injury from falling trees cut by other servants, it was the master's duty to see that proper signals were given, "and if the injury is caused by the failure to give the signals, the master is liable. * * * The authority to a servant to give a signal is nondelegable, and the failure to give it is imputed to the master, and the servant employed to give it is not the fellow servant of the injured employe so far as the giving or failure to give the signal is concerned." We are of opinion that the holding in that case that "the authority to a servant to give a signal is nondelegable" was, under the circumstances and facts shown by the record, obiter. Yet if we concede that it was not obiter, as a statement of a general principle of law, it finds no support in the great weight of authority, including numerous cases decided by the Supreme Court of the United States. And so far as it may be considered as supporting the doctrine that "authority to a servant to give a signal [to a coservant] is nondelegable," it is expressly overruled.

It should not be inferred that the conclusion reached by the court in that case was erroneous, because, under the peculiar conditions disclosed by the record, it is apparent that the court based its decision on the ground that the master had not used ordinary care in furnishing the servant with a reasonably safe place in which to work.

The distinction seems to be drawn by the authorities that if the master furnishes a competent servant to give signals where signals are necessary to protect the workmen, and such servant neglects to give them, the master is not liable. Of course, if it appears that the servant was not competent, and that the signals were to be given in a way, manner, or language that could not be understood by the servant, then the master would be liable. But where the servant is competent and the signals are such as would protect the workmen, if given, the master is not an insurer, and not liable if injury results from the servant's failure to give them. In the vast business enterprises carried on throughout the country, it is utterly impossible for the master to be present at all places where signals may be needed to be given, and to hold him liable, after he has adopted proper rules for the giving of signals and has employed a competent servant to give them, would make him an insurer, and the decided weight of authority is against any such rule.

[5] It is next contended by counsel for ap-

pellant that the trial court erred in giving instruction No. 6 to the jury, and in refusing to give appellant's requested instruction B, for the reason that the evidence establishes conclusively that appellant used reasonable care to enforce the giving of the warning signal. In instruction No. 6, the court, among other things, said that appellant adopted such reasonable rules as were required, and then added:

"It is for you to say under the evidence whether the defendant exercised reasonable care to see that they were enforced."

The giving of the latter part of this instruction, when tested by the evidence, in our opinion, clearly constituted reversible error.

Respondent himself, testified, with reference to the firing of blasts, that it had been the practice, while he was there working, for the foreman to call out "fire," and the men would then seek a place of safety, that they did not come to him and notify him at any time that there was going to be a blast, and that at the time the accident occurred, no warning was given.

The father-in-law of respondent, who was at work with him at the time the injury occurred, testified that prior to the time of the accident there had been blasting around near where they were at work, and when the powder men lighted a fuse, they would call "fire," and the workmen would go to a place of safety, a distance of 500 or 600 feet; that before these powder men would discharge a blast, they did not go and tell the men that they were going to fire a blast and then go back and light the fuse; that they never came down to tell them anything about the blast—they just shouted "fire."

Witness Holmes testified that they had rules there governing blasting operations; that the rule was to shout "fire" two or three times, 10 or 15 minutes before they would set the fuse afire, in order to let the men get away. After the fuse was fired, one of the powder men would go one way and one the other, in order to "flag his end for fear somebody would be coming up."

Witness Hende testified that when he was there he heard the warnings whenever there was blasting, and when the blasting was over, he would hear the cry of "All over," "Come back," or something like that.

Witness Armstrong testified that the powder men would always have their stumps loaded, and the powder man would call three times before he would light a fuse in order to give the men a chance to get in the clear, and they would count the shots as they went off, and when the last shot was exploded, they would shout "All over."

Witness Koran, one of the powder men, who was present when the blasts were touched off that did the injury, testified that the other powder man, to let the men know he was going to spit the fuse, would shout "fire" three times, and that witness went one way and the other powder man the other way;

that every time before they touched off a blast, they would shout "fire" three times, and after the blasts had gone off, they would call "All over."

It will be observed from the foregoing testimony that the signal given before spitting the fuse was to shout "fire," and one of the powder men would go one way and the other go the other way from the place where the powder was exploded. There is no conflict in the testimony in regard to the giving of signals, as above indicated, by all of the witnesses as well as the respondent himself, except upon the one single occasion when the respondent was injured. The trial court instructed the jury that the rules adopted by appellant for warning the men were sufficient, and we think the evidence conclusively shows that appellant used reasonable care to enforce the giving of the warning signal, and that the instruction complained of should not have been given or that question submitted to the jury.

We have examined carefully the contention of appellant that the court erred in admitting Stewart's deposition, and, while in view of what has been said we do not deem it necessary to go into a discussion at length on this question, we are of the opinion that, under the facts of this case, the court committed error in admitting this deposition.

The remaining two assignments of error as to the falsity of the birth record and the excessive amount of the verdict are, on account of the conclusions we have reached, unnecessary to be determined.

For the foregoing reasons, the judgment of the trial court should be reversed and a new trial granted; and it is so ordered. Costs are awarded to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

On Rehearing.

MORGAN, J. Both appellant and respondent moved for a rehearing. Their motions were granted, and the case has been again submitted to us for decision.

Counsel for appellant argues that, in view of our decision heretofore rendered, we should have directed the trial court to dismiss the action. This contention is based upon a statement in the opinion to the effect that appellant provided a competent servant to give the warning, and that respondent knew the means employed for the purpose of notifying him of the explosions of dynamite and assumed the risk incident to his employment, and upon our decision that, under the facts of this case, where the master used due diligence in the adoption of a reasonably safe signal system, and used reasonable care to see that it was enforced, his nondelegable duties were complied with, and he could not be held answerable in damages for the injury to a servant caused by the negligence of a

fellow servant in failing to give the proper signal.

It is the contention of respondent that the judgment of the trial court should be affirmed. He urges that the evidence shows that during the time he was employed by appellant prior to the date of the accident he had not been working in the immediate vicinity of where blasts were being exploded, but that the powder men had worked at a distance of about half a mile from him, and that on the day of the injury appellant changed the place of his employment and that of the powder men, so that he was required to work within a short distance from where the blasts were exploded and within the danger zone; that he was given no notice and was not aware he was working any nearer than half a mile from where the blasting was to be done, and that he did not, therefore, assume the risk to which he was subjected and which resulted in his injury. It is also urged that it was the duty of appellant to warn respondent that it was about to explode a charge of dynamite in close proximity to him, and that this duty was absolute and nondelegable.

Without entering into a further discussion of the law we will say that, upon a careful examination of the authorities cited by the parties, we have reached the conclusion that if respondent was, for several days prior to the accident, continuously employed at work upon the construction of a road so near to others engaged in the same work, who were using dynamite, as to make it necessary to give him signals in order that he might retire to a place of safety when a blast was to be set off, and if appellant had adopted and used reasonable and proper care to enforce a system of signals for his protection and had assigned to proper persons the duty of giving them, the performance of that duty was a detail of the work, and was not nondelegable, and the failure of such persons to give the warning on the occasion of the accident was not the failure of a vice principal of appellant, but that of a fellow servant of respondent.

If respondent's contention is well founded in fact, that he had always before the accident been employed at a safe distance from where blasting was done, and that he was removed from there by appellant to a place within the danger zone without any notice to him, or knowledge upon his part, that his new place of employment was near enough to the point where blasts were about to be exploded to render his position hazardous, he cannot be held to have assumed the risk incident to his employment, for he could not assume a risk without the knowledge of its existence.

We do not desire it to be understood that we decide from the record before us that the above-stated contention of respondent is, or is not, well founded in fact. This is a question

which should be submitted to a jury, under proper instructions.

We therefore adhere to our former conclusion and reverse the judgment and remand the cause to the district court, with instructions to grant a new trial.

SULLIVAN, C. J., and BUDGE, J., concur.

SNYDER v. CONN et al.

(Supreme Court of Idaho. Oct. 10, 1916.)

TRIAL \Leftrightarrow 139(1)—TAKING CASE FROM JURY— —NONSUIT—SUFFICIENCY OF EVIDENCE.

Held, that the evidence is sufficient to support the findings of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341; Dec. Dig. \Leftrightarrow 139(1).]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Washington Snyder against Charles E. Conn and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Walter H. Hanson and Therrett Towles, both of Wallace, for appellants. Featherstone & Fox, of Wallace, for respondent.

SULLIVAN, C. J. This action was brought to recover on two causes of action, one for merchandise sold and delivered, and the other for zinc ore alleged to have been converted by the defendants to their use without the consent of plaintiff.

The defense to the first cause of action was that the action was brought before said debt became due, but it was admitted that it was due at the time of filing the answer. Defendants aver, as a defense to the second cause of action, that they were the owners of the ore by reason of a lease they had upon the mine, and that the value of the ore they found on the dump of said mine and appropriated was worth only about \$75.

Upon the issues made by the pleadings the trial was had by the court without a jury, and the court made findings of fact and conclusions of law, and entered judgment in favor of the plaintiff on both causes of action for the amounts claimed in the complaint.

Several errors are assigned by the appellants, but they are substantially all included in the assignment of the insufficiency of the evidence to sustain the findings of fact. We have examined the evidence with some care and are clearly of the opinion that it supports the findings of the court. That being true, there was no error in denying the motion of the defendants for a nonsuit, and the court did not err in entering judgment in favor of the respondent.

The judgment is therefore affirmed. Costs in favor of respondent.

BUDGE and MORGAN, JJ., concur.

McBAIN v. NORTHERN PAC. RY. CO. (No. 3688.)

(Supreme Court of Montana. Oct. 18, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 265(1)—INJURY— —ACTION—BURDEN OF PROOF.

In an action brought under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, \S 8657-8665]), plaintiff assumes the burden of pleading and proving that at the time of injury he was engaged in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 877, 894; Dec. Dig. \Leftrightarrow 265(1).]

2. COURTS \Leftrightarrow 97(5) — DECISIONS OF UNITED STATES SUPREME COURT—INTERSTATE COMMERCE.

The decisions of the United States Supreme Court are conclusive upon state courts as to what is interstate commerce.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 332; Dec. Dig. \Leftrightarrow 97(5).]

3. COMMERCE \Leftrightarrow 27—INTERSTATE COMMERCE— —EMPLOYMENT.

In action under federal Employers' Liability Act, whether plaintiff's injury was incurred while he was engaged in interstate commerce depends on the nature of the work being done by him at the time when injured, and not either immediately before or immediately thereafter.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. \S 25; Dec. Dig. \Leftrightarrow 27.]

4. COMMERCE \Leftrightarrow 27—"INTERSTATE COMMERCE"— —EMPLOYMENT.

Where a brakeman who was a member of a train crew engaged indiscriminately in handling interstate and intrastate freight was injured while going from his caboose, which was awaiting assignment, to the yard office for supplies for the caboose when it should be called into service, he was not then employed in "interstate commerce"; it being immaterial that his work had to do with interstate commerce to a greater extent than purely local shipments.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. \S 25; Dec. Dig. \Leftrightarrow 27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

5. EVIDENCE \Leftrightarrow 35—JUDICIAL NOTICE—STATUTES OF ANOTHER STATE.

The courts of Montana do not take judicial notice of the statute law of a sister state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 35, 51; Dec. Dig. \Leftrightarrow 35.]

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

Action by J. H. McBain against the Northern Pacific Railway Company. From a judgment for plaintiff and from order denying it a new trial, defendant appeals. Reversed and remanded, with directions.

Gunn, Rasch & Hall, of Helena, for appellant. Ed Fitzpatrick and G. L. Tyler, both of Butte, for respondent.

HOLLOWAY, J. The plaintiff recovered a judgment in the district court of Silver Bow county, and the defendant appealed therefrom, and from an order denying it a new trial.

The facts disclosed by the record and pertinent here are that, on October 15, 1912,

plaintiff was employed by the defendant as a brakeman on the Pascoe division of the road in the state of Washington, and was at the city of Ellensburg, Wash. The train crew of which he was a member engaged indiscriminately in handling interstate and intrastate shipments of freight. At the time of his injury plaintiff was going from his caboose to the yard office to present a requisition for supplies needed upon the caboose whenever it should be called into service. He started to make the trip on foot, but, a train from the west passing by, he boarded the locomotive, and while riding on it was injured. He had completed his previous run some hours before, and anticipated that he would be again called into service soon after noon on the 15th, but whether to handle interstate or purely local freight he had no means of knowing, as he had not been called for duty; his train had not been made up, and his caboose was on a siding in the yard awaiting assignment.

[1-3] The action was brought under the federal Employers' Liability Act (35 Stat. at Large, 65), and plaintiff assumed the burden of pleading and proving that at the time he was injured he was engaged in interstate commerce. The allegation of his complaint is sufficient, but does his proof sustain it? The record presents a federal question, and the decisions of the United States Supreme Court upon it are conclusive upon this court. Under a state of facts substantially identical with the facts before us, that court held that it is immaterial that the injured party may have been engaged in interstate commerce immediately before he was injured, or that immediately after completing his then present task he would again engage in interstate commerce, and said:

"The true test is the nature of the work being done at the time of the injury." *Illinois Cent. R. R. Co. v. Behrens*, 238 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163.

Applying that test to the facts presented here, and it is apparent at once that plaintiff has failed to make out his case under the federal statute. The character of the supplies he sought furnishes no index to his employment. The fuses, torpedoes, and waste were necessary supplies for his caboose, whether it would be employed in interstate or intrastate commerce, and at the time of his injury it was impossible to determine the character of his next assignment, for he had not then been called to duty; the train to which his caboose would be attached had not then been made up, and the caboose had not been assigned.

[4, 5] Under the interpretation placed upon this statute by the Supreme Court of the United States, it is of no consequence that the work performed by plaintiff had to do with interstate commerce to a much greater extent than with purely local shipments. The

Congress doubtless had authority, under the commerce clause of the Constitution, to impose upon a carrier engaged in both interstate and intrastate traffic liability for an injury sustained by its employé in the course of its general work, whether the "particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce" (*Behrens Case*, above); but Congress did not see fit to exercise its authority to that extent. The act in question provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," etc.

In further consideration of this feature of the statute the court in the case above said:

"Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employé is engaged is a part of interstate commerce."

At the time he was injured, plaintiff was not engaged in interstate commerce within the meaning of the federal Employers' Liability Act as construed by the highest court of the land. *Alexander v. Great N. Ry. Co.*, 51 Mont. 565, 154 Pac. 914. Whether he could have succeeded under the statutes of Washington even though he failed to make out his case under the federal act does not appear. The statutes of Washington are not pleaded or relied upon. Plaintiff chose to sue in the courts of this state instead of the courts of the state where his injury occurred, and we cannot take judicial notice of the statute law of a sister state.

For the reason given, the judgment and order are reversed, and the cause is remanded to the district court, with directions to enter judgment for the defendant.

SANNER, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

STATE v. RUSSELL. (No. 3692.)

(Supreme Court of Montana. Oct. 23, 1916.)

1. CRIMINAL LAW — 1186(4) — APPEAL — REVERSAL — TESTIMONY TECHNICALLY INADMISSIBLE.

In trial for unlawful taking of fish, testimony of a witness for the state that he was prompted to make report to the warden because certain "boys told me that some one down the river was killing fish," being wholly immaterial and not conceivably prejudicial to any substantial right of defendant, was, although hearsay, no ground for reversal under Rev. Codes, §§ 9415, 9548.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3215; Dec. Dig. — 1186(4).]

2. CRIMINAL LAW **741(1), 742(1)—TRIAL—**
PROVINCE OF COURT AND JURY—CREDIBILITY
AND WEIGHT OF EVIDENCE.

The jurors are the judges of the credibility of witnesses and of the weight to be given to their testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1719, 1727, 1728; Dec. Dig. 741(1), 742(1).]

3. FISH **15 — UNLAWFUL TAKING — EVIDENCE—SUFFICIENCY.**

In trial for unlawfully taking fish from a stream, prohibited by Laws 1913, c. 79, § 2, evidence that accused deposited in a river fishberries ground up with meat which were eaten by the fish and, while the fish were stupefied thereby, one at least was taken by accused from the river with a landing net, supported finding of guilt.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 27-30; Dec. Dig. 15.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

John A. Russell was convicted of a misdemeanor, and appeals. From the judgment and from an order denying him a new trial, he appeals. Affirmed.

Harry Parsons, of Missoula, for appellant. J. B. Poindexter, Atty. Gen., for the State.

HOLLOWAY, J. This appellant was convicted of a misdemeanor in a justice of the peace court. He appealed to the district court, where he was again found guilty, and now appeals from the judgment and from an order denying him a new trial.

1. An attack is made upon the complaint, but we think it is sufficient to charge the unlawful taking of fish from a stream of this state, as that offense is defined by section 2, c. 79, Laws of 1913. It appears also to meet the requirements of section 9032 Revised Codes.

[1] 2. Complaint is made that the trial court admitted certain hearsay evidence. In explanation of his act in making a report to

a deputy game warden, a witness for the state testified that he was prompted to do so because "the Wagner boys told me that some one down the river was killing fish." This explanatory evidence was hearsay, but it was brought out by a preliminary question, was wholly immaterial, and it is inconceivable that any substantial right of the defendant was prejudiced by it. Under these circumstances, the judgment cannot be reversed on that ground alone. Rev. Codes, §§ 9415, 9548; State v. Creau, 43 Mont. 47, 114 Pac. 603, Ann. Cas. 1912C, 424.

[2, 3] 3. The other specifications of error call in question the sufficiency of the evidence in view of the court's instruction No. 3. That instruction imposed upon the prosecution a greater burden than the circumstances of the case warranted; but, even so, the only fair deduction from the evidence produced by the state is that appellant deposited in the Bitter Root river, in Ravalli county, fishberries ground up with meat which were eaten by the fish, with the result that they were stupefied and rendered easy prey; that while in that condition appellant, by means of a landing net, took from the river at least one of these fish. If the jury had believed the evidence offered by the defense, a different verdict would have been required; but the jurors were the judges of the credibility of the witnesses and of the weight to be given to their testimony. The only conclusion from the verdict is that no credence whatever was given to the story told by appellant and his companions. There is evidence in the record to justify the verdict, and we shall not interfere.

The judgment and order are affirmed. Affirmed.

SANNER, J., concurs. Mr. Chief Justice **BRANTLY**, being absent, takes no part in the foregoing decision.

SAN DIEGO COUNTY v. UTT et al.
(L. A. 8689.)

(Supreme Court of California. Oct. 18, 1916.)

1. PLEADING — 37—AVERMENTS—FACTS NOT AVERRED.

A pleading cannot be aided by reason of facts not averred.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 87, 88; Dec. Dig. — 37.]

2. PLEADING — 8(15) — CONCLUSIONS OF PLAIDER—FRAUD.

Fraud cannot be charged epithetically, but the facts showing the fraud, and not a mere conclusion, must be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½; Dec. Dig. — 8(15).]

3. DISTRICT AND PROSECUTING ATTORNEYS — 10 — ACTIONS AGAINST COUNTY OFFICERS — FRAUD—COMPLAINT—SUFFICIENCY.

A complaint alleged that defendant, the assistant district attorney of a county, who occupied a position of trust and confidence, and whose duty it was to represent the interest of the county in all matters pertaining to easements or rights of way and for the construction of highways and in contracts between individuals and corporations dealing with or conveying to the county easements over their lands, induced the highway commissioners of the county to change the route of a road for which bonds had been voted, so that it crossed a ranch owned by a corporation in which defendant was interested at a different place, and that he induced the commissioners, in consideration of receiving a grant of a right of way, to fence the right of way; the cost of the fencing greatly exceeding the value of the land conveyed. There were general averments of fraud. Under Laws 1907, p. 666, the highway commission, consisting of three members, required to give bonds for the faithful performance of their duties, was required to prepare specifications and plans for the highway, which were to be submitted with recommendations to the board of supervisors, who might either adopt or reject them. The supervisors were authorized, on recommendation of the commission, to cause any highway to be widened, straightened, or altered. *Held*, that, as the district attorney was the legal adviser of the board of supervisors, and there was no averment of fraud on his part or on the part of the highway commission or supervisors, the complaint did not state a cause of action for the fraud of defendant authorizing the county to recover the difference between the value of the highway and the fences erected.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 38; Dec. Dig. — 10.]

Department 2. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by the County of San Diego against Lewis J. Utt and another. From a judgment sustaining a general demurrer to the complaint, plaintiff appeals. *Affirmed*.

H. S. Utley, Dist. Atty., of San Diego (James O'Keefe and E. L. Davin, both of San Diego, of counsel), for appellant. Lewis J. Utt, of San Diego, for respondents.

HENSHAW, J. The complaint herein sought to charge a breach of trust upon the part of the defendant Utt, resulting in injury, to the plaintiff and in advantage to defend-

ant Utt, as a stockholder in the Utt Investment Company, defendant. The breach of trust charged was the asserted fraudulent efforts of defendant Utt, resulting in success, whereby the plaintiff was induced to enter into a contract with the Utt Investment Company, by which the defendant investment company conveyed to the county a certain strip of land as and for a main highway, which land it is asserted was worth but \$260. In return for this the plaintiff agreed to fence and did fence the line of this highway, at an expense of \$1,000. A decree was sought declaring the contract to be void ab initio and awarding the plaintiff a large sum as damages. A motion to strike out certain paragraphs of the complaint was made and granted. Thereafter a general demurrer to the complaint was sustained, and plaintiff, refusing to amend, has appealed from the judgment which followed.

It first complains of the court's ruling in striking out portions of the complaint. This consideration may be addressed to the complaint as it originally stood; for, if the original complaint did not state a cause of action, the court's ruling in striking out portions of it need not be reviewed. The essential allegations are:

That the defendant Utt Investment Company, a corporation, owned a ranch known as Agua Tibia ranch, situated some 70 miles from the city of San Diego. The capital stock of the corporation "was distributed amongst the said defendant Lewis J. Utt and his relatives, and is still held by them." Defendant Utt at all the times mentioned was the duly appointed, qualified, and acting assistant district attorney of the county of San Diego. As such officer he occupied a position of trust and confidence in his dealings with the county. Amongst his duties was to represent the interests of the county "in all matters pertaining to the county in all easements or rights of way for the construction of highways, * * * and in all contracts had between individuals and corporations dealing with or conveying to the said county of San Diego easements over their lands for the construction of said public highways."

The county of San Diego had voted bonds in the sum of \$1,250,000 for the construction of public highways in the county, "according to the report of the highway commissioners appointed by the board of supervisors of the county of San Diego to lay out main public highways in the said county." As a part of this system there was projected "a main public highway running through the said ranch and over and along the old road theretofore and for many years prior thereto used as a public highway." "At the instance and request of Utt the route prescribed in the report to the highway commissioners was changed and altered so that the same, instead of running about a mile and a half or

two miles south of the house of said defendants on the Agua Tibia Ranch, was moved to within a distance of approximately a quarter of a mile of said house, which change necessitated the building and construction of about four miles more road than would have been necessary had the preliminary route selected and designated by the highway commissioners been followed. That in the building and construction of the new route so changed at the instance and request of the said defendant Lewis J. Utt, as aforesaid, it was necessary to build and construct certain bridges at a cost to the county of San Diego of the sum of \$2,000, or thereabouts, which bridges would have been unnecessary had the said old line been followed, as was intended by the highway commissioners appointed to lay out the route of roads to be built and constructed pursuant to the provisions of the statute, under which said bonds were voted, and which bridges so constructed were of great use and benefit to the said defendant and improved and benefited lands of said defendants, and rendered the same more valuable. That the said highway commissioners, intended to improve the old road so running through the said Agua Tibia ranch as a part of the main public highways to be constructed under the said bond election, and not to lay out or build a new road through the said Agua Tibia ranch, and not acquire any new right of way through said ranch of defendant." While defendant Utt was acting in his official capacity as assistant district attorney of the county, and while he was acting as counsel for and representing the interests of the county "in the matter of any change of routes of highways to be built pursuant to said bond election, and while the said defendant Lewis J. Utt, was a member of and acting as counsel and agent for the said Utt Investment Company, he, the said defendant Lewis J. Utt, prepared a contract and procured the same to be executed, to which contract the said county of San Diego and the Utt Investment Company were parties, whereby it was agreed and provided that the new public highway" should be built along the new route. The Utt Investment Company agreed to convey to the county of San Diego the necessary land for a right of way. It did so, and conveyed 13.2 acres of land, of the value of \$260 and no more. The contract further provided that the county should build a hog wire fence, two cattle passes, and one hogway for the transportation of stock on the lands of the Utt Investment Company across the highway. The county did this, at an actual cost of \$1,000, and "by reason of the change of said route the cost of the new bridges rendered necessary thereby was the sum of \$2,000 or thereabouts." That at the time of the execution of this agreement the cost and value of the improvements agreed to be erected by the county "were not known to the said county of San Diego, nor to the board

of supervisors thereof, nor to any officer or person authorized to represent the said county of San Diego other than the said defendant, said Lewis J. Utt," and the same allegation is made touching the cost of the construction of the bridges. "That the said county of San Diego, at the time of the making of said contract herebefore alleged, was induced in the making of the said contract by the fraud of the said defendant Lewis J. Utt, and that the execution of the said contract on the part of the said Utt Investment Company and the said Lewis J. Utt was a fraud on the said county of San Diego, and the said action on the part of the said Lewis J. Utt in the making and executing of the said contract was a breach of the trust relation then existing between the said Lewis J. Utt and the said county of San Diego."

The defendant Utt knew that the land which the Utt Investment Company conveyed to the county of San Diego was of no greater value than \$260, and knew that the reasonable value of the fencing constructed in pursuance of the agreement was \$1,000, and "he fraudulently, and in breach of his duty, and in violation of said trust relation to and with the said county of San Diego, caused and procured the said contract to be executed by and between the said Utt Investment Company and the said county of San Diego." The Utt Investment Company executed and delivered to the county of San Diego its deed for the lands for a highway, "and caused said easement to be recorded." "The benefits accruing to said lands belonging to said defendants were and are of the reasonable value of \$7,500, and no damage has accrued or will accrue to said lands of said defendants because of the construction of said highway." In doing these things "defendant took advantage of his official position as such assistant district attorney, and took advantage of the confidential relationship which existed between him and the said county of San Diego, and thereby did fraudulently, willfully, and deceitfully, and in violation of said confidential relationship, and of the trust so existing between said county of San Diego and himself as such assistant district attorney, cause and procure the county of San Diego to expend in the building and construction of said improvements" the sum of \$3,000. The contract with the county of San Diego "was executed without authority of law," and is "against public policy and void. The said county of San Diego has no authority, right, or power to enter into said agreement, nor to construct or build the said improvements."

For the understanding of the allegations of this complaint something first must be said of a matter treated lightly therein—the duties and powers of the highway commission and of the supervisors of the county in the matter of the construction of the main highways for which the bonds were voted and

sold. This will be found in the statutes of 1907 at page 686:

"Said highway commission shall consist of three members, who shall be, * * * especially qualified to have charge of the improvement of highways, * * * shall give a bond for the faithful performance of his duties." Section 2.

When the bonds have been sold the commission proceeds to prepare detailed specifications, plans, and profiles for the work to be done, with power to hire assistance to this end, and when this work is done they present their specifications, plans, and profiles with their recommendations to the board of supervisors, who either adopt or reject them. If the board adopts, contracts are called for after advertisement, and the board may reject any or all bids. The commission, with the consent of the supervisors, hires "all necessary engineers, inspectors, and superintendents to supervise the performance of said contract, or to have charge of the doing of said work without contract." Section 9. Whenever the highway commission shall deem it necessary, the supervisors may, on its recommendation, "cause any highway they propose to improve to be widened, straightened or altered, and for that purpose they may acquire land in the name of the county by donation or purchase, and may order the condemnation." Section 11.

[1, 2] With this statement of the law before us, we are prepared to consider the materiality and sufficiency of the averments of the complaint. Before doing so, however, it becomes necessary to remind the district attorney that the power of this court in dealing with the sufficiency of a complaint is limited to the facts pleaded in the complaint, and, however interesting or however valuable may be his statements of fact de hors the record, it can only be said concerning them that, if they were material to the charge, they should have found their place in the complaint, and if not found in the complaint they have no place in his brief. Also it may be added that if it were enough to charge fraud epithetically the complaint undoubtedly is adequate. But the test of its sufficiency rests, not upon its epithets, but upon its facts.

[3] What, then, are the facts which either distinctly appear by averment, or, being matters of law, must so far as the pleading is concerned be taken as true against the pleader. They may be summarized: The defendant Utt was assistant district attorney of the county, and was in his official capacity the legal adviser of the highway commission. This commission was composed of men especially qualified to have charge of the development of the highways. At the suggestion of the assistant district attorney they made a change in the route of one of the highways. This they had the power to do. Under the arrangement, agreement, and contract to this effect, the defendant Utt was to secure the conveyance of some 13 acres

of land as a route for the highway. This he did. The highway commissioners, subject to the approval of the supervisors, were to build a fence along the line of the highway. The value of the land conveyed was \$260, while the cost of the fence was \$1,000. Pausing here, it is to be noted that no reflection in this pleading is cast upon the highway commissioners. Yet, if there is any foundation for the charge of fraud against defendant Utt, his evil machinations could have been accomplished only because the highway commission itself deliberately joined with him in the fraud, or else because the members of the commission were utterly incompetent to fill their positions. Neither of these things is charged, nor are the members or their bondsmen made defendants, and it is a necessary inference, therefore, that these highway commissioners were both upright and competent, and, with knowledge of all these matters, agreed to the contract, and did not find in it the disparity in values here alleged, or that, if there were such a disparity in values, the public interests, for other reasons (as the delay and expense and uncertainty of condemnation), made the contract desirable. But this is not all. The highway commission, under its powers, does nothing more than report to the supervisors. They in turn, with expert advice and legal assistance, adopt or reject these plans and contracts. Since it is charged that the work under this agreement, which up to this time was purely executory, was performed, it is an unescapable conclusion that the supervisors did so approve. It is not charged that defendant Utt deceived the supervisors. It is not even charged that he advised them, and their legal adviser was the district attorney himself. Presumptively the latter advised them. We have therefore a second review of the equities of this contract and the adequacy of its consideration by a second discerning board, which body approved this contract. But the only way this is met is by an averment of ignorance upon the part of the supervisors and other county officials of a knowledge which in the performance of their duties they were bound to possess. Nor is this all. For, waiving this consideration, the supervisors, their agents, and the agents of the highway commission, could not have been ignorant of the cost of this work at the time when they were about to enter upon the actual construction of the fence. Here was ample opportunity for withdrawal and rescission; yet there is no withdrawal nor rescission and the fence is constructed.

What, then, does this complaint amount to? The defendant Utt was the legal adviser of the highway commission, composed of upright, qualified men; they agreed to a change of highway; in consideration of a fence which the county should build there should be conveyed by the land company, in which the defendant was interested, a strip of land for this highway. The contract to that ef-

fect was submitted to and approved by the commission and board of supervisors. The county, with full knowledge of the cost of the consideration which was to pay for this strip of land, paid that consideration by constructing the fence. After all this has been done the county institutes an action charging fraud because of an asserted disparity between the value of the land and the cost of the fence. In so doing it fails to implead the highway commissioners and the board of supervisors. Yet there could have been no fraud excepting through their gross ignorance or deliberate design, and the county seeks to exculpate itself upon the ground that its officers were ignorant of that which it was their legal duty to know. True it is that it is declared that the county of San Diego was induced to execute the contract by the fraud of defendant Utt, but no fact is stated showing how, in what way, he did or could have so induced the county to enter into it, or could have caused them to perform it after they had entered into it. An abuse of confidence is asserted, but it is accompanied by no single averment of fact showing how defendant Utt—merely the legal adviser of the commission—could have abused its confidence in the matter of land values and added cost of construction, knowledge of which it was their especial duty to have. *Kisling v. Shaw*, 33 Cal. 441, 91 Am. Dec. 644. Fraud is not to be inferred even when epithetically charged, and, saving for the epithets, there is nothing in this complaint that militates against the uprightness and fair dealing of the defendant Utt. The demurrer was therefore properly sustained.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

=====

WILLIAMS v. SOUTHERN PAC. CO.
(Sac. 2240.)

(Supreme Court of California. Oct. 14, 1916.)

1. MASTER AND SERVANT §137(4) — OPERATION OF TRAINS—CARE REQUIRED.

An engineer operating a train on the railroad right of way at the usual speed and with adequate working equipment need not watch for an employé conversant with the tracks and the traffic, and his duty is fulfilled if, on the discovery of the employé's presence on the tracks, he adopts reasonable precautions to avoid injuring him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 274, 277, 278; Dec. Dig. §137(4).]

2. MASTER AND SERVANT §236(15)—INJURIES TO PERSON ON TRACK — CONTRIBUTORY NEGLIGENCE.

A boy 17 years old employed as night watchman by a railroad company was struck by a train while walking with his back to the train along a track with whose use he was familiar, as to the danger of which use he had been warned, and as to which danger he knew. *Held*, that

he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 739; Dec. Dig. §236(15).]

3. MASTER AND SERVANT §13—REGULATION OF EMPLOYMENT — "MANUFACTURING, MECHANICAL, OR MERCANTILE ESTABLISHMENT, OR OTHER PLACE OF LABOR."

St. 1911, pp. 282, 910, limiting the hours of employment of minors when employed "in laboring in any manufacturing, mechanical, or mercantile establishment, or other place of labor," to nine hours a day, except when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery, forbid the employment of minors for more than nine hours a day in manufacturing, mechanical, mercantile, and other like establishments, but does not forbid the employment by a railroad company of a minor as watchman to watch a tunnel and to keep suspicious characters from loitering in or about the same.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 14; Dec. Dig. §13.]

4. MASTER AND SERVANT §13—REGULATION OF EMPLOYMENT—HOURS.

St. 1911, pp. 282, 910, providing that no minor under 18 shall be employed or permitted to work between 10 o'clock in the evening and 5 o'clock in the morning, forbids the employment of any minor under 18 in any occupation between the hours of 10 p. m. and 5 a. m.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 14; Dec. Dig. §13.]

5. MASTER AND SERVANT §13—REGULATION OF EMPLOYMENT—STATUTES—CONSTRUCTION.

A statute forbidding the employment of minors for more than a given number of hours a day or during certain named hours is enacted within the police power for the protection of minors, and the statute is violated only by the illegal time of employment, and not merely by an illegal contract of employment when under it no illegal period of employment has taken place.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 14; Dec. Dig. §13.]

6. MASTER AND SERVANT §356—REGULATION OF EMPLOYMENT — STATUTORY PROVISIONS—LIABILITY.

Under the provision of the Workmen's Compensation Act (St. 1911, p. 796), that it shall be conclusively presumed that an employé was not guilty of contributory negligence in any case where the violation by the employer of any statute enacted for the safety of employés contributed to his injury, an employer who has violated a statute enacted for the safety of his employés is deprived of the defense of contributory negligence only where the violation contributed to an injury, and where an injury to an employé results during the course of employment under a contract forbidden by law as to certain of its terms, it must appear that the doing by the employé of the act forbidden to the employer contributed in some manner to his injury, to defeat the defense of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §356.]

7. MASTER AND SERVANT §356—REGULATION OF EMPLOYMENT—VIOLATION BY EMPLOYER—LIABILITY.

A boy under 18 years was employed by a railroad company as watchman from 12 o'clock noon to 12 o'clock midnight, in violation of St. 1911, p. 282, declaring that no minor under 18 shall be employed or permitted to work between 10 o'clock p. m. and 5 o'clock a. m. The boy was struck by a train about 9:30 p. m. *Held*,

that the violation by the railroad company of the statute did not in any way contribute to the accident, and it was not deprived by Workmen's Compensation Act (St. 1911, p. 796) of the defense of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ¶356.]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkert, Judge.

Action by Theodore Williams against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

George F. Buck, of Stockton, for appellant. J. W. Hawkins and F. O. Hoover, both of Modesto, for respondent.

HENSHAW, J. This action was brought by Theodore Williams in his own behalf and that of his wife, seeking a recovery for the death of their son, charged to have been occasioned by the negligence of the defendant. The complaint alleged that Glen L. Williams, the son, was on the 8th day of October in the employ of the defendant as a watchman on its railroad right of way near the station of Tormey in Contra Costa county, Cal., and that he had been employed by the defendant for some time prior to the 8th day of October; that by the terms of his employment he was required "to work and be on duty as such watchman daily from 12 o'clock noon to and until 12 o'clock midnight," and that he was "employed by the defendant to act as such watchman and to work and to be on duty from 12 o'clock noon of each day to and until 12 o'clock midnight of each day"; that on the 8th day of October Glen Williams was 17 years, 4 months, and 20 days of age; that on the 8th day of October, "while said Glen L. Williams, was employed by said defendant as a watchman, as aforesaid, and while the said Glen L. Williams was on duty as such watchman, and while said Glen L. Williams was regularly performing his duties as such watchman, he was struck by a train operated by the defendant," and on the following day died of the injuries thus sustained. Plaintiff alleged "the fact to be that the defendant was negligent in the operation of said train which struck said Glen L. Williams in that the said defendant did not warn the said Glen L. Williams of the approach of said train, and no warning bell or whistle was sounded, and by reason of the failure of the defendant to so warn the said Glen L. Williams and to sound a whistle or to sound a bell the said Glen L. Williams was unable and did not observe the approach of said train, and was run down and struck by said train, and died as a result of the injuries received thereby." The answer admitted that Glen L. Williams was on the 8th day of October in the employ of the defendant as a watchman on the railroad right of way of defendant, and that he had been so employed for some time prior to the 8th day

of October. It also admitted that "by the terms of said employment Glen L. Williams was required by said defendant to work and be on duty as such watchman daily from 12 o'clock noon to and until 12 o'clock midnight," and that he was "employed by the defendant to act as such watchman and to work and to be on duty from 12 o'clock noon of each day to and until 12 o'clock midnight of each day." The answer admitted that Glen L. Williams was struck by a train operated by defendant, but denied that at the time he was so struck he was acting in his employment as watchman, and denied that when he was so struck he was on duty as watchman, and denied that when struck he was in any way acting in the service of or performing any service for the defendant. And in this connection the answer affirmatively alleged that at the time he was so struck and injured he had left his place of duty as such watchman, in violation of the duties of his employment, and was a mere trespasser upon the railroad track when struck by the train. The answer further denied the allegations of negligence in the operation of the train, denied all negligence, and averred that the deceased "was struck by said train by reason of his own carelessness and negligence in failing to inform himself of the approach of defendant's train in time to step from defendant's railroad track and avoid being struck." The evidence disclosed that the deceased was of the age pleaded; that, at the solicitation of his uncle, who was the station agent at Tormey, he was employed as an extra watchman at tunnel No. 1, near the station of Tormey. His duties were to watch tunnel No. 1, and to keep all suspicious characters from loitering in or about the tunnel, so that no injury might be done to it. His hours of duty were from 12 o'clock noon to 12 o'clock midnight. He had been employed and had worked for about a week. Over this division, in railroad parlance, the trains move east and west, over double through line tracks, one being the track for the east-bound traffic, the other for the west-bound traffic. The station of Tormey by the railroad men is described as west of the station of Selby, and tunnel No. 1 is still further west of Tormey station—west being toward the city of Oakland, east being toward the city of Sacramento. The deceased's uncle, who had secured his employment, testified that he sent for the boy and when he came "looked him over and considered that he was a wide-awake lad, and so reported to the agent of the railroad company, who replied that it was all right and put him to work." Instructions touching his conduct and work were given to the deceased by his uncle. The uncle emphasized his instructions to the boy to keep off the "working tracks" and not to walk on a "live track." He was further instructed that if he walked on a live track to walk "facing the traffic," thus to walk to the west upon a track carrying east-

bound traffic, and to the east upon a track carrying the west-bound traffic, so that any train would be visible because approaching him from the front. He was told of the imminent danger of walking on the live tracks because trains were liable to pass at any time, "and I told him that if he walked on a dead track he would never get hit." "If a man goes and kills himself by carelessness, that is up to him."

The deceased was killed by an east-bound express train, while walking with his back to the traffic; that is to say, while walking from the tunnel toward Selby upon the east-bound track. He was struck by a regular express train running at its schedule rate of speed and passing the place of the accident on schedule time, about 9:30 o'clock of the evening of October 8th. He was, of course, not at his post of duty—the tunnel—but had walked from the tunnel easterly past the Tormey station, and well on to the Selby station when the train struck him. He had been furnished a night lantern and instructed to get oil for his lantern from a Greek known as Nick Paul, whose home was on the line of the railroad between Tormey station and Selby and near to Selby. It is in evidence that he had stopped at Nick Paul's on his way to work to secure oil, but Paul was away, and he did not get it. It is fairly inferable from the evidence and from the condition of the oil cup of his lantern found after the injury, that his lantern had burned or was on the point of burning out, and that he had left the tunnel to go to Nick Paul's to secure more oil. In addition to the physical conditions already pointed out, it should be added that there was a bypath leading from the tunnel to Selby along the line of the railway tracks, over which one could walk with perfect security, and that the deceased's older brother had advised him to take this footpath or trail.

Touching the operation of the train, the uncontradicted testimony is that the engine was equipped with a powerful electric headlight, which was operating perfectly. Also it was equipped with an automatic bell which rang continuously. The engineer sounded his whistle after leaving the tunnel and taking the curve at Tormey. The train was moving at about 33 miles an hour. As near as the engineer could estimate, he was about 50 feet distant from the man when first he discovered him upon the track; his bell was ringing; he immediately sounded his whistle and applied the brakes, but not in time to prevent the accident. Because of the curve, the headlight did not illumine the track for any great distance ahead.

In addition to the general verdict which the jury returned in favor of the plaintiff, it was called upon to answer certain special issues submitted to it. The jury found that the deceased was struck while he was on the defendant's east-bound track, and that the defendant's engine bell was ringing as the train

approached him; also that the whistle of the engine had been sounded after leaving the tunnel. The jury declared its inability to say whether or not the deceased was "in the possession of his faculties of sight and hearing" at the time of the accident, notwithstanding the fact that there was no evidence to show that he was not, and there was evidence to show that he was a wide-awake lad. It returned the same answer, "We do not know," to interrogatories asking them to declare whether or not Glen Williams "was unable to observe the approach of the train," and whether "as a matter of fact he was unable by the use of his eyesight or sense of hearing to observe the approach of defendant's train in time to have escaped injury." The jury further found that the defendant warned Glen Williams of the approach of the train by its bell only, and to the following compound question: "If you find that the defendant did not warn Glen Williams of the approach of the train and no warning bell or whistle was sounded, was the defendant negligent in any of those respects?" answered "Yes."

So far as we have gone the case presents no exceptional features. It is the usual one of damages for the death of an employé of a railroad, predicated upon allegations of the railroad's negligent operation of its train, and met in answer by a denial of this negligence, and a charge that the accident occurred solely through the negligence of the employé. We have thus at length set forth these evidentiary matters to illustrate the importance of certain instructions which the court gave, which instructions in their legal bearing differentiate this case from similar actions for damages.

[1, 2] Thus it is clear that the evidence fails to establish the negligent operation of the train charged against defendant. The train was being operated upon the defendant's private right of way at a usual speed, at a usual time, and under adequate working equipment. Upon the engineer of such a locomotive is not imposed the duty of watching for trespassers upon this right of way. His duty is fulfilled if upon the discovery of such a trespasser, at and after the time of the discovery, he adopts reasonable precautions to avoid injuring him. It is unquestioned that in this case the discovery was made at a time and under circumstances when, using the appliances at hand, it was impossible to stop the train in time to avoid striking the young man. We have used the word "trespasser." If the deceased be not regarded as a trespasser, but as an employé, conversant as this deceased was with the tracks and their traffic, still less reason had the engineer to suppose that such an employé would be upon the track at all, or, if upon the track, would not avail himself of the means ready at hand to step to one side to a place of safety. When all these matters are considered, in connection with the unquestioned negligence

of the deceased in walking with his back to the traffic along a track with whose use he was perfectly familiar, as to the danger of which use he had been warned, and which danger he must have known, the conclusion is unescapable that he met his death solely through his own negligence, and that his uncle's language is sadly in point, "If a man goes and kills himself by carelessness, that is up to him."

Coming now to the matters which differentiate this case from the ordinary, at the time of this accident there stood upon our books two laws: First, an act regulating the employment and hours of labor of children, and prohibiting the employment of minors under certain ages. This law declared as follows:

"Section 1. No minor under the age of eighteen shall be employed in laboring in any manufacturing, mechanical, or mercantile establishment, or other place of labor, more than nine hours in one day, except when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery, or when a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week; and in no case shall the hours of labor exceed fifty-four hours in a week.

"Sec. 2. No minor under the age of eighteen years shall be employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning."

The remaining provisions of this law provided for permits, under which children of the specified ages might be exempted from the operation of the law and allowed to labor. No penalty was imposed for the violation of its terms. Stats. 1905, p. 11, as amended by Stat. 1911, p. 282. A similar enactment is found in the Statutes of 1911 at page 910. This later act contains language identical with sections 1 and 2 above quoted, and provides as a penalty for a violation of its terms a fine of not less than \$50 or more than \$200, and imprisonment for not more than 60 days, or both fine and imprisonment.

The second of these laws is an act relating to the liability of employers for injury or death sustained by their employes, section 1 of which is as follows:

"In any action to recover damages for a personal injury sustained within this state by an employe while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employe, and it shall be conclusively presumed that such employe was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employes contributed to such employe's injury." Stats. 1911, p. 796.

The court gave to the jury instructions tendered by both the defendant and the

plaintiff. Those tendered by the defendant treated of the law of negligence and of contributory negligence in unobjectionable form. They were addressed, as usual, to different phases of the evidence. They declared, for example, that:

"The jury are instructed that if they believe from the evidence that the defendant exercised ordinary and reasonable care in warning the said Glen Williams of the approach of its train, then your verdict must be for the defendant."

Again:

"All that is required of the defendant is that it produce enough evidence to offset the effect of plaintiff's evidence, and if at the end of the case the plaintiff has not shown by a preponderance of evidence that the defendant was guilty of carelessness or negligence directly causing the accident or injury complained of, or if the evidence is equally balanced, then I instruct you that your verdict in this case must be in favor of the defendant."

Upon the other hand, at the request of the plaintiff, the court gave instructions which destroyed all the force and effect of the instructions to which we have just adverted. Or, if it be said that they did not destroy all their force and effect, then they left the law of the case before the jury in hopeless contrariety and confusion.

It is of the giving of these instructions last referred to that appellant complains. Their nature will be shown by the following extracts:

"III. You are instructed that the law provides that no minor under the age of eighteen years shall be employed in laboring in any manufacturing, mechanical or mercantile establishment or other place of labor more than nine hours in one day except when it is necessary to make repairs to prevent the interruption of the ordinary running machinery, or when a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week, and in no case shall the hours of labor exceed fifty-four hours in a week. The law also provides that no minor under the age of eighteen years shall be employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning.

"The law also provides that it shall be conclusively presumed that a person so employed was not guilty of contributory negligence in any case where the violation of a statute enacted for the safety of employes contributed to such employe's injury and it shall not be a defense.

"The law makes it unlawful to employ a minor under the age of eighteen years to work between the hours of ten o'clock in the evening and five o'clock in the morning, and making it unlawful to employ minors in places and establishments above named for more than nine hours in one day as I before instructed you are statutes enacted for the safety of employes.

"IV. Under the admissions of the defendant as to the age of the deceased at the time of his employment and as to the terms of the employment as regards the hours he was to work, you are instructed that the defendant violated the terms of the statute before referred to, and you are therefore instructed that the defendant is liable in damages regardless of the imprudence or negligence of the deceased if he was killed by defendant's train while he was engaged in the line of his duties or the course of his employment by defendant as appears by admissions of the defendant."

"VII. In this state the employment of a minor under the age of eighteen years to either work between the hours of ten p. m. and five a. m.,

or to work more than nine hours in a day in a manufacturing, mechanical or mercantile establishment or other place of labor, except when it is necessary to make repairs to prevent the interrupting of the ordinary running of machinery, or when different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week or to work more than fifty-four hours in one week, is contrary to the law and unlawful and constitutes negligence per se; that is, it is negligence of itself. In case of such unlawful employment it is presumed that the employé is not guilty of contributory negligence and the employer is responsible to the father for the death of a minor child employed contrary to such law, if such minor child is injured while it is engaged in the line of its duty or the course of its employment.

"VIII. You are instructed that the defendant's allegation of contributory negligence cannot be considered by you if you find that the deceased met his death by reason of his employment by defendant in violation of the statute heretofore referred to regulating the hours during which a minor may be employed to work, and as the result of an accident which occurred while he was engaged in the line of his duty or the course of such employment."

The legal import of these instructions and the others of like character is this: That regardless of the imprudence or negligence of the deceased and of defendant's own negligence, the defendant is liable in damages under the provision of the Employers' Liability Act above quoted (Stats. 1911, p. 796), because of the admissions in the pleadings that the deceased was under 18 years of age, and by the terms of his employment was to labor more than nine hours a day, and by the terms of his employment was to labor between the hours of 10 p. m. and 5 a. m. These admissions the court by its instructions charged the jury met the conditions prescribed by the Employers' Liability Act, in that they established a violation of the statute enacted for the safety of employées, which violation "contributed to such employé's injury." Also by these instructions, as matter of law, the court told the jury that a minor employed as was this one, to watch a tunnel along a railroad right of way, came within the provisions of paragraph 1 of the act regulating the employment and hours of labor of children in this, that Glen Williams was, within the meaning of the law, "employed in laboring in a manufacturing, mechanical or mercantile establishment or other place of labor." And, finally, the court instructed the jury, as matter of law, that even though the employé's injury occurred before he had labored more than nine hours, in violation of the law, or although the employé's injury occurred earlier than 10 o'clock p. m. and not within the inhibited hours between 10 p. m. and 5 a. m., nevertheless if the contract of employment contemplated labor for more than nine hours, or during the inhibited hours, the employer was responsible because of this contract, even though in fact the injuries did not result when the employé was laboring more than the prescribed nine hours, or between the hours of 10 p. m. and 5 a. m., and without regard to the question

whether his laboring during these forbidden times contributed to his injury.

That we have in no respect misunderstood and so misstated the purport of these instructions is conclusively established by the position which respondent's attorney, who proposed them, takes in regard to them. Thus he says:

"The court would certainly not, if this case were a prosecution for the violation of the statute, allow the defendant to say: 'Yes, we employed the boy to work twelve hours and he went to work under that understanding; but we are guiltless of unlawfully employing him, because the boy was killed just before he had completed nine hours of work.' Our contention is that every minute of the time of the engagement to work by the minor would have been of the prohibited character."

And again:

"The other branch of the statute is still less open to question as to its meaning. When it says no minor shall be 'employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning' it can mean nothing other than that the minor shall not be employed to work, or permitted to work, during the prohibited hours. That statute would certainly be violated the minute the minor became employed so to work."

That we may come directly to a consideration of the legal propositions thus presented, we will pass over appellant's contention that the complaint is legally insufficient to charge upon the matters covered by the instructions, and that it rests solely in its allegation of negligence upon the operation of the train.

[3] The first proposition which invites attention is this: Was the employment of the deceased within the purview of section 1 of the act prohibiting the employment of minors? That act, it will be noted, limits the hours of employment of minors to nine hours a day only when those minors are under the age of 18 and when they are employed "in laboring in any manufacturing, mechanical or mercantile establishment or other place of labor." Clearly this minor was not laboring in any manufacturing, mechanical, or mercantile establishment. The employment of a watchman to look out for a tunnel upon a railroad track is as foreign to employment in a manufacturing, mechanical or mercantile establishment, as would be the employment of a minor to herd sheep. What then is meant by the added phrase "or other place of labor"? If, as respondent contends, this throws wide open the door and includes all employments, then the previous limiting words "manufacturing, mechanical or mercantile establishment" become useless surplusage, and the law should have read and would have read, no minor under the age of 18 shall be employed "in any place of labor" or "at any labor." Unquestionably the statute meant to forbid the employment of minors for more than nine hours a day in manufacturing, mechanical, mercantile and other like establishments. Such is not only the uniform rule of construction under all of the authorities under the application of the

familiar doctrines of *noscitur a sociis* and *eiusdem generis*, but it is borne out and made peculiarly cogent in the present statute by virtue of the language which immediately follows, by which language the law is not violated if the minor is employed for more than nine hours "when it is necessary to make repairs to prevent the interruption of the ordinary running of the machinery." So plain do we take this proposition to be, that it requires no further amplification, and it is sufficient to cite in its support *Chapman v. Piechowski*, 153 Wis. 356, 141 N. W. 259, 45 L. R. A. (N. S.) 687; *Bucher v. Commonwealth*, 108 Pa. 528; *Raeder v. Bensberg*, 6 Mo. App. 445; *United States v. 1,150½ Pounds of Celluloid*, 82 Fed. 627, 27 C. C. A. 231; *Jensen v. State*, 60 Wis. 577, 19 N. W. 374; *Whitfield v. Terrell Compress Co.*, 26 Tex. Cr. App. 285, 62 S. W. 116; *City of Lynchburg v. Norfolk & W. R. Co.*, 30 Va. 237, 56 Am. Rep. 592; *Wicker v. Comstock*, 52 Wis. 315, 9 N. W. 25. Since, then the deceased's employment did not come within the class where the hours were limited to nine hours a day, the consideration of this proposition comes to a close with the necessary declaration that the instructions to the jury so declaring were manifestly erroneous.

[4] However, it is indisputable that the law did forbid the employment of this or any minor in any occupation between the hours of 10 p. m. and 5 a. m. It is conceded that, under the terms of this minor's employment, it was contemplated that he should work during the forbidden hours between 10 p. m. and 12 midnight. And, finally, it is indisputable that he was not working during these forbidden hours when he met his death, that death by all the testimony, having occurred before 10 o'clock, and at about half past 9 o'clock. The next question presented for consideration, then, is the soundness of the court's instructions holding that by virtue of the defendant's admission that the terms of employment did include these two inhibited hours, the defendant had violated a statute designed for the protection of the employé, was therefore as matter of law conclusively guilty of negligence and was debarred from tendering in defense of this negligence any issue of the negligence of the deceased.

[5] We need not here be at great pains to discuss the question propounded by respondent and above quoted touching the meaning of the law if this action were an action to enforce a liability imposed for a violation of the statute (Stats. 1911, p. 910, *supra*), for this is not an action to enforce a penalty for a violation of the act. If it were so, the judgment could only be a judgment of fine, imprisonment, or both. Therefore we need not delay to consider whether the act is violated so far as concerns its penal provisions by a mere contract of employment, without illegal labor under that contract, or whether the forbidden labor must have been performed before liability under the contract at-

taches. Suffice it here to say that such laws are enacted in the exercise of the police power for the protection and well-being of minors, that protection and well-being taking the form of forbidding employers to use the services of such minors for more than a given number of hours or during certain named hours. And with this manifest purpose of the act in view, the uniform holding is that the law is violated by the illegal time of employment, and not merely by the illegal contract of employment when under it no illegal period of employment has taken place. Enough here to cite *In re Spencer*, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105, where the statute declared that "no minor under the age of sixteen * * * shall be employed or permitted to work in any mercantile institution, etc.," and this court declared that the language meant "that no child under sixteen years of age shall work at any gainful occupation" during the inhibited hours, and that " * * * no minor under sixteen shall work in any mercantile institution" during the inhibited hours. In addition it is sufficient to cite *State v. Deck*, 108 Mo. App. 292, 83 S. W. 314; *Fortune v. Hall*, 122 App. Div. 250, 106 N. Y. Supp. 787; *Commonwealth v. Riley*, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388; *School Dist., etc., v. Dilman*, 22 Ohio St. 194; *People v. McKinney*, 10 Mich. 54.

[6] We have said, and of course it is indisputable, that this is not an action to enforce a penalty for a violation of the statute. What in fact respondent's counsel here has sought to do, and what in the trial court he successfully did, was to invoke as applicable to the facts of his case the provision of the Workmen's Compensation Act above quoted, to the effect that:

"It shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employes contributed to such employé's injury."

The meaning of this language is perfectly plain. It is that if an employer shall have violated any statute enacted for the safety of his employes, and this violation shall have contributed to an employé's injury, the employer shall not be allowed to avail himself of the defense of contributory negligence which otherwise would have been open to him. In the case of an action to enforce a penalty for the violation of the statute, the right of action is in no wise dependent upon the circumstances of injury or noninjury to the employé. In the civil action to recover damages, not only must injury be shown, but it must further be shown that the employer's violation of a statutory duty contributed to this injury. This language is not unusual, nor is any doubt left by the adjudications as to what is meant when the law declares that the violation of a statute must contribute to an employé's injury. Endless illustrations come readily to mind.

The law requires an automatic door or gate to be placed in front of every elevator used in business establishments. An employé, engrossed in reading a bill of lading, and forgetful of the absence of the gate, walking to the elevator falls down the shaft and is injured. The violation of the statutory duty to maintain the gate has contributed to the employé's injury, and the employer is forbidden to defend upon the ground that the negligence of the employé in reading the bill of lading when he approached the elevator contributed to his injury. But, upon the other hand, the same employé under the same circumstances, while walking to the elevator, stumbles over a box and so is injured. The employer is still in the same position touching his violation of a statutory duty, but that violation in no wise contributed to the employé's injury. So far as that particular accident was concerned, notwithstanding his violation of the statutory duty, the employer was not only not guilty of any negligence per se, but he was not guilty of any negligence at all, and he would not therefore be forbidden by the law to tender the issue of contributory negligence. Such has been the holding of this court, and of every court whose decisions have come under observation. Thus in *McKune v. Santa Clara V. M. & L. Co.*, 110 Cal. 486, 42 Pac. 980:

"That the failure of any person to perform a duty imposed upon him by statute or legal authority is sufficient evidence of negligence has been repeatedly declared by this court. *Siemens v. Eisen*, 54 Cal. 418; *Driacoll v. Market Street, etc., Ry. Co.*, 97 Cal. 553 [32 Pac. 591], 33 Am. St. Rep. 203. But the principle has this very obvious limitation: The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it."

To like effect are *Manning v. App. Con. Gold Mining Co.*, 149 Cal. 45, 84 Pac. 657; *Thomas v. German General Benevolent Society*, 168 Cal. 183, 141 Pac. 1186; *Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 391; *St. L. & Iron Mt. Ry. v. McWhirter*, 229 U. S. 265, 33 Sup. Ct. 558, 57 L. Ed. 1179; 21 Am. Ency. of Law (2d Ed.) 490.

Under this plainly established rule the determinative questions calling for answer are: Did defendant violate the statute, and, if it did, did this violation contribute to the deceased's injury? For, as is said in *Inland Steel Co. v. Yedinak*, supra, a case relied on by respondent:

"Appellant's insistence that a causal connection must be shown between the negligence charged and the injury complained of is undeniably true. A violation of these penal statutes constitutes negligence per se, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought."

[7] From what has been said it clearly follows that a mere contract of employment can never be a contributing cause to an injury.

Equally plain is it that if an injury results during the course of employment under a contract which is denounced and forbidden by the law as to certain of its terms, it must be shown that the employé's doing of the act, forbidden to the employer, in some manner contributed to his injury. To illustrate: A minor is employed to labor from 8 o'clock in the evening until 12 o'clock night. On the first day of his employment he labors for the full period. In engaging and permitting this employment the employer has violated the statute. On the second evening of his employment at 9 o'clock he is injured. He was not, at the time of his injury, working during any forbidden hour. His injury in no way could have been occasioned by the fact that he was employed to work between 10 and 12 o'clock at night because he was not even working between those hours when injury resulted. There is, therefore, no possible causal connection between the injury and the withdrawal of the protection of the statute. The fact that upon the day previous he had worked during illegal hours, and that his employer had thus violated the statute, was in no sense a contributing cause to his injury upon the following day at an hour of labor which the law did not forbid. The only connection between his injury and his labor was his contract of employment, or, in other words, that he was there laboring because he was there employed to labor. But this connection is not the causal connection—the contributing cause—which the law declares. So fundamentally true is this that even in statutes like this, where the hours of labor are limited by law, it must be shown not only that the employé was laboring during the forbidden or excessive hours, but that his injuries in some proximate way resulted from this fact. Such is the decision of the Supreme Court of the United States in *St. L. & Iron Mt. Ry. v. McWhirter*, supra, where the statute prohibited a railroad from permitting an employé to remain on duty for a longer period than sixteen consecutive hours. The complaint specifically alleged that the employé was injured after he had remained on duty for more than sixteen hours. The judgment in his favor was reversed by the Supreme Court of the United States because it was not sufficiently alleged nor shown that the violation of the statute was the proximate cause of the injury, that court saying:

"We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employés to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage.

The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such a character as to justify not only the conclusion of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employé to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of."

So here we say that conceivably a case might arise where merely by virtue of the fact that the minor was laboring between the hours of 10 p. m. and 5 a. m. (the natural hours of repose for youth) he sustained injury in some manner, as from sleepiness and fatigue. But no such cause of action is attempted here either to be pleaded or proven. The conclusion may not be avoided that the court's instructions upon the matter were seriously erroneous and gravely prejudicial, for the case bears no aspects of similarity to those cases where the employment of a minor in a given character of work being absolutely prohibited, the employer is held responsible in damages when he has put the minor to work at the prohibited task and injury results. In such cases, upon very familiar principles of justice, it is held that the employer, if injury shall result, shall not be allowed to raise the defense of contributory negligence. *Lenahan v. Pittston Coal Min. Co.*, 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885; *Casperson v. Michaels*, 142 Ky. 314, 134 S. W. 200. In these and all such cases injury resulted while the minor was performing the prohibited work. Here the only limitation upon his labor fixed by law were its hours, and he was injured at an hour when it was legal for him to be at work, and for him to be at work in the kind of employment in which he was engaged.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

IN RE MUMFORD'S ESTATE. (L. A. 4605.)
(Supreme Court of California. Oct. 14, 1916.)

1. EXECUTORS AND ADMINISTRATORS §20(7)
—APPOINTMENT—CREDITORS—EVIDENCE.

In a proceeding to have letters of administration granted on the local estate of a non-resident decedent at the instance of petitioning creditors, it is only necessary to make a prima facie showing that petitioners are creditors; the question of the validity of the asserted claim being one to be determined on appropriate litigation between the creditors and the representatives of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 96; Dec. Dig. §20(7).]

2. ATTORNEY AND CLIENT §166(2)—COMPENSATION—QUANTUM MERUIT.

To support a recovery for services rendered by an attorney, upon the quantum meruit, there must be evidence showing that the services were rendered with some understanding or expectation by both parties that compensation was to be made.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 369; Dec. Dig. §166(2).]

3. EXECUTORS AND ADMINISTRATORS §20(7)
—APPOINTMENT—CREDITORS—EVIDENCE.

In a proceeding by attorneys to admit to probate the foreign will of deceased and for the granting of letters of administration with the will annexed on the ground that the attorneys were creditors, evidence held insufficient to establish prima facie any indebtedness.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 96; Dec. Dig. §20(7).]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Edgar Huldokoper Mumford, deceased. From an order, admitting to probate the foreign will of deceased and granting letters of administration with the will annexed, on petition of G. R. Jones and another, alleged creditors, the foreign executrix appeals. Order reversed.

J. W. McKinley, of Los Angeles (Walter L. Mann, of Los Angeles, of counsel), for appellant. John W. Hart and A. I. McCormick, both of Los Angeles, for respondent.

LORIGAN, J. This is an appeal from an order, admitting to probate the foreign will of the deceased and granting letters of administration with the will annexed.

There is no dispute about the facts. Abel Stearns died testate in the county of Los Angeles in 1871, leaving to his widow by his will large property, including certain real estate in Los Angeles county. The widow later married one Robert Baker who predeceased her. Mrs. Baker died in this state in Los Angeles county in 1912, leaving surviving her neither husband, ascendants, or descendants, and leaving a large estate in said county, including what is known as the "Laguna Rancho," which had been devised and bequeathed to her by her first husband, Abel Stearns. This Laguna rancho Mrs. Baker had contracted to sell in her lifetime, and in October, 1912, the Title Insurance & Trust Company of Los Angeles, as administrator of her estate and in execution of her contract conveyed the same to the purchaser, taking in part payment therefor a certain promissory note and mortgage, further herein referred to. When Abel Stearns died he left surviving him as heirs at law besides his widow certain brothers and sisters. Five of these left issue surviving at the death of Mrs. Baker, one of whom was Edgar H. Mumford, deceased herein, who became entitled to a one-fifth interest in any right that the de-

scendants of the brothers and sisters of said Abel Stearns had under the succession laws of the state of California in or to the estate of said Mrs. Baker. On November 14, 1913, these heirs of the brothers and sisters of Abel Stearns, all of whom were nonresidents of this state, transferred their interests in the estate of Mrs. Baker to certain trustees for the purposes—specified in the instrument—of taking legal proceedings to establish title to the property in the trustees by legal proceedings, to sell and dispose of it and divide the proceeds among the heirs in proportion to their interests in the estate of Mrs. Baker. Subsequently the trustees applied to the superior court in the matter of the estate of Mrs. Baker for a decree of partial distribution, claiming that as successors in interest of the brothers and sisters of said Abel Stearns they were entitled to have distributed to them all of the estate of said Mrs. Baker, on the ground that she had received it from her deceased husband, Abel Stearns, whose separate property it had been in his lifetime. The superior court sustained a demurrer to the petition for partial distribution, and entered judgment against said petitioners, who thereupon took an appeal from said judgment. Pending the appeal a compromise was effected between the heirs of the blood of Mrs. Baker, and said trustees received a promissory note for \$750,000, payable in February, 1918, secured by a mortgage on said Laguna rancho and owned by the estate of Mrs. Baker, being the note and mortgage heretofore referred to, which was by the decree of distribution distributed to said trustees. Said note was executed in Los Angeles by R. A. Rowan & Co., a California corporation, and was payable to the Title Insurance & Trust Company, also a California corporation, and administrator of the estate of Mrs. Baker, and is in the possession of said Title Insurance & Trust Company in escrow to be delivered to the trustees. Subsequent to the decree of distribution, and on April 18, 1915, Edgar H. Mumford died, a resident and citizen of the state of New Jersey, leaving a will which was duly admitted to probate in that state. Mumford was never a resident of this state.

It is the validity of the order and judgment admitting this will to probate in the superior court of Los Angeles county as a foreign will which is involved in the present appeal. The petition for the probate thereof was filed by G. R. Jones and J. S. Bennett, who alleged that they were creditors of the estate of E. H. Mumford on an account for services rendered during the lifetime of said decedent, and that he left estate in the state of California, consisting of a one-fifth interest in a promissory note secured by mortgage on the Laguna rancho heretofore mentioned. The widow of Mumford, to whom letters of administration had been issued on the probate of the will in New Jersey as

executrix thereof, objected to the admission of the will to probate here as a foreign will, denying that the petitioners were creditors of the estate or that decedent had left any property in this state. Upon a hearing upon the issues thus made the court found that G. R. Jones and J. S. Bennett were creditors of said decedent in his lifetime and are creditors of his estate; that the deceased left property in the county of Los Angeles, and made an order admitting the will to probate as a foreign will and appointing an administrator with the will annexed in accordance with the prayer of the petition. The executrix appeals from this order, and in a bill of exceptions specifies the insufficiency of the evidence to support the findings.

It is insisted by appellant that there is nothing in the evidence to warrant the finding of the court that G. R. Jones and J. G. Bennett are creditors of deceased, or that the deceased left any property in this estate.

Proceeding first to a consideration of the attack on the finding as to creditors: The parties, G. R. Jones and J. G. Bennett, found by the court to be such creditors of deceased, were attorneys practicing law in the city and county of Los Angeles at the time of the death of Mrs. Baker, and their claim is that they performed legal services for the deceased relative to the interest of said deceased in the estate of Mrs. Baker as one of the heirs at law of Abel Stearns. This claim is based entirely upon correspondence which passed between them and Mumford, disclosing what they did and the circumstances under which it was done; correspondence also between them and T. L. Frothingham, an attorney of New York representing Mumford, and two conversations between them and Frothingham in the city of Los Angeles.

As to the correspondence: This was initiated by Jones and Bennett through a letter dated October 10, 1912, addressed to Edgar H. Mumford at Elizabethport, N. J. They had no personal acquaintance with Mumford when they wrote to him. This letter opened as follows:

"We are interested in tracing the heirs of Arcadia Bandini Stearns Baker who recently died intestate in the county leaving an estate estimated to be worth four million dollars."

The letter then proceeded to inform him that under the law of this state the heirs of the brothers and sisters of Abel Stearns, the first husband of Mrs. Baker, were entitled to the portion of Mrs. Baker's estate acquired by her from him; that they were informed that the grandmother of Mumford was a sister of Abel Stearns, and that as her representative either the mother of Mumford if she was alive, or he himself if she was dead, was entitled to an interest in the estate of Mrs. Baker. It then closed:

"We shall be glad to take this matter up in detail either directly with you or through your local attorney upon authority from you, it being understood that you are to be put to no expense

and that our compensation is to depend on establishing a substantial interest in the estate for either your mother or yourself."

Mumford, on October 18, 1912, replied to this letter, stating that his mother had died in 1897, and that he was the only heir of his grandmother, the sister of Abel Stearns, mentioned in their letter to him, and closing with:

"You are the first to advise me of the situation and if I find upon investigation that you are desirable attorneys, and that attorneys are either worth while or necessary, I shall be glad to employ you as you suggest."

On October 23, 1912, Jones and Bennett wired Mumford the names of local and eastern parties as reference. The next day they received from Mumford a telegram reading:

"Message received my counsel Theodore L. Frothingham 32 Liberty street, New York, if matter urgent communicate with him forward reference."

On October 24, 1912, Jones and Bennett wrote Mumford, acknowledging receipt of the message and giving additional references, and closing as follows:

"We suggest the following as a reasonable and proper basis for our compensation, contingent upon recovery: All reasonable and proper disbursements actually paid out to be repaid to the party advancing same, and as our compensation for services fifteen per cent. of value of estate recovered in case settlement is had without contested litigation; and additional ten per cent. if there is actual contested litigation in our superior or probate courts but no appeal is taken, and a further ten per cent. if an appeal shall be taken to the Supreme Court."

On October 25th Jones and Bennett received a letter from Frothingham, stating that his client Mumford had consulted him with reference to their recent letter to him concerning the estate of Mrs. Baker, and then (quoting the pertinent part of the letter) proceeds:

"In order that I may advise Mr. Mumford in the matter, I shall be greatly obliged if you will send me a general statement regarding the situation; indicating the date of Mrs. Baker's death, the administrators, if any, that have been appointed, the bonds given by them, their counsel, the general character and amount of the estate, the proportion which would probably pass to the next of kin of Abel Stearns, the probability of controversy as to the division of the estate, and generally any information necessary to give a fairly complete outline of the situation. I note that in your letter you suggest that you would be glad to represent Mr. Mumford in this matter; and that you would be willing to undertake the matter upon a contingent basis. In case Mr. Mumford should wish to have the matter placed upon such a basis, I shall be obliged if you will let me know what your views are as to terms."

On October 25th Jones and Bennett wrote to Frothingham in reply to his letter, inclosing copies of correspondence with Mumford and explaining the situation with reference to his interest in the Baker estate, but nothing was said in this letter about terms of employment that Frothingham had asked for. However, on October 30, 1912, they wrote again to Frothingham informing him of the proceedings in the estate of Mrs. Baker

up to date, sent a copy of the will of Abel Stearns, a copy of the inventory in his estate, a copy of the petition for letters of administration in the estate of Mrs. Baker, mentioned the Laguna rancho as the principal portion of the estate of Mrs. Baker to which the heirs of Abel Stearns had a claim, and its probable value. They also sent copies of the code provisions under which in their judgment, the rights of the Stearns heirs were to be determined, with some information as to other property in the estate of Mrs. Baker to which the Stearns heirs might assert a claim. As to their views of the terms of employment they wrote:

"Our letter to Mr. Mumford, inclosed in our letter to you of the 26th inst., contains our views as to terms of employment based on a contingency agreement. We should be pleased to consider the matter of a retainer in association with you, or a contingent compensation where Mr. Mumford would pay the necessary disbursements."

On November 4, 1912, Jones and Bennett received the following telegram from Mumford:

"Have yours thirtieth to Frothingham Appreciate your sending full information may co-operate with Massachusetts heirs and may agree on joint counselor may retain separate counsel. We think your suggested terms too high but may make proposition to you do not consider yourselves retained until definite arrangements made."

While this correspondence just mentioned was going on Jones and Bennett were also corresponding with Hamilton Mayo, an attorney representing certain of the Stearns heirs residing in Massachusetts. On November 4, 1912, probably before the receipt of Mumford's dispatch just referred to of the same date, Jones and Bennett wrote Frothingham, inclosing a sketch of the Laguna rancho, showing the portion owned by Abel Stearns at his death and a copy of a letter written to Mayo explanatory of the sketch. The copy of the letter to Mayo also contained additional information with regard to the property left by Abel Stearns at his death. On November 5, 1912, Jones and Bennett telegraphed Mumford, acknowledging the receipt of his message, and stating that they had forwarded Frothingham a copy of their correspondence with Mayo, who represented the Massachusetts heirs, and said:

"If you desire to retain this firm the matter of fees can be arranged. All we desire is to be well paid for the character of professional services we render."

On the next day they wrote Mumford and said:

"In regard to terms of compensation, we think of no better arrangement than that suggested in our night letter to you and in the last paragraph of letter to Mr. Mayo, viz. that until the attitude of the blood heirs of Mrs. Baker is ascertained we arrange for the necessary disbursements and a reasonable fee contingent or otherwise as you wish, with a fixed minimum. Then if litigation becomes necessary the question of further compensation may be separately agreed upon, which can then be done with greater fairness to both attorney and client as the probability of success and the value of services will be

more apparent. We shall be pleased to receive the proposition you refer to in your night letter and to represent you either independently or in conjunction with the Massachusetts heirs. A preliminary arrangement will enable your counsel here to search for evidence in support of your claim to property, title to which was taken in the name of Arcadia B. Stearns without obligating you to pay a fee based on the costs, risks and services attendant upon protracted litigation which may or may not take place."

On December 27, 1912, Frothingham telegraphed Jones and Bennett that he was leaving for Los Angeles, and would arrive there about January 1st, and would see them shortly thereafter. This constitutes the correspondence referred to.

In conformity with his dispatch Frothingham, accompanied by a Mr. Onthank, came to Los Angeles and called on Jones and Bennett on two occasions, January 3 and 7, 1913. The conversations on these two occasions in so far as they are material here were conducted between Frothingham and Mr. Bennett. They were, to some extent, relative to the extent of the interest which the Stearns heirs might have in the estate of Mrs. Baker, but principally in regard to the employment of attorneys. Bennett testified he discussed with them a number of attorneys in Los Angeles, particularly those with whom his firm would like to be associated in representing the Stearns heirs, and expressed a desire that they would investigate both as to their firm and as to associate counsel. Frothingham thanked them for the information relative to attorneys, and stated that they (Mr. Onthank and himself) had come out as a committee representing the five trustees, to whom the Stearns heirs had transferred their interests in the Baker estate, as heretofore referred to, himself and Onthank constituting two of said trustees. Quoting a portion of the testimony of Bennett as to what occurred at the first conversation:

"Q. Was anything said in that conversation as to their expectation or determination of employing you, or whether they had determined that fact, or not? A. Yes; they said that they had not determined whom they would employ to conduct the case. Q. Is that all that you remember that was said with regard to your employment? A. No; there was some further conversation just before we left. I am trying to think just how that occurred. There was another request from Mr. Frothingham as to whether I had further information which would be valuable to them, and I told him, no, that I had stopped gathering information upon receipt of Mr. Mumford's wire that we were not to consider ourselves under retainer; that I had spent considerable time after receiving his request for information until I received that wire from Mr. Mumford, securing information. * * * Q. And did he say to you that the information that they had in the East was not sufficient to enable them to select counsel, and that they had agreed to come to Los Angeles for the purpose? A. No; I think not. We had something of a conversation about that; he reminded me that I had advised them to send some one to Los Angeles before finally determining on counsel and fees. Our whole conversation was based upon the idea that we, meaning Jones & Bennett, would not conduct the litigation alone; we desired to be associated with some one. That

question reminds me of something else that was said if I can just place it. The conversation with regard to attorneys here covered considerable time. I referred to other attorneys besides those I have mentioned. I reminded him of the detailed character of the information we had sent with regard to the estate, and Mr. Frothingham said that it had been very helpful. He also said that they had received some information from a Mr. Kemp. I asked him if he had received anything in detail, and he said no. Q. Did he say that you were one of several, but not the first, to communicate with the heirs? A. He did; and I called his attention to Mr. Mumford's letter stating that it was the first information that he had had. And he made some remark about some of the Massachusetts heirs having earlier information than Mr. Mumford's of a general character. * * * Q. Did he say that they understood that nothing that had gone before involved any obligation on their part to retain your firm, or any particular firm, or anything to that effect? A. He did not say just that, or anything to that effect. If it is modified to say that nothing that had gone before obligated them to retain our firm to carry on the litigation, I should think that that was the correct statement, though I cannot give you the exact language. * * * I assented to that as I have restated it."

This was about all of any materiality that took place at this first conversation. Frothingham and Onthank left, saying that they would be in Los Angeles for several days, making inquiry about the various attorneys who had been suggested and would call on Jones and Bennett again and advise them as to their decision in the matter. They returned on January 7th, when a second conversation was had. Frothingham then told Bennett that after a careful consideration of their obligations to the trustees and the people that they (himself and Onthank) represented, they had decided to employ Judge McKinley. He was one of the attorneys favorably discussed at the first meeting on January 3d and with whom Jones & Bennett had stated they would like to be associated. Quoting from the testimony of Mr. Bennett:

"I asked him if he would be associated with Judge McKinley, and he stated that he left that entirely to Judge McKinley's discretion. * * * They said that they had suggested that, but after consulting with Judge McKinley had decided that the better way was to leave it entirely in his hands. He said some more about appreciating what we had done, and about having told Judge McKinley in detail, and expressed the—well, I cannot recall the language. Anyway, he expressed the wish or desire that we might be associated with him; it left the impression on me that it was entirely in the hands of Judge McKinley, but he had made such representation to him that we might reasonably expect an association. * * * Q. Was anything said in either of these conversations by you with reference to your claim for services or disbursements? A. I don't recall that there was anything directly said."

In the first conversation Bennett had testified that he had told Frothingham:

"That they were under no obligations to retain us to conduct the litigation as contradistinguished from work we had already done."

Further, with reference to this last statement, we quote from Mr. Bennett's testimony:

"Q. Now in making the statement, Mr. Bennett, that they were under no obligation to retain you to conduct the litigation as contradistinguished from work that you had already done, do you mean that you said anything about contradistinguishing it from the work that you had done? A. I did not use that language at all. Q. Well, what did you say to that effect? A. That came up a number of times in the course of our conversation in regard to attorneys, and each time it was accompanied with an expression of appreciation for what we had done, on their part, and followed by a statement by me that in selecting an attorney they should have particular regard to his trial experience, and that that was the part of the case that we were looking after now. Q. And you did not specifically express any distinction between the work you had done, and the work that was to be done? A. I think that distinction was carried through nearly all of our conversation, though not expressed in the language I have used, as contradistinguished. We didn't draw the hard and fast boundary line, but that was underlying all our conversations. * * * It was left in view of both parties, as it appeared to me from the conversation, that we would be associated with Judge McKinley here. That was the last expression which Mr. Frothingham referred to and the last thing that we referred to."

On January 28, 1913, Jones & Bennett wrote Judge McKinley, detailing their connection from the beginning respecting the claims of the Stearns heirs and the information they had furnished, stating that Mr. Frothingham on returning to New York had told them that he had recommended their association with him, and asking that they be advised of their present position in the matter. To this letter Judge McKinley replied forthwith, stating that Frothingham had recommended their association if the assistance of associate counsel became necessary; but the matter, however, had been left entirely to his own discretion, and he had not yet determined to associate any one.

[1] The foregoing correspondence and conversations constituted all the evidence in the case bearing on the question whether the deceased, Mumford, in his lifetime had become indebted to Jones & Bennett for legal services performed by them in relation to his claim as one of the Stearns heirs in the Baker estate, and form the basis for the finding of the court that they were creditors of his estate. The contention of the appellant is that no such finding was warranted under the evidence. It is, of course, well settled that in a proceeding to have letters of administration granted on the estate of a decedent at the instance of petitioning creditors, it is only necessary to make a prima facie showing that such petitioners were creditors of a decedent; that on such a showing letters should be granted leaving the matter of the validity of such asserted claim to be determined under appropriate litigation between the alleged creditors and the representatives of the estate. And respondents, meeting the attack of appellant on the finding as to creditors, assert that not only was there a sufficient prima facie showing, at least, that they were creditors, which was all

they were required to make to warrant the granting of letters of administration under which their claim might be subsequently tried out, but that the evidence produced shows also a clear case where both parties anticipated compensation to be paid, but failed to agree upon the amount, terms, or conditions of payment before the services were rendered.

[2, 3] We cannot agree with counsel for respondents as to either claim. In our judgment the evidence shows that there was not only nothing approaching a prima facie showing of any indebtedness existing between deceased and respondents at the death of the former, but the evidence shows that there was no plain agreement between them that there should not be unless under their negotiations respondents should be employed as his attorneys and should establish for him a substantial interest in the estate of Mrs. Baker. This was their offer to the deceased in the very beginning of their correspondence when they were seeking employment from him upon a contingent fee depending upon their success. It is not pretended by respondents that the offer of their services as his attorneys was ever accepted by deceased, or that by any correspondence or interviews with his representative they ever became his attorneys for any purpose, or that he had violated any agreement in employing other counsel, or was at any time under any obligation to retain them. Their claim is based on no such theory. They concede that an ineffectual effort was made by them to secure their employment as attorneys for the deceased, or at least their association with other attorneys in asserting a claim for him to the estate of Baker. This, it is apparent, was the purpose sought to be accomplished, as their correspondence and negotiations with Mumford and his representative Frothingham clearly discloses. Having failed to secure this employment, their claim now is they are entitled to payment for services rendered to deceased, consisting of advice and information given to him and his attorney while such negotiations were pending; that the evidence shows sufficient facts and circumstances, notwithstanding the failure of such negotiations, to warrant the inference that there was an implied contract that respondents should be paid for such services as they rendered while such negotiations for their retention as such attorneys were going on. But we look in vain to the evidence to disclose the slightest basis for any such claim. Nowhere in the correspondence or interviews, which constitute all the evidence in the case, do we find any statement or declaration by the parties which could be construed to warrant any offer or expectation that compensation was to be paid or was to be received by respondents for any services rendered, unless they were actually retained as attorneys for deceased, and a contingent fee earned by them.

consequent on their establishing for him a substantial interest in the Baker estate.

In order to support a right for recovery for services rendered upon a quantum meruit, which is the claim of respondents here, there must be evidence tending to prove that the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made. We find nothing of that kind here, nor would we expect to do so, when there is taken into consideration the object of respondents in opening up negotiations with deceased; their declaration to him in their first letter that he was "to be put to no expense" unless as a result of their success; their subsequent efforts to arrange terms of employment as his attorneys on a contingent basis, and the apparent purpose for which the information they imparted and for which they now seek compensation was given and received. The situation as disclosed by the evidence amounts to just this: Respondents being advised from some source that the deceased, to whom they were strangers, had a possible interest in the estate of Baker, opened up a correspondence with him, avowedly with the hope of securing employment as his attorneys, informing him, as stated, that he would be put to no expense unless they secured for him a substantial interest in the estate. It is, of course, apparent that any compensation respondents were to receive for services was a matter for future arrangement, and that they would only expect remuneration if successful. Deceased, a layman, properly referred them to his attorney, Frothingham, who immediately opened up a correspondence on the subject of which they wrote. Naturally this was to be expected. It was a course invited by the opening of the correspondence by respondents. Frothingham would obviously need information which respondents were prepared to furnish, for the purpose of determining whether deceased had any interest in the estate of Baker and its probable extent, for the purpose of determining whether there was any necessity of employing attorneys in Los Angeles to represent him, as the respondents wished to be employed. Respondents well understood that the imparting of this information would be necessary for intelligent action on the part of deceased and his attorney, and that they would be expected to furnish it as they did, but it was not furnished under any idea or expectation that it was to be compensated for. It was furnished in order that the deceased might be fully appraised of his interest in the estate, its probable extent, and that the furnishing of it might operate as an inducement to the deceased to employ them as his attorneys. The whole idea of respondents, and all the advice and information given by them, was particularly for their own benefit and advantage, with a view to inducing their em-

ployment and with only this object in view in furnishing it. They furnished the information with expectation of being retained under a contingent contract, respecting which they frequently wrote, and which was to embrace the whole subject of their compensation. It was not contemplated that there should be a payment for advice given or information furnished prior to the making of the hoped-for contingent contract and the making also of such contract. According to the theory of respondents, payment for the services for which they now assert a claim accrued immediately when they rendered them, and the deceased was indebted therefor at a time while they were endeavoring to induce him to employ them as his attorneys, and were distinct from any other arrangements which might possibly have resulted from the negotiations. But certainly there is no suggestion of any intention to recede from their original declaration that deceased should "be put to no expense" to be found in the evidence; nowhere in the correspondence between respondents and deceased and his attorney is there the remotest suggestion that "there was any intention to charge, or expectation of payment for, information furnished if the negotiations looking to the employment of respondents on a contingent fee were ineffectual. It is further to be remarked that in the interviews which the respondents had later with Frothingham and Onthank, and from which they learned that their hope of employment to represent the deceased was practically gone, and the time for advancing any claim they might have had arrived, they then made no claim that they were either entitled to or should be paid for the services rendered and information furnished while negotiations for employment were pending—a circumstance which only confirms the conclusion, otherwise apparent from a consideration of the entire situation, that services rendered by respondents, advice and information, to the deceased pending their efforts to be retained as his attorneys were voluntarily given, in the hope solely of thereby inducing their employment as attorneys. We fail to find anything in the evidence which would warrant an inference that there was an implied promise on the part of deceased to pay for such services, or which would warrant an expectation on their part that he would do so, or which justified the finding of the court that respondents were creditors of the deceased in his lifetime.

Under this view it becomes unnecessary to discuss the other finding attacked, that the deceased left estate in this state subject to administration.

The order appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.

KOWALSKY v. KIMBERLIN et al.
(L. A. 3591.)

(Supreme Court of California. Oct. 14, 1916.)

1. VENDOR AND PURCHASER — 229(10)—BONA FIDE PURCHASER — NOTICE TO THIRD PERSONS—AGENTS.

One authorized to close by payment a deal for purchase of land if the vendor's record title was good is not such an agent of the purchaser that information to it of a secret trust is notice to the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 491; Dec. Dig. 229(10).]

2. VENDOR AND PURCHASER — 229(10)—BONA FIDE PURCHASER — NOTICE TO THE THIRD PERSONS—AGENTS.

One having a contract for purchase of land is not agent of one buying his interest, as regards notice a secret trust in the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 491; Dec. Dig. 229(10).]

3. VENDOR AND PURCHASER — 242 — BONA FIDE PURCHASER—NOTICE OF TRUST—BURDEN OF PROOF.

Any notice, without which Civ. Code, § 856, provides that no implied or resulting trust can prejudice the rights of a purchaser of real estate for value, being matter outside the record title, the one asserting the trust has the burden of proving the notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. 242.]

4. VENDOR AND PURCHASER — 229(1)—BONA FIDE PURCHASER—NOTICE OF TRUST.

Mere assertion by a third person to a purchaser of land that he owned an interest therein is not notice of an implied or resulting trust.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477, 493; Dec. Dig. 229(1).]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahan, Judge.

Action by Henry I. Kowalsky against O. B. Kimberlin and others. From an adverse judgment, plaintiff appeals. Affirmed.

F. E. Borton, of Bakersfield, for appellant. Lucien A. Gray, of Los Angeles, and Keyes & Martin, of Oakland, for respondents.

MELVIN, J. Appeal from a judgment in favor of defendant Barlow.

Plaintiff sued to quiet his title to a half interest in section 5, township 26 S., range 26 E., Mount Diablo base and meridian in Kern county. According to the allegations of the amended complaint this half interest was acquired in 1888, when Henry I. Kowalsky furnished one-half of the purchase price to his brother Joseph N. Kowalsky, who bought the land from the Southern Pacific Company, the grantee of the United States government. Joseph took the title in his own name, and held it until 1910, when he sold and deeded the property to respondent John W. Barlow. The contention of the plaintiff at the trial in the superior court and upon appeal was that the property was impressed with a trust in his favor, and that respondent had full

notice thereof when the legal title passed to him from Joseph N. Kowalsky. It was not denied that the legal title was and had been, for many years before the sale to Barlow, in Joseph N. Kowalsky, and that there was nothing of record to apprise intending purchasers that Henry I. Kowalsky had paid any part of the purchase price. It is not denied that Joseph represented himself to O. B. Kimberlin, who had a contract to buy the property and through whom respondent purchased, that he (Joseph) was the sole owner. It is not pretended that John W. Barlow ever had personal notice of Henry I. Kowalsky's pretense of interest until long after the deed passed and the money was paid, but appellant's theory of the case rests upon the supposed efficacy of attempted notice to persons and corporations designated by him as "agents" of the purchaser. It appears clearly from the evidence and the court found that on January 19, 1910, Joseph N. Kowalsky and O. B. Kimberlin entered into an agreement in writing, whereby the former promised to sell and the latter to buy the property here in controversy for the sum of \$5,472, of which \$547.20 was paid at the date of the execution of the contract. This agreement also provided that Kowalsky should place in escrow with the First National Bank of Berkeley a conveyance of the property to Kimberlin, or such person as he might designate, to be delivered upon the payment of the balance of the purchase price. On January 29, 1910, upon Kimberlin's request, Joseph N. Kowalsky executed and acknowledged such a conveyance, which was deposited with the Anglo-London-Paris National Bank of San Francisco, with written instructions to deliver said deed to the First National Bank of Berkeley for surrender to Kimberlin, or to such person as he should nominate, on payment of the balance of the purchase price. It was also found that:

"Said written instructions from said defendant Kowalsky directed said San Francisco bank to direct said First National Bank of Berkeley, that if said Kimberlin, or his order, should so request the said First National Bank of Berkeley, said bank should forthwith forward said deed to any bank in Los Angeles that said Kimberlin might designate, with directions that said deed, should be held by said bank at Los Angeles, Cal., to be delivered to said Kimberlin, or order, on payment of said sum of \$4,925, and further directed that if said sum of \$4,925, was not paid on or before 30 days after January 29, 1910, either at said First National Bank of Berkeley, or at said bank at Los Angeles, said deed should forthwith be returned to be held subject to the order of defendant Kowalsky."

The bank at Berkeley received the conveyance, and upon Kimberlin's written order transmitted it to the Los Angeles Abstract & Trust Company, to be delivered by that corporation to Robert Barry or his order on payment of \$10,560 by February 20, 1910. Barry was Kimberlin's agent, and by his written instructions of January 18, 1910, he au-

thorized the Los Angeles Abstract & Trust Company to deliver the conveyance to Barlow. Prior to February 12, 1910, John W. Barlow had paid all of the sum of \$10,560, to the Los Angeles corporation in full compliance with the terms of his agreement to purchase from Kimberlin. On that date Barlow's attorney and agent approved the form of the deed, and authorized the abstract company to finish the escrow when the certificate of title was deliverable according to the instructions of Barlow. Subsequently this money was duly remitted to the bank at Berkeley, and sent to the bank in San Francisco, where Joseph N. Kowalsky received the balance of the purchase price due him from Kimberlin, amounting to \$4,925. One-half of this amount he offered to his brother Henry, who declined to accept it, and it was accordingly deposited to Henry's credit. After the receipt of the conveyance by the Los Angeles corporation the document was sent to the Kern County Abstract Company, and on February 17, 1910, that corporation placed the deed of record, and issued to John W. Barlow its certificate, showing the title of all of said section 5 vested in him free from all incumbrances. On the same day, February 17, 1910, Henry I. Kowalsky wired the Los Angeles Abstract & Trust Company as follows: "San Francisco February 17—10. L. A. Abstract and Trust Company, Los Angeles. Please notify John W. Barlow that I own undivided half of section five township twenty-six south, range twenty-six east, M. D. M. and base, Kern county, California, and decline to sell same. Henry I. Kowalsky."

He also sent registered letters on the same day, directed to respondent at Los Angeles, to Kimberlin at Berkeley, and to his brother. The letter directed to respondent Barlow was never received by him, but was returned unclaimed. On receipt of the telegram a clerk of the abstract company took the matter up with the corporation's counsel, and then communicated by telephone with the Kern County Abstract Company, instructing that corporation to hold the escrow until further notice. The Kern County Abstract Company replied by letter that at the time of the receipt of the message the whole matter had been closed up several hours. On the 18th of February, 1910, the Los Angeles corporation mailed to respondent, in care of his attorney in Los Angeles, a copy of the telegram from Henry I. Kowalsky. Barlow himself was absent from the state. On the 22d of February a draft for the entire purchase price was sent to the bank in Berkeley, and on the 23d that corporation acknowledged its receipt. The court found that Barlow purchased the land in good faith, for a good and valuable consideration, innocently and without any notice in any way of the claims of the plaintiff.

Appellant complains of one of the findings, to the effect that Joseph N. Kowalsky was the owner of the property in fee simple absolute down to the time of the delivery of the

deed to Barlow. An examination of the findings reveals that the court was not declaring the fact of the grantor's complete ownership of the land, but had reference to the state of the record—a matter about which there is no dispute.

[1, 2] That Barlow was an innocent purchaser for value without notice of Henry I. Kowalsky's asserted interest was amply shown by the evidence. Plaintiff's contention was that the Los Angeles Abstract & Trust Company was Barlow's agent, and that notice to that corporation at any time before the actual transmission of the purchase money to Berkeley was sufficient to make the grantee a taker with notice of the equities. The Los Angeles corporation was not an agent clothed with full power to act for Barlow in the matter of determining whether or not H. I. Kowalsky's telegraphic assertion, entirely unsupported by the record, should be investigated before the closing of the matter of transferring the title to Barlow and transmitting the money to the record owner. Its duty was to close the deal upon evidence that the record title was subject to the deed from Joseph N. Kowalsky to John W. Barlow. It was not vested with authority nor bound by duty to investigate an assertion of ownership depending upon oral proof of a resulting trust. Indeed Kowalsky did not treat the Los Angeles corporation as an agent. He merely requested it to inform Barlow of his claim of ownership. Nor was Kimberlin an agent of Barlow. The latter was purchasing Kimberlin's interest, evidenced by his contract, but that did not make Kimberlin the agent of Barlow in any sense that would bind Barlow by notice to Kimberlin.

[3, 4] The burden of proof was upon plaintiff to show due and sufficient notice to defendant of matters outside the record title tending to establish any resulting or constructive trust in plaintiff's favor. *Wyrick v. Weck*, 68 Cal. 8, 8 Pac. 522; *Bell v. Pleasant*, 145 Cal. 410-415, 78 Pac. 957, 104 Am. St. Rep. 61. Plaintiff utterly failed to meet this burden. Section 856 of the Civil Code provides that:

"No implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value and without notice of the trust."

Appellant's telegram gave no notice of the trust. It was a mere, bald assertion that he owned an interest—a claim unsupported by the records and undefined by the claimant. To hold such notice sufficient in form to defeat the transaction between the owner of the record title and the innocent purchaser, even if the latter were chargeable with having received it before the sale was consummated, would be to permit the gravest injustice. Notice, in order that it may be effectual, should be precise and complete enough to put the defendant upon his guard. *Renton v. Monnier*, 77 Cal. 449-455, 19 Pac. 820.

We conclude, therefore, that the trial court

properly decided that Barlow was a purchaser in good faith, without notice of the trust in plaintiff's favor.

Other matters argued in the briefs do not demand discussion.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

**FIRST CHRISTIAN CHURCH OF FRESNO
v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.
(S. F. 7685.)**

(Supreme Court of California. Oct. 17, 1916.)
MASTER AND SERVANT §417(5)—INDUSTRIAL
ACCIDENT COMMISSION—REVIEW—WAIVER—
RIGHT TO MAKE.

Where applicant for compensation for personal injuries was a party to a petition for review, the Industrial Accident Commission, or members thereof, cannot waive, so far as the applicant is concerned, time for filing briefs and concede the invalidity of the award.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §417(5).]

In Bank. Application by the First Christian Church of Fresno for writ of review against the Industrial Accident Commission of the State of California, and A. J. Pillsbury and others, members, and H. Thorwaldsen, as Sheriff of the County of Fresno, and Augustus Cohnhoff, applicant for compensation. Award annulled.

Geo. F. Hatton, W. T. Plunkett, and Hartley F. Peart, all of San Francisco (Gus L. Baraty, of San Francisco, of counsel), for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. Certiorari directed to the Industrial Accident Commission of the State of California for the purpose of reviewing an award in favor of one Augustus Cohnhoff and against the petitioner to this court, First Christian Church of Fresno.

Cohnhoff had been employed by a subcontractor, the Thomas & Schneider Art Glass Company, and counsel for the church denied liability of their client for that reason. They also contended that no legal notice of the hearing before the Industrial Accident Commission had ever been served upon any accredited representative of the church until after the testimony had been taken. After the issuance of the writ, the cases of Carstens v. Pillsbury et al., 158 Pac. 218, and Sturdivant v. Pillsbury et al., 158 Pac. 222, were decided. Thereafter counsel for respondent filed a memorandum in which he recited that, as the decisions in said cases determined and ruled all questions raised in this proceeding adversely to respondent's contentions, he waived further time for filing briefs and agreed that the award made against petitioner should be annulled so far as the Industrial Accident Commission was

concerned. He properly declined to make any waiver on behalf of Augustus Cohnhoff, who was represented here by his own counsel. No brief has been filed by Cohnhoff or his counsel, probably for the reason that there is no possible way of differentiating the facts involved in this proceeding from those considered by the court in the decisions cited above. We have examined the record and fully agree with learned counsel for the Industrial Accident Commission that those decisions "determined and ruled all questions raised and involved in the instant case."

Therefore the award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

**HALF MOON BAY LAND CO. et al. v.
COWELL et al. (S. F. 7148.)**

(Supreme Court of California. Oct. 17, 1916.
Rehearing Denied Nov. 16, 1916.)

**1. WATERS AND WATER COURSES §39 —
STREAMS—RIPARIAN LANDS—SEPARATION
FROM STREAM.**

The mere fact that a riparian owner whose lands may properly be irrigated from a stream conveys a right of way to a railroad does not cut off his riparian right, where the railroad embankment is cut and the stream permitted to flow through.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 31; Dec. Dig. § 39.]

**2. WATERS AND WATER COURSES §39 —
STREAMS—RIPARIAN LANDS.**

That low-lying land slopes downward from a creek bed by reason of deposits of torrential debris by the creek does not deprive the owner thereof of his riparian rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 31; Dec. Dig. § 39.]

**3. WATERS AND WATER COURSES §138—IR-
RIGATION RIGHTS—EFFECT OF PERMISSIVE
USE.**

Permissive use of waters for irrigation by diversion to another watershed does not create a right to continue such diversion, however long continued.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.]

**4. APPEAL AND ERROR §1011(1)—SCOPE—
FINDINGS OF FACT.**

A finding of a lower court as to facts on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. § 1011(1).]

**5. WATERS AND WATER COURSES §40 —
STREAMS—RIPARIAN RIGHTS—OBJECTIONS
TO USE.**

The use by one riparian owner of the water of a stream in whole or in part cannot be interfered with by another riparian owner not using the water himself.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 32; Dec. Dig. § 40.]

6. WATERS AND WATER COURSES §49 — STREAMS — RIPARIAN RIGHTS — APPORTIONMENT — DECREE.

A decree apportioning the waters of a stream between riparian owners, declaring that each riparian owner shall be entitled to a certain share in the water if there is enough in the stream to serve all at that rate, that when there is not enough for all, each shall share in the proportion that his area of land bears to the total area that is irrigable, but that when only 23 miners' inches is flowing, they shall be respectively entitled only to the specific amount so stated, provided that either one may take a greater quantity so long as none of the other parties objects, should be modified to more clearly state the rule that each owner may use the whole or any part of the water on his land at any time when such use does not interfere with the actual use by the other owners of their due shares.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 39, 40; Dec. Dig. §49.]

7. WATERS AND WATER COURSES §49 — STREAMS — RIPARIAN RIGHTS — DETERMINATION — SCOPE OF INQUIRY.

In apportioning waters for irrigation purposes, the court may consider the length of the stream, the volume and extent of riparian ownership, the character of soil, the area to be irrigated, the practicability of irrigation, the expense thereof, and the comparative profit of the different uses.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 39, 40; Dec. Dig. §49.]

8. WATERS AND WATER COURSES §49 — RIPARIAN RIGHTS — USE OF WATER.

If a riparian owner is allotted a certain amount of water for irrigation purposes, he may nevertheless use it for any other beneficial use, and the apportionment merely furnishes a standard, but is not conclusive of the amount which may be used in any one year.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 39, 40; Dec. Dig. §49.]

9. APPEAL AND ERROR §984(2) — REVIEW — PRESUMPTIONS — FACTS SUPPORTING JUDGMENT.

Where the court found that one riparian owner used waters of a stream for watering stock and for domestic purposes, but made no allotment to him or the other owners for such purposes, and there is no evidence as to the quantity necessary for that purpose or that any is necessary in addition to the quantity allotted, it will be presumed in support of the judgment that the court considered the allowance sufficient for all purposes.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3777; Dec. Dig. §984(2).]

10. WATERS AND WATER COURSES §48 — IRRIGATION RIGHTS — LOSS BY USE.

Whether a riparian owner having the right to use waters for irrigation has actually used them or not, is immaterial; the right to such waters not being subject to acquirement by use or to loss by disuse.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 83; Dec. Dig. §48.]

11. WATERS AND WATER COURSES §49 — IRRIGATION RIGHTS.

The mere fact that if one riparian owner consented, another could construct a diversion dam and irrigate a greater acreage thereby does not warrant a finding that the greater acreage is irrigable, in the absence of a showing

that the other owner's consent could be obtained and that the cost would not render the scheme unprofitable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 39, 40; Dec. Dig. §49.]

Department 1. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Suit by the Half Moon Bay Land Company and another against S. H. Cowell and others and E. N. Torello. Judgment for plaintiffs and order denying new trial, and defendants other than Torello appeal. Modified and affirmed.

Mastick & Partridge, Peter F. Dunne, and W. I. Brobeck, all of San Francisco, for appellants. Ross & Ross, of San Mateo, and John F. Davis, H. A. Van C. Torchiana, Stratton, Kaufman & Torchiana and Bourdette & James, all of San Francisco, for respondents.

SHAW, J. The plaintiff, Half Moon Bay Land Company, the defendants Cowell et al., who are appellants, and the defendant Torello, each own separate tracts of land through which runs a stream of water known as San Vicente creek. The plaintiff Quilici is a tenant of the plaintiff land company, and some of the appellants are tenants of the Cowells and the Cowell estate, who are the owners of the tract of land referred to as owned by the appellants. The object of the action was to ascertain the amount of water of the stream that each owner was entitled to under his riparian rights and to apportion to each the proper amount for use on his riparian lands and to enjoin each of the defendants from diverting more than his reasonable share of the water. It appears that the plaintiff's parcel of land contains 108 acres, that the land of the appellants contains 195.96 acres, and that of the defendant Torello 714.22 acres. The land of the defendant Torello lies highest on the stream; next comes that of the appellants, and below that is the land of the plaintiff Half Moon Bay Land Company. A considerable portion of the land lies on steep hillsides. The court made findings that 66 acres of the plaintiff's land is suitable for profitable irrigation and is riparian to said creek; that a portion of the land of the appellants is not within the watershed contributing to said creek, and that of the land within the legal watershed of the stream only 34.25 acres was capable of profitable irrigation from the creek; and that of the land of the defendant Torello only 96 acres could be profitably and advantageously irrigated from said stream. It further found that one miners' inch of water continuous flow during the irrigation season was sufficient to irrigate 10 acres of land; that 8 miners' inches would be sufficient to irrigate the said 66 acres of the plaintiff;

that 4½ miners' inches would sufficiently irrigate the land of the appellants susceptible of irrigation from the stream; and that 10½ miners' inches would sufficiently irrigate the lands of the defendant Torello found to be susceptible of irrigation. The appellants claim a prescriptive right to a portion of the water by use upon a part of their lands situated beyond the ridge which divides the land sloping to San Vicente creek from the land sloping to an adjoining stream known as Dennison creek. The court found that this claim was without foundation, because the use of the water of San Vicente creek on said land was not adverse, but was permissive so far as plaintiff and their predecessors in interest were concerned.

Thereupon, it was adjudged that plaintiff is entitled to a continuous flow of 8 miners' inches for irrigation of its riparian land; that the appellants are entitled to a continuous flow of 4½ miners' inches of water for irrigation of their riparian land; and that Torello is entitled to a continuous flow of 10½ miners' inches of water for the irrigation of his riparian land; that if at any time there is less water flowing in the creek than the aggregate amounts allotted to the several parties then each should take less in the same proportion; that when more water is flowing than the aggregate of the amounts allotted and any additional area of land belonging to the appellants or to the defendant Torello within the watershed of the creek should prove to be capable of profitable irrigation, said appellants, or said Torello, should be allowed to use on such additional land the additional water therein in excess of the amount allotted by the judgment and in proportion to the amount of additional land so capable of profitable irrigation. It is further adjudged that the appellants have no right to divert water from said creek to non-riparian lands, and they are enjoined from so doing. It is also provided that nothing in the judgment should prevent the appellants or Torello from using more water on their riparian lands when the plaintiff or other lower proprietors do not object thereto. Other provisions were inserted which are not necessary here to mention. The defendants, other than Torello, appeal from the judgment, and from an order denying their motion for a new trial.

[1, 2] The first point urged in support of the appeal is that the court erred in determining that more than 9.61 acres of the irrigable land of the plaintiff is riparian to the creek and entitled to water therefrom as riparian land. The first reason advanced for this claim is that before this action was begun one Quilici, from whom the plaintiff derived title, had conveyed in fee to the Ocean Shore Railway Company a strip of land 60 feet in width extending through the tract and cutting off all except 9.61 acres from access to said creek. This, it is said,

cut off access to the stream from the remainder of the tract, and deprived the land so separated of riparian rights therein. The answer is that the railroad right of way does not cut off that part of the land from the stream. The creek runs under the railroad, through the strip deeded for railroad purposes, and through the part of the tract lying westerly of the railroad. This is sufficient to give all that part of the tract the character of riparian land, and entitles the owner to the use of the water from said stream thereon. It is unnecessary to determine whether or not a conveyance of land to a railroad for a right of way would cut off riparian rights from land thereby wholly severed from the stream. A further claim is made because, as appellants say, the slope of the abutting land of the plaintiff would carry water away from the stream, and that upon the principles laid down in *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158, and *Anaheim, etc., Co. v. Fuller*, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, it is not riparian, and the owner thereof is not entitled, as a riparian owner, to the use of water of the stream upon said land. The topographical character of the land involved in these two cases was so different from that of the land here involved that the decisions cannot be said to have any application. This 66 acres of the plaintiff's land lies in the flat territory bordering upon the ocean near the outlet of the creek. It can scarcely be said to have any grade or slope. The proof indicates that its general slope is toward the ocean, and from a fourth to a half of 1 per cent. from horizontal. In delta land situated at the lower end of a stream, the water in the bed of the stream is often higher than the adjacent land, and that was the situation in the case at bar. This occurs to land properly within the watershed and from natural causes. The torrential flow from the steeper grades carries the débris down to the flat land, where it is deposited, raising the bed above the level of the land adjoining. It would be an extremely unwise and unjust adherence to a supposed rule to declare that land thus made to slope away from the stream, is thereby deprived of the riparian character and rights. In *Bathgate v. Irvine* the water was taken out of the creek and carried around the nose of a ridge separating the watershed of that creek from that of another stream, and for use upon land situated in a different valley some miles away. In the *Anaheim Union Water Company Case* the water was taken from the Santa Ana river over an intervening elevation to be used upon land sloping away from the river and into another and distinct stream, the only connection between the two watersheds being that the last-mentioned stream entered the Santa Ana river a considerable distance below the land upon which the water was to be used. None of the reasons existing there

and given as the foundation of the rule exist in this case. In such a case, "When the reason of a rule ceases, so should the rule itself." Civ. Code, § 3510. The above decisions have no just analogy to the case at bar, and the rule there applied cannot be applied here.

[3, 4] The finding that the water diverted by the appellants from the stream and carried from the watershed to lands sloping toward Dennison creek was permissive is sustained by sufficient evidence. The court may reasonably have inferred from all the evidence that the discussions of the parties on this subject were nothing more than efforts to accommodate all parties concerned without controversy, rather than the assertion of a right by one party and a yielding thereto by the other. The evidence at best is conflicting on the subject, and it would serve no useful purpose to discuss it further. The finding to that effect is conclusive here. The use being permissive, no right to continue it would accrue from long continued use.

[5, 6] The appellants further claim that the apportionment of the water made by the court does not give them a reasonable share. The court did not attempt to apportion the entire quantity of water that might, at any time, be flowing in the stream. The apportionment was made of the respective shares of the parties at a time when the stream had a flow of only 23 miners' inches. The year which gave rise to this suit was the driest that had been known for many years, and the apportionment included no greater quantity than was flowing in the stream in the dry season of that year. The decree, in effect, declares that each riparian owner shall be entitled to a share of the water equal to 1 inch for each 10 acres of his riparian land capable of profitable irrigation, if there is enough in the stream to serve all at that rate, that when there is not enough for all, each shall share the water in the proportion that his area of land so irrigable bears to the total area so irrigable, but that when only 23 miners' inches is flowing they shall be respectively entitled only to the specific amounts stated; provided, that either one may take a greater quantity so long as none of the other parties objects. The mere objection by one riparian owner, in such a case, is not sufficient to deprive any other riparian owner of the use of the water of the stream. Each owner has the right to use the whole or any part of the water on his own riparian land at any time when such use does not interfere with the actual use by the other owners of their due shares. If any such owner is not using the water himself, he has no right to object to the use of it by another riparian owner on riparian land. The decree should have declared this rule more clearly. We presume that this was what was intended by the form used,

and that the parties so understood it, since the appellants do not object to its form in this particular. Nevertheless, to prevent further dispute, we think it well to modify the decree in accordance with the above views. But as no objection has been made regarding this point, the appellants will not be entitled to costs on account of the modification.

[7, 8] In apportioning the waters of a stream among the riparian owners, where there is not sufficient for the needs of all, many different facts are to be considered. In *Harris v. Harrison*, 93 Cal. 681, 29 Pac. 326, the court, in considering this question, said:

"The length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these, and many other considerations, must enter into the solution of the problem."

See, also, *Southern, etc., Co. v. Wilshire*, 144 Cal. 71, 77 Pac. 767. So far as we are aware no court has even undertaken to lay down a comprehensive rule on the subject. We are satisfied that the court may also consider the practicability of irrigation of the lands of the respective parties, the expense thereof, the comparative profit of the different uses which could be made of the water on the land, and that when the water is insufficient for all the land, or for all of the uses to which it might be applied thereon, and there is enough only for that use which is most valuable and profitable, the shares may properly be limited to and measured by the quantity sufficient for that use, and the proportions fixed accordingly. The party taking, under such a decree, could, of course, put his share so fixed to another beneficial use if he so desired. The decree here does not, and it should not, prohibit him from doing so. The apportionment made appears to have awarded to each his reasonable share of the limited quantity of water flowing in the stream during the dry season of the excessively dry year taken as the basis upon which the apportionment was made. The fact that it was made with regard to the area of land capable of profitable irrigation does not, of necessity, make the apportionment inequitable. It was a reasonable division for a year of that character. No reason appears why it should not be equally fair and reasonable to divide the water in the same proportions in other years when there is more water. As we have said, the fact that it is divided by reference to the area capable of profitable irrigation does not limit the use of any share to that purpose, but merely furnishes a standard for apportionment, and there is nothing in the evidence to prove that such apportionment would not be fair in other years for all the uses which the parties may desire to apply the water. The evidence as to the number of acres of the land of the respective parties that are sus-

ceptible of profitable irrigation is conflicting, and we find no ground upon which we could disturb the findings on that subject.

[9] The court found that the appellants have used the water in the stream for watering stock and for domestic purposes. The findings do not state the amount used or the amount necessary for these purposes. We cannot say that the quantity necessary will not be too trifling to require any allowance on account of it. Our attention has not been called to any evidence as to the quantity necessary for that purpose, or that any is necessary in addition to the quantity allotted. Therefore, in aid of the judgment, we will presume that the court below so considered the allowance sufficient to cover all purposes. Furthermore, the court made no specific allowance to the other parties for these uses. All are on the same basis regarding it. In time of scarcity all alike must make shift with the share allotted, and each must use it for such purposes as may be deemed most necessary, if he has not enough for all uses. This is clearly equitable and just. The appellants have merely mentioned the point in their briefs. They do not argue it. We, therefore, refrain from further discussion upon it.

[10] The appellants contend that it does not appear that the 96 acres of Torello, for which he was allowed water for irrigation, has ever been actually irrigated. The point is immaterial. The court found that it could be profitably irrigated from the stream. If so, Torello is entitled to use his reasonable share of the water thereon at any time he may choose to do so. He does not gain such right by use, nor does he lose it by disuse. His failure to use it in the past does not impair his right to use it in the future. So long as he makes no actual beneficial use of it, the other owners may take and use it even over his objection.

[11] It is claimed that the evidence shows that 78 acres of the Cowell land is susceptible of irrigation for which the court made no allowance. There is evidence to show that if the appellants could have obtained from Torello the right to make a diverting dam on his land above the Cowell land, and a right to maintain and use the dam and a ditch leading from it to their land, water could be carried by gravity to higher levels of the Cowell land than if it were taken out within the lines of that land, and that if this were done, about 78 acres of that land could thereby be irrigated. The claim is based upon this evidence. But this does not establish the fact that it would be possible for them to obtain such right. It may be presumed that Torello would not give the right except for a valuable consideration. Conceding, but not deciding, that a mere possible right of this character could be considered at all, it was incumbent upon the appellants to prove that it would

not cost too much to render the scheme profitable. They offered no evidence at all upon this point. The finding excluding this land from the right to the water for irrigation in times of scarcity is therefore sustained by the evidence.

The judgment is modified by adding thereto the following clause:

Providing, however, that nothing in this decree shall operate to prevent any one of the parties from taking and using the water of the stream on his own land at any time when such taking and use does not interfere with the use by any of the other owners, upon his riparian land, of his reasonable share of the water, as above limited.

As so modified, the judgment is affirmed. The order denying a new trial is also affirmed. The appellants shall not recover costs of appeal.

We concur: SLOSS, J.; LAWLOR, J.

McARTHUR et al. v. GOODWIN et al.
(L. A. 3779.)

(Supreme Court of California. Oct. 14, 1916.)

1. TAXATION \Leftrightarrow 810(3)—TAX TITLES—QUIETING TITLE.

A party, in a suit to quiet title, who relies on tax titles, and who introduces in evidence deeds from the state, but who fails to offer any deed to the state, fails to prove a chain of title depending on tax deeds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1608; Dec. Dig. \Leftrightarrow 810(3).]

2. ATTORNEY AND CLIENT \Leftrightarrow 125—PRIVILEGES AND LIABILITIES OF ATTORNEY—TRANSACTION ADVERSE TO CLIENT.

Where an attorney for an owner of land incumbered by a mortgage purchased the note and mortgage after his dismissal from the action to foreclose the mortgage and did not inform the owner of the fact, the purchase by him was void.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 250-263; Dec. Dig. \Leftrightarrow 125.]

3. QUIETING TITLE \Leftrightarrow 15—TITLE OF PLAINTIFF—DEFENSES.

A defendant, in a suit to quiet title brought by a beneficiary of a trust imposed in a deed executed by defendant to a third person as trustee for the beneficiary, may not attack a finding that the beneficiary is the owner of and entitled to the possession of the land in controversy, in the absence of anything to show his interest in the trust.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 47; Dec. Dig. \Leftrightarrow 15.]

4. DEEDS \Leftrightarrow 196(2)—BURDEN OF PROOF.

A defendant in a suit to quiet title who pleads in a cross-complaint fraud in the execution and delivery of a deed by him and under which plaintiff claims as beneficiary of a trust created by the deed has the burden of proving the fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 649; Dec. Dig. \Leftrightarrow 196(2).]

5. QUIETING TITLE \Leftrightarrow 51—TRIAL—RELIEF TO DEFENDANT.

A defendant in a suit to quiet title, who had fraudulently concealed his course in making

outlays in procuring the dismissal of a suit to foreclose a mortgage on the land in controversy and in paying amounts due because of delinquent taxes, became an involuntary trustee through his own fault, and under Civ. Code, § 2275, had none of the rights existing in favor of a trustee, and he could not complain of a judgment for plaintiff quieting title without repayment of the outlays.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 101; Dec. Dig. ¶51.]

6. MORTGAGES ¶278—ASSUMPTION OF PAYMENT—DEEDS.

A deed, which merely recites that it was made "subject to the mortgage" on the premises conveyed, does not impose any personal liability on the grantees for the payment of the mortgage debt, and such liability only arises by distinct assumption of the debt or contractual obligation to pay it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 729-736; Dec. Dig. ¶278.]

7. TRIAL ¶404(2)—FINDINGS OF FACT.

A finding, in a suit to quiet title of ownership, title, or interest, is a finding of ultimate fact and not a conclusion of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 958; Dec. Dig. ¶404(2).]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Charlotte L. McArthur and another against D. M. Goodwin and others. There was a judgment for plaintiffs, and defendant Will D. Gould appeals. Affirmed.

James H. Blanchard and Will D. Gould, both of Los Angeles, for appellant. Carter, Kirby & Henderson, of Los Angeles, for respondents.

MELVIN, J. One of the defendants, Will D. Gould, appeals from the judgment and from an order denying his motion for a new trial.

The action was one brought by Charlotte L. McArthur to quiet her title to lots 1, 7, 10, 11, and 13 of the Hillard tract in the county of Los Angeles. The original defendants were D. M. Goodwin, Will D. Gould, and certain persons sued by fictitious names. The complaint, in addition to the usual allegations in such suits, contained the averment on information and belief that the claim of defendants to an interest in the property was based upon certain tax deeds. Defendant Gould answered denying the allegations of the complaint except those which contained a statement of his adverse claim of title, and he averred that he was seised and possessed of all of the lots of land described in the complaint "as the sole owner thereof." This answer was filed January 23, 1909. Three and a half years later, on July 15, 1912, a few days before the time set for the trial, the appellant filed and served a cross-complaint and interpleader, in which he set up certain equitable matters. Charles H. McArthur answered this pleading and charged Will D. Gould with fraud in the purchase of a certain mortgage which, according

to the pleading, was bought by Gould (who is an attorney at law) for his own benefit while he was acting as counsel for Charles H. McArthur in an action to foreclose the mortgage. In his brief filed in the superior court, Mr. Gould disclaimed any intention of depending upon the efficacy of any tax deeds as vesting title in him. He admitted that he was Mr. McArthur's attorney of record at a time when he compromised certain litigation to which we shall refer more fully hereafter.

In his brief before this court, however, the appellant asserts that his case presents these questions:

"(1) Can a cestui que trust quiet title to the property against the trustor before the determination of the trust?

"(2) Can the title to property be quieted against a mortgage held by a joint owner or an attorney in the case who has purchased it to protect the title?

"(3) Can the title to property be quieted against taxes paid by a joint owner who paid them to protect the title?"

The land known as the "Hillard tract" was purchased by Charles H. McArthur and Will D. Gould from Margaret A. Hillard in 1890. It was subject to a mortgage for \$5,000, but the court found that:

"It is not true that Charles H. McArthur and Will D. Gould, or either of them, assumed or promised to pay a note and mortgage for \$5,000, or for any other sum as part consideration of the deed executed to them by Margaret A. Hillard or otherwise."

At the trial it was stipulated that Gould deeded to C. H. McArthur an undivided half of lot 7 on June 26, 1891, and that he deeded to said C. H. McArthur an undivided half of lot 10 on July 1, 1892. By an instrument dated August 2, 1897, Gould deeded an undivided one-half interest in lots 1, 11, and 13 to Mary E. Linton. It will thus be seen that he had divested himself of the record title long before this suit was instituted. It also appears that the record title is in the plaintiff Charlotte L. McArthur.

[1] At the trial appellant introduced certain tax deeds. These represented alleged tax titles bought by Gould, as he asserted, through persons representing him, to whom he advanced the money for the purchase price. However, he failed to prove a chain of title because he began with the introduction in evidence of the deeds from the state. No deeds to the state were offered. Appellant's chain of title depending on the tax deeds was therefore incomplete. County Bank of San Luis Obispo v. Jack, 148 Cal. 437-442, 83 Pac. 706, 113 Am. St. Rep. 285. Numerous other criticisms of appellant's alleged tax title are made by respondent. These are in the form of technical objections to the sufficiency of the proceedings leading up to the execution of the tax deeds, and, although they are all apparently of much force, we need not examine them in detail in view of the failure upon the appellant's

part to prove his chain of title depending upon the alleged sales of the property for delinquent taxes.

[2] But appellant bases his claim of interest in the land mainly upon payments which, as he avers, he made to protect the interests of the plaintiff and the other adversaries mentioned in his cross-complaint. In that pleading he took the position that after he and Charles H. McArthur acquired title from Mrs. Hillard they made improvements and sold certain lots; that they paid to the mortgagee, one Albertson, \$2,705 in consideration of which sums he released certain lots not here in controversy from the effect of the mortgage; that in 1894 and 1897 upon specified dates Mrs. Hillard, Charles H. McArthur, and Will D. Gould renewed and extended the note and mortgage; that Charles H. McArthur, acting for himself and the plaintiff Charlotte L. McArthur, induced Gould to convey his interest in lots 1, 11, and 13 to Mary E. Linton as trustee for the benefit of Charlotte L. and Charles H. McArthur in consideration of the promise of Charles H. McArthur for himself and in behalf of plaintiff, who is his daughter, and also in behalf of Mary E. Linton, his sister-in-law, that they and each of them would fully pay the note and mortgage then a lien upon the unsold portion of the Hillard tract, Gould and Charles H. McArthur (so runs the pleading) having promised to pay the note and mortgage as a part of the purchase price of the tract; and that the promises made by Charles H. McArthur were made fraudulently and without intention of keeping them. The pleading contains further allegations substantially setting forth the failure of the grantee of Gould and the beneficiaries of the trust to pay the note or the taxes, the sale of these five lots at public auction and the purchase of the tax titles in appellant's behalf and at his expense, the eventual transfer of said titles to him, the commencement by one Knight of an action for the foreclosure of the mortgage mentioned above, and the purchase by Gould through intermediaries of the note and mortgage. It will thus be seen that the only important matter to be determined is whether or not, under the pleadings and the evidence, Gould was entitled to a lien on the land for moneys properly expended in behalf of the trustee and the beneficiaries.

Gould was attorney for Charles H. McArthur at the time when he purchased the note and mortgage and the alleged tax titles. He did these things after the action for foreclosure had been dismissed as to him. He acted in opposition to the interests of his clients and his purchases were therefore void. An attorney at law is forbidden to purchase an interest in the thing in controversy adverse to his client. *Webster v. King*, 33 Cal. 348; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; *Cunningham v.*

Jones, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257.

The court found that Gould did not tell Charles H. McArthur of his purchases. The assignments of the mortgage by and through Gould's representatives, George Gould and James H. Blanchard, and finally to appellant himself, were not recorded at the time of the trial. The tax deeds were not recorded until a very few days before the cross-complaint was served on plaintiff. Regarding the suit to foreclose the mortgage, the court found, upon abundant evidence, that Gould, without Charles H. McArthur's knowledge, "settled, satisfied, and discharged" the said action for \$250; that he operated through others to conceal the fact of settlement from McArthur and his successors; and that this course was taken "for the fraudulent purpose of compelling said Charles H. McArthur and his successors in interest, to pay on account of said note and mortgage a much larger sum of money than said Will D. Gould had paid to satisfy and discharge the same."

[3] Appellant attacks the first finding, which is to the effect that plaintiff is the owner of and entitled to the possession of the five lots in controversy. He calls attention to the fact that the pleadings admit Mary E. Linton's trusteeship under his deed. But that admission does not help him, if his averment regarding the consideration for his deed to Linton be not true, and the court specifically found that the alleged promise to pay the note was not the consideration for the deed to Linton; that Gould did not rely upon any such promise in executing the deed; and that there was other consideration for the transfer of appellant's interest to Linton. Gould never pretended that the trust was in his favor. He pleaded that it was for the benefit of plaintiff and her father. We are not here concerned with the details of the trust imposed upon Mary E. Linton, because it does not appear that Gould was interested therein.

Appellant argues that there was no evidence of any other consideration for his deed to Mary E. Linton save the promise of payment of the note and mortgage because Mr. McArthur at the trial did not explain the consideration. The deed imported a consideration (section 1614, Civ. Code), and Mr. McArthur denied that he had promised to pay the note secured by the mortgage. Instead of questioning him about the true consideration, the appellant chose not to cross-examine Mr. McArthur.

[4] Appellant seeks to shift the burden of proof because of the partnership which he says was existing between himself and Mr. McArthur and the consequent fiduciary relation arising therefrom. There is no force in this contention. The fraud in the execution and delivery of the Linton deed was pleaded in the cross-complaint by which Charles H. McArthur was brought into the

case. The burden was upon Gould to establish this alleged fraud. The Linton deed was drawn by appellant himself. It contains no statement of any promise to be performed by the McArthurs or by Mary E. Linton, but it does contain language to the effect that it was made "subject to" the mortgage. In the foreclosure suit Gould made his affidavit disclaiming all interest in the property. In addition to all this Mr. McArthur testified that before the Linton deed was made appellant told him that the mortgage was barred, and that was the very position taken by Mr. Gould as attorney for Mr. McArthur in preparing the demurrer to the complaint in the action to foreclose the mortgage. From the foregoing it will be seen that the court was justified in finding that the respondents were not guilty of any inequitable conduct.

[5] Nor does the evidence sustain appellant's argument that the plaintiff is not entitled to have the title to these lots quieted in her favor until she at least repays him the actual outlay made by him in causing the dismissal of the foreclosure suit and paying the amounts due because of the delinquent taxes. If Mr. Gould had shown that he acted on behalf of and under the orders of his client or of the other beneficiaries, when he made the outlays for which he seeks reimbursement, there would be some strength in his position; but the court found, under competent evidence, quite the contrary. In the purchase of the tax titles he was a volunteer and one, moreover, acting secretly so far as his client was concerned. Plaintiff is under absolutely no obligation to repay these outlays. If they had been made by Gould to protect his client's interests, he naturally would have sought a settlement and would not have waited many years before seeking to establish an interest in himself as grantee under a tax deed. But he insists that the payments made by him in procuring the assignment of the mortgage to him were in protection of the rights of Mr. McArthur and those of the plaintiff and Mrs. Linton, and for such advancements he is entitled to repayment. But, as we have seen from the court's findings, he fraudulently concealed his course in this matter and became an involuntary trustee through his own fault. Therefore he has none of the rights ordinarily existing in favor of a trustee. Civ. Code, § 2275.

[6] Appellant attacks finding No. 2, which is to the effect that McArthur and Gould did not assume or promise to pay the note and mortgage as part consideration of the deed to them from Margaret A. Hillard. The language of the deed surely created no such personal obligations on their part. The mere recital in the deed that it was made "subject to the mortgage" did not impose any personal liability upon the grantees for the payment of the mortgage debt. Such

liability only arises by distinct assumption of the debt or contractual obligation to pay it. *Hibernia Savings and Loan Society v. Dickinson*, 167 Cal. 616, 140 Pac. 265; 27 Cyc. 1343. Mr. McArthur testified that they never did assume personal liability for the mortgage. In this he was contradicted by appellant. The court's finding upon this conflicting testimony must stand.

[7] The court also found that Mr. Goodwin and the others who acted for appellant in purchasing tax titles had no interest in the property. This was correct. Appellant freely admitted that they were acting for him and at the time of the trial they had divested themselves in his favor of such record title as they had possessed. This finding is not, as contended, a misplaced conclusion of law. The statement of ownership, title, or interest by the court as resting in any individual is a finding of ultimate fact and not a conclusion of law. 2 Hayne, New Trial and Appeal, p. 1339. The same may be said of the finding that Gould was not compelled to pay any money on account of taxes or the mortgage. He had been dismissed as a party to the suit to foreclose the mortgage, and there was evidence which the court accepted that he had received no instructions from his client to pay any sums whatever. Therefore he had no interest to protect.

Other specifications of alleged error are argued in the briefs, but they are without merit and are answered substantially in the foregoing discussion. We will not, therefore, review them in detail.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

GARNER et al. v. PURCELL. (L. A. 3744.)
(Supreme Court of California. Oct. 14, 1916.)

1. TRUSTS §41 — SECRET TESTAMENTARY TRUST—EVIDENCE—INTIMACY.

Mere intimacy between testatrix and a legatee which would make it easy for them to enter into a secret trust is no more significant, as an independent fact, in a suit to establish that the legacy was given on a secret trust for an illegal purpose, than in an attack on a will for undue influence, so that plaintiffs have the burden of establishing the trust by direct or circumstantial evidence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 60; Dec. Dig. §41.]

2. TRUSTS §44(1) — SECRET TESTAMENTARY TRUST—EVIDENCE.

That in a prior will testatrix attempted to give more than allowed by law to a charity is not evidence that a bequest to an individual was given on a secret trust to evade such law.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 66; Dec. Dig. §44(1).]

3. TRUSTS §44(1) — SECRET TESTAMENTARY TRUST—EVIDENCE.

Evidence in a suit to establish a secret testamentary, to evade Civ. Code, § 1313, as to amount which may be bequeathed for charity, held insufficient, being consistent with legatee's position of a legatee not bound to carry out a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. §44(1).]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Suit by James F. Garner and others against Charles A. Purcell, as trustee and individually. From an adverse judgment and order, plaintiffs appeal. Affirmed.

See, also, 167 Cal. 176, 138 Pac. 704.

Ball & Ball, Thomas Ball, and Murphey & Poplin, all of Los Angeles, and Park Henshaw, of Chico, for appellants. Valentine & Newby, of Los Angeles, for respondent.

MELVIN, J. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

This is the third time that this court has been concerned with litigation connected with the estate of Mary B. Purcell, deceased. These plaintiffs, who are heirs at law of said Mary B. Purcell, attempted to have the probate of her will revoked upon the grounds of fraud, or want of testamentary capacity of the testatrix, and of lack of due execution of the said will. Nonsuit was directed, and from the judgment entered thereon the plaintiffs unsuccessfully appealed. Estate of Purcell, 164 Cal. 300, 128 Pac. 932. Later an appeal was taken from the decree of distribution which plaintiffs had attacked upon the ground that the residuum given to Charles A. Purcell by the seventeenth paragraph of the will was bestowed in violation of section 1313 of the Civil Code, which limits the proportion of an estate which may be devised or bequeathed in trust for charitable uses. In that appeal the plaintiffs also failed. Estate of Purcell, 167 Cal. 176, 138 Pac. 704. Plaintiffs then sued in equity, praying that the court should impress a trust upon the property distributed to Charles A. Purcell. The defendant answered, and a trial was had upon the issues joined, resulting in the granting of his motion for nonsuit at the close of the testimony offered by plaintiffs.

The pleadings were simple, and the principal contention of plaintiffs was that a secret understanding existed between the testatrix and Charles A. Purcell in pursuance of which he was to distribute to charity more than one-third of the estate, which was given to him absolutely under the terms of the will, but in reality for the purpose of having him violate section 1313 of the Civil Code. It was alleged by plaintiffs and admitted by defendant that he claimed the residu-

ary portion of the estate in his own right. It was similarly alleged and admitted that for nine years prior to execution of the will, and up to the time of her death, defendant had been Mrs. Purcell's trusted adviser and financial agent. Appellants quote the seventeenth clause of the will, and insist that by the very terms of the testament it suggests a trust because it makes both a specific and a residuary bequest to Charles A. Purcell; that in the residuary clause testatrix refers to her wish to bestow some of her fortune in charity, and that she also expresses her "full confidence" in Mr. Charles A. Purcell "that he will respect and endeavor to carry out" her "wishes and desires." All of these contentions are interesting, but they were disposed of by this department in Estate of Purcell, 167 Cal. 176-178, 138 Pac. 704, 705, where we said:

"The words of the will are to be taken in their ordinary and grammatical significance, unless a clear intention to use them in another sense can be collected. Civ. Code, § 1324. From the words of the seventeenth clause there can be no doubt that the testatrix did not intend to create a trust. She inserted the most emphatic disclaimer to any such intention; and, unless we feel bound to say that she was totally disingenuous, we must give full value to her declaration that she desired to place no limitation upon Charles A. Purcell in respect to the legacy. The meaning of her words is unmistakable, and her intention not to create a trust must govern."

That decision disposes of the contention that from the will itself an inference in favor of the existence of a trust is to be drawn. See, also, *In re Sharp*, 17 Cal. App. 634, 120 Pac. 1079; *O'Donnell v. Murphy*, 17 Cal. App. 625, 120 Pac. 1076; *Estate of Marti*, 182 Cal. 666, 61 Pac. 964, 64 Pac. 1071; *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846; *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774.

[1] Nor do the admitted confidential relations between the defendant and the testatrix amount to any more than the establishment of a state of facts which would make it easy for them to enter into an understanding with reference to a secret trust. But mere intimacy as an independent fact is no more significant in a case of this sort than it is in an attack upon a will on the ground of undue influence. In other words, the burden of proof is upon the plaintiffs to establish the alleged secret trust either by direct or circumstantial evidence, and the fact of intimacy between Mrs. Purcell and this defendant is not more than a mere showing of opportunity by them to confer confidentially upon the desired disposition of her property.

[2] The plaintiffs introduced in evidence a former will, in which were bequests to them one-half as great as those made by the later will, and in which testatrix sought to dedicate the residue of her estate to an institution to be known as "Purcell Home for Aged People," and it is argued that the building

and endowment of some such institution were enjoined upon the defendant by the precatory words of the later will. But it does not by any means follow that because the testatrix once contemplated the founding of such a charity, she cherished the same purpose when the second will was executed. We must read her last will by itself, and construe it without reference to other and earlier instruments. The very fact that she caused another will to be prepared indicated that she was not satisfied with the previous will.

[3] William H. Garner, a legatee, testified regarding two conversations, in one of which defendant informed him that he would not have to pay a certain note held by the estate. Purcell told witness that:

"It was just the same with the note as with the charity money in clause seventeenth; that he knew the charities she wanted it to go to, and knew her intentions, and intended to carry them out to the letter."

Later when witness went to Charles A. Purcell to get a settlement, the latter said he could not settle, that the money was going to charities, and that he purposed to carry out the known wishes of his aunt. He promised, however, to consult with the other executors, and to see what he could do in case of a settlement. This testimony, as respondent suggests, is entirely consistent with his position as residuary legatee not bound to carry out a trust. As trustee of a fund he could hardly agree to exempt a debtor of the estate from the payment of a note. Another witness detailed a conversation in which Mr. Purcell told her that his aunt's personal effects would be sold, and the proceeds would go to charity. Other witnesses told of statements by Charles A. Purcell, to the effect that he wrote the will, and Mr. Valentine, the attorney, put it in proper form. This was all of the evidence offered, and it utterly failed either to establish a secret trust or a conspiracy by Mr. Purcell and Mr. Valentine to evade the law expressed in section 1313 of the Civil Code as alleged in one count of the complaint. No one can dispute the existence of the rule that a court of equity may impose and enforce upon a legatee a trust where he has procured the legacy to be given him upon a promise, express or implied, that he will take and hold the property for some particular use; and, where the secret trust is created for a purpose which is contrary to law, if no other disposition is made of the legacy by the will, the legatee will be declared by a court of equity the holder of the property in trust for the benefit of the heirs. But, as was said by Mr. Justice Hall, who delivered the opinion of the court in *O'Donnell v. Murphy*, supra:

"Before this may be done the evidence must establish that the legacy was given upon a promise, express or implied, that it would be taken and used for the particular trust."

There is here no such showing, and no testimony from which the existence of such secret trust might justly be inferred.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

MACHADO v. MACHADO. (Civ. 1944.)

(District Court of Appeal, First District, California. Sept. 12, 1916.)

DIVORCE \Leftrightarrow 287 — ALIMONY PENDENTE LITE — ORDER COMMANDING ISSUANCE OF EXECUTION.

Where, before issuance of mandate by the trial court to its clerk commanding him to issue writ of execution to enforce an order for payment of alimony pendente lite, the order granting alimony was reversed so that the wife was not entitled to the amounts, the order granting writ of mandate will be reversed on appeal.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 771; Dec. Dig. \Leftrightarrow 287.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit for divorce by Maria Machado against Frank R. Machado. From an order granting a writ of mandate addressed to the clerk of the court below commanding him to issue a writ of execution to enforce an order for the payment of alimony pendente lite, defendant appeals. Order reversed.

See, also, 26 Cal. App. 16, 145 Pac. 138.

A. M. Free and C. L. Witten, both of San Jose, and R. V. Burns, of Mountain View (F. H. Bloomingdale, of San Jose, of counsel), for appellant. Joseph Rafael, of San Francisco, for respondent.

PER CURIAM. Upon the petition of the plaintiff the court below granted a writ of mandate addressed to the clerk of the court, commanding him to issue a writ of execution to enforce an order for the payment of alimony pendente lite. It appears, however, that before the issuance of the writ of mandate the order granting alimony had been revoked, and that the petitioner was not entitled to the amounts for the enforcement of payment of which the execution was issued. Under these circumstances there is nothing for this court to do but to reverse the order appealed from, and that will be the judgment of the court.

MERWIN v. SHAFFNER. (Civ. 2003.)

(District Court of Appeal, Second District, California. Sept. 11, 1916. Rehearing Denied Oct. 10, 1916. Denied by Supreme Court Nov. 9, 1916.)

1. BROKERS \Leftrightarrow 54 — EMPLOYMENT TO SECURE LESSEE—RIGHT TO COMMISSION.

Where defendant agreed in writing to pay plaintiff a commission if he procured a lease of her realty upon terms specified by her, or terms acceptable to her, and he procured three persons, and produced them to her, who were ready, able,

and willing to lease the property on terms, which, by defendant's written acknowledgment, were acceptable to her, though their offer to lease specified no time for the commencement of the lease, plaintiff was entitled to his commission, the implication being that the term of the lease should commence upon its making, there being no condition specified in the offer as to any different time.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. ¶ 54.]

2. BROKERS ¶ 63(1)—RIGHT TO COMMISSION—REPUDIATION BY PRINCIPAL.

Where defendant employed plaintiff to lease her realty, agreeing to pay \$2,500 commission "along during the first year," and refused to enter into any lease at all, and repudiated her liability for commission, plaintiff, having procured prospective lessees on terms acceptable to defendant, was entitled to recover the full commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. ¶ 63(1).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. B. Merwin against Rosalia B. Shaffner. From judgment of dismissal on demurrer, plaintiff appeals. Judgment reversed.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for appellant. Denis & Loewenthal and George W. McDill, all of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover commissions alleged to have been earned by procuring a lessee for real property owned by the defendant. A general demurrer to the complaint was sustained without leave to amend. A judgment of dismissal followed, from which this appeal was taken.

In the complaint it was alleged that on or about the 22d day of January, 1913, the defendant made and delivered to the plaintiff the following instrument in writing:

"Los Angeles, Cal., Jan. 22, 1913.

"W. B. Merwin, 424 H. W. Hellman Bldg., Los Angeles, Cal.—Dear Sir: You are hereby authorized to find a lessee for my property at (611 West Sixth street), the east 40 feet of the west 85 feet of lots 1 and 2, block 102, Bellevue Terrace tract, for the term of 99 years, at the annual net rental of \$3,000.00, payable monthly in advance for the first ten years, and an annual net rental of \$4,800.00 for the remainder of the 99 years term, payable monthly. Should you secure a lessee acceptable to me on the above terms, or terms acceptable to me, I agree to pay you a commission \$2,500, payable along during the 1st year. This is exclusively good to you for 60 days from date.

"A building not to cost less than \$40,000 to \$50,000 on or before 10 years from date of lease, to be built upon the property.

"Yours respectfully, Rosalia B. Shaffner."

It was then alleged that pursuant to the authority given by this writing the plaintiff procured three individuals to make an offer to lease the property described, the offer being submitted in the following form:

"Los Angeles, Jan. 24, 1913.

"W. B. Merwin & Co., H. W. Hellman Building, Los Angeles, California.—Gentlemen: On behalf of myself, Mr. Jeff. P. Chandler and Mr. Leo S. Chandler, I hereby make you the following proposition: We will lease, for a period of ninety-nine years, the Mrs. R. B. Shaffner lot, having a frontage of forty (40) feet and a depth of one hundred twenty (120) feet on the north side of Sixth street, eighty (80) feet west of Grand avenue, in this city, at the following rentals, viz:

"At the rate of \$3,000 per year for the first year.

"At the rate of \$2,400 per year for the next five years.

"At the rate of \$3,000 per year for the next four years.

"At the rate of \$3,600 per year for the next five years.

"At the rate of \$4,200 per year for the next five years.

"At the rate of \$5,000 per year for the last twenty-nine years.

"All rentals payable monthly in advance.

"We will agree to build a building upon the property costing not less than \$40,000 within ten years, and we will pay all taxes and assessments of every kind that may be levied against or become a lien upon the property during the life of our lease.

"Yours truly,

Shirley C. Ward."

The allegation then follows that the plaintiff communicated the offer last set out to the defendant, and that the defendant thereupon made the following indorsement upon the paper containing the offer:

"Los Angeles, Calif., January 25, 1913.

"Messrs. W. B. Merwin & Co., Los Angeles, Calif.—Dear Sirs: I hereby accept the terms and conditions of the above agreement.

"Rosalia B. Shaffner."

It was then alleged that the persons mentioned in the offer, of which acceptance was made by defendant, were and continued to be ready, able, and willing to execute a lease upon the property, and that they did within 60 days from the 22d of January, 1913, communicate to defendant their readiness to execute the lease, and offered to so execute it, but that defendant refused and continues to refuse to enter into any lease with such proposed lessees, and disclaimed and repudiated any liability to plaintiff for commissions.

[1, 2] We think the demurrer to this complaint was improperly sustained. The defendant agreed in writing to pay to the plaintiff a commission if he procured a lease upon the terms specified by her or other terms acceptable to her. He did procure persons and produced them to her who were ready, able, and willing, according to the allegations of his complaint, to enter into a lease upon terms which by the written acknowledgment of the defendant were acceptable to her. Considering the allegations of the complaint, no ground appears to excuse the defendant from entering into the lease as proposed and accepted, and the plaintiff, having done all that it was conditioned he should do, appears to have fully earned the commission agreed to be paid. The fact that in the offer of

Ward and his associates to make a lease no time was specified for the commencement thereof, was not a defect fatal to the validity of the offer. There being no condition specified in the offer as to any different time for the commencement of the lease, it would be implied that the term was to commence upon the making thereof. It has often been held that where the agreement to pay commissions upon the sale or leasing of real estate is in writing, the agent, as a condition to the earning of his commissions, need only produce to his principal persons who are ready, able, and willing to contract according to the terms proposed or acceptable to such principal. In the first instrument signed by the defendant the time for the payment of the commission was stated to be "along during the first year." As it appears in the allegations of the complaint that the defendant refused to enter into any lease at all, but repudiated her liability to pay commission, the well-established rule would apply which permits the other party to the contract in such a case, after having rendered fully all of the consideration to be by him rendered, to sue to recover the amount agreed to be paid. As we view the complaint, it stated a good cause of action, and was not subject to the objection raised by the demurrer.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

PEOPLE v. CARDER. (Cr. 355.)

(District Court of Appeal, Third District; California. Sept. 8, 1916.)

CRIMINAL LAW §762(5)—INSTRUCTIONS—INVADING PROVINCE OF JURY—OPINION AS TO GUILT.

In a criminal prosecution, where the jury returned into court and its foreman informed the presiding judge that in his opinion the jury could not agree, the judge's remark that the question of fact was for the jury "though it seems very plain to me," and his question, after the jury had again returned and reported their inability to agree, as to "how many contrary ones are there?" and his further remark that there ought not to be any trouble, that in a good natured way they should work it out, in view of the jury's final verdict of conviction, were such that the jury must have concluded that he was convinced of the defendant's guilt, and that as honest men it was their duty to so find, and hence reversible error; though it was proper for the judge to admonish the jury to consult together, to listen to argument, and to endeavor earnestly to reach an agreement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1758, 1759; Dec. Dig. §762(5).]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Henry Carder was convicted of the larceny of a calf, and, from the judgment of conviction and an order denying his motion for a new trial, he appeals. Judgment and order reversed.

Charles Kasch, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of the larceny of a calf, and he appeals from the judgment and order denying his motion for a new trial.

Among the alleged errors, the most serious is involved in certain remarks to the jury made by the trial judge. It seems that after the case was submitted the jury returned into court at 3:35 p. m. on Friday, and asked to have certain evidence read to them. This was done and they again retired. A few hours later they returned to the courtroom and the foreman informed the presiding judge that in his opinion the jury could not agree. The trial judge then said:

"You must work this out, gentlemen. If there is anything I can help you in I can do it, and I will be here 10 minutes longer to help you. You oughtn't to make up your mind you are not going to agree on this kind of a case, simply calls for the sensible reasoning of men according to the evidence and talk it over together."

Furthermore, in reply to a juror's question, the court said:

"I don't want to decide any question of fact for you; *that question though it seems very plain to me.*"

A little later he used this language:

"You must try and reconcile the testimony if you can and come to a verdict, gentlemen, if you possibly can. These cases are expensive to try."

The jury returned again into court on Saturday morning at 10:35, and the transcript reveals the following:

"Clerk: Have you reached a verdict, gentlemen? A. We have not. Court: Well, what can I do for you, gentlemen? Jurymen Yates: Your honor please, there isn't a possibility, I don't think, in the minds of any of the jury, that we can agree. We have went over the evidence and every particle of that; we can agree as to what the evidence is, but we can't agree on a verdict. The Court: You can't agree, you think? Jurymen: No, sir; done everything that we could to reach a verdict since you left here last night. The Court: *How many contrary ones are there?* Jurymen: Two. Court: Well, I tell you, gentlemen, you can work just as good on this, a jury can on holidays, Sundays, and any other time, and the law is all right in that respect, and the court can take the verdict at any time, too, on Sunday as well as Saturday afternoon. Now, if there is any question of law that you need that you are in doubt about, why I will give it to you. Questions of fact you must decide. *There oughtn't to be any trouble. It's a case you ought to decide, ought to agree upon, and don't make up your minds that you can't agree, don't get contrary, but just in a good humor, good natured way work it out.* Jurymen Cleland: Your honor, we worked all night in there and we have talked all night. I think we have got it down to where they say we have made up our minds and no use to argue. Court: Well, of course, men go into the jury room. They think their minds are made up, and some little question comes up, they come to the conclusion then they ought to change it. If they keep working on the theory they are not going to change their minds, it is made up, of course they will not, but that's not the way for a jury to do, want to work at

it with the possibility always in view that I may be wrong about this and I'll change if I am. * * * You think there is no question of fact the court can help you on by having it read? A. I don't think so. Court: Well, go back and go to work, gentlemen. The court will be here any time when you agree."

The jury returned later to have some of the testimony read. They retired again for deliberation, and finally brought in a verdict of guilty.

We think it quite apparent that from the statements of the learned trial judge the jury must have concluded that he was convinced of the defendant's guilt and that as honest men it was their duty to so find. A portion of the remarks we have quoted was quite appropriate and calls for no criticism, but the statements we have italicized constitute, in our opinion, an infringement of the special prerogative of the jury. It was proper for the presiding judge to admonish the jury of their duty to consult together, to listen to argument, and to endeavor earnestly to reach an agreement, and, although of somewhat questionable propriety to remind the jury of the expense of a new trial, such remark could not justly be held sufficient ground for reversal, nor perhaps even for criticism; but to characterize the two dissentient jurors as "contrary" and to declare that there should be no trouble about agreeing upon a case like this, and that it simply called for the sensible reasoning of men according to the evidence, transcends the proper limits of judicial discretion and authority. The "contrary" jurors were undoubtedly for acquittal. It is not likely that if the other ten had been opposed to conviction they would so readily have yielded to the persuasive suggestions of the trial court. Of course, these two jurors had the same legal and moral right to their opinion of the guilt of the defendant as had the other ten, and their attitude should not have been ascribed to obstinacy. That under our system, in the determination of the guilt or innocence of a defendant, the jury must be left free from coercion or influence of the trial judge, will not be gainsaid. This right and privilege accorded by the Constitution to one charged with crime is manifestly fundamental and vital. If serious infractions of it are to be tolerated, then trial by jury becomes a delusive formality.

The case here is controlled by the principle of the decision in *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852, and *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703. In the former, the trial judge said to the jury:

"In view of the testimony in this case the court is utterly at a loss to know why twelve honest men cannot agree."

And in the latter, the objectionable remark was:

"Now, gentlemen, I think I have read to you about all the instructions you desire upon these points, and I suggest to you that there is no rea-

son why twelve honest, intelligent, reasonable men should not reach a conclusion in this case, and I am surprised that you have not done so already."

The case at bar, for the same reason, is equally subject to animadversion, and the only reasonable conclusion, as we conceive it, is that the jury were prejudicially influenced against the defendant. It may be said as to this that the principle is thoroughly considered and the cases reviewed by Mr. Justice Kerrigan in the *Conboy* decision, *supra*, and therefore we need pursue the subject no further.

The other questions discussed will probably not arise again, and we forego specific consideration thereof; but, for the reason stated, we think the defendant did not have a fair trial, and the judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

EATON et al. v. SOUTHERN PAC. CO. (Civ. 1995.)

(District Court of Appeal, Second District, California. Sept. 12, 1916. Rehearing Denied by Supreme Court Nov. 9, 1916.)

1. COSTS \Leftrightarrow 254(5)—COSTS ON APPEAL—EXPENSE OF TRANSCRIPT OF TESTIMONY—STATUTE.

Under Code Civ. Proc. § 1027, providing for the recovery as costs of the amounts actually paid out by a party in connection with his appeal, where plaintiff obtained the reporter's transcript of the testimony solely to assist her counsel in preparing amendments to a bill of exceptions proposed by defendant on its motion for new trial in the superior court, the amount paid for the transcript was purely an expense in the conduct of the case in the superior court, and was not a part of the preparation of the record for appeal, so that the item could not be allowed as costs on appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 974; Dec. Dig. \Leftrightarrow 254(5).]

2. COSTS \Leftrightarrow 70—RIGHT TO—TIME OF ACCRUAL.

The general rule is that the right to costs accrues when the judgment is rendered, though the judgment has not become final, or entry thereof has been stayed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 290-296; Dec. Dig. \Leftrightarrow 70.]

3. APPEAL AND ERROR \Leftrightarrow 834 — FORCE AND EFFECT OF JUDGMENT.

A judgment on appeal, like a judgment of a trial court, has the force and effect of a judgment from the time of its entry, though rehearing may be ordered, suspending operation of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3213; Dec. Dig. \Leftrightarrow 834.]

4. COSTS \Leftrightarrow 258—COSTS ON APPEAL—STATUTE.

Respondent, upon affirmance, was entitled to have only the costs on appeal to which she was entitled by law at the time of the rendition of the judgment in her favor, and not those to which she was entitled when remittitur was sent down to the superior court, despite Code Civ. Proc. § 1034, providing that whenever costs are awarded to a party by an appellate court, the time within which he may file in the superior court a memorandum of such costs is lim-

ited to begin after filing of the remittitur, and cannot recover costs of printing brief on petition for rehearing.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 978-982; Dec. Dig. § 258.]

Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by Jennie Eaton and J. O. Eaton, her husband, against the Southern Pacific Company. There was judgment for plaintiffs, which was affirmed (22 Cal. App. 461, 134 Pac. 801), and from an order denying its motion to strike out respondent's memorandum of costs, defendant appeals. Order taxing costs and allowing items complained of reversed, with direction that the superior court enter an order disallowing the items.

H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellant. Richards & Carrier and John J. Squier, all of Santa Barbara (John William Heaney, of San Francisco, of counsel), for respondents.

CONREY, P. J. Upon a former appeal by the defendant in this case the judgment was affirmed (22 Cal. App. 461, 134 Pac. 801). The judgment on appeal was rendered July 7, 1913; became final August 6, 1913; an application for a rehearing in the Supreme Court was denied within 30 days thereafter; a remittitur from this court went down to the superior court on September 8, 1913. Thereafter respondent filed her memorandum of costs, and appellant applied to the superior court for an order to strike out the memorandum of costs on the ground that the same had been illegally filed, and also demanded that certain items in the cost bill be stricken out upon the ground that they are not legally allowable as costs of the appeal. The items in dispute are: (1) \$104 paid for a reporter's transcript of the testimony taken at the trial and which respondent claims as an expense "for transcript of testimony used by plaintiffs in preparing record on appeal and amendments to defendant's bill of exceptions used upon appeal." (2) \$10.80 claimed by respondent as cost of printing answer to defendant's petition for a rehearing in the Supreme Court. This appeal is by the defendant from an order denying said motion.

[1] By an amendment to section 1027 of the Code of Civil Procedure relating to costs on appeal, which amendment became effective on the 10th day of August, 1913, it is provided as a part of that section that:

"The party entitled to costs, or to whom costs are awarded, may recover the amounts actually paid out by him in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs: Provided, however, that no amount shall be allowed as

costs of printing briefs in excess of fifty dollars to any one party."

The record on this appeal shows that the reporter's transcript was obtained by respondent solely for the purpose of assisting her counsel in the preparation of amendments to a bill of exceptions proposed by the defendant on its motion for a new trial in the superior court. The expense thus incurred was purely an expense in the conduct of the case in the superior court, and was not a part of the preparation of the record for the appeal. Therefore the item in question cannot be allowed even if, as contended by respondent, her right to costs is governed by the amendment of section 1027. *Bank of Woodland v. Hlatt*, 59 Cal. 580.

[2-4] With respect to the other item, it is necessary to determine whether respondent's right to costs on appeal accrued prior to August 10, 1913, or subsequent thereto. The general rule is that the right to costs accrues at the time when the judgment is rendered, notwithstanding that the judgment has not become final or that entry thereof has been stayed. Code Civ. Proc. § 1033. Respondent claims, however, that her right to costs on appeal did not accrue until the remittitur was sent down to the superior court. This contention is based upon section 1034, Code of Civil Procedure, from which it appears that whenever costs are awarded to a party by an appellate court the time within which he may file in the superior court a memorandum of those costs is limited to begin after the filing of the remittitur. It seems to us, however, that since the right of the prevailing party to recover any costs on appeal is obtained by virtue of the judgment as rendered, this necessarily includes the assumption that he is to have those costs and only those costs to which he is entitled by law at the time of the rendition of such judgment. A judgment on appeal, like a judgment of a trial court, has the force and effect of a judgment from the time of its entry. The fact that within a limited time thereafter a rehearing may be ordered, while it may suspend the operation of the judgment, does not in the meantime deprive the judgment of its inherent attributes as an act of the court, any more than one could say that a judgment of the superior court is no judgment until it has become final. It follows that in the present case respondent is not entitled to recover the cost of printing her brief in answer to the petition for a rehearing in the Supreme Court.

The order taxing costs and allowing the items above mentioned is reversed, and it is directed that the superior court enter an order disallowing the said items.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. WINNER. (Cr. 491.)

(District Court of Appeal, Second District, California. Sept. 7, 1916.)

1. CRIMINAL LAW §918(1)—TIME FOR JUDGMENT—RIGHT OF DEFENDANT TO NEW TRIAL—STATUTE.

Under Pen. Code, § 1202, providing that, unless judgment be rendered or pronounced within the time fixed by or to which it is continued under section 1191, defendant shall be entitled to new trial, where judgment was not pronounced within the time limited, defendant became entitled to new trial if he desired it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2187-2189, 2141, 2142, 2145; Dec. Dig. §918(1).]

2. CRIMINAL LAW §913(1)—APPEAL—HARMLESS ERROR—DELAY IN PRONOUNCING JUDGMENT—STATUTES.

Where judgment was not pronounced upon a defendant convicted of crime within the time limited by Pen. Code, § 1191, defendant was entitled to new trial, under section 1202, providing that, unless judgment be rendered, or pronounced within the time fixed by or to which it is continued under section 1191, defendant shall be entitled to new trial, though defendant's counsel, in open court, consented to postponement of time for sentence; the sections having been enacted as a matter of public policy to insure a swifter infliction of the penalty which the law requires to be imposed upon those convicted of crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2187-2189, 2141, 2142, 2145; Dec. Dig. §913(1).]

Appeal from Superior Court, Kern County; Howard A. Pears, Judge.

Phillip Winner was convicted of grand larceny, and from the judgment and an order denying his motion for new trial, he appeals. Reversed, with direction to grant defendant's motion for new trial.

Wesley P. Grijalva, of Bakersfield, Henry R. Holsinger, and A. B. Campbell, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Upon an information filed by the district attorney of Kern county the defendant was, on March 16, 1916, convicted of the crime of grand larceny. On March 20th he presented to the court a motion for a new trial, the hearing of which was by the court continued to March 27th, at which time the court, as shown by the minutes thereof, made an entry as follows:

"By consent of counsel for respective parties in open court, it is by the court ordered that said motion for a new trial be and the same is hereby submitted upon briefs, to be presented within five, five, and two days."

On April 4th, more than 15 days after defendant's conviction, the court made an order denying his motion for a new trial. Thereupon defendant, within due time, made a motion for a new trial upon the ground that more than 15 days had elapsed since the date of the conviction of defendant, and upon the same ground objected to the court pronouncing judgment upon defendant, which

motion the court likewise denied. The ruling constitutes error.

Section 1191, Penal Code, provides that:

Upon a defendant being convicted "the court must appoint a time for pronouncing judgment, which must not be less than two, nor more than five days after the verdict or plea of guilty: Provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment: And provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this Code; provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional."

And section 1202 of the Penal Code provides that:

Unless judgment be "rendered or pronounced within the time so fixed or to which it is continued under the provisions of section eleven hundred and ninety-one of this Code, then the defendant shall be entitled to a new trial."

[1] As said by the court in *People v. Polich*, 25 Cal. App. 464, 143 Pac. 1066, quoting from *Rankin v. Superior Court*, 157 Cal. 189, 106 Pac. 718:

"If the judgment was not pronounced within the time limited, a new trial was made imperative if the defendant so desired; he became 'entitled' to it. * * * If the court should refuse a new trial and render judgment against the defendant after the authorized time has passed, its action would be erroneous, and the judgment would be reversed on appeal if an appeal should be taken."

To the same effect is *People v. Okomoto*, 26 Cal. App. 568, 147 Pac. 598, where it was held that the defendant was entitled to a new trial, but lost his right thereto by reason of not asking for it in the trial court.

[2] Conceding the error, the Attorney General in support of the court's action insists that it was cured by the fact, as shown that counsel for defendant in open court consented to the postponement of the time for sentence. In support of this contention a number of cases arising under section 1382, Penal Code, providing for the dismissal of prosecutions in cases therein specified, are cited. In our opinion, such cases are not in point and throw no light upon the interpretation to be given sections 1191 and 1202, which should be construed in accordance with the plain import of the language used. Thus construed, as held in *People v. Polich* and *People v. Okomoto*, supra, the delay beyond the time specified for pronouncing judgment renders it imperative that defendant have a new trial if he asks for it. Prior to the enactment the courts with consent of parties or otherwise, not infrequently indulged in prolonged delays before pronouncing sentence upon those convicted of crime. Such practice was recognized by the Legislature as an evil, to cure which sections 1191 and 1202 were adopted, not as a benefit conferred upon defendant which he might waive, but as a matter of public policy intended to insure

a swifter infliction of the penalty which the law requires to be imposed upon those convicted of crime. To uphold the contention of respondent and recognize the consent of the parties as justifying an indefinite postponement of the time for pronouncing judgment beyond that specified for, so doing would not subserve, but, on the contrary, nullify, the plain purpose and intent of the Legislature in adopting the provision.

The judgment and order are reversed, and, for the reasons stated, the court directed to make an order granting defendant's motion for a new trial.

We concur: CONREY, P. J.; JAMES, J.

BLANCHARD v. KEPPEL, Ex Officio Secretary. (Civ. 2023.)

(District Court of Appeal, Second District, California. Sept. 5, 1916.)

SCHOOLS AND SCHOOL DISTRICTS §130—PRELIMINARY ELEMENTARY SCHOOL CERTIFICATE—FEE—"TEACHER'S CERTIFICATE"—STATUTES.

A preliminary elementary school certificate authorizing the holder to do practice and cadet teaching without salary in any of the elementary schools of a county, as described and referred to in Pol. Code, § 1775, subd. 1(c), and section 1771, subd. 3(c), is a "teacher's certificate" within section 1565, requiring that, except for a temporary certificate, every applicant for a teacher's certificate or its renewal, upon presenting application, shall pay to the county superintendent a fee of \$2; the Code nowhere using the term "temporary certificate" as applied to any form of certificate issued by a county board of education.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 285, 286; Dec. Dig. §130.

For other definitions, see Words and Phrases, Teacher's Certificate.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Petition for mandamus by Alfred Blanchard against Mark Keppel, Ex Officio Secretary, etc. From a judgment for petitioner, defendant appeals. Judgment reversed.

A. J. Hill, of Los Angeles, and Hugh Gordon, Deputy County Counsel, for appellant. John W. Luter, of Los Angeles, for respondent.

CONREY, P. J. This is a proceeding in mandamus wherein the defendant has appealed from the judgment. By the terms of the judgment the defendant, as superintendent of schools of the county of Los Angeles and ex officio secretary of the county board of education, is required to approve and present to the county board of education the application of the petitioner (together with the recommendation of the president of the State Normal School at Los Angeles) for the issuance to the petitioner of a preliminary elementary school certificate authorizing him to

do practice and cadet teaching, without salary, in any of the elementary schools of Los Angeles county, without the payment of a fee of \$2 demanded by appellant. The superior court held that a preliminary elementary school certificate as described and referred to in the Political Code in section 1775 (subdivision "c" of subdivision 1) and in section 1771 (subdivision "c" of subdivision 3) is not a teacher's certificate within the meaning of section 1565 of that Code.

The fee of \$2 demanded by appellant from respondent as an applicant for a preliminary school certificate is required by section 1565 to be paid by every applicant for a teacher's certificate, "except for a temporary certificate." Section 1543 provides for the issuance of "temporary certificates" good for not exceeding six months and which are issued upon certain credentials shown, by the superintendent of schools of the county. Various other forms of certificate mentioned in section 1771 and in other sections of the Political Code are issued by the county board of education. In the list of these last-mentioned certificates we find no reference to a "temporary certificate," but it does include "preliminary elementary certificates" which shall not be valid for a longer period than two years. It does not appear that the Code anywhere uses the term "temporary certificate" as applied to any form of certificate issued by a county board of education.

We shall not follow respondent's counsel in his argument based upon alleged unreasonableness of the \$2 fee. The language of the Code being in this instance clear and unmistakable, we cannot indulge in a discussion about what the Legislature ought to have intended to do.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. GOODRUM. (Cr. 350.)

(District Court of Appeal, Third District, California. Sept. 14, 1916. On Petition for Rehearing, Oct. 14, 1916. Rehearing Denied by Supreme Court Nov. 9, 1916.)

1. CRIMINAL LAW §53—RESPONSIBILITY—TEMPORARY INTOXICATION.

Under Pen. Code, § 22, providing that no act committed by a person in a state of voluntary intoxication is less criminal by reason of such condition, a sane man who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, and to lead him to the commission of an act which in his sober senses he would have avoided.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 761; Dec. Dig. §53.]

2. CRIMINAL LAW §57—RESPONSIBILITY—PERMANENT INSANITY FROM ALCOHOLISM.

Where one by long-continued indulgence in intoxicants has become so permanently diseased mentally that he cannot distinguish right from wrong and is generally insane, he is no more

legally responsible for his acts than a man congenitally insane or insane from violent injury to the brain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 69, 70; Dec. Dig. ¶ 57.]

3. CRIMINAL LAW ¶814(10)—INSTRUCTIONS—INSANITY—APPLICABILITY.

In a trial for assault, instructions as to settled insanity from alcoholism were properly refused where they submitted to the jury not only the issue of settled insanity, but also of permanent insanity from any cause; there being no evidence as to insanity from other causes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1979, 1981; Dec. Dig. ¶814(10).]

4. CRIMINAL LAW ¶762(1)—INSANITY—INSTRUCTIONS—APPLICABILITY.

In an assault trial, the defense being settled insanity from alcoholism, and there being some evidence thereof, an instruction stating, as a quotation from a recent opinion of the appellate court, "Defendant's normal condition was that of a sane man; his alleged mental derangement was not only transient in character, but such condition was the result of his voluntary acts," and that such condition was no defense, was error, as it took from the jury the question of fact whether accused's mental derangement was only of a "transient character" and his condition the result of his voluntary acts; it not appearing that the jury did not understand such instruction to apply to the instant case rather than to the former one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1768; Dec. Dig. ¶762(1).]

On Petition for Rehearing.

5. CRIMINAL LAW ¶355—EVIDENCE—ADMISSIBILITY—INSANITY FROM ALCOHOLISM.

Under Pen. Code, § 22, as to the defense of intoxication, testimony disclosing mere temporary mental derangement from intoxicants is admissible only where the existence of a particular purpose, motive, or intent is a necessary element of the crime charged, and it may then be considered not as the predicate for the full exoneration of accused, but solely to assist in determining the purpose or intent with which he committed the act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 761; Dec. Dig. ¶355.]

6. CRIMINAL LAW ¶704 — OPENING STATEMENT—EFFECT AS LIMITING DEFENSE.

Accused in making a defense and proving his case is not necessarily required to remain strictly within the literal scope of the defense outlined by counsel in his opening address to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1660; Dec. Dig. ¶704.]

7. HOMICIDE ¶270—PROVINCE OF COURT AND JURY—INSANITY.

In an assault trial, where there was some evidence of settled insanity induced by long-continued use of intoxicants, whether accused's mental condition was such that he was not legally responsible was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 564; Dec. Dig. ¶270.]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Frank Goodrum was convicted of assault with a deadly weapon, and appeals from the judgment and an order denying him new trial. Reversed and remanded, and rehearing denied.

J. M. Lee, of Red Bluff, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Under an indictment charging him with the crime of assault to commit murder, the defendant was convicted of the crime of assault with a deadly weapon, and was sentenced to imprisonment in the state prison for the term of 18 months. This appeal is prosecuted by the defendant from the judgment and the order denying him a new trial.

The assault was committed on the wife of the defendant, in the city of Red Bluff, on the 20th day of December, 1915. Domestic dissensions had led to the separation of the parties, and for some little time prior to the date of the assault the defendant had not lived with his wife. The undisputed facts are: That on the said 20th day of December, between the hours of 5 and 6 o'clock p. m., Mrs. Goodrum and her mother, Mrs. Harriet B. Reyon, who was then stopping at the home of the former, were on their way home from the business part of the city, when they were approached from the rear by the defendant. He placed his hand upon the shoulder of his wife, and, addressing her, said: "Belle, I want to speak to you a minute." Both Mrs. Goodrum and Mrs. Reyon turned and faced him, and at the same time the defendant drew a revolver and pointed it in the face of his wife. Mrs. Reyon grabbed the weapon, a tussle ensued, and the weapon was discharged, no one, however, being struck by the bullet. Thereupon the defendant drew a knife and began cutting and slashing his wife about the head and left arm. Several ugly, though not serious, wounds were thus inflicted upon the head, left arm, and hand of Mrs. Goodrum. Mrs. Reyon called loudly for assistance, and finally the defendant desisted from his attack and stepped away a distance of 12 or 15 feet and threatened, and apparently attempted, to commit suicide. Mrs. Goodrum was taken to a drug store near by, where she received the attention of a physician, and the defendant was placed under arrest, taken to the county jail, and subsequently on account of a gash across his throat, inflicted by a knife, presumably by himself, and weakness resulting from said wound, was conveyed to the county hospital, where he remained for several weeks.

The defense interposed at the trial was that of insanity, and testimony was introduced to support it, a number of "intimate acquaintances" testifying that in their opinion the defendant was insane on the day upon which the assault was committed. And the defendant himself testified that he had no recollection of the assault or of any incidents connected with himself occurring on that day.

The complaint against the result reached by the jury is based solely upon certain instructions given by the court upon the issue of insanity, and also upon the action of the court in rejecting certain instructions proposed by the defendant upon that question.

While it was expressly admitted in court by the district attorney that the defendant was not under the influence of intoxicating liquor at the time of the assault, it was the theory of the people at the trial that, if the defendant's mentality was not wholly normal, or was, to the extent of rendering him irresponsible, impaired on that occasion, such condition of mind was occasioned wholly by the use by him of intoxicating liquors for some period of time prior to the assault. And in harmony with this theory the court instructed the jury, basing its instructions upon that question upon section 22 of the Penal Code, which reads as follows:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

The court correctly instructed the jury, in accordance with the provisions of the foregoing section, that temporary insanity produced by the voluntary use of intoxicating liquor is no excuse for the commission of crime. It is claimed, however, that since it was admitted that the defendant was not in an intoxicated condition on the day that the assault was committed, there was, under the proofs, ample room for the theory that the alleged insanity of the accused was not of a temporary character as the result of his voluntary intoxication, but the effect of long-continued intoxication for a period prior to the time of the commission of the act, and was, within the meaning of the law, "settled insanity"; that the court should have instructed upon that theory, and erred to the prejudice of the defendant by refusing to do so. In view of the fact that there was some testimony tending to show that the accused had, previously to the day of the difficulty, habitually imbibed intoxicating liquors to excess, and of the further fact that the people admitted that the defendant was not in a state of intoxication on the day of the assault, we think there is some force to this contention.

[1, 2] There is a well-recognized distinction in law between temporary insanity or mental aberration brought on by voluntary intoxication and "settled insanity" superinduced by long-continued indulgence in alcoholic liquors.

"A sane man, * * * who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, impair his perceptions, derange his normal faculties, and lead him to the commis-

sion of an act which in his sober senses he would have avoided. Upon the other hand, if one, by reason of long-continued indulgence in intoxicants, has reached that stage of chronic alcoholism where the brain is permanently diseased, where the victim is rendered incapable of distinguishing right from wrong, and where permanent general insanity has resulted, then and in such case he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain." *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830, 832.

See, also, *People v. Travers*, 88 Cal. 233, 239, 26 Pac. 88; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People v. Hower*, 151 Cal. 638, 642, 643, 91 Pac. 507.

[3] While there can be no doubt that the case as made by the evidence justified the giving of an instruction upon settled insanity brought about by an incessant and excessive use of intoxicating liquors for a long period of time prior to the commission of the assault, we believe that those rejected instructions which purported to contain concrete statements of the law as applied to the present case were, under the evidence, framed in language entirely too general. The evidence strongly tends to show—indeed, there is no other character of showing upon that subject—that, to whatever extent the defendant's mentality had been impaired, his condition in that regard had been caused by the use of intoxicants; but some of the instructions proposed by the accused, but rejected, were so phrased as to have submitted to the jury, if given, the question, not whether the defendant was afflicted with settled insanity caused by the use of intoxicating liquors, but whether from any cause he was the victim of permanent insanity, as to which latter proposition there was no evidence presented or received. All the concrete instructions on the question of insanity in this case should have been, with proper qualifications, made applicable solely to insanity caused by the use of intoxicating liquors so that the jury could not have been misled as to the recognized distinction in law between the mental derangement so caused which would not excuse a criminal act and the insanity so caused which would, because of a defect of criminal or any intent necessarily the result of such insanity, excuse such an act. This is not to say, however, that an abstract or a general instruction on the question of insanity as applied to crimes should not have been given. To the contrary, we think such an instruction should have been submitted for the purpose of enlightening the jury upon the general proposition that one committing a criminal act while laboring under a state of "settled" insanity resulting from any cause whatsoever cannot be held liable for such act.

[4] But we are of the opinion that the learned trial judge, ordinarily singularly accurate and correct in the statement of pertinent legal principles to juries, permitted himself to be led into error seriously preju-

dicting the defendant by giving an instruction in which, without qualification, it was declared:

"On this subject [that of insanity] the Appellate Court in a recent decision uses this language, which I will read to you as a part of the instructions in this case: 'Defendant's normal condition was that of a sane man. His alleged mental derangement was not only transient in character, but such condition was the result of his voluntary acts in the use of alcoholic liquors. Under such circumstances, one prosecuted for the commission of a crime cannot urge such condition as a defense thereto.'"

The foregoing language was taken from the opinion in the case of *People v. Bremer*, 24 Cal. App. 315, 316, 317, 141 Pac. 222, and the principle stated thereby is unquestionably correct as an abstract proposition. But, as applied to the present case, the instruction plainly invaded the province of the jury. Whether the defendant's mental derangement was only of "a transient character" and his condition the result "of his voluntary acts in the use of alcoholic liquors" was one of the most important questions of fact involved in the case, and one, obviously, whose solution was solely and exclusively a function of the jury. It has been suggested, however, that since the court declared that it was taken from an appellate court decision, the instruction, so far as it purports to deal with facts, must be viewed as having reference, not to the present case, but to the case from the opinion in which its language was taken, and that its effect, therefore, so far as this case was concerned, was merely to state the application generally of the rule relating to the effect of voluntary intoxication upon the commission of a criminal act by one when suffering from a mental derangement so superinduced. But we do not feel at liberty to so view the instruction or to declare that the jury did not understand it as applying particularly to this case. While the court did explain that the language was taken from the decision in another case, it also declared that it would be adopted as part of the instructions in the case at bar; and from this it is to be assumed, as we may justly presume the jury assumed, that, according to the opinion of the court, the facts of this case were precisely the same as the facts in the case giving rise to the language of the instruction, and that the principle therein declared was therefore peculiarly applicable and pertinent to the present case. In any event, as stated, the instruction, notwithstanding the particular source whence it was derived, was expressly made a part of the court's charge, and, as declared, it involved a clear instruction upon a vital question of fact in the case. And, since the effect of the instruction was to take from the jury one of the most vital questions of fact in the case, it cannot in our opinion be held that the error in giving it is one of those which may properly be said, after a review and consideration of the entire record, not to have resulted in a miscarriage of justice. It is very true, as

well we may suggest in the present connection, that if the defendant was not wholly irresponsible by reason of insanity when he attacked his wife, his assault upon her was unprovoked and of a most atrocious character; but, however vicious and unjustifiable his attack might have been, he was entitled to have his only defense, viz. insanity, passed upon and determined solely by the jury.

The judgment and the order are reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. In their petition counsel for the people say:

"On the outset of this matter we admit that the decision heretofore rendered in this case is correct in principle, but we claim that the people tried one case and the court decided another."

The point is that the defendant at the trial tried his case solely upon the theory of temporary insanity brought on by "recent indulgence in alcoholism," that such was the theory upon which the learned trial court instructed the jury, and that this court decided the case upon the erroneous supposition that the defense interposed by the defendant was that he was wholly irresponsible and not accountable in law for his act because of settled insanity superinduced by the excessive use of intoxicating liquors.

In proof of their position, counsel for the people call attention to certain language of the attorney for the defendant in his opening statement to the jury in which he declared:

"In other words, I think, gentlemen, we will show you beyond question in this case that Frank Goodrum, at the time this assault was made, knew nothing about it, that he was simply laboring under a case of delirium tremens, simply insane from the effect of alcohol that he had consumed in the week or two before that, and that he was in a state of mind not to be accountable for what he did. We will show you that the acts that he did in the manner in which this offense has been portrayed here were not natural, but unusual—an improbable way of doing that kind of thing; that he had nothing against his wife at any time. Now, I say, if we show you that, then that is a defense to this action."

Again, in his opening address, the attorney said:

"We will show you that he was nervous; that he had all the indications, gentlemen, that make up a case of alcoholic insanity, not drunkenness, gentlemen, but the effects of alcohol after the stimulant has died out—the effect on the nerves. * * * I think I will show you what I have said, and even more on that line."

Thus, it is contended, the counsel for the defendant expressly limited the purpose of proof upon the question of the mental condition of the accused at the time of the commission of the alleged assault to the establishment of the fact that he was suffering only from temporary mental derangement as the result of the use of intoxicating liquors, and this proposition is, it is asserted, em-

phasized and clearly sustained by the statement of counsel that he would show that the defendant, on the occasion of the assault, was suffering from an attack of delirium tremens, a condition which is a mere temporary effect of alcoholism, and not a characteristic of settled insanity caused by alcoholism.

[5] It is to be conceded that the attorney for the accused, in his opening statement to the jury, was not altogether happy in his expressions or the presentation of this case as he proposed to make it. Obviously mere temporary mental derangement resulting from the use of intoxicants, whether it manifests itself in the form of delirium tremens or in some milder form, cannot operate to absolve a person from liability for a criminal act, and testimony disclosing that precise mental state at the time the criminal act was committed is admissible only where the existence of a particular purpose, motive, or intent is a necessary element of the crime charged, and then it may be considered by the jury, not as the predicate for the full exoneration of the accused, but solely to enable or assist them in determining the purpose, motive, or intent with which he committed the act. Pen. Code, § 22.

But we think that the opening statement of counsel is broader in its scope than the people ascribe to it. Whether the attorney for the defendant, in his opening statement, did or did not state to the jury in apt technical language that he proposed to rely upon the defense of insanity for the complete exoneration of the accused, it is clear to our minds that said statement clearly enough and so sufficiently shows that that was what he intended and endeavored therein to say. On numerous occasions, in the course of his statement, he declared that he would show or attempt to show that the defendant, when the assault was made, was insane, and that he was suffering from "alcoholic insanity," adding in one instance, when using the latter language, the statement, "not drunkenness," thus attempting to emphasize the proposition that he did not refer to mere temporary mental aberration or derangement, but to settled insanity, that the accused was "in a state of mind not to be accountable for what he did," and many other like expressions, all indicating with sufficient clearness that what he intended to say to the jury was that he proposed to prove that the defendant, by the excessive use of intoxicating liquors for a time prior to the assault, had become afflicted with insanity to a degree that, in a legal view, he was at the time of the assault wholly irresponsible, and not accountable for his act.

[6, 7] But a defendant in a criminal case, in making a defense and proving his case, is not necessarily required to remain strictly within the literal scope of the defense outlined by his counsel in his opening address to

the jury. It may happen, as doubtless it has happened, that a lawyer may not succeed in stating his case to the jury in a strictly proper manner or in correct technical nomenclature. This may naturally occur in a criminal case where the attorney for the defendant, generally well learned in the law, has had no experience in the practice of the criminal law, and whose practical familiarity with the rules and doctrines of that branch of jurisprudence is decidedly limited. Hence that would be a strange and, indeed, a manifestly unjust rule which would, in a case where his defense had not been properly explained in the opening statement, preclude the defendant from making his case as he intended to prove it and as he had reason to believe he could only prove it as in complete answer to the charge against him. But, even assuming that the opening statement of counsel for the accused in this case is amenable to the interpretation to which it is subjected by the people, the trial court in this case, so far as the proof was concerned, accorded to the defendant the right to traverse a broader field than the said opening statement, as so interpreted, warranted; for it allowed opinion testimony of intimate acquaintances of the defendant that he was insane at the time or in near proximity to the time at which the assault occurred. This testimony, even if it may truly be said that the opening statement did not, squarely and broadly brought into the case as a vitally important issue therein the question whether the defendant was insane to the extent that he was so bereft of reason and the power of volition as to have rendered him wholly irresponsible for his act. And the fact that the testimony offered in support of that issue might have been insufficient in probative force to prove it by the requisite degree of proof, or the fact that other witnesses might have given testimony tending to show or even satisfactorily showing that the mental condition of the accused was only temporary and the result of mere drunkenness, could not have the effect of taking insanity from the case as one of the vital issues. The issue was there, and some testimony received in its support, and, as declared in our former opinion, and as is obviously true, it was wholly for the jury to say whether it was proved to a sufficient degree to entitle the defendant to an acquittal on the ground that thus he was not in a mental condition to be responsible legally for the assault. Hence it was, as we have held, error, prejudicial to the accused, for the court to have practically taken that question from the jury, and, moreover, under our view of the record as above pointed out, we may add to what we said in our former opinion that the court further erred to the serious detriment of the defendant by confining the jury to the consideration of the evidence upon the defendant's intoxication to the mere determination by them of the par-

ticular "purpose, motive, or intent" with which the accused committed the act. In other words, we think that an instruction on insanity brought on by the use of intoxicating liquors that will, in law, excuse a criminal act, should have been given, and that, such an instruction having been proposed by the defendant and disallowed, the action of the court in that respect constituted prejudicial error.

There can be no possible doubt that the trial court intended to and did, under its conception of the case, give the defendant a fair trial; but we think the scope of the defendant's position in the case was misapprehended by the prosecuting attorney, and that the court, erroneously adopting the mis-conceived theory of the people, made the errors above referred to and which we think undoubtedly demanded the reversal heretofore ordered.

Rehearing denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

Ex parte SAUL. (Cr. 498.)

(District Court of Appeal, Second District, California. Sept. 12, 1916.)

DIVORCE ~~§~~289—CUSTODY OF CHILDREN—POWER OF COURT TO AWARD.

Civ. Code, §§ 136, 138, provides that, though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband of the wife and children, and during the pendency of the action, or at the final hearing, or at any time thereafter during the minority of any of the children, make such order for their custody, education, etc., as may seem necessary. Civ. Code, § 214, provides that when a husband and wife live separated without divorce, a court may award the custody of a minor child to either, etc., and Civ. Code, § 246, declares the considerations to guide the court in awarding the custody of a minor child. *Held*, that the jurisdiction of the superior court in divorce to award custody of minor children does not depend on the question of whether a divorce is granted or denied.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 773; Dec. Dig. ~~§~~289.]

Application for habeas corpus by John E. Saul. Writ discharged, and petitioner remanded.

Davis & Rush, John S. Cooper, and Wm. A. Gaines, all of Los Angeles, for petitioner. Harry A. Chamberlain, of Los Angeles, for respondent.

CONREY, P. J. Habeas corpus. The petitioner is held in custody by the sheriff of Los Angeles county under an order made by the superior court of that county, wherein petitioner was adjudged guilty of contempt, in that he willfully violated certain orders of that court. The return filed herein by the sheriff sets forth a commitment entered in a certain action, wherein John E. Saul was

plaintiff and Emma Saul defendant. The commitment is in the form of an order signed by a judge of the superior court, which, after reciting that the plaintiff John E. Saul was then before the court in person and with counsel in response to an attachment and arrest for the alleged contempt, continues as follows:

"And it appearing to the satisfaction of the court, after a full hearing had, that heretofore, to wit, on the 25th day of March, 1908, a judgment was duly given and made and thereafter duly entered herein in Book 168, page 184, of Judgments, Records of the County of Los Angeles, State of California, and notice thereof was duly given to the plaintiff herein, John E. Saul, wherein and whereby it was ordered, adjudged, and decreed as follows, to wit: 'That the care and custody of the minor children of plaintiff and defendant be and the same hereby is awarded as follows, to wit: The care and custody of Eddie Saul and of John Saul to the plaintiff herein; the care and custody of George Saul, Dinah Saul, and Walter Saul to the defendant herein.' And it further appearing to the court that subsequent to the entry and rendition of said judgment and heretofore, to wit, on the 18th day of February, 1916, and while the said George Saul and Dinah Saul were in the care and custody of the defendant herein, Emma Saul, pursuant to the terms of said judgment hereinabove referred to, said plaintiff herein, John E. Saul, did by stratagem and fraud and willfully and unlawfully and contrary to the provisions of said judgment, take the said George Saul and Dinah Saul from the custody and care of the defendant herein, Emma Saul, without her knowledge or consent and against her will, and took said George Saul and Dinah Saul without the jurisdiction of this court. And it further appearing to the satisfaction of the court that said plaintiff, John E. Saul, now has the custody and care of Dinah Saul, contrary and in disobedience to the judgment of this court hereinabove referred to. And it further appearing to the satisfaction of the court that the said plaintiff, John E. Saul, has refused, and still refuses, to return and deliver the care and custody of the said Dinah Saul, to the defendant herein, Emma Saul, in accordance with and pursuant to the terms of said judgment herein referred to and made a part hereof, and that the said failure to deliver the care and custody of said Dinah Saul consists in the omission to perform an act which is yet in the power of the said plaintiff, John E. Saul, to perform: Now, therefore, it is hereby ordered, adjudged, and decreed that the plaintiff herein, John E. Saul, is guilty of a contempt of this court, and that he be imprisoned in the county jail of the county of Los Angeles, state of California, until he shall have delivered the custody and care of Dinah Saul to the care and custody of Emma Saul, defendant herein. You are therefore commanded forthwith to convey the said John E. Saul to the jail of the county of Los Angeles, and there commit him until he shall have delivered the custody and care of Dinah Saul to Emma Saul, or be discharged according to law."

In the petition for the writ of habeas corpus it is stated that the action of John E. Saul against Emma Saul was tried upon a complaint of the plaintiff and cross-complaint of the defendant and the answers thereto, each of said parties seeking a divorce upon grounds stated in their several pleadings. Copies of those pleadings and of the

findings and judgment are made part of the petition in this proceeding. It appears therefrom that the court found each party guilty of the misconduct alleged in the complaint and cross-complaint, respectively, and for that reason entered its decree denying a divorce. Thereupon and as a part of the same decree the court proceeded to award the care and custody of their minor children, some of them to the plaintiff and some of them to the defendant, in the terms quoted in the foregoing order of contempt. That decree was entered in March, 1908, and the minors George and Dinah Saul remained in the custody of their mother, Emma Saul, until they were taken from her by John E. Saul in February, 1916.

The allegations in the petition, showing that the action of Saul v. Saul was for a divorce and that the petition for divorce was refused, are not denied in the return filed herein; therefore those allegations must be taken as true. *Ex parte Smith*, 143 Cal. 368, 370, 77 Pac. 180; *In re Hoffman*, 155 Cal. 114, 119, 99 Pac. 517, 132 Am. St. Rep. 75; *In re Collins*, 151 Cal. 340, 342, 90 Pac. 827, 91 Pac. 397, 129 Am. St. Rep. 122. Or if formal proof thereof be necessary, it undoubtedly could readily be supplied in this case. Counsel for respondent in effect admits the facts as stated, but merely relies upon the point that we are limited to an examination of the return. Holding, as we do, that the facts alleged in the petition, showing denial of a divorce in the principal action, are subject to proof herein, we shall, in view of the statements of counsel, consider them as admitted. This will bring us to the petitioner's main proposition, which is, that where in an action for divorce the judgment denies a divorce, the court is without power, then or thereafter in that action, to make an order affecting the custody of children.

Sections 136 and 138 of the Civil Code are found in article 4 of the chapter concerning divorce, which article contains sundry general provisions relating to divorce actions. Section 136, under the heading, "Maintenance by Husband, where Judgment is Denied," reads as follows:

"Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them."

Section 138, under the heading "Custody and Maintenance of Minors during Actions for Divorce," reads as follows:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."

Section 214 of the Civil Code occurs in the title on "Parent and Child" and in the chap-

ter entitled "Children by Birth." Section 214 says:

"When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. The decision of the court must be guided by the rules prescribed in section two hundred and forty-six."

Section 246 declares the considerations by which the court is to be guided in awarding the custody of a minor. Where the custody of children is to be awarded, whether in a divorce action or in a separate proceeding under section 214, the superior court is the court having jurisdiction of those matters. It thus appears that there are two classes of actions or proceedings wherein superior courts have jurisdiction to determine the custody of a child at the instance of one or both of its parents. In addition to this, it may be observed that where children are brought before a court in habeas corpus proceedings involving adverse claims of right to their custody, the court is not obliged to recognize either parent as entitled to the custody as of right, but may take into consideration such facts as are necessary to enable the court to determine what are the best interests of the children.

The petitioner does not deny the existence of these powers and judicial processes as provided by law. His contention is that the power of the court with respect to the custody of children in a divorce action is wholly derived from the statutes, and that by the terms of the Code sections to which we have referred the right to award custody of children in a divorce action is strictly limited as an incidental power to be exercised only when a divorce is granted. On the other side it is contended that the jurisdiction exercised by the superior court in divorce cases is a part of its general chancery jurisdiction which includes the care of children as wards of the court; that since the parents of these children came before the court as a court of equity demanding relief on behalf of their children, and since they might have done that same thing by filing petitions for that purpose without asking for a divorce, no good reason appears why the court, though it denies the divorce, should turn the parties entirely out of court in order that they might come back into the same court to demand separately the same relief as was sought in this action so far as the children are concerned. Such was the opinion of the Supreme Court of Arkansas, in *Horton v. Horton*, 75 Ark. 22, 86 S. W. 824, 5 Ann. Cas. 91. In that case, as here, no separation of the family was brought about by the court's order. The court merely recognized and found the facts as they existed, and then made an order for the well-being of the children.

The decisions upon this subject are con-

flicting. In some states it has been held that where the divorce is denied, custody of the children may be awarded. *Horton v. Horton*, supra; *Hoskins v. Hoskins* (Ky.) 89 S. W. 478; *Knoll v. Knoll*, 114 La. 703, 38 South. 523. Decisions cited to the contrary effect are *Redding v. Redding* (N. J. Ch.) 85 Atl. 716; *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, 35 L. R. A. (N. S.) 1158, Ann. Cas. 1912B, 344. See, also, *Davis v. Davis*, 75 N. Y. 221, 226, *Robinson v. Robinson*, 146 App. Div. 533, 131 N. Y. Supp. 260, and *Light v. Light*, 124 App. Div. 567, 108 N. Y. Supp. 931. In *Thomas v. Thomas*, supra, there is a well-reasoned dissenting opinion by Carter, J., closing as follows:

"The parties being before a court of equity, what more proper time can there be to adjudicate the rights of the parents to the custody of the children? 2 *Nelson on Divorce and Separation*, p. 979. The court having acquired jurisdiction of the subject-matter and the parties to the suit at the instance and by the prayer of plaintiff in error, I cannot reach any other conclusion than that, on the plainest principles of equity, she should be precluded from questioning the jurisdiction of the court which she herself has invoked."

Section 138, Civil Code, quoted above, recognizes the power of the court, in an action for divorce, to make orders concerning the custody of the children of the marriage, either during the pendency of the action or at the final hearing or at any time thereafter during the minority of the children. If the court at the final hearing, in making its decree granting or refusing a divorce, is silent with respect to the custody of children and fails to make any provision for this custody and care, it would seem that this is a complete and final determination of that case. But if the court, in view of the facts found by it, deems that the welfare of the children requires that some order for the custody and maintenance of the children be made and makes that order as a part of its decree, or in specific terms retains the case for the purposes of such custody and maintenance, we find no sufficient reason for holding that such action by the court is beyond its powers as declared in section 138. The section itself does not state any limitation of its effect to cases in which divorce is denied. If such limitation be imposed upon the language of the statute, it must be a limitation by construction. But it has been held that the section is designed for the protection of children, and should be liberally construed. *Harlan v. Harlan*, 154 Cal. 341, 350, 98 Pac. 32. It seems to us that this rule of liberal construction may fairly be applied to the question here presented.

The petition herein, and the sheriff's return, show that the petitioner is also detained in custody by virtue of another commitment for a second contempt of the authority of the superior court, in a matter arising out of the same divorce action of Saul v.

Saul. In view of our decision upon the matters herein discussed, it is not necessary to make a further statement, which would involve the same questions and lead to the same result.

The writ is discharged, and petitioner is remanded to the custody of the sheriff.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. HOWARD. (Cr. 845.)

(District Court of Appeal, Third District, California. Sept. 9, 1916.)

1. LARCENY \S 40(4)—PRINCIPAL AND ACCESSORY—CONVICTION.

Under Pen. Code, \S 971, abolishing the distinction between accessory before the fact and principal, defendant could only be shown to be a principal in the larceny charged by showing that he aided and abetted in its commission, and could not be convicted if he aided and abetted an embezzlement or some other offense.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. \S 110, 125; Dec. Dig. \S 40(4).]

2. EMBEZZLEMENT \S 16—LARCENY \S 15(1)—ELEMENTS OF OFFENSES.

Where one honestly receives goods upon trust and afterwards fraudulently converts them to his own use, he is guilty of embezzlement; but if he obtains possession fraudulently with intention to convert the same to his own use, and the owner does not part with the title, the offense is larceny.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. \S 17, 18, 21; Dec. Dig. \S 16; *Larceny*, Cent. Dig. \S 39, 40; Dec. Dig. \S 15(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Embezzlement*; *Larceny*.]

3. LARCENY \S 14(1)—REQUISITES—INTENT.

To constitute an act of taking the money of an employer larceny, it must appear that the possession of the money was obtained by the employé fraudulently, or by means of some trick, conspiracy, or artifice, with the felonious intent of converting it to his own use.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. \S 34, 37; Dec. Dig. \S 14(1).]

4. LARCENY \S 68(1)—PRINCIPAL—QUESTION FOR JURY.

Whether the circumstances indicating that defendant aided and abetted his wife in the felonious taking of the money of her employer, together with their flight, warranted an inference that he did so was a question for the jury.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. \S 180, 181; Dec. Dig. \S 68(1).]

5. LARCENY \S 40(4)—EVIDENCE—"CLERK" OR "SERVANT."

Evidence in a prosecution for grand larceny, committed in aiding and abetting his wife in her taking money from her employer, held to show that the wife, while in the service of her employer, was a "clerk" or "servant" of the corporation, and that the money she was charged with taking from the corporation came into her "control and care by virtue of her employment as such clerk or servant," so that her offense was embezzlement, within Pen. Code, \S 508.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. \S 110, 125; Dec. Dig. \S 40(4).]

For other definitions, see *Words and Phrases*, First and Second Series, *Clerk*; *Servant*.]

6. EMBEZZLEMENT \S 13—CLERK OR SERVANT—“PERMISSION”—“AUTHORITY.”

Under Pen. Code, \S 508, declaring every clerk or servant, fraudulently appropriating to his own use any property of another coming into his control by virtue of such employment, to be guilty of embezzlement, the “permission” to an employé to handle the money in a cash register gave her “authority” under the employment to receive the money for goods sold and to make change if required out of money in the register, since “permission” to do an act is “authority” to do it.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. $\S\S$ 11, 12; Dec. Dig. \S 13.]

For other definitions, see Words and Phrases, First and Second Series, Authority; Permission.]

7. LARCENY \S 40(4) — PROSECUTION — VARIANCE.

In a prosecution as a principal in the crime of grand larceny by reason of aiding and abetting his wife in the commission thereof, proof that the crime committed by the wife was that of embezzlement, as defined by Pen. Code, \S 508, was a fatal variance.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. $\S\S$ 110, 125; Dec. Dig. \S 40(4).]

8. INDICTMENT AND INFORMATION \S 32(2)—FORMAL REQUISITES — STATUTE — CONCLUSION.

Although Pen. Code, $\S\S$ 809, 951, require an indictment to conclude by charging the offense to be contrary to the form, force, and effect of the statute, etc., an information, by one count, charging larceny of money, by the second the embezzlement of such amount, and by the third, the receiving of such money knowing it to have been stolen, and ending with such conclusion, was sufficient, as such conclusion is merely a matter of form.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 124; Dec. Dig. \S 32(2).]

9. JURY \S 136(8) — CHALLENGES — NUMBER — COUNTS OF INFORMATION.

Under Pen. Code, \S 1070, entitling a defendant in a prosecution for an offense not punishable with death or life imprisonment to 10 peremptory challenges, defendant charged by one count of an information, with larceny of money, by another count with an embezzlement of it, and by the third count with the receiving of it knowing it to have been stolen, was not entitled to exercise 10 peremptory challenges on each count, but only 10 in all.

[Ed. Note.—For other cases, see Jury, Cent. Dig. $\S\S$ 614, 618; Dec. Dig. \S 136(8).]

10. INDICTMENT AND INFORMATION \S 132(5)—ELECTION OF COUNTS—STATUTE.

Under Pen. Code, \S 954, permitting the charge of different offenses under separate counts relating to the same act, and not requiring the prosecution to elect between different counts, where an information in three counts charged the larceny of money, the embezzlement of such money, and the receiving of such money knowing it to have been stolen, it was not necessary for the district attorney, before offering proof, to elect on which count he intended to rely for a conviction, since it was proper for him to prove the facts and ask for a conviction of that offense appropriate to the facts proved.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 444; Dec. Dig. \S 132(5).]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

W. A. Howard, true name Walter H. Allen, was convicted of grand larceny, and from the

judgment of conviction and from an order denying his motion for a new trial, he appeals. Judgment and order reversed.

Cross & Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of grand larceny, and appeals from the judgment of conviction and the order denying his motion for a new trial.

The information is in three counts, each stating a different offense, viz. the first charging the larceny of \$305 in money, the second the embezzlement of said sum, and the third the receiving of said money knowing it to have been previously stolen.

The attack upon the verdict is upon numerous grounds, which, generally stated, are that the court erred in overruling the demurrer to the information, in disallowing certain voir dire questions by the defendant to a certain juror, in denying the challenge by the defendant of a certain venireman upon the ground of actual bias, in refusing to require the people to make an election of the particular count of the several set out in the information upon which they intended to rely, in refusing to allow the defendant 30 peremptory challenges, the theory being that he was entitled to 10 such challenges upon each of the offenses stated in the information, in its rulings upon questions involving the legal propriety of the admissibility of certain evidence, and in disallowing certain instructions proffered by the accused. It is further insisted that, if the defendant was guilty of any crime whatsoever, it was not that of grand larceny, of which the jury convicted him, but that of embezzlement. This last point necessarily involves, and its solution depends upon, the question whether the evidence supports the verdict.

Under the several heads above specified, many specific objections to the legal soundness of the result reached at the trial are here interposed and argued in the briefs. Such of these as we deem entitled to special notice and review we shall consider.

The facts, as gleaned from the evidence, may be summarized as follows: In the early part of the month of August, 1915, the defendant and his wife arrived at the city of Stockton and, under the name of Howard, took rooms at a house known as the “Adams Apartments.” They were strangers in Stockton, and at said apartments represented themselves as being husband and wife. A few days thereafter they moved to a rooming house in said city, known as the “McPhee Apartments,” where they remained until their departure from Stockton, on the 30th day of said month of August. While stopping at the last-named apartments, and about the middle of the month named, “Mrs. How-

ard" secured employment as a stenographer with a commercial college in said city known as the Western School of Commerce. Said college was incorporated, and at the time of the employment of Mrs. Howard, one John R. Humphreys was president of the corporation and principal of the school, and as such was authorized to employ such assistants as were found necessary to aid in carrying on the business of the institution. When she applied for employment she represented to Humphreys that her name was "Miss Helen Burns," and under that name she accepted the employment. "Mrs. Howard" worked at a desk located in the office of the secretary of the corporation. At about the hour of 12 o'clock, noon, on the 30th day of August, 1915, she left the office of the secretary and did not return. A short time after her departure and after the time at which she should have returned to the office and resumed the discharge of her duties, it was discovered upon investigation that the sum of \$305 was missing from the cash register, which was kept in the office of the secretary.

It transpired that, on the day last mentioned, Howard and his wife met at a point on one of the streets of Stockton and hired a taxicab, in which they were driven to Lodi, a distance of a few miles north of Stockton. At Lodi, Mrs. Howard purchased some wearing apparel at one of the stores in said town, and Howard, at another store, bought a suit of clothes and a suit case. The clothes worn by him to Lodi he left at the store at which he purchased and donned the new suit. Howard also went to the bank at Lodi and exchanged some gold for paper money. Within a brief time thereafter, Howard and his wife at Lodi boarded a north-bound train and went to Sacramento, at which place they bought tickets for the East, and on the said 30th day of August together left for the East. They were later arrested in the East and returned to Stockton. While in the East, and before their arrest, the defendant, whose true name is Walter Howard Allen, gave his name and registered at hotels variously as "Taylor," "Churchill," and "Howard."

There is, in the record, testimony from which the jury could justly have inferred, as perhaps they did conclude, that the defendant down to the day upon which he with his wife left Stockton, was wholly without financial means, with the exception of \$5 in gold from which he paid for some drinks at a bar for himself and one R. J. Richardson, who, with his wife, also occupied rooms at the McPhee Apartments, and to whom the defendant explained that he had received the money from his wife.

It further appears that Mrs. Howard, a day or two before the date of her departure from Stockton, took to her apartments a bank book which was the property of the institution by which she was then employed, and that while she and the defendant were eating their lunch on that occasion, Mrs.

Richardson, wife of the party of that name above referred to, came into their apartments, whereupon the defendant picked up the bank book from the table where it had been placed by Mrs. Howard, and, addressing Mrs. Richardson, remarked:

"Look what my little girl has banked to-day. Three hundred and sixteen dollars! Wouldn't that make a fine trip?"

To this Mrs. Howard rejoined:

"No, the straight and narrow path for me."

It was further shown that, on two several occasions, Mrs. Howard asked the secretary of the corporation, J. W. Rousch, whether she "should take money received at the school to the bank," and the secretary replied that she should not.

It was shown, and, in fact, the defendant admitted, that, within an hour before he and his wife left Stockton for Lodi, he held a conversation with his wife through the telephone from a saloon which he had been in the habit of frequenting while in Stockton, that within brief time thereafter his wife called and talked with him over the same telephone, and that immediately thereupon the defendant left the saloon, met his wife, and immediately left with her for Lodi in the manner above described.

Certain statements made to the sheriff by the defendant after his arrest were received in evidence at the behest of the people. Thus it was shown that, among other declarations, the defendant said that he could not be convicted of any offense which might be charged against him without the testimony of his wife disclosing that he was implicated in the crime, and that his wife could not testify against him without his consent. He further asseverated his innocence of any connection with the commission of the crime by his wife, and declared that he had no knowledge before she took the money that she intended to do so. He admitted, however, that, when he met his wife just before leaving Stockton, she told him that she had taken the money, and that he then said to her that she had better "beat it," by which he meant to say that it was better for her to get away from Stockton. He also explained that he registered at hotels in the East under fictitious names only because he desired to protect his wife and so prevent her apprehension, and not because he was himself conscious of having been guilty of committing any wrong in connection with the transaction. These declarations were, as before stated, proved or brought into the record by the people as having been extra-judicially made by the accused.

Thus we have reproduced in substance all the testimony introduced by the people bearing upon the defendant's connection with the crime committed by his wife.

[1, 2] It will not, of course, be disputed that, since the defendant himself did not actually take the money, it must be made to appear, before a conviction of larceny can

stand against him, that the taking of the money by his wife constituted larceny. In other words, since the defendant can only be made out a principal in the crime charged by showing that he aided and abetted in the commission thereof (Pen. Code, § 971), he obviously cannot be convicted of larceny if the crime in the commission of which he aided and abetted is that of embezzlement or some other offense than that of larceny. The distinction between embezzlement, in a general sense, and larceny is thus stated in *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506:

"* * * If one honestly receives goods upon trust, and afterward fraudulently converts them to his own use, he is guilty of embezzlement; * * * if he obtains possession fraudulently, with intent to convert the same to his own use, and the owner does not part with the title, the offense is larceny."

Section 503 of the Penal Code defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted."

Section 508 of the same Code reads:

"Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

[3] Thus it will be observed that, to constitute the act of taking the money by the wife of the defendant larceny, it must be true and shown that the possession of said money was obtained by her fraudulently or by means of some trick, conspiracy, or artifice, with the felonious intent of converting the same to her own use. If, for illustration, it was clear that Mrs. Howard (or Allen) had designedly and fraudulently and for the purpose and with the felonious intent of taking the money from the possession of the School of Commerce, to be converted by her to her own use, sought employment with said school so as to place herself in a position in which she could the more readily execute her evil or felonious design and intent, then, she having under such circumstances taken the money, the crime would be larceny. *People v. Rae*, 66 Cal. 423, 424, 6 Pac. 1, 56 Am. Rep. 102. On the other hand, if honestly she received possession of the money on trust (*People v. Tomlinson*, supra), or if, as a duly employed clerk, agent, or servant of the school, the money came "into her control or care by virtue of her employment as such clerk, agent or servant," and she fraudulently appropriated such money to her own use, or secreted it with the intention of appropriating it to her own use (Pen. Code, § 508), then she is guilty of embezzlement and not of larceny of the money (*People v. Tomlinson*, supra).

[4, 5] There are, it will be observed from the testimony presented by the people and thus far and above stated herein, but two circumstances, aside from the fact of flight,

which tend in any measure to indicate that the accused aided and abetted his wife in the commission of the felonious taking of the money, viz.: (1) The remark of the defendant that the amount of money shown by the bank book to be on deposit in a bank in the name of the school would "make a fine trip"; (2) the fact of the telephonic communications between the defendant and his wife while he was at the saloon referred to just prior to the time at which he met her and the two together left for Lodi. Whether these circumstances, together with that of flight, were sufficient to warrant a substantial inference that the defendant aided or abetted or advised his wife to take the money was, of course, a question for the jury. And, conceding that thus the jury might have justly concluded that he did so aid and abet his wife in whatever crime her act constituted, still it will certainly not be contended that those circumstances showed that, prior to her employment by the School of Commerce, there was a conspiracy or understanding between them that she was to seek and, if possible, secure such employment for the purpose and with the design and intent of making available to her an opportunity for the felonious asportation of the money of said school. In other words, it will not be seriously claimed that those circumstances, whatever may be their probative value in some other direction, show that the taking of the money was the result of a fraudulent and felonious design of the defendant and his wife, conceived before she secured employment with the school. The fact of flight and the assumption by him of fictitious names after he left California are the strongest circumstances which were presented against him. Both these facts, when proved constitute, it is to be conceded, strong incriminatory circumstances against an accused. But it will not be claimed that either can have the effect of disclosing, or of serving as the test for determining, the legal character or nature of the crime committed. In this case it cannot, of course, be determined from those circumstances when the design to commit the crime was formed—whether before Mrs. Howard went to work for the school or after she entered upon the discharge of her duties as an employé of the school. Thus it is clear that whether the crime committed by the wife was larceny or embezzlement does not appear from the testimony thus far considered. We are therefore required to examine and consider the testimony disclosing the circumstances attending her employment and showing the scope and extent of her duties and authority as an employé of the school to determine the legal character of the crime committed by her. Upon this question, the only testimony brought into the case was that given by the witness Humphreys, principal of the school and president of the corporation into which the institution had been organized.

It will be recalled that Humphreys testified that he, as president of the corporation, conducted the negotiations culminating in the employment of Mrs. Allen. He further testified that he employed her as a stenographer; that the desk at which she performed her duties was located in the office of the secretary of the corporation; that the corporation kept a stock of "petty merchandise," such as pencils, paper, etc.; that among the duties assigned to Mrs. Howard was that of selling the articles of merchandise mentioned, to receive the money therefor, and to deposit the same in the cash register, which was kept in the secretary's office; that she, by reason of the authority so conferred on and exercised by her, had—

"free access to the cash, and made change, sold the merchandise, and had general authority that a stenographer has in an office. Q. She sold merchandise? A. Yes, sir; had free access to the drawer. Q. Received money from the sale of merchandise? A. Certainly, just as any other employé would. Q. You state that this money that you allege was embezzled from the Western School of Commerce was in the till—the cash register? A. Yes, sir. I do not know that all the money she took was in the cash register, because there was other money in the room which was not in the cash register. Q. How much money was in the room at that time? * * * A. Approximately \$1,300 to \$1,500, * * * a large portion of which was in the cash register."

No doubt exists in our minds that the foregoing testimony clearly shows that Mrs. Allen, while in the service of the school, was a clerk or servant of the corporation within the meaning of section 508 of the Penal Code, and that the money which she is charged to have taken from the corporation came into her "control and care by virtue of her employment as such clerk or servant," there can be no possible room for doubt, in our opinion. She was, by virtue of her employment, authorized to receive money in exchange for goods sold, and to make change from the moneys in the cash register when necessary. In short, as Humphreys testified, she had free access to the cash register, with authority to handle the money deposited therein for any purpose within the scope of her authority as a clerk or employé. The money in the cash register was, to the extent of her authority and the use to which it was necessary for her to put it as such employé, as clearly and as much intrusted to her control and care as the money in a bank is intrusted to the control and care of the cashier, or the money received into the cash till of a general store is intrusted to the control and care of the sales clerks in such store. If a sales clerk in an establishment dealing in general merchandise, during working hours and while actually performing his duties as such clerk, were to fraudulently take and convert to his own use money from the till, to which he had authorized access, and in which it was his duty to place money received for merchandise, and from which it was within the scope of his authority to

take money for the purpose of making change, no one would be found to doubt for a moment that his act would constitute embezzlement. The case stated is in no respect different from the present case under the facts as proved at the trial and above stated in substance.

[6] Emphasis is, however, placed upon the statement of the witness Humphreys, in one part of his testimony, that Mrs. Howard was not given *authority* but merely *permission* to handle the money in the cash register. But we cannot perceive that that statement in any way shows a qualification of the authority of Mrs. Howard, under her employment, to receive the money for goods sold and to make change, if required, out of the moneys in the register. "Permission" to do an act is "authority" to do it. Every agent is authorized to do whatever the terms of his agency permit him to do, and, stating the proposition conversely, is permitted to perform any act within his authority as agent. Moreover, the contractual relation between the principal and the agent must be determined by the facts upon which the relation is founded, and not by the conclusion of the one or the other of the parties from the facts.

[7] Under the testimony of Humphreys, and in view of the fact that, as above shown, there is no proof whatever showing that the act of Mrs. Howard in taking the money was the result of a conspiracy between her and the defendant, conceived and planned before she entered upon the discharge of her duties under her employment with the corporation, it is clear to us that the crime which the evidence appears to sufficiently show was committed by Mrs. Howard was that of embezzlement, as defined by section 508 of the Penal Code. It therefore follows as a matter of law that there exists a variance between the charge of which the defendant was found guilty and the proof. In other words, the conviction of the defendant of grand larceny under the evidence presented by the record cannot be sustained, since, as we have pointed out, he cannot legally be adjudged guilty of an offense different from that in the commission of which he has aided and abetted.

The conclusion thus arrived at is, of course, decisive of the case, and therefore, so far as is concerned the result so reached, it is wholly unnecessary to consider other points made by the defendant. But, in view of a probable retrial of the case, we deem it proper to review some of those points.

[8] 1. There was no prejudicial error in the order overruling the demurrer to the information. The particular ground of objection to the information arises from the absence therefrom at the end of each count the conclusion, "contrary to the form, force, and effect of the statute," etc. At the common law, in cases where several different offenses or different statements of the same offense were set up in different counts, and where in

such cases the rule was disregarded and the form omitted as so required, the omission was held sufficient to vitiate the accusatory pleading. And there are some cases which hold that under the code system each count must be followed by the conclusion mentioned. In this case, after stating the different offenses, the information ends with said conclusion; and we think that this was sufficient. The conclusion referred to, although required by the statute (Pen. Code, §§ 809 and 951), involves a conclusion of law and is a mere matter of form and not of substance. If an indictment or information states facts disclosing that a public offense has been committed, the statement that the commission of such offense is "contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state," etc., adds nothing to the force of the charge as made, and conveys no information which does not necessarily inhere in or proceed from the mere statement of the offense itself. Of course, we are not thus to be understood as holding that the form in which the Legislature has declared that an indictment or information shall be molded need not be adhered to. To the contrary, we hold that the form as prescribed must, or should, be observed. What we have said relative to the proposition is only for the purpose of showing that the objection against the information here goes only to a matter of form, and that, since that pleading does end with the conclusion required by the statutes, the effect of the omission to end each count with such conclusion, even if necessary in a strict view of the statute, could not, had he been convicted of the proper crime, justly be held to have affected or impinged upon the substantial rights of the accused, or in any degree deprived him of a full and fair trial on the charge of which he was so convicted. While section 4½ of article 6 of the Constitution is not applicable to this proposition inasmuch as the cause must be reversed, still the views above expressed are in harmony with the spirit of that provision of our organic law, and are, moreover, in perfect harmony, not only with the spirit, but with the letter, of section 960 of the Penal Code.

[9] 2. The contention that the defendant was entitled to exercise 10 peremptory challenges on each of the counts, or 30 in all, is wholly destitute of merit. The ultimate object of the law in authorizing the statement of different offenses in the same indictment or information is to prevent mistrials, and experience has demonstrated that this can in certain cases the better be accomplished by setting forth several different offenses of the same general class, thus so framing the accusatory pleading as to authorize, where the evidence justified it, a conviction of the accused of the precise crime which the evi-

dence shows he has committed, it often being difficult to determine, until the facts are all brought out and have been presented in regular and concrete form, what particular crime of several belonging to the same general class has been committed. And, both in theory and in fact, it is only that particular offense, if any at all, which the evidence discloses that the accused has committed upon which he is to be tried or, in the last analysis, is tried; for, very clearly, he can, in contemplation of law, neither be tried upon, nor convicted under, all the counts. It follows that the accused was legally entitled to exercise the right to interpose but 10 peremptory challenges. Pen. Code, § 1070.

[10] 3. It was not necessary for the district attorney to make an election, before offering proof, of one particular count, of the three stated in the information, upon which he intended to rely for a conviction. As we have already shown, it was the proper practice for the district attorney to prove the facts and then ask for a conviction of the accused of that offense of the several charged legally appropriate to the facts so proved. Indeed, if, as the attorney for the accused contends is true, it was legally incumbent upon the people to make an election before any evidence was presented, the very primary purpose of section 954 of the Penal Code would be defeated. There would, in such case, be no efficacy in charging different offenses.

There are no other points to which special attention need be given.

For the reasons herein stated, the judgment and the order are reversed.

We concur: ELLISON, J. pro tem.;
CHIPMAN, J.

MOORE v. BOARD OF SUP'RS OF SAN
BERNARDINO COUNTY et al.
(Civ. 1948.)

(District Court of Appeal, Second District, California. Sept. 12, 1916.)

1. COUNTIES ↔3—AMENDMENT OF CHARTER— DIRECT REPEAL OF SECTIONS.

The amendment to the charter of San Bernardino county approved by the electors in November, 1914, and by the Legislature by resolution filed with the secretary of state January 30, 1915 (St. 1915, p. 1727), was fatally defective as an attempted direct repeal of any sections of the original charter, adopted at the general election of 1912, and approved by the Legislature (St. 1913, p. 1652 et seq.), it being impossible to determine what sections of the charter were intended to be repealed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. ↔3.]

2. COUNTIES ↔3—AMENDMENT OF CHARTER— IMPLIED REPEAL.

Such amendment, providing that all county officers, other than supervisors, shall be elected at each general election, is effective, in that it adds to the charter a new section, and so impliedly repeals the provisions of the original

charter (St. 1913, p. 1652 et seq.), which relate to the same subject-matter and are in conflict.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. ¶3.]

3. COUNTIES ¶3—AMENDMENT OF CHARTER—REPEAL BY IMPLICATION.

There is no inconsistency between the amendment, providing that all county officers, other than supervisors, shall be elected at each general election, and article 2, sections 1 and 2, of the original charter (St. 1913, p. 1652 et seq.), designating the county officers, repealing sections 1 and 2 by implication.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. ¶3.]

4. COUNTIES ¶3—COUNTY OFFICERS—"SHERIFF"—"CORONER"—STATUTE.

The "sheriff" of San Bernardino county, under County Charter, art. 2, § 1 (St. 1913, p. 1652 et seq.), providing that the sheriff shall be ex officio coroner, by virtue of his appointment as sheriff, becomes coroner of the county, and, when performing the duties of a coroner, he is, in contemplation of law, the coroner of the county as distinctly and completely as any other duly appointed or elected person would be, when lawfully performing those duties, the office of "coroner," being separate from that of sheriff, with separate duties provided by law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. ¶3.]

For other definitions, see Words and Phrases, First and Second Series, Coroner; Sheriff.]

5. COUNTIES ¶3—AMENDMENT TO CHARTER—EFFECT—STATUTE.

Under Pol. Code, § 4013, providing for certain county officers and such other officers as may be provided by law, the amendment to the charter of San Bernardino county (St. 1915, p. 1727), providing that all county officers, other than supervisors, shall be elected, as provided by general law, and that their powers and duties shall be such as provided by general law, did not abolish the offices of county purchasing agent and county highway commissioner, created by articles 4 and 6 of the original charter (St. 1913, p. 1652 et seq.), the charter still having effect as to what county offices exist and their powers and duties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. ¶3.]

6. COUNTIES ¶8 — CHARTER PROVISIONS — SUPERSESION BY POLITICAL CODE—CONSTITUTION.

In view of Const. art. 11, § 7½, authorizing the framing of charters by counties, subdivision 4, providing that county charters shall provide for the powers and duties of boards of supervisors and for the consolidation and segregation of county offices, the provisions of the charter of San Bernardino county (St. 1913, p. 1652 et seq.), as amended by St. 1915, p. 1727, providing that all county officers, other than supervisors, shall be elected at each general election, with respect to the consolidation of county offices, are not superseded by Pol. Code, §§ 4017, 4018, providing that boards of supervisors of counties may, by ordinance, consolidate the duties of certain officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 2; Dec. Dig. ¶3.]

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst and J. W. Curtis, Judges.

Application for writ of mandamus by Hiram H. More against the Board of Supervisors of the County of San Bernardino and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Rex B. Goodcell and Robt. M. McHargue, both of San Bernardino, for appellant. T. W. Duckworth, of San Bernardino, for respondents.

CONREY, P. J. In this proceeding the plaintiff applied for a writ of mandamus, requiring the defendants to appoint some fit and proper person to the office of county coroner of the county of San Bernardino, the plaintiff claiming that there is a vacancy in that office. From a judgment in favor of the defendants, plaintiff appeals.

Pursuant to the provisions of section 7½, art. 11, of the Constitution of California, the charter for the county was adopted at the general election of 1912, and thereafter approved by the Legislature. Stats. 1913, p. 1652 et seq. That charter consists of seven articles. Six of those articles contained sections numbered 4, 5, and 6. Section 4 of article 1 made it the duty of the board of supervisors, at its first regular meeting after noon of the first Monday after the 1st day of January, 1915, to appoint each and all of the county officers provided for by the charter or by general law for a term of four years. Sections 5 and 6 of that article relate to the appointment and duties of deputies in the several county offices.

At the general election held in November, 1914, the electors of San Bernardino county approved an amendment to the county charter, which amendment was duly approved by the Legislature by resolution which was filed with the secretary of state January 30, 1915. Stats. 1915, p. 1727. That amendment, without naming any article of the charter, purported to strike from the charter "sections 4, 5, and 6 of said charter," and insert in lieu thereof the following amendment, to be known as section 4 thereof, to wit:

"Section four (4): All county officers other than supervisors of said county shall be elected at each general election by the qualified electors of said county as is now or may be hereafter provided by general law, and all deputies and assistants to such county officers shall be appointed as is now or may be hereafter provided by general law; and the powers and duties of such officers, deputies and assistants shall be such as are now or may be hereafter provided by general law, and any part of this charter in conflict herewith is hereby repealed."

Section 1 of article 2 of the charter provides for certain county officers, including a sheriff and a coroner. Section 2 of the same article provides that:

"The following county officers are hereby consolidated: * * * (b) The sheriff shall be ex officio coroner." Stats. 1913, p. 1656.

Section 4 of article 2 provides that:

"Each county officer shall have the powers and perform the duties now or hereafter prescribed by general law as to such officer, except as otherwise provided by this charter; and shall have and perform such other powers and duties as are or shall be prescribed by this charter."

[1-4] As an attempted direct repeal of any sections of the original charter, the amendment is fatally defective because it is impossible to determine what sections of the charter are intended to be repealed. But the amendment is effective in that it adds to the charter a new section, and by so doing impliedly repeals those provisions contained in the original charter which relate to the same subject-matter as the new section and are in conflict therewith. The county officers appointed in January, 1915, will continue to hold their offices until the time regularly appointed by general law for the election of county officers, at which time their successors will be elected the same as if the present officers had been elected under the general law. The charter amendment does not state what county officers shall exist in San Bernardino county. Those officers are designated by sections 1 and 2 of article 2, and there is no inconsistency between the amendment and these two sections which would require us to hold that the latter are repealed by implication. The office of coroner is a separate office from that of sheriff, with separate duties and powers as provided by law. The sheriff by virtue of his appointment as sheriff becomes coroner of the county; he is "ex officio coroner." When performing the duties of a coroner he is in contemplation of law the coroner of the county as distinctly and completely as any other duly appointed or elected person would be when lawfully performing those duties. Upon the facts of this case we think that there is no sound reason for holding that the office of coroner of San Bernardino county is at this time vacant.

[5] Counsel for plaintiff insist that the amendment, in providing that all county officers other than supervisors shall be elected as is now or may be hereafter provided by general law, and that the powers and duties of such officers shall be such as are now or may be hereafter provided for by general law, intended to refer only to those officers provided for by general law; and that thereby the amendment eliminated some county officers provided for by the charter. Article 4 of the charter provides for a county purchasing agent and article 6 for a county highway commissioner, defining their powers and duties. It is contended that since the general law does not provide any powers or duties for either of these officers, the offices no longer exist. From this it is argued that the provisions of the charter as to consolidation of certain county offices are no longer effective because such consolidation affects directly and materially the powers and duties of the officer. But we think that the consequences thus contended for do not follow. As we have above suggested, the powers and duties pertaining to the office of coroner are not affected by providing that the person appointed as sheriff shall also be the coroner. Neither do we see any reason for holding here that the offices of county purchasing agent

and county highway commissioner are abolished by this amendment. The general law of the state provides for certain county officers, among whom are a sheriff and a coroner, and "such other officers as may be provided by law." Pol. Code, § 4013. The charter of San Bernardino county is a law. If by general law the Legislature shall hereafter prescribe the duties of a county purchasing agent or of a county highway commissioner, such designation of the duties of the office will (under the above-quoted amendment of 1915) supersede the description of those duties as now contained in the charter. In the meantime the designation of those duties as contained in the charter is not in conflict with any general law, since the general law has not spoken upon the subject. For these reasons we do not agree with counsel for plaintiff in their contention that the charter is no longer of any effect either as to what county offices exist or as to how they shall be filled or as to what shall be their powers and duties.

[6] Our attention is directed to the fact that in sections 4017 and 4018 of the Political Code it has been enacted that boards of supervisors of counties may, by ordinance, consolidate the duties of certain officers named in section 4017, and that the consolidation of the duties of sheriff and coroner is not included therein. So it is urged that the effect of the provision of the charter that the sheriff shall be ex officio coroner is to impose upon him duties not imposed upon him by general law, and that under the very terms of the 1915 amendment the powers and duties of sheriff are limited to those provided by general law. Some light may be thrown upon this matter by referring to section 7½, art. 11, of the state Constitution, which authorizes the framing of charters by counties for their own government. It is therein provided (subdivision 4) that county charters shall provide—

"for the powers and duties of boards of supervisors and all other county officers, for their removal and for the consolidation and segregation of county offices, and for the manner of filling all vacancies occurring therein; provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws."

Thus it is seen that when the 1915 amendment of the San Bernardino county charter states that the powers and duties of the county officers shall be such as are or may be provided by general law, it merely repeats in substantially the same words the terms of the Constitution on the same subject. Therefore it is the Constitution rather than the charter which constitutes the effective declaration of law upon the subject; a declaration which in the same paragraph, above quoted, of the Constitution authorizes county charters to provide for the consolidation of county offices. Having in view these provisions of the Constitution, we think that even under

the charter amendment there is no valid ground for holding that the charter provisions with respect to the consolidation of county offices are now superseded by the terms of section 4017 of the Political Code upon the same subject.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

RENDER v. LILLARD. (No. 7455.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Oct. 3, 1916. Leave to File
Second Petition Denied Oct. 31, 1916.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF §153—PLEADING—ISSUES AND PROOF.

A general denial raises the question of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 367; Dec. Dig. §153.]

2. APPEAL AND ERROR §173(6)—PRESENTING QUESTIONS IN TRIAL COURT—NECESSITY.

The question of the statute of frauds was not presented nor urged in the trial court, neither was it mentioned therein in any manner, nor was it relied upon in said court by the defendant for a defense. This court, therefore, will not consider this question when presented and urged by the defendant upon this court for the first time on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1101; Dec. Dig. §173(6).]

Commissioners' Opinion, Division No. 4. Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Ross N. Lillard against S. P. Render. Judgment for plaintiff, and defendant brings error. Affirmed.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. Sam Hooker and E. L. Fulton, both of Oklahoma City, for defendant in error.

DAVIS, C. The parties will be spoken of throughout this opinion as in the court below. The plaintiff, Ross N. Lillard, sued the defendant, S. P. Render, in the district court of Oklahoma county, Okl., on a verbal contract of employment alleged to have been made by the defendant with the plaintiff as an attorney and counselor at law to prosecute an action for \$50,000 damages on behalf of the plaintiff, one Minnie Bond, in what is known as the case of *Bond v. Gore*, in the district court of Oklahoma county, Okl. Plaintiff averred in his petition that his services were well worth the sum of \$1,500, provided said averment by competent testimony, which was not controverted on the part of defendant, admitted a credit on same of \$175, and recovered by verdict of a jury the balance of \$1,325 on February 11, 1915, for which sum, together with 6 per cent. interest per annum from February 11, 1915, until paid and for costs, judgment was by the trial

court duly rendered on May 7, 1915, the court having previously heard, duly considered and overruled the defendant's motion for a new trial. The petition of the plaintiff, omitting caption and formal parts, reads as follows:

"The plaintiff, Ross N. Lillard, for his cause of action herein, says that he is a regular licensed practicing attorney at law of the state of Oklahoma and county of Oklahoma, and has been for the last past three years, with his office in the city of Oklahoma City; that on or about the 1st day of October, 1913, he was employed by one Minnie Bond and Julian R. Bond to institute suit in the district court of Oklahoma county, state of Oklahoma in the sum of \$50,000 against one T. P. Gore for assault, and that on or about December 1, 1913, this plaintiff notified the said Minnie Bond and Julian R. Bond that he would not remain in said case any longer, unless arrangements were made for a fee for his services in said cause, and that he then and there notified said parties that he would withdraw from the case unless the same was done, and thereupon, on or about the 1st day of December, 1913, the defendant, S. P. Render, came to this plaintiff and said to him that if this plaintiff would continue his services in said cause and not withdraw therefrom, he, the said S. P. Render, would pay a fee for plaintiff's services in said cause, and requested this plaintiff not to withdraw from said cause, but to continue his services therein, and acting upon the defendant's representations that he would pay plaintiff's fee in said cause, this plaintiff did continue in said case and did not withdraw therefrom; that from the 1st of December, 1913, up and to and including the trial of said cause, which was in February, 1914, this plaintiff devoted all of his time and attention to the preparation of said case, and spent much time from his office in taking depositions and consulting with witnesses and other parties necessary for a trial of said cause, and upon the trial thereof, participated therein; that the services rendered by this plaintiff in said cause, for which the defendant agreed and promised to pay, were reasonably worth the sum of \$1,500, and that no part thereof has been paid to this plaintiff, save and except the sum of \$175; that said defendant frequently, from December 1st up to the time of the trial and during the trial, stated to this plaintiff that he would pay him for his services in said cause, and this plaintiff rendered and performed the same relying upon the defendant's promise and agreement to pay him therefor. Wherefore, premises considered, the plaintiff prays judgment against the defendant, S. P. Render, for the sum of \$1,325, with interest from this date, for costs and all proper relief."

The defendant to this petition filed the following verified answer:

"Comes now S. P. Render, defendant above named, and, for answer to the petition of said plaintiff denies each and every allegation therein contained."

The defendant in the court below defended against this action on the theory, and the sole and only theory, that he did not make the promise or enter into the contract as alleged and set forth in plaintiff's petition, and as proven by plaintiff. The sole question presented to the court below upon the trial of this case, and submitted by the trial court to the jury, was whether or not the defendant made and entered into the contract with the plaintiff as alleged and proven by him. The defendant requested no instructions and

saved no exceptions to any of the instructions given by the court to the jury in his charge—none. For the first time in this lawsuit and in his printed brief the defendant raises and urges upon this court the sole and single proposition that this was a verbal contract, made by the defendant with the plaintiff in the nature of a special promise to answer for the debt, default, or miscarriage of another, and that it does not fall under the article of our statutes on guaranty, and that hence, under section 941, Rev. Laws of Oklahoma 1910, the same is expressly inhibited and invalid, the plaintiff having first been employed by one Minnie Bond and Julian R. Bond to institute and prosecute the \$50,000 damage suit against T. P. Gore for assault, and upon their failure to arrange for or pay the plaintiff his fee for said services, conceding that the defendant contracted to pay same as alleged and proven by plaintiff in this action in the trial court, still the said contract clearly falls under the statute of frauds of our state.

Conceding but not deciding that this contract falls within the statute of frauds, has defendant waived this point by his failure to raise and urge it, obtain a ruling thereon, and when decided adversely to him, save the proper exception in the trial court? We think so. A verbal promise to answer for the debt of another is not illegal, unlawful, or immoral. It is not, strictly speaking, void, but merely voidable. The statute is solely for the benefit of a person sought to be bound by such a promise. He may avail himself of the statute, or not, as seems best to him. It is a question in which he and no one else is interested. If he fails to take advantage of the statute, the contract, under all the authorities, is valid and enforceable. While there may be a conflict in the authorities as to what will constitute a waiver of the statute, yet we know of no authority which holds that the statute cannot be waived. This court in the case of *Altoona Portland Cement Co. v. Burbank*, 44 Okl. 76, 143 Pac. 845, in passing on this question held as follows:

"Such contracts are not positively illegal in any particular, but are negatively invalid, although only as against one who has not subscribed a note or memorandum thereof in writing, and only to the limited extent that no enforceable demand against him can be predicated thereon in the absence of at least his tacit consent, *as by waiver of that point*, in the action or of an equitable estoppel to deny liability." (Italics ours.)

Defendant did not demur to the petition of plaintiff on the ground that the contract was within the statute or on any other ground. He did not plead the statute of frauds in his answer. He did not object to the introduction of evidence under the petition of the plaintiff on the ground that no cause of action was stated, or on the ground that the contract was within the statute of frauds. He did not object to the testimony of plaintiff when testifying regarding the

verbal contract, nor move to strike the same out on any ground or for any reason. After the evidence was all in and established, as now claimed, by defendant, that the contract was within the statute, he did not demur thereto or move the court for a directed verdict. He requested no instructions on any ground, and took no exceptions to the instructions given by the court, which presented to the jury but the one question, and that was whether or not the plaintiff entered into the contract alleged. And he did not even raise the question in his motion for a new trial. That all this constituted a plain waiver of the statute and the rights, if any, he had thereunder, we think, is plain. The Supreme Court of South Dakota passed on this question in the case of *Prior v. Sanborn County*, 12 S. D. 86, 80 N. W. 169, wherein it held:

"Failure to urge an objection that a contract is within the statute of frauds, in the trial court, is a waiver thereof."

Defendant, as the record affirmatively shows, at no time and in no manner even attempted to raise the question of the statute of frauds in the trial court, and he therefore brought himself squarely within the rule laid down by this court in the *Altoona Portland Cement Co. Case*, supra. Not having raised this question in the trial court, he cannot raise it for the first time in this court. That a party cannot, for the first time on appeal, raise the question that the contract sued on is within the statute of frauds we think is settled by all the authorities. The general rule in this regard is laid down in 2 Cyc. 665, as follows:

"An objection to the validity of a contract or instrument must be made in the court below, and cannot be urged for the first time on appeal. * * * Thus it cannot be first objected to that a contract is void under the Sunday laws; that a contract or deed is tainted with fraud or usury; that it is champertous; that it is void under the statute of frauds. * * *"

The Supreme Court of the state of Illinois passed on this question in the case of *Highley v. Metzger*, 187 Ill. 237, 58 N. E. 407, as follows:

"The objection that defendant was sued on an oral promise to answer for the debt of another, which has not been raised by the pleadings, nor by objections to evidence, nor by exceptions to the instructions, cannot be taken advantage of for the first time on appeal."

The Supreme Court of South Dakota upheld the same rule in the case of *Prior v. Sanborn County*, 12 S. D. 86, 80 N. W. 169, as follows:

"Whether the foregoing record is sufficient to take the agreement out of the statute need not be determined, because the failure to raise the point in the trial court constitutes a waiver, and it is now too late to urge the objection for the first time."

The Supreme Court of Iowa also followed this rule in the case of *Holt v. Brown*, 63 Iowa, 319, 19 N. W. 235, from which case we quote as follows:

"Where the statute of frauds is not pleaded, nor objection made to evidence on the trial, because the contract was within the statute, but the objection is first made in the argument of counsel on appeal, it comes too late."

In the case of *Lydig v. Braman*, 177 Mass. 212, 58 N. E. 696, the Supreme Court of Massachusetts held as follows:

"A defense of the statute of frauds on a contract sued on is not available on appeal, where it is not raised on the trial."

The Court of Appeals of Missouri passed on this question in the case of *Walker v. Cooper*, 97 Mo. App. 441, 71 S. W. 370, as follows:

"The statute of frauds cannot be invoked as a defense to an action on a contract for the first time on appeal."

In the case of *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93, the court held:

"The statute of frauds cannot be, for the first time, invoked on appeal."

The Supreme Court of Vermont, in the case of *Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943, upheld this same rule as follows:

"A defense that a contract was within the statute of frauds could not be set up on appeal where appellants had allowed the same to be established on the trial by parol evidence without objection."

The Court of Appeals of New York passed on this question in the case of *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 88, 17 N. E. 671, wherein it was held:

"The question whether an assignment of a debt is valid under the statute of frauds cannot be raised on appeal where an exception is not taken below."

Other courts have held:

"The defense of the statute of frauds is waived, if not pleaded." *Hogan v. Easterday*, 58 Ill. App. 45; *Van Dyne v. Vreeland*, 12 N. J. Eq. (1 Beas.) 142.

"Failure to plead the statute of frauds in an action on a verbal contract is a waiver of that defense." *Carpenter v. Davis*, 72 Ill. 14.

"By placing a defense on other grounds, and failure to plead the statute, a party waives the defense that the contract sued on is within the statute of frauds." *Finucan v. Kendig*, 109 Ill. 198.

"Where, in an action by the vendor for the price, the purchaser did not seek to avoid the sale as being in parol, but sought to have the lands purchased, secured by a good deed, and it was proper to consider the case as if the contract of sale had been in writing." *Richardson v. Milner*, 5 Ky. Law Rep. 118.

"Where the defendant, in his answer, admits substantially the contract set out in his petition, but alleges that the plaintiff has violated its provisions, and there is no plea of the statute of frauds, the statute will be considered as waived." *Connor v. Hingtgen*, 19 Neb. 472, 27 N. W. 443.

"Where the defendant admits the contract declared upon and does not plead the statute of frauds, or insist on it in his answer he will be deemed to have renounced the benefit of it." *Duffy v. O'Donovan*, 46 N. Y. 223.

"An objection that a contract was void under the statute, not taken in the complaint and raised for the first time in the requests for finding, comes too late." *Porter v. Wormser*, 94 N. Y. 431.

"A defendant can waive the immunity granted

him by the statute of frauds, and unless he sets up the defense, or in some way calls it to the attention of the court, the court is not required to interpose it." *League v. Davis*, 53 Tex. 9.

"The statute of frauds is waived, unless pleaded." *Howe v. Chesley*, 56 Vt. 727.

Century Digest, topic "Frauds, Statute of," § 865.

"The privilege is personal, and cannot be made available by a third person, a stranger to the contract, and it may be waived, and is regarded as waived, unless the party avails himself of it either by his pleadings, or under the general issue, where advantage may be taken of it without a special plea. * * * The courts, of course, take judicial notice of the statute, but they will not take judicial notice that a given contract is void because not in writing. The party must allege and prove such ground of defense." *Wood on Statute of Frauds*, § 277.

In *McCoy v. Williams*, 6 Ill. 584, the court held that the plea of the statute of frauds is a personal privilege, which the party may waive; another cannot plead it for him, or compel him to plead it.

In Vermont, if a plea avers that the promise sued on was a promise to pay the debt of another, to wit, B., a replication that the promise was not a promise to pay the debt of said B. is good, and the defense of the statute may be shown under the general issue, or pleaded specially. *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679.

In Illinois the statute must be pleaded, if it is to be relied upon by the defendant. He cannot set it up, for the first time, in an instruction. *Warren v. Dickson*, 27 Ill. 115.

So in Alabama, the defense arising under the statute must be pleaded; and, if waived, and the contract is admitted or established by proof, it will be enforced. *Patterson v. Ware*, 10 Ala. 444.

In New Jersey the statute must be relied on; that is, the party must either plead it specially or urge it as a ground of defense. Thus, a defendant may insist upon the benefit of the statute of frauds, although he admits the parol agreement; but if he does not insist upon the statute, he is not entitled to its benefit. *Ashmore v. Evans*, 11 N. J. Eq. 151.

We are of the opinion that the correct rule as to properly raising the question of the statute of frauds by the defendant in this jurisdiction is that when the defendant denies in his answer the making of the contract upon which the action is brought, he may then avail himself of the defense that the agreement was invalid under the statute of frauds, but where the defendant admits the making of the contract sued on in the petition, in his answer, he must then specially and specifically set up and plead the statute of frauds in his answer, or he will be held thereby to have waived it. Under a general denial the defendant raises the issue that he did not make the contract sued upon as set forth by the plaintiff in his petition, and the issue that the same, if made, is invalid under the statute of frauds.

"Generally anything going to show that the cause of action sued upon never existed, or

which merely disproves what plaintiff alleges, may be given in evidence under a general denial. The defendant may give evidence controverting any facts necessary to be established by plaintiff, but not to disprove a defense founded on new matter. Evidence to disprove wholly or in part any fact which plaintiff must establish to show a cause of action may be given in evidence under a general denial. Under our system of practice, and under every rational, logical system of pleading, the defendant must, under a general denial, be permitted to controvert by evidence everything which the plaintiff is bound, in the first instance, to prove to make out his cause of action." *Evans v. Williams*, 60 Barb. (N. Y.) 346; *Greenfield v. Mass. Mut. L. I. Co.*, 47 N. Y. 430; *Andrews v. Bond*, 16 Barb. (N. Y.) 633; *Weaver v. Barden*, 49 N. Y. 286; *O'Brien v. McCann*, 58 N. Y. 373; *Griffin v. Long Island R. R. Co.*, 101 N. Y. 848, 4 N. E. 740.

The defendant quotes from and cites the following authorities in his reply brief filed herein July 7, 1916: *Altoona Portland Cement Co. v. Burbank*, 44 Okl. 76, 143 Pac. 845; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 191; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; *Williams-Haywood Shoe Co. v. Brooks et al.*, 9 Wyo. 424, 64 Pac. 343; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722; *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 837, 80 Am. St. Rep. 783; *Wiswell v. Tefft*, 5 Kan. 263—to show that the statute of frauds may be raised under a general denial. To this proposition we have acceded and do now accede. "But one thing lackest thou yet." The defendant, having thus raised said issue by his general denial, which at the same time raises the other issue denying the making of the contract sued upon, must, in some manner, somehow, somehow, and by some means, go further and challenge the attention of the trial court to the issue of the statute of frauds, and insist and rely upon it as a defense in the trial court. He will not be permitted by some legerdemain to keep this issue, so raised by him, snugly smuggled away somewhere in the mental catacombs of silence and obscurity, jealously keeping and guarding it from the sight and attention of the trial court from the inception of the cause to its uttermost close, and then for the first time spring it on this court, Minerva-like, and press it for the first time, and as the sole, single, and only issue in his brief here.

We have carefully examined each of the cases cited by defendant in his reply brief, as set out herein, supra, and find that in each and all, save and except perhaps, *Wiswell v. Tefft*, supra, it is plainly to be seen that under the general denial, the defendant in some manner brought the attention of the trial court specifically to the issue raised of the statute of frauds. In *Wiswell v. Tefft*, supra, equal comfort can be found that it was or that it was not drawn to the attention of the trial court. In the case of *Altoona Portland*

Cement Co. v. Burbank et al., supra, *Thacker, O.*, speaking for this court said:

"The defendant, as seller, is not bound by a merely oral acceptance of plaintiffs' order for 500 barrels of cement at \$1.17 per barrel, nor liable for damages for failure to deliver the same, as such a contract is invalid under section 847, St. Okl. 1890 (section 941, Rev. Laws 1910). * * * The plaintiffs' bill of particulars, demanding \$199.50 as, in effect, the excess * * * of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled' (quoting section 2627, St. Okl. 1890; section 2860, Rev. Laws 1910) and disclosing that defendant had not directly nor by agent subscribed any note or memorandum of the contract in writing, as required by section 847 (section 941), cited supra, stated no cause of action. See cases cited supra. Although our statute renders such contracts invalid only in the qualified sense stated in *Schechinger v. Gault et al.*, 35 Okl. 416, 130 Pac. 305 [Ann. Cas. 1914D, 468], we think they are so far invalid, as held in *Jones v. Pettigrew*, 25 S. D. 482, 127 N. W. 538, under a statute in the same form and derived from the same source (the territory of Dakota), that it is unnecessary for defendant to specially plead the statute. Such contracts are not positively illegal in any particular, but are negatively invalid, although only as against one who has not subscribed a note or memorandum thereof in writing, and only to the limited extent that no enforceable demand against him can be predicated thereon in the absence of at least his tacit consent, as by waiver of that point, in the action or of an equitable estoppel to deny liability. And, where there is at least a general denial, as here, the court should, upon a motion therefor, as was made in this case, direct a verdict for the defendant. Such a bill of particulars was subject to demurrer; but, even if there was a failure to demur, this would not constitute a waiver of the invalidating effect of the statute of frauds, as the contract itself is invalid in respect to plaintiffs' demand; and nothing less than the tacit consent of the defendant that it be treated as valid or its estoppel to deny its validity, as by failing both to demur and to deny its alleged valid effect or by some other act or omission implying such consent or showing such estoppel, could be regarded as precluding it from asserting its invalidity at any time prior to the final submission of the case to the jury. See *Jones v. Pettigrew*, supra. There is a contrariety of views, however, upon the question of proper defensive pleadings in such cases, as will be seen from an examination of 20 Cyc. 312-314; *Owen v. Riddle*, 81 N. J. Law, 546, 79 Atl. 836, Ann. Cas. 1912D, 45, with the extensive notes thereto. Further, it will be presumed that defendant's pleadings, being oral, were sufficient to present the question of the validity of the contract under the statute of frauds as a partial and legally necessary explanation of the action of the trial court in submitting to the jury the question as to whether the contract was valid notwithstanding the statute of frauds, upon the ground that the amount involved was under \$50, which was contrary to all the evidence, or upon the ground that some note or memorandum of the contract in writing had been signed by the defendant or its agent, of which there was no evidence, although this does not explain why this question was so submitted in the absence of any issue of fact made by the evidence in this regard."

We have also gone to the trouble of obtaining from the clerk's office the original case-made or record in this case, and the same lies before us. We find from it: That the

plaintiffs originated this action by filing the following bill of particulars in the justice court, before M. D. Asher, Justice of the Peace, in and for the city of Enid township:

"Comes now C. J. Burbank and C. F. Holmes, plaintiffs in the above entitled cause, and for cause of action against the defendant allege: That on or about the 30th day of October, 1909, the plaintiffs and the defendant entered into an agreement, upon a statement or memoranda in writing, signed by plaintiff, whereby the defendant sold and agreed to deliver to the plaintiffs 500 barrels of cement at the agreed price of \$1.17 per barrel. Said cement to be delivered to the plaintiffs, at any time, upon ten days' notice. Plaintiffs state that on or about the 25th day of October 1909, they gave notice to the defendants, that said cement would be needed, and delivery, at Enid, was demanded on 8th day of November, 1909, as provided for in said agreement. Plaintiffs further state that they repeatedly, and at various times made inquiry about said cement, and that said cement was not delivered within the ten days, after notice given, as aforesaid, and that said cement has never been delivered, according to the agreement, by the defendant to the plaintiffs, at Enid, Okl., to the damage, to the plaintiffs in the sum of \$190.50. Wherefore plaintiffs pray judgment against the defendant, in the sum of \$190.50, together with the costs of this action."

That this bill of particulars was afterwards, and on the 17th day of February, 1910, filed in the office of the clerk of the county court of Garfield county, Okl. That afterwards said cause came on regularly for trial in said county court, whereupon the following journal entry was entered of record:

"On this 3d day of September, 1910, the same being one of the days of the regular August, 1910, term of this court, the above-entitled action came on to be heard upon the pleadings and the evidence, and, a jury being waived, was submitted to the court, Swigert & Wedgewood appearing for the plaintiffs, and Kruse & Hills for the defendant. After the plaintiff, C. J. Burbank, had been sworn and some testimony elicited from him on part of the plaintiffs, the plaintiffs made application for a continuance, in order to enable them to serve notice upon the defendant to produce in court, that the same might be used in evidence, the order or memoranda in writing, claimed by the plaintiffs to have been delivered to the defendant, for the cement mentioned in plaintiffs' bill of particulars, the defendant having objected to the production thereof without notice as required by law, upon request of the plaintiffs, and objected to the introduction of parol evidence to show the contents thereof; and the court, after carefully considering said application, finds that the same ought to be granted, upon condition that the plaintiffs pay all court costs to this date; and, the plaintiffs having agreed to said terms, it is ordered by the court that this action be, and the same hereby is, continued to the next regular term of this court, and it is further ordered that the plaintiffs pay all court costs herein to and including this term of court. To all of which the defendant excepts, and exception is hereby given it.

"By the Court:

"[Signed] James B. Cullison, Judge.

"O. K. Swigert & Wedgewood, Attys. for Plaintiffs. Kruse & Hills, for Deft."

That thereafter, and on January 10, 1911, plaintiffs served upon the defendant notice to produce certain papers as follows:

"The defendant is hereby notified to produce and have the same present that they may be

used in evidence upon trial of the above-entitled action, in the county court of Garfield county, Okl., wherein said action is now pending, on the hearing and trial thereof, an order or memoranda, in writing, claimed by the plaintiffs to have been furnished and delivered to the defendant, through Park Cole, its agent at Enid, Okl., for the cement, which is mentioned in the plaintiffs' bill of particulars, and also an order for cement, which was offered and used in evidence on part of the defendant, in the trial of this said action, in justice court of Garfield county, Okl.

"Dated January 10, 1911. Swigert & Wedgewood, Attys. for Plaintiffs.

"We hereby acknowledge service and the receipt of a copy of the above and foregoing notice, this 10th day of January, 1911. Carl Kruse, Atty. for Defendant."

That afterwards and upon the trial of said cause in said county court on the 28th day of February, 1911, before the court and a jury of six men, the plaintiff, C. J. Burbank, was called to the stand, and testified in behalf of the plaintiffs. Over objections and exceptions, multifarious and multitudinous, he testified that he had given to one Park D. Cole, as agent for defendant company, an order for the cement in question, and that a memorandum in writing was made of said order, and signed by said Cole on behalf of said defendant company, and the same was delivered to said Cole by plaintiff. The price of said cement so purchased exceeded \$50. The plaintiffs rested their case with the testimony of this single witness. Whereupon the defendant company interposed the following demurrer to the evidence of plaintiffs:

"At this time the defendant demurs to the evidence introduced by the plaintiff, and asks the court to direct the jury to return a verdict in favor of the defendant and dismiss the plaintiff's cause of action, for the following reasons, to wit:

"First. Because the testimony does not show any cause of action in favor of the plaintiff and against the defendant.

"Second. Because the plaintiff has wholly neglected to establish any contract with the defendant.

"Third. For the reason that in the bill of particulars filed in this case the allegation is that the plaintiff entered into a verbal contract with the defendant and that the testimony shows that no such contract was entered into between the plaintiff and defendant.

"Fourth. For the further reason that plaintiff has wholly failed to show that Park D. Cole, who took the order, was the agent of the defendant, or had any authority from the defendant to represent the defendant as such agent.

"By the Court: For that reason the demurrer will be overruled, and the request for a peremptory instruction will be overruled, and exception noted."

Thereupon the defendant company introduced J. J. Helfer, who y-clept himself as a "usually recognized salesman" of said defendant company; said he knew one Park D. Cole; said he had a contract with the company for the output of this mill, and that he employed all the salesmen, and that he checked all sales and all shipments, and that everything pertaining to the sales department came through his hands; that at

the time this memorandum was signed by the said Park D. Cole, he, the said Cole, was no agent of said company; denied the agency of Cole, and denied that the company was bound by said memorandum of agreement. The defendant rested its case on the testimony alone of this witness, J. J. Helfer. The court then charged the jury in instruction No. 1, as follows:

"Gentlemen of the jury, you are instructed that this is a case wherein O. J. Burbank and C. F. Holmes, partners, plaintiffs, sued the Altoona Portland Cement Company, defendants, upon the following cause of action: That on or about the 30th day of October, 1909, the plaintiffs and the defendant entered into an agreement upon a statement or memoranda in writing signed by plaintiff, whereby the defendant sold and agreed to deliver to the plaintiff 500 barrels of cement at the agreed price of \$1.17 per barrel, said cement to be delivered to the plaintiff at any time upon ten days' notice. That plaintiffs further allege that on or about the 25th day of October, 1909, they gave notice to the defendant that said cement would be needed on the 8th day of November, 1909, as provided for in said agreement. Plaintiffs further allege that they repeatedly and at various times made inquiry about said cement from the said defendant, and that said cement was not delivered to the plaintiff within the ten days after notice was given, as aforesaid, and that said cement has never been delivered according to the agreement by the defendant to the plaintiffs at Enid, Okla., and that by reason of said defendant failing to deliver said cement the said plaintiffs have been damaged in the sum of \$199.50. To all of which the defendant herein has filed herein its general denial, denying that the said defendant ever entered into any contract of any kind whatever, either directly or indirectly with the plaintiff. Which puts into issue every material allegation in the plaintiff's petition, filed herein and in order for the plaintiff to recover, the burden of proof is upon the plaintiff, and they must prove every material allegation in their petition by a preponderance of the evidence, and unless the plaintiffs so prove the material allegations in their petition by a preponderance of the evidence, your verdict should be for the defendant."

And in instruction No. 3, as follows:

"The jury are instructed that under the law of the state of Oklahoma a contract is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged, that is, the defendant, or by his agent, where the same is for an agreement for the sale of goods, chattels, or things in action such as is involved in this case at a price not less than \$50, and in this connection you are instructed that, if you find from a fair preponderance of the evidence in this case that the amount attempted to be charged against the defendant is more than \$50, and that the defendant or its agent did not subscribe a memorandum in writing, your verdict should be for the defendant."

This instruction, the court's instruction No. 3, supra, was clearly prepared and asked by the defendant for the following reasons: The court gave 16 instructions, 1 to 16, inclusive, marked by numerals at the bottom of each. Instruction No. 1 has no number or other notation at the top, and was clearly prepared and given strictly by the court. Instruction numbered 2 at bottom is designated at top with style of court, style of cause,

"Instruction No. 4, requested by Pliffs," and begins with, "Gentlemen of the jury." It is marked at bottom, "Given, objected to by Deft., objection overruled, exception noted. Winfield Scott, Co. Judge." The same is true as to instruction 10 as numbered by the court, except it is marked at top, "Instruction No. 3, requested by the plaintiffs." The same is true as to instruction No. 11, as numbered by the court, except it is marked at top, "Instruction No. 2, requested by plaintiff." The same is true as to instruction numbered 12 by the court, except it is marked at top, "Instruction No. 1, requested by the plaintiff." Instruction numbered 3 by the court, and marked at bottom, "Given, Winfield Scott, Co. Judge"—is marked at top, "Instruction No. 8." This is true of court's No. 4, except marked at top, "Instruction No. 2." The same is true of court's No. 5, except marked at top, "Instruction No. 7." The same is true of court's No. 6, except marked at top, "Instruction No. 6." The same is true as to court's No. 7, except marked at top, "Instruction No. 5." The same is true as to court's No. 8, except marked at top, "Instruction No. 4." The record then shows the exception on the part of the defendant to the court's refusal to give instructions Nos. 1, 9, and 10, asked for by the defendant. Thus it becomes manifest that the plaintiffs asked for four instructions, each of which were given by the court and objected to and excepted to by the defendant, and that the defendant asked for 10 instructions, instructions as numbered by defendant, 2, 3, 4, 5, 6, 7, and 8, being given by the court, with no objections made nor exceptions saved by the plaintiffs, and instructions as numbered by the defendants 1, 9, and 10, refused by the court and excepted to by the defendant. The record does not disclose any exceptions on the part of plaintiffs to the refusal of the court to give any instructions asked for by them. In the instructions asked for by both sides and given by the court the question as to agency and the proof of same, etc., are fully set forth to the jury. The remaining instructions given by the court are general. It, therefore, needs no comment from us. It doth now most gloriously appear from the face of the record that under his general denial in the trial court the defendant not only raised the two issues of not having made the contract and of the question of the statutes of frauds, but that it most strenuously, and with a dogged and stubborn persistence born of despair to win its lawsuit, pounded said question, so raised, upon the attention of the court and jury from alpha to the omega of the cause in the court below.

The case of *Feeney v. Howard*, supra, is quoted from by counsel for defendant most extensively, heavily underscored very frequently, and largely relied upon for the sustention of the proposition that the defendant can raise the issue of the statute of

frauds under a general denial. This case lies before us. We will call upon Hayne, C., to repeat for us his words uttered by him in the statement of this opinion in speaking for the Supreme Court of California, July 1, 1889:

"Michael Feeney, in his lifetime, commenced the present suit in his own name (not as administrator) to have it declared that he was entitled to said balance. On the trial, he introduced in evidence the deeds above mentioned, and then offered parol evidence to prove that they were without consideration, and that the property was conveyed to Howard upon certain trusts, and was to be reconveyed on request. Howard objected on the ground of the statute of frauds. The parol evidence was admitted against such objection, to which Howard excepted, and judgment was given for the plaintiff, from which, and from an order denying a motion for a new trial, the appeal is taken. * * * Unless the case can be brought within some one of the exceptions hereinafter noticed, we think that it is clear that the statute of frauds is a defense to the action, and that the parol evidence was improperly admitted. If a trust could be raised in such a way, what operation could the statute of frauds ever have? The authorities are overwhelming to this effect."

We will next call to the stand, Dickinson, J., who spoke for the Supreme Court of Minnesota, in the case of *Louis Fontaine and Another v. H. T. Bush and Another*, supra:

"This action is for the recovery of the price (more than \$50) of a large quantity of potatoes, alleged to have been sold by the plaintiffs to the defendants at an agreed price. The answer denied the sale. The court, trying the cause without a jury, found in favor of the defendants, upon the ground that the case was within the statute of frauds. The mere oral agreement was void, under the statute, and the denial of the sale in the answer was sufficient to enable the defendants to avail themselves of that defense. *Tatge v. Tatge*, 34 Minn. 272, 25 N. W. 596, and 26 N. W. 121. The case justified the finding of the court that there had been no acceptance on the part of the defendants satisfying the requirement of the statute."

We will now call upon Poland, C. J., to tell us again what he said on this question in speaking for the Supreme Court of Vermont in the case of *Hotchkiss v. Ladd*, supra:

"To the plaintiff's declaration the defendant pleaded the statute of limitations and the statute of frauds, to both which pleas the plaintiff replied, and to these replications Ladd demurred. The defendant Ladd claims, not only that the plaintiff's replications are insufficient, but that the plaintiff's declaration is also defective, so as to be reached by the demurrer. Two objections are made to the declaration: First, that it states no sufficient consideration to support the promise declared on; second, that the promise is within the statute of frauds. Whether either of these objections is well founded or not depends mainly upon the construction to be given to the declaration. It is exceedingly difficult from the declaration to determine the real character of the transaction between the parties, and its allegations are nearly repugnant to each other."

And lastly we will again hear from Chief Justice Potter, when speaking for the Supreme Court of Wyoming in the case of *Williams-Haywood Shoe Co. v. Brooks*, supra:

"As disclosed by the testimony, plaintiff, a corporation, is engaged in the wholesale boot

and shoe business at Omaha, Neb. On or about November 1, 1897, a traveling salesman of the plaintiff visited Sheridan, where the defendant firm conducted a mercantile business, and solicited their order. The salesman testified that Mr. J. H. Ivey went with him to the hotel, examined his samples, and gave him an order for goods, which he, the salesman, put down upon a written statement or memorandum, describing the various items, with the price opposite each item. When the statement or order was offered in evidence, the defendants made the following objection: 'Defendants object to the admission of Exhibit A, for the reason that the contract is within the statute of frauds; that the same is a verbal statement, not signed by the defendants, or either of them, and in no way can bind them, and is void; and for the further reason that it is incompetent, irrelevant, and immaterial.' The total amount of the order was \$789.20, and the statement thereof so offered in evidence was not signed by either of the defendants. No other writing or memorandum in writing showing the order or contract for the sale was produced. In the following April the plaintiff shipped the goods by rail to the defendants, but the latter refused to receive or accept them, and, in fact, did not take the goods from the depot, and never did accept them. Indeed, upon the trial it was admitted 'that the goods are at the depot, and that the firm of J. H. Ivey & Co. refused to receive them from the depot, and never have received the goods from the station at Sheridan, and have never accepted them, and have paid no part of the purchase price.' The court found that neither Lyman H. Brooks nor Ida Ivey were members of the firm of J. H. Ivey & Co., but that said Brooks had so held himself out as such a member as to be liable to creditors. The court further found, among other things, that the defendants had not received or accepted the goods, nor paid any part of the purchase price thereof; that no written contract of sale or purchase, or note or memorandum thereof, had been made or executed by the defendants, or either of them. Thereupon the law was found to be with the defendants, and judgment was rendered accordingly, and against the plaintiff for costs. A motion for new trial having been filed, it came on for argument, at which time, at the request of defendants, they were permitted to amend their answer by adding thereto the defense of the statute of frauds in accordance with the facts proved, which was thereupon done, and the motion for new trial overruled. An exception was duly preserved to the ruling, permitting the answer to be amended, and to the overruling of the motion for new trial."

This sufficeth to show that this question was directly brought to the attention of the trial court in these cases.

This court has laid down the same principle a number of times, and that is that this court will not pass upon questions not raised or presented in the trial court. One of the earliest decisions on this point is the case of *Healy v. Loofbourrow*, 2 Okl. 458, 37 Pac. 823, wherein it was held as follows:

"As a general rule, the Supreme Court of this territory will not consider for the first time on appeal questions not presented in the cause in the court below."

Later in the case of *McDonald v. Carpenter*, 11 Okl. 115, 65 Pac. 942, the territorial Supreme Court held:

"The points now contended for in the brief were not raised upon motion for a new trial, nor presented to the trial court for review at all. And the defendant in error was entitled

upon these grounds, to have the cause dismissed."

In the case of *Baker v. Marcum*, 22 Okl. 21, 97 Pac. 572, this court held:

"This court will not consider questions that do not go to the jurisdiction of the trial court that are raised for the first time in this court."

One of the latest expressions of this court on this question is found in the case of *Tirey v. Darneal*, 37 Okl. 611, 132 Pac. 1087, wherein the court held:

"In order to properly present a question to the Supreme Court for review, the record must affirmatively show that the alleged error complained of was presented to the trial court, and either ignored or decided adversely to the complaining party; and, unless it is thus presented to the trial court, and an opportunity there given to pass upon it, the same will not be considered by this court on appeal."

This court has repeatedly held that where a defendant relies upon a certain defense in the trial court, he will not be permitted on appeal to shift his position and present a defense that was not presented in the trial court. The latest expression of this court on this question that we have found is contained in the case of *Bouton v. Carson*, 152 Pac. 131, wherein this court held:

"A party cannot try his case in the trial court on one theory and then ask a reversal of judgment in this court on a theory not presented to the trial court or raised by the pleadings."

In the case of *Wattenbarger v. Hall*, 26 Okl. 815, 110 Pac. 911, this court said:

"The right of the plaintiff in error to recover was properly submitted on this theory, to the jury; and, the jury having found against him thereon, he will not be permitted to change from it in this court, amend his hold, and claim his right to recover on some other theory."

A similar expression is found in the case of *Duffey v. Scientific American Comp. Dept.*, 30 Okl. 742, 120 Pac. 1088, as follows:

"Where a defendant relies upon a certain defense in the trial court, he will not be permitted to shift his ground of defense on appeal, so as to present another defense, not presented nor relied upon, in trial court."

In the following cases the court upheld this same rule: *Harris v. First State Bank*, 21 Okl. 189, 95 Pac. 781; *Smith v. Colson*, 31 Okl. 703, 123 Pac. 149; *Hamilton v. Brown*, 31 Okl. 213, 120 Pac. 950; *Herbert v. Wagg*, 27 Okl. 674, 117 Pac. 209; *St. L. & S. F. R. R. Co. v. Key*, 28 Okl. 769, 115 Pac. 875; *Myers v. First Pres. Ch.*, 11 Okl. 544, 69 Pac. 874; *Shuler v. Collins*, 40 Okl. 126, 136 Pac. 752; *Turley v. Feebeck*, 38 Okl. 257, 132 Pac. 889; *Rhone Milling Co. v. F. & M. Nat. Bank*, 40 Okl. 131, 136 Pac. 1095; *Horne v. Okl. State Bank*, 42 Okl. 37, 139 Pac. 992; *Coombs v. Cook*, 35 Okl. 326, 129 Pac. 698; *C. R. I. & P. Ry. Co. v. McBee*, 45 Okl. 192, 145 Pac. 331; *Watson v. Taylor*, 35 Okl. 768, 131 Pac. 922; *Wallace v. Killian*, 40 Okl. 631, 140 Pac. 162.

For the reasons herein stated, it becomes and is manifest to us that the judgment of

the lower court should be, in all things, affirmed. Judgment affirmed.

PER CURIAM. Adopted in whole.

EVERY et al. v. HAYS. (No. 7518.)
(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. JURY \Rightarrow 14(2)—RIGHT TO TRIAL BY JURY
—NATURE OF ACTION.

Issues of fact arising in an action for the recovery of money only must be tried to a jury, unless a jury trial is waived or a reference ordered as provided by statute.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 67; Dec. Dig. \Rightarrow 14(2).]

2. JURY \Rightarrow 14(2)—RIGHT TO TRIAL BY JURY
—NATURE OF ACTION.

Where issue was joined by answer to a supplemental petition seeking recovery of a money judgment for use and occupation, rents, or damages, and a jury was not waived, defendant was entitled to a trial by jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 67; Dec. Dig. \Rightarrow 14(2).]

Commissioners' Opinion. Division No. 3.
Error from District Court, Mayes County;
Preston S. Davis, Judge.

Action by Craig C. Hays, a minor, by Jerry V. Hays, his guardian, against P. Avery and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

A. W. Fisher, of Pryor, for plaintiffs in error. J. Howard Langley, of Pryor, for defendant in error.

BLEAKMORE, C. This action was commenced in the district court of Mayes county, on January 31, 1911, by defendant in error as plaintiff, against the plaintiffs in error as defendants, seeking the cancellation of certain deeds of conveyance and to restrain the defendants from interfering with plaintiff in the possession of the lands involved. Judgment was rendered for plaintiff for the relief sought, and the cause was appealed to this court, where such judgment was affirmed. 44 Okl. 71, 144 Pac. 624.

When the mandate of this court reached the trial court, the plaintiff on January 9, 1915, filed in said cause the following motion:

"Comes now the plaintiff and respectively shows to the court that the defendants have had the use and benefit of the lands involved in this action and have collected the rents and profits therefrom for the years 1910, 1911, 1912, 1913, and 1914, the amount whereof and the value whereof the plaintiff is informed and believes and charges is \$150 per annum, amounting in the aggregate to \$750, and, wherefore, plaintiff moves the court for an accounting of such rents and profits by the defendants, and that the plaintiff be awarded such sum or sums as may be due him upon said accounting out of the moneys now in the hands of the defendant Citizens' Bank & Trust Company of Pryor Creek, Okl., and by the court heretofore ordered by said bank to wait the further determination of this cause."

The cause was set for hearing upon said motion upon January 19, 1915. Defendants

appeared by counsel and moved for a continuance. Upon refusal of the continuance, defendants filed what is termed an "answer" to said motion, by way of general denial. Defendants thereupon objected to a trial for divers reasons; among others, that notice of the filing of such motion was never given them, and that an issue of fact was presented upon which defendants were entitled to trial by jury. Such objections were overruled, to which defendants excepted. The court heard evidence and found that the defendants had used and occupied the premises for certain years, determined the reasonable rental value thereof, rendered judgment in favor of plaintiff for that amount, and directed its payment out of funds belonging to certain of the defendants then in the custody of the defendant Citizens' Bank & Trust Company. From this judgment defendants have again appealed.

[1, 2] No recovery for rents, use and occupation, or damages was sought in the original petition; and plaintiff's cause of action, therefore (save for the year 1910), arose during the pendency of the cause. While the pleading filed by plaintiff is styled "Motion for Accounting," it was apparently considered and treated as a supplemental petition such as might properly have been filed. *Consolidated Steel, etc., Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654. No motion was made to strike the same. After answer trial was had upon the issues thus presented. By appearance and answer defendants may be held to have waived notice of the filing of such supplemental petition. They failed to challenge the sufficiency thereof by demurrer or other pleading. They did object, however, to the trial had by the court of the issues of fact arising on such pleadings. The sole cause of action attempted to be alleged by the supplemental pleading was for the recovery of money only, and in no sense for an accounting.

By statute (R. L. 1910) it is provided:

"4989. Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party, and controverted by the other. There are two kinds: First, of law. Second, of fact." Section 5781, Comp. L. 1909.

"4990. An issue of law arises upon a demurrer to the petition, answer or reply, or to some part thereof." Section 5782, Comp. L. 1909.

"4991. An issue of fact arises: First, upon a material allegation in the petition controverted by the answer; or, second, upon new matter in the answer, controverted by the reply; or, third, upon new matter in the reply, which shall be considered as controverted by the defendant without further pleading." Section 5783, Comp. L. 1909.

"4993. Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided." Section 5785, Comp. L. 1909.

"4994. All other issues of fact shall be tried

by the court, subject to its power to order any issue or issues to be tried by jury, or referred as provided in this code." Section 5786, Comp. L. 1909.

In construing the foregoing provisions, it was held in *McCoy v. McCoy*, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146:

"In all civil actions for the recovery of money or for the recovery of specific real or personal property, every issue of the fact arising from the pleadings must be tried by a jury, unless a jury be waived by both parties to the action, or a reference be ordered as prescribed by statute. All other issues of fact (except those arising in actions for the recovery of money or specific real or personal property) and all issues of fact arising in equity proceedings may be tried by the court subject to its power to submit the issues to a jury or order a reference."

It follows that the defendants, not having waived a jury trial, were entitled to have the issues so formed tried by a jury, and it was error for the court to try and determine such issues of fact over their objections.

The judgment should therefore be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

MANGOLD & GLANDT BANK v. UTTERBACK. (No. 6028.)

(Supreme Court of Oklahoma. Jan. 11, 1916.
Released for Publication Nov. 17, 1916.)

(Syllabus by the Court.)

1. BILLS AND NOTES — 330 — NEGOTIABLE NOTE—INNOCENT PURCHASER—"INDORSEE."

When the payee of a negotiable promissory note transfers it by indorsing thereon, "Payment guaranteed. Protest waived," the purchaser is an "indorsee," within the rule protecting an innocent purchaser of such paper for value and before maturity against defenses good between the original parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804; Dec. Dig. 330.]

For other definitions, see Words and Phrases, First and Second Series, Indorsees.]

2. BILLS AND NOTES — 330 — NEGOTIABLE NOTE—COMMERCIAL INDORSEMENT IN DUE COURSE.

The tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases toward holding the same to be a commercial indorsement in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804; Dec. Dig. 330.]

3. BILLS AND NOTES — 267 — SIMPLE INDORSEMENT—EFFECT.

A simple indorsement by the payee of his name upon a note serves the double purpose, both of transferring the title to the holder, and of charging the payee with the obligation to pay it in event the maker upon presentation declines to honor it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 620, 629; Dec. Dig. 267.]

4. PLEADING \Leftrightarrow 345(1)—ACTION ON NOTE — JUDGMENT ON PLEADINGS.

Where plaintiff declares upon an indorsed negotiable promissory note, and a copy of the note is attached to the petition showing an undated indorsement, and defendant does not deny such indorsement under oath or fails to plead facts showing that plaintiff took the note with knowledge of such infirmities as would operate to defeat it between the original parties, plaintiff was entitled to judgment upon the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1067-1069; Dec. Dig. \Leftrightarrow 345(1).]

Commissioners' Opinion, Division No. 4. Error from County Court, Caddo County; C. Ross Hume, Judge.

Action by the Mangold & Glandt Bank against W. T. Utterback. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Randall U. Livesay, of Anadarko, for plaintiff in error. A. J. Morris, of Anadarko, for defendant in error.

MATHEWS, C. In October, 1910, the defendant purchased from the Denver-Laramie Realty Company certain shares of stock in said company and executed his note to said company in payment for same. On August 14, 1911, the note was renewed, and afterwards transferred to the plaintiff in error. A copy of the note with indorsements is as follows:

"\$1,000.00. Denver, Colorado, August 14, 1911.

"December 14, 1911, after date, I promise to pay to the order of Denver-Laramie Realty Company one thousand & no/100 Dollars, for value received. Payable at First State Bank of Binger, Okl., with interest at seven per cent., from maturity. [Signed] W. T. Utterback."

Indorsed on back:

"Payment Guaranteed. Protest waived.

"The Denver-Laramie Realty Co.,

"By A. J. Spengel, Treasurer.

"Northwestern Land and Iron Co.,

"By A. J. Spengel, Treasurer."

On October 10, 1912, suit was instituted on said note in the county court of Caddo county. The defendant answered by general denial, admitted the execution of the note, and alleged that the note was given for certain shares of stock in the Denver-Laramie Realty Company, but claimed that he was induced to sign the same through certain false and fraudulent representations upon the part of said company. Trial was had to a jury, verdict was returned for defendant, and plaintiff prosecutes this appeal.

[1] Its first specification of error is stated as follows:

"The court erred in overruling motion of plaintiff for judgment, for the reason that, as plaintiff had alleged it was a purchaser in due course of business, for value, before maturity, and without notice, the defenses set up were not available to defendant."

The defendant advances the following argument against the foregoing contention of plaintiff:

"While the note is negotiable in form, the indorsement is in no sense a commercial indorsement. It is a guaranty of payment pure and simple; that is, the words, 'Payment guaranteed. Protest waived,' followed by the signatures of the two companies, mean that the companies guarantee the payment of the note and waive the protest thereof. The indorsement, amounting to a guaranty of payment, gives the plaintiff in error no standing as a bona fide holder of the note, but it holds the same subject to all defenses which would be available as against the original payee."

If plaintiff's contention is correct that the said indorsement upon the note was a commercial indorsement, there being no allegations in the answer that defendant had notice of the alleged infirmity of the note, then plaintiff was entitled to judgment upon the pleadings.

In arriving at a decision on this point we are confronted with a chaotic conflict of opinions thereon, and, as far as our investigation has led us, we find that the courts of but few, if any, of the states have been consistent in declaring on this proposition, and our own court is in conflict thereon. The case of McNary et al. v. Farmers' Nat. Bank, 33 Okl. 1, 124 Pac. 286, 41 L. R. A. (N. S.) 1009, Ann. Cas. 1914B, 248, sustains plaintiff, and the case of Ireland et al. v. Floyd, 42 Okl. 609, 142 Pac. 401, L. R. A. 1915C, 661, sustains defendant. An instructive note to the case of Hendrix v. Bauhard, Ann. Cas. 1918D, 688, after giving a list of the states, including both Oklahoma and Kansas, which hold that a signed guaranty on the back of a note makes the guarantor liable as an indorser, states that the great weight of authority supports that view. In the case last cited there was written on the back of the note, "For value received we hereby warrant the makers of this note financially good on execution," which was followed by the signatures of the payees, and it was there held, if the note was negotiated before maturity to a bona fide purchaser for value, he would be protected from any defense the maker might have against the payees.

The leading case holding to this view is a North Dakota case, Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556, and there the subject is also treated with an extended note which declares that the numerical weight of authorities support the decision in Dunham v. Peterson. The indorsement on the note in the Dunham Case was as follows: "For value received, I hereby guarantee the within note, waiving notice of protest and demand." Beneath this guaranty the payee signed his name. The court held therein that, when the payee of a negotiable promissory note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee within the rule protecting an innocent purchaser of such paper for value before maturity against defenses good between the original parties.

The case of Markey v. Corey, 108 Mich.

184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698, presents an instance where an assignment was written on the back of the note followed by the signature of the payee of the note, and the court held the payee liable as an indorser.

The case of *Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616, is an exhaustive and well-considered one on the point under discussion, and, after reviewing the authorities thereon at great length, concludes that a guaranty written on the back of a negotiable promissory note followed by the signature of the payee ordinarily amounts to a commercial indorsement. *Robinson v. Lair*, 31 Iowa, 9; *Kellogg v. Douglas County Bank*, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596; 2 Daniel on Negotiable Instruments (8th Ed.) § 1781; *Judson v. Gookwin*, 37 Ill. 286; *Green v. Burrows*, 47 Mich. 70, 10 N. W. 111; *Russell & Co. v. Klink*, 53 Mich. 161, 18 N. W. 627; *National Bank v. Haylen*, 14 Neb. 430, 16 N. W. 754; *Mullen v. Jones*, 102 Minn. 72, 112 N. W. 1048; *German American Savings Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57; *Dunham v. Peterson*, 5 N. D. 414, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556; *Elgin City Banking Co. v. Zelch*, 57 Minn. 487, 59 N. W. 544; *Childs, Junior, v. Davidson*, 38 Ill. 437; *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254; *Partridge v. Davis*, 20 Vt. 499; 3 R. C. L. vol. 3, § 241, p. 1035; *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811; *Helmer v. Commercial Bank*, 28 Neb. 474, 44 N. W. 482.

We are not unmindful of the fact that the case of *Ireland v. Floyd*, supra, is supported by a respectable line of authorities headed by the *Central Trust Co. v. First National Bank of Wyandotte*, 101 U. S. 68, 25 L. Ed. 876. Other authorities to the same effect are found in Ann. Cas. 1913D, 695; 36 L. R. A. p. 232, and 67 N. W. p. 295. But we think the better reasoning and greater weight of authority is with the case of *McNary et al. v. Farmers' Nat. Bank*, supra.

But, even if the case of *Ireland v. Floyd*, supra, was not opposed by the case of *McNary v. Farmers' Nat. Bank*, supra, and by the weight of authority from other states, we are inclined to the view that it is in conflict with the Negotiable Instruments Law of this state, adopted in 1909.

Section 4067, Rev. Laws 1910, so far as applicable, is as follows:

"Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply: * * *

"Sixth. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

Section 4088:

"Qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an in-

dorsement does not impair the negotiable character of the instrument."

Section 4107:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Section 4109:

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

[2] Section 4113:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

It will be observed from section 4113 that the tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases towards holding the same to be a commercial indorsement in due course. This rule is founded upon commercial necessity. The unshackled circulation of negotiable notes is a matter of great importance. The different forms of commercial instruments take the place of money. To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions.

[3] A simple indorsement by the payee of his name upon a note serves the double purpose both of transferring the title to the holder and of charging the payee with the obligation to pay it in event the maker upon presentation declines to honor it. But before the liability can be fixed against the indorser there must be: First, a demand made upon the maker of the note for payment; and, second, in case the same is not paid, notice must be given the indorser. The rule seems to be that a general guaranty is in law a general indorsement of the instrument, with a waiver of the condition precedent of a notice of nonpayment by the drawers. 3 R. L. C. § 371.

There is no contention but that in the case at bar the defendant is at least a guarantor. If he be a guarantor only, then he is not entitled to the legal rights of an indorser to be served with notice of nonpayment. Yet we find written upon the back of the instrument in controversy the very significant words "Protest waived." Why waive a right that the party did not have? It must be presumed that the parties did not intend to do a

useless and unnecessary act when these words were written upon the back of the instrument, and the reasonable construction is that by the entire indorsement he became an indorser with the enlarged liability of being legally held to payment without notice of the dishonor of the note. Further, no one can fairly say that the intention of defendant not to be bound is clearly indicated from the words written upon the back of the instrument in controversy; in fact, the indication points the other way.

It will be admitted that, where the payee in a note makes a written assignment of the same on the back of the note, followed by his signature, he can with much better logic argue that such an act should be construed as an assignment only, and not a commercial indorsement, than can one who makes a guaranty in a similar way, yet in the recent case of *Farnsworth v. Burdick*, 147 Pac. 863, under the same Negotiable Instruments Law as our own, the Kansas court held:

"Under the Negotiable Instruments Law (sections 5247-5448, Gen. St. 1909), a writing in these words, 'I hereby assign this note over to E. H. Farnsworth this the Nov. 1, 1910,' signed by the payee, on the back of a negotiable promissory note, complete and regular on its face, accompanied by delivery to the person named in the writing, is an indorsement of the note; and one who takes the note in good faith, for value, before it is due, without notice that it has been previously dishonored, and who, at the time he takes it, has no notice of any infirmity in the note or defect in the title of the person negotiating it, becomes the holder thereof in due course, and holds it free from any defect of title of the payee, and free from defenses available to the maker against the payee, and may enforce payment of the note for the full amount thereof against the maker."

Therefore holding, as we do, that the defendant was an indorser of the note in controversy, it appears that his answer was defective in two important particulars.

Section 4095, Rev. Laws 1910, reads as follows:

"Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been affected before the instrument was overdue."

[4] Not only was there a presumption of law that the plaintiff became a bona fide holder before maturity, but it so averred in its petition, and defendant has failed to plead that plaintiff took the note in bad faith or had notice of any infirmity of the note. *Sho-walter v. Webb*, 141 Pac. 439.

Section 4759, Rev. Laws 1910, provides:

"In all actions, allegations of the execution of written instruments and indorsements thereon, * * * shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

The plaintiff having alleged that the note was indorsed to it before maturity, for a valuable consideration, in due course of business, and a copy of said note having been attached to its petition showing the indorsement, and the indorsement having not been

denied under oath, it follows that plaintiff was entitled to judgment on the pleadings. See the case of *First Nat. Bank of Laramie, Wyo., v. Vaughan*, 151 Pac. 1118.

The judgment will be reversed and remanded, with instructions to the trial court that, if defendant does not elect to amend his answer, to enter judgment upon the pleadings in favor of plaintiff; if the answer is amended, then to proceed in conformity with this opinion.

PER CURIAM. Adopted in whole.

ST. LOUIS, I. M. & S. RY. CO. v. LOWREY. (No. 7877.)

(Supreme Court of Oklahoma. Oct. 17, 1916.)

(Syllabus by the Court.)

1. MOTIONS \S 59(2) — ORDERS—VACATION—POWER OF COURT.

A court of record has the inherent power on its own motion to set aside, vacate, or modify its orders, however conclusive in their character, during the term at which such orders are rendered or entered of record.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 76; Dec. Dig. \S 59(2).]

2. MOTIONS \S 49—DECISION—TIME FOR DECISION.

Where a motion is made during the term and continued to a future term, when decided, it is of the same legal contemplation as if the decision had been made at the term at which the motion was filed.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 62; Dec. Dig. \S 49.]

3. FORMER DECISION OVERRULED.

The holding in *Lookabaugh v. Cooper*, 5 Okl. 102, 48 Pac. 99, being in conflict with the weight of modern authorities, is not followed.

4. APPEAL AND ERROR \S 933(1)—REVIEW—PRESUMPTIONS—GROUND OF DECISION.

When the court in granting an order specifies fully and in detail the reasons for granting the same, it will be presumed that the ground thus stated is the only one upon which the court acts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3772; Dec. Dig. \S 933(1).]

5. APPEAL AND ERROR \S 1072 — REVIEW — SCOPE AND EXTENT—GROUND OF DECISION.

An order of court, setting aside an order granting a new trial and directing judgment to be entered upon the verdict, upon the grounds that the court was without jurisdiction at the term at which the new trial was granted to set its previous order aside rendered at the same term, overruling the motion for a new trial, was prejudicial error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4233½; Dec. Dig. \S 1072.]

Commissioners' Opinion, Division No. 1. Error from District Court, Nowata County; Chas. B. Wilson, Jr., Judge.

Action by Mary Lowrey against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Tillotson & Elliott, of Nowata, Thos. B. Pryor, of Ft. Smith, Ark., and W. L. Curtis, of Sallisaw, for plaintiff in error. Chase & Campbell and W. J. Campbell, all of Nowata, for defendant in error.

COLLIER, C. This is an action brought by defendant in error, hereinafter called plaintiff, against plaintiff in error, hereinafter designated as defendant, resulting in a verdict for defendant in error, in the sum of \$1,499.50, the said verdict being returned on September 30, 1914. On the 2d day of October, 1914, the defendant filed a motion for new trial, which was heard on the 7th of October and overruled, and judgment ordered entered on the verdict; and on the same day the order of the court, overruling motion for new trial and entering judgment on the verdict, was set aside. On December 28, 1914, motion for new trial was granted, and plaintiff given 10 days in which to file amended petition. On January 6, 1915, the plaintiff filed a motion to have judgment entered upon the pleadings, notwithstanding the fact that the court had entered an order granting a new trial. All of said motions and orders were filed and made during the term of said court at which said verdict was returned. At a subsequent term of the court, the prayer of the motion which was filed on January 6, 1915, was by leave of court amended by adding to the prayer of said motion for rehearing cancellation of order of said court made and entered October 7, 1914, which set aside and vacated prior order of said court made and entered on the same day, overruling motion for new trial, and directing judgment to be rendered on verdict, and also for the further relief of the cancellation and vacation of the order of said district court made and entered on the 28th day of December, 1914, granting defendant a new trial. Upon the hearing of said amended motion filed by plaintiff, the following order and journal entry was entered, which, omitting the caption, is in words and figures as follows, to wit:

"Be it remembered that on this 16th day of June, 1915, there came on for hearing the motion of the above-named plaintiff to have the court direct the clerk of this court to enter the judgment of this court, rendered on the 7th day of October, 1914, and to have vacated and set aside the order of court made on the 7th day of October, 1914, setting aside the order on that day made, overruling and denying the motion for a new trial, and directing and ordering judgment on the verdict of the jury in the sum of \$1,499.50, the said plaintiff appearing by its attorney of record; and, upon the hearing of said motion filed herein by the plaintiff, the court finds from the records in this case that on the 30th day of September, 1914, a verdict was returned in this case by the jury after trial thereof, in which verdict the plaintiff was awarded a recovery in the sum of \$1,499.50, and that on the 2d day of October, 1914, the defendant duly filed its motion for a new trial, which motion for new trial came on for hearing and was heard by the court on October 7, 1914, and was by the court

denied and overruled, and the defendant duly allowed and given an exception, and thereupon the court ordered judgment on the said verdict of the jury in the sum of \$1,499.50, and further ordered that the time be extended for a period of 90 days from that date in which the defendant might make and serve case-made, allowing 10 days in which amendments might be suggested after said time by plaintiff, and approving that such case-made might be settled by the court upon a notice of 5 days by either party; that thereafter, and on the same day, the court on its own motion, and without any motion being made by the defendant, and without any showing being made by the defendant, made and entered an order, vacating its former and previous order, denying and overruling the motion for new trial filed by the defendant, and vacated its order previously made, directing entry of judgment upon the verdict of the jury in favor of the plaintiff and against the defendant in the sum of \$1,499.50, and reinstating the said motion for a new trial, which the court had previously denied and overruled, and ordered the motion for a new trial to stand for hearing on a later day in the term, and did, on the 28th day of December, 1914, further consider the said motion for a new trial, and did sustain and grant the same, and did order a new trial in this case; and that all of said action of the court was done and orders made after the court had denied and overruled the motion for a new trial filed by the defendant in the first instance, and after judgment had been ordered on the verdict, and after the time had been extended for the making and serving of a case-made; that on January 6, 1915, and within the term of said court, this motion was filed by the plaintiff herein to have said orders vacated and have judgment entered as ordered.

"The court, being fully advised in the premises, concludes that the court was without power to reconsider its former action, and was without power to vacate and set aside its order, denying and overruling the motion of defendant for the new trial and ordering judgment on the verdict for plaintiff in the sum of \$1,499.50, when no application, petition, or motion was made by the defendant for that purpose, showing any valid or legal grounds therefor, and that the arbitrary and summary action on the part of the court in vacating and setting aside its former order, denying the motion for a new trial and ordering and directing the entry of judgment on the verdict of the jury in favor of the plaintiff and against the defendant in the sum of \$1,499.50, without any motion, application, or petition therefor, and without any showing or any legal or sufficient reasons and grounds therefor, was without effect, and was *coram non jure* and without the jurisdiction of the court, and was not legal and binding, but such orders were null and void.

"The court, therefore, doth order, adjudge, and decree the order made on the 7th day of October, 1914, vacating the previous and prior order of the court, denying and overruling the motion for a new trial and ordering judgment on the verdict for plaintiff in the sum of \$1,499.50, be, and the same is hereby, vacated and set aside, and the order of this court, made and entered on the 28th day of December, 1914, sustaining and granting the motion of defendant for a new trial herein, be, and the same is hereby, vacated and set aside, and the order of this court in the first instance, made and entered on October 7, 1914, denying and overruling the motion for a new trial filed by the defendant, and directing and ordering judgment on the verdict of the jury for \$1,499.50 in favor of the plaintiff and against the defendant, and extending the time in which the defendant may make and serve a case-made, allowing 10 days for the suggestion of amend-

ments, and providing for a settlement thereof on a notice of 5 days by either party, be, and the same is hereby reinstated upon the records of this court in this cause; and the court doth further order that the clerk of this court, pursuant to said order of this court, made on the 7th day of October, 1914, and pursuant to this order, proceed to enter the judgment of the court as directed by the court on the 7th day of October, 1914, in its first order, denying the motion for a new trial herein, and that such judgment be entered as of that date, to wit, October 7, 1914, then and there, then and there been entered as on that date."

To the ruling of the court upon said motion, setting aside the order of the court made and entered December 28, 1914, granting defendants a new trial, and ordering judgment entered on the verdict, in accordance with the amended prayer of plaintiff's motion, filed January 6, 1915, the defendant duly excepted.

Within the statutory time, the defendant filed a motion for a new trial on said motion, which was heard and denied. To reverse the ruling of the court upon said amended motion, filed January 6, 1915, this appeal is prosecuted.

[1] There are many errors assigned, but, as said in defendant's brief, there is presented to this court primarily for consideration but one question: Did the court have such inherent power over its judgments and orders during the term in which they were entered to enable it to, upon its own motion, or upon representation of counsel, order, modify, or set aside order formerly made by it in the case? The record discloses that within the statutory period motion was made by defendant for a new trial, which was heard and overruled on October 7, 1914, and that, on the same day, upon the oral representation that the plaintiff's attorney was absent from the court for a short while, and who had been in attendance during the entire day, awaiting the hearing upon said motion, the court reconsidered its action and set aside the order overruling the motion for a new trial. That the court had the inherent right to set aside said order, overruling said motion, cannot be questioned. In *Phillip Carey Co. v. Vickers*, 38 Okl. 643, 134 Pac. 851, it is held:

"It is a general rule of law that all the judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court."

The rule announced in *Phillip Carey Co. v. Vickers* has been followed in *Parks et al. v. Haynes*, 152 Pac. 400 (not yet officially reported).

[3] The case of *Lookabaugh v. Cooper*, 5 Okl. 102, 48 Pac. 99, relied upon by the plaintiff in error, is not in conflict with the holding in this case. The holding in said case of *Lookabaugh v. Cooper* being based upon the absence of a showing of fraud, unavoidable casualty or misfortune, which is

not the case in the instant case. The misfortune which is called to the attention of the court, and thereby invoking the exercise of its power, was the misfortune of plaintiff's attorney being absent from the court when the motion was acted upon. We are, however, of the opinion, that the holding in *Lookabaugh v. Cooper*, supra, is not sound, and that a court of record of its own motion, without the intervention of a moving cause, invoked by either party to the action, has a right, at a term at which it is rendered, to revoke or amend its orders rendered at the same term. Suppose that a motion for a new trial is heard and an authority offered by the movant for a new trial, showing conclusively that the movant is entitled to a new trial, which authority is not combated by the opposing side; that the court, shortly thereafter, recesses the court and looks up the question and finds that the case upon which he acted has been overruled and a contrary ruling adopted, and consequently is convinced that he committed reversible error in granting a new trial. Can it be questioned that the court has the inherent power, on its own motion, to set aside its previous order and subsequently act upon the motion for a new trial? We do not think that it can be said that the court is without such power; that the only remedy is by appeal to this court.

[2, 4] After the hearing of the motion and the granting of a new trial, on the 6th day of January, 1915, which time is correctly stated in defendant's brief to be at a time subsequent to the term at which the new trial was granted, the plaintiff filed a motion to have judgment entered upon the record, based upon the contention that the court was without jurisdiction to set aside the order made on the 7th day of December, overruling motion for new trial and subsequently making order granting a new trial. The motion of plaintiff, filed January 6, 1915, to enter judgment upon the verdict was amended so as to ask in addition to the entry of judgment upon the verdict to set aside all orders subsequent to the order overruling motion for a new trial, which motion was heard at a term of court subsequent to the one in which judgment was rendered. It is unquestionably the law that if the power of the court is invoked during the term by motion against an order made by the court at such term, such motion, if properly continued, may be heard at a subsequent term of court, and ruling thereon will be the same in legal effect as a ruling made at the term at which the motion was made. It follows that, if the ruling of the court upon said motion was heard on June 16, 1915, was free from error, this cause should be affirmed. In granting the order to enter judgment upon the verdict, it is stated by the court:

"That the court was without power to reconsider its former action and was without power

to vacate and set aside its order, denying and overruling the motion of defendant for the new trial and ordering judgment on the verdict for plaintiff in the sum of \$1,499.50, when no application, petition, or motion was made by the defendant for the purpose, showing any valid or legal grounds therefor, and that the arbitrary and summary action on the part of the court in vacating and setting aside its former order, denying the motion for a new trial and ordering and directing the entry of judgment on the verdict of the jury in favor of the plaintiff and against the defendant in the sum of \$1,499.50, without any motion, application, or petition therefor, and without any showing or any legal or sufficient reasons and grounds therefor, was without effect, and was coram non iudice and without the jurisdiction of the court, and was not legal and binding, but such orders were null and void."

In short, the action of the court, in setting aside all the orders made in the case subsequent to the order overruling the motion for a new trial and directing the entry of judgment on the verdict, is based alone upon the theory that the action of the trial court in setting aside the order overruling the motion for the new trial was null and void, and this ground is the only ground stated for the action of the court in granting the order to enter judgment upon the verdict and to set aside all orders made by the court in said cause subsequent to the order overruling motion for new trial.

"When the court in granting a new trial specifies fully and in detail the reason upon which the act is based, it will be presumed that the reason thus stated is the only one upon which the court acts." *Anderson v. Chrisman*, 37 Okl. 73, 130 Pac. 539.

[5] The only ground stated in the order of the court upon which the court set aside all orders in the cause subsequent to the order overruling the motion for new trial and directing the entry of judgment on the verdict, is that the trial court was without authority, at the same term at which the order was made, to set aside its order overruling the motion for new trial. It clearly appears that the order, setting aside all subsequent orders to the order overruling the motion for new trial and directing a judgment upon the verdict, was not a legal ground for such action of the court.

We are of the opinion that it was not necessary that a formal written application be made in order to call the attention of the court to the misfortune shown by the defendant and thus invoke its action. The oral statement of the attorney was sufficient.

The appeal in this case is from the action of the court on the motion filed January 6, 1915, and heard June 16, 1915, ordering judgment to be entered upon the verdict rendered; and we are of the opinion that the court, in ordering the judgment rendered and setting aside all orders of the court subsequent to the order overruling the motion for a new trial, committed prejudicial error.

We are of the opinion that this cause

should be reversed and remanded, with instructions to set aside the order, directing that all subsequent orders made in the cause subsequent to the order overruling motion for a new trial, and directing that judgment upon the verdict be entered, be set aside, and that the cause be again tried.

PER CURIAM. Adopted in whole.

SHIELDS, Sheriff, et al. v. COLONIAL TRUST CO. (No. 7754.)

(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL \S 110—NATURE OF RIGHT—POWER OF COURT.

The district courts of this state have the inherent power upon their own motion to set aside a verdict and grant a new trial on account of prejudicial error, when done at the same term of court at which the verdict was rendered or judgment rendered.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 231; Dec. Dig. \S 110.]

2. NEW TRIAL \S 110—NATURE OF RIGHT—DISCRETION OF COURT.

Where such action of the court is had at the time when the verdict is rendered, in the absence of counsel, and it is not shown that counsel did not have an opportunity to be present, and the exceptions of counsel are properly entered and all rights of appeal saved, it does not appear that there has been an abuse of judicial discretion in the entering of such order; and, under such circumstances, unless it can be seen beyond all reasonable doubt that the trial court has manifestly erred with respect to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been so made, this court will not reverse the ruling of the trial court granting a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 231; Dec. Dig. \S 110.]

3. NEW TRIAL \S 65 — GROUNDS — VERDICT CONTRARY TO LAW AND EVIDENCE.

Record examined, and held, that the facts shown are not such as will warrant this court in reversing the order of the trial court granting a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 130; Dec. Dig. \S 65.]

Commissioners' Opinion, Division No. 3. Error from District Court, Garfield County; James B. Cullison, Judge.

Action by the Colonial Trust Company against Ed M. Shields, sheriff, and another. Order granting a new trial after verdict for defendants, and defendants bring error. Affirmed.

Hills & Manatt and Parker & Simons, all of Enid, for plaintiffs in error. John F. Curran, of Enid, and W. V. Biddison, of Tulsa, for defendant in error.

JOHNSON, C. This is an appeal from an order of the district court of Garfield county, granting a new trial. On February 4, 1914, one Corray executed to the Colonial Trust Company, at Tulsa, Okl., a chattel mortgage

upon a certain automobile, then located in Tulsa county. Within a few days, Corray removed the mortgaged property to Garfield county. The mortgage was filed of record in Tulsa county on February 5, 1914, but was never filed in Garfield county. In the summer of 1914, after the expiration of 120 days from such removal to Garfield county, attachments were levied against the said mortgaged property in four different suits in the courts of Garfield county, filed by different plaintiffs against the said mortgagor, upon unsecured debts, the said plaintiffs not making the statutory adjustment of the Colonial Trust Company mortgage. The present case was an action in replevin by the Colonial Trust Company against Ed M. Shields, as sheriff of Garfield county, and John Williams, constable, to recover the possession of the attached property under the chattel mortgage of plaintiff. The plaintiffs in the various attachment suits were represented at the trial of this cause. The contentions of the defendants at such trial were that the attached automobile was not identified as the one mortgaged, and that, the mortgage, not having been filed of record in Garfield county within 120 days after the removal of the property to the latter county, the mortgage was void as to the attaching creditors of the mortgagor. The case was tried to a jury, which returned a verdict in favor of defendants, the attaching creditors of the mortgagor, for the return of the property or the value of the property, assessed at \$900. When the jury returned its verdict, the attorneys for neither side being present in court, the court of its own motion entered an order, setting aside the verdict and granting a new trial to plaintiff and giving defendants an exception to this order. Later counsel for defendants filed a motion to vacate this order and enter judgment upon the verdict. At the time of overruling this motion, the court made a record showing that the verdict was set aside and a new trial granted, for the reason that in the opinion of the court the verdict was contrary to the law and the evidence, and was brought about by undue influence. No specific acts of undue influence were stated by the court, or appear in the record. Defendants were given exceptions and the usual rights and time for appeal.

[1] Defendants have appealed to this court, alleging that the lower court erred in its order setting aside the verdict and granting a new trial, and in overruling the motions of defendants to vacate such order and to render judgment on the verdict. They contend that the order setting aside the verdict and granting a new trial, upon the court's own motion and in the absence of counsel, was an abuse of judicial discretion. It has been repeatedly held by this court that:

"Courts of general common-law jurisdiction have the inherent power, upon their own motion, to set aside a verdict and grant a new trial

on account of prejudicial error, when done at the same term of court at which the verdict was returned or judgment rendered; and the power will not be deemed to have been taken away by statute, unless intent to do so is clear." *Todd v. Orr*, 44 Okl. 459, 145 Pac. 393; *Barker v. National Oil & Development Co.*, 154 Pac. 518 (not yet officially reported); *St. Louis, I. M. & S. Ry. Co. v. Lowrey* (cause No. 7877 in this court) 160 Pac. 716, not yet officially reported.

These cases hold that the power mentioned in the quoted excerpt exists in the district courts of this state, and has not been affected by statute.

[2] It is also the established rule in this jurisdiction that:

"The Supreme Court will not reverse the ruling of the trial court, granting a new trial, unless it can be seen, beyond all reasonable doubt, that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial." *Jacobs v. City of Perry*, 29 Okl. 748, 119 Pac. 243; *Duncan v. McAlester-Chocaw Coal Co.*, 27 Okl. 427, 112 Pac. 982; *Sharp v. Chocaw Ry. & Lighting Co.*, 34 Okl. 780, 126 Pac. 1025.

Following this rule to its logical conclusion, this court has further said:

"Trial courts are invested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever, in the opinion of the trial court, the party asking for the new trial has not probably had a reasonably fair trial, and has not, in all probability, obtained or received substantial justice, although it might be difficult in many instances for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them." *Hughes v. C. R. I. & P. Ry.*, 35 Okl. 482, 130 Pac. 591.

Under these rules the power of the lower court is clear, and the extent to which this court will go in reviewing the same is no less so.

Plaintiffs in error contend that not alone was there plainly error in the making of the orders complained of, but that it was an abuse of judicial discretion for the court to set aside the verdict and grant the new trial, of its own motion, immediately upon the return of the verdict, and in the absence of counsel. They predicate their assertion of abuse of judicial discretion largely upon the statement in the brief that throughout the trial the lower court displayed prejudice against the defendants, and in support of the contention that legally it was an abuse of discretion to make the order in the absence of counsel quote from *Todd v. Orr*, *supra*, where the court, in announcing the power of the lower court to set aside a verdict upon its own motion, said:

"The extraordinary power thus recognized to exist should be exercised sparingly, and, we may add, upon due notice to the parties, or at the time when the verdict is rendered. This, that the losing litigant may have timely opportunity to except, and, if desirous, appeal from the court's action."

The order setting aside the verdict was entered at the time of the return of the verdict. Counsel could have been present. It was their duty to be present. The lower court seems to have been extremely fair in protecting their rights in their absence. They were given the exception they would have received if present. The matter was later fully presented. They were given their full rights of appeal. As a final basis of this, our conclusion that the trial court did not exercise an abuse of judicial discretion, and at the same time passing upon the allegation of error in the order setting aside the verdict and granting the new trial, we find no prejudicial error against the trial court.

[3] In view of the charge of prejudice and abuse of discretion by the lower court, in fairness to the lower court, as well as to the parties, we have examined the entire record with extreme care, and fail to find in the record of the trial anything tending to indicate a display by the trial judge of bias or prejudice toward either of the parties, or any act or word of the court inconsistent with strict judicial impartiality between the parties. His rulings, in the trial procedure, were probably more often against the plaintiffs than against the defendants, and no word gave any shadow of partiality to these rulings. At a hearing before the court, after the discharge of the jury, in stating his attitude for the record, the trial judge said:

"The court set aside the verdict in this case: First, because it is contrary to the evidence; second, because it is contrary to the law of the case, and contrary to the instructions of the court. Further, the court was of the opinion, and was in possession of sufficient information to convince the court, that the jury had been unduly influenced by the parties in interest, and at that time I was, and I am now, of the opinion that this verdict was hammered and whipped out of the jury. It is not in accordance with the law. It is not in accordance with good government. I regard it as a verdict that was obtained under force, duress, and misrepresentation, and it was the duty of the court to set it aside, and set it aside instantly. The attorneys for the defendant could have been present, if they so desired. The attorneys did come, or some of them did come, into this courtroom within 10 or 15 minutes after the verdict was rendered. The court saw them here himself, and there is nothing to all of this talk about not having an opportunity to be present at the time the verdict was returned by the jury and set aside by the court. It is a miscarriage of justice. It was the duty of the court to not permit anything of that kind in his presence, when he knew that this undue influence was being exercised all of the time."

When requested by counsel for defendants, the court declined to state into the record his grounds for his belief that the verdict was the result of undue influence. The trial judge saw the trial, the play of the personal magnetism of the attorneys and its influence upon the emotions and prejudices of the jury, as well as the other occurrences in the court never caught by the reporter's pencil; and he passed judgment upon these things. We will not say that this judgment displayed prej-

udice, or was error, if there was not error in the essential effect of it. In the language of this court in *Hughes v. C., R. I. & P. Ry.*, supra:

"It might be difficult in many instances for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them."

We have read the record carefully. With only the written record before us, and even without the intimacy that the lower court had with the actual trial proceedings, it appears to us that the lower court was amply justified in his assumption that the jury had violated its instructions, and that the verdict was contrary to the evidence and to the instructions of the court, which were not excepted to and became the law of the trial. An officer of the mortgagee company, the plaintiff, positively identified the automobile in controversy as the mortgaged machine, and other evidence supported him. The rebutting evidence, offered by defendants, did not controvert this, except to show that the factory number, testified by plaintiff's witnesses to have been on the machine at the time the mortgage was executed, was not on it at the time of the attachments, and showed that at the time last mentioned no factory number was on the machine, and that at one time a representative of plaintiff was looking for a six-cylinder car and not for a four-cylinder car, the machine in question being a four-cylinder one. The court instructed the jury that the record of the mortgage in Tulsa county, it not having been recorded in Garfield county, was sufficient, if the indebtedness which was the subject-matter of the attachments accrued within 120 days after the removal of the car to Garfield county, and that under such circumstances the attachments would not hold the property unless the statutory adjustment of the rights of the mortgagee had been made by the attaching plaintiffs, if the attached automobile was the property mortgaged. There was evidence for plaintiff upon both issues. In fact the evidence was fairly preponderant in favor of plaintiff, if not conclusive. The jury assessed the value of the automobile at \$900, and there was no evidence of that value. We do not weigh this evidence for the purpose of determining the ultimate strength of the proof, but to find the ground, if any, upon which the trial judge stood, in his orders upon the verdict and subsequent motions, whether he may have allowed any prejudice or bias to have interfered with, or cause him to abuse, the discretion vested in him by law. We are unable to find any reasonable inference of prejudice in the record, or that the court, in granting the new trial, erred with respect to any question of law. The verdict must have been such as to have satisfied his conscience. There was reasonable ground for the assumption by the trial

court that the plaintiff had not, in all probability, obtained or received substantial justice.

The orders of the lower court, granting the new trial, and overruling the motions to vacate such order and render judgment on the verdict, are affirmed.

PER CURIAM. Adopted in whole.

STRONG v. DAY et al. (No. 8263.)
(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

BRIDGES ¶37—INJURIES FROM NEGLIGENCE—OFFICERS—PERSONAL LIABILITY.

The individuals composing a board of county commissioners are personally liable to any person suffering damage thereby, and who is himself not guilty of contributory negligence, for their negligent failure to repair a county bridge under their care and supervision; there being sufficient public funds available for making such repairs.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 96, 103-105, 109; Dec. Dig. ¶37.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Custer County; T. A. Edwards, Judge.

Action by S. J. Strong against G. W. Day and others. From a judgment sustaining a general demurrer to the petition, plaintiff appeals. Reversed, with directions to overrule demurrer.

Geo. T. Webster, of Clinton, for appellant.
Geo. C. Darnell, of Arapaho, for appellees.

BURFORD, C. Plaintiff alleged that the individual defendants constituted the board of county commissioners of Custer county; that, as such, they were charged by law with the duty of repairing the public bridges in the county over 20 feet in length; that among such bridges was one constructed over Deer creek at a point particularly described, said bridge having been built by the county in 1910; that said bridge was upon an improved public road upon a section line laid out and improved by the county; that said bridge was being used as a county bridge on June 2, 1915; that on said day, while crossing the same with a loaded wagon, the plaintiff's work animals were killed by reason of the bridge falling down and precipitating them and their driver into the creek below. Many defects in the original construction of the bridge were set out, and it was further alleged that the beams and supports thereof had become rotten and decayed, and had been in such condition for more than 17 months prior to the accident. The petition then states:

"Which condition was unknown to plaintiff, but was well known to said defendants, as plaintiff verily believes and so charges, but if such fact were not known to them, their ignorance and want of knowledge relative to

the rotten condition of said tie beams and struts was due to their wanton negligence and want of care in looking after and trying to ascertain the true condition of said bridge, and said plaintiff alleges that, if said defendant had given said bridges any attention, or had made the most casual examination of same with the end in view of ascertaining if the same was in good repair, they would have readily discovered that the same was in a dangerous condition and liable to collapse at any time, and this they wantonly and negligently failed to do. That the joints and ends of said beams where the struts entered against the shoulders became and were rotten and in a decayed and worthless condition, destroying the use and value of said bridge, and making it extremely dangerous to the traveling public, and liable to collapse at any time, and that the 8x8 beams extending over said piling at the ends thereof upon which rested the tie beams became and were rotten and decayed and incapable of resisting the usual and ordinary weight of public travels, but these were so covered that their true condition was not capable of being readily discovered by the public, and could only be seen by making a careful inspection thereof, but these defects could have been readily ascertained by these defendants if they had attempted to inspect the same, or have caused the same to be inspected by any competent person by them employed, which duty rested upon them because of their official duties toward the public, and for the purpose of protecting the public from falling off said bridge."

It was further alleged:

"That said defendants have at all times hereinafter mentioned had ample and sufficient money in their hands and under their control to repair the bridge hereinafter described."

The value of the animals killed was set out, together with a prayer for damages.

To the petition the individual defendants filed a general demurrer, which was by the court sustained. The Fidelity & Deposit Company, surety upon their official bonds, filed no pleading, and neither its rights nor liabilities are considered herein.

Considering this petition with all the reasonable intendments to be drawn therefrom, we are of the opinion that it states a cause of action. The American courts have widely divided upon the question of personal liability of road officers for negligent or willful misfeasance or nonfeasance in the repair of the roads and bridges under their care. Some states have apparently taken different views upon the subject at different periods of their judicial history. The following cases will be found to be illustrative of the various holdings and reasons therefor: *Freeholders v. Strader*, 18 N. J. Law, 106, 35 Am. Dec. 530; *Livermore v. Freeholders*, 29 N. J. Law, 245; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428; *Mayor v. Furze*, 3 Hill (N. Y.) 617; *Adsit v. Brady*, 4 Hill (N. Y.) 632, 40 Am. Dec. 805; *Robinson v. Chamberlain*, 84 N. Y. 889, 90 Am. Dec. 713; *Smith v. Wright*, 24 Barb. (N. Y.) 170; *Hover v. Barkhoof*, 44 N. Y. 113; *Coleman v. Eaker*, 111 Ky. 181, 63 S. W. 484; *Lynn v. Adams*, 2 Ind. 143; *McConnell v. Dewey*, 5 Neb. 385; *Dunlap v. Knapp*, 14 Ohio St. 64, 82 Am. Dec. 468; *Tearney v. Smith*, 86 Ill. 391; *Allen*

v. Michel, 88 Ill. App. 318; Harris v. Carson, 40 Ill. App. 147; Skinner v. Morgan, 21 Ill. App. 209; Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697; Sells v. Dermody, 114 Iowa, 344, 86 N. W. 325; Commissioners v. Duckett, 20 Md. 468, 88 Am. Dec. 557; Commissioners v. Gibson, 36 Md. 229; Downes v. Hopkinton, 87 N. H. 456, 40 Atl. 433; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Warden v. Witt, 4 Idaho, 404, 39 Pac. 1114, 95 Am. St. Rep. 70; Hathaway v. Hinton, 46 N. C. 243; McKenzie v. Chovin, 1 McMul. (S. C.) 222. Upon the common law Brooke's Abr. title Action on Case, reviewing the Year Books, Russell v. Men of Devon, 2 T. R. 608, and Henly v. Mayor of Lyme, 5 Bing. 91, are often cited.

It appears to be not necessary to go into a discussion of these cases in view of the decision of this court in *Mott et al. v. Hull*, 152 Pac. 92, L. R. A. 1916B, 1184, not yet officially reported. In that case certain township trustees were individually sued for damages arising from their negligently leaving an unguarded obstruction in a highway which they were repairing. It was there held that their duties in this regard were purely ministerial, and that for negligence in the performance thereof they might be held individually liable. This court said:

"Where the duties of an officer are purely ministerial, he may be liable in damages to any one who can show he has suffered a special injury because of such officer's failure to perform or negligent performance of such duty."

Indeed, there is little conflict in the adjudicated cases upon the principle. It is in its application that diversity of opinion has arisen. The rule is tersely stated in *Amy v. Supervisors*, 11 Wall. 136, 20 L. Ed. 101.

"The rule is well settled that, where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."

It must be taken as settled by *Mott et al. v. Hull*, supra, that the work of repairing roads—and bridges must rest in the same category—by public officers is ministerial in its nature, and likewise that the distinction between acts of misfeasance and nonfeasance in some of the cases does not exist in this state; for each is placed upon the same plane in the language above quoted. But one distinction is noted between the governing principles announced in *Mott v. Hull*, supra, and those to be applied in the instant case. In the *Mott* Case the officers sued were township officers, who pleaded that they "were charged by law with power and duty of repairing the highway." Here the parties sued are county commissioners, and the point is made that the statutes of this state impose no absolute duty upon them to repair the bridges under their charge. We therefore pass to a consideration of the laws govern-

ing county commissioners in this regard. It is to be noted that there is no allegation that the bridge in question was upon a "state road," and that therefore the provisions of the act of 1915 peculiar to the duties of the various officers having supervision of such roads are not considered.

By section 7581, Rev. Laws 1910:

"All bridges more than 20 feet long shall be under the control and supervision of the board of county commissioners."

By section 1600, Rev. Laws 1910:

The county commissioners "shall have power * * * to construct and repair bridges and to open, lay out and vacate highways * * * [and] to do and perform such other duties and acts that the board of county commissioners may be required by law to do and perform."

And it is provided in section 7609, contained within the general articles upon roads and bridges, that:

"The board of county commissioners shall provide all roads improved, under the provisions of this article, with suitable bridges of a permanent and substantial character and shall keep and maintain same in repair."

Some question is raised that the latter section applies only to roads within the "improvement districts" provided for in said article. However that may be, we are of the opinion that the general grant of power to repair bridges above set out carries with it the duty so to do within the funds provided by law for such purpose. As early as *King v. Inhabitants of Derby*, Skin. 370, it was held that "may" in the case of a public officer is tantamount to "shall" and in *Rex v. Barlow*, 2 Salk. 609, it was said:

"When a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall.'"

In *Supervisors v. U. S.*, 4 Wall. 435, 18 L. Ed. 419, the statute provided that the supervisors "may, if deemed advisable, levy a tax," etc. Construing the statute, the Supreme Court of the United States said:

"The conclusion to be deduced from the authorities is that, where power is given to public officers, in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory."

This language was adopted and followed in *Jordon v. Davis*, 10 Okl. 329, 61 Pac. 1063.

Almost the identical language of our statute was involved in *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171, supra. The law there provided that:

"The trustees have power to provide for the opening, lighting, and keeping in good repair streets and alleys."

Under the statute it was held that if the officers, in regard to repairs, negligently performed their duty or did not perform it at all, they were liable in damages to any one specially injured as a result of such neglect.

We can scarcely conceive of a power whose exercise is more strongly called for by the "public interest" than that of keeping bridges in repair. The people use these bridges upon

the supposition that they are capable of sustaining ordinary traffic. The county commissioners are public officers, paid for their services, who have the supervision of these bridges and the power to repair them. Under such conditions we hold that power to repair carries with it a duty to exercise that power within the lawful limitations regarding available funds and the like. With the duty to repair necessarily goes the duty to inspect, in person or by agent, in order to ascertain the necessity therefor. Whether or not repairs are necessary; upon what bridges, if more than one is in disrepair, the public funds should be expended; the amount to be devoted to each; the kind of repairs to be made—all these may be matters of discretion, for a mistake in the exercise of which the officers would not be liable; but if this bridge, as alleged, funds being available to do this particular repairing, as alleged in the petition, were left for 17 months so decayed that it constituted, in the language of the petition, "a veritable death trap," and the commissioners knew these facts or could have ascertained them upon "a casual examination," as alleged, and neglected to so inspect the bridge or cause it to be inspected, "wantonly and negligently," then we think that, the necessity for repairs being apparent, and the funds being available therefor, the duty to repair the bridge becomes ministerial, and if they negligently failed to perform that duty they are liable to the plaintiff in the absence of contributory negligence upon his part. The word "negligently" is used herein advisedly, and we are not to be taken as holding that every failure to repair a bridge constitutes a negligent failure of duty or raises a presumption of negligence upon the part of the commissioners.

Defendants rely wholly upon *James v. Wellston Township*, 18 Okl. 56, 90 Pac. 100, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938, and *Howard v. Rose Township*, 37 Okl. 153, 131 Pac. 683, holding the township not liable for damages arising from defects in the township highways. This contention is disposed of by the language of *Mott v. Hull*, supra:

"An officer may be liable to an individual for negligence in the performance of a purely ministerial duty, although the state or political subdivision thereof which elects him may not, under the law, be liable for his negligence."

We have confined our remarks to a discussion of the duty to repair. So far as the petition alleges defects in the original construction, there being no allegation that these defendants were in office at the time the bridge was first built, we are of opinion that no liability can be fastened upon them in that regard. If any cause of action exists for negligence in the original construction, the right of action is against the persons in office at that time. It does not extend to their

successors. *Lament v. Haight*, 44 How. Prac. (N. Y.) 1.

The judgment of the trial court is reversed, with directions to overrule the demurrer to the petition.

PER CURIAM. Adopted in whole.

BROWN et al. v. ANDERSON. (No. 7416.)
(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨362(1)—PRESENTING QUESTIONS IN TRIAL COURT—NECESSITY.

The syllabus in *Vandenberg v. Winne*, 155 Pac. 245, is adopted herein.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1960, 3282-3284; Dec. Dig. ⇨362(1).]

2. APPEAL AND ERROR ⇨362(3) — ASSIGNMENTS OF ERROR—AMENDMENT.

After the expiration of the statutory time allowed for filing petition in error in this court, it cannot be amended by setting up new and distinct assignments of error, and where permission to amend has been given and a new assignment is set out in the amended petition in error, such assignment will be considered as having been inadvertently made, and will not be considered by the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. ⇨362(3).]

3. INDIANS ⇨15(1) — LANDS — POWERS OF STATE COURTS.

One of the essential elements in the jurisdiction of a court is "power to adjudicate the particular question" presented for judgment. The state courts of this state have no power to authorize a conveyance of restricted Indian lands in contravention of the treaties and acts of Congress relating thereto.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 38, 40; Dec. Dig. ⇨15(1).]

4. INDIANS ⇨27(2)—RIGHT OF ACTION—JURISDICTION OF STATE COURT.

A full-blood Indian, being a citizen of the United States, and of this state, has a right to sue in the courts of the state, the same as any other citizen and, within the jurisdiction of such courts, may have his rights growing out of the treaties and acts of Congress relating to his land adjudicated, and such rights as may be protected at the suit of the executive department of the federal government may also be enforced in the state courts by an action instituted by the Indian in his own proper person.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 20; Dec. Dig. ⇨27(2).]

Commissioners' Opinion, Division No. 2. Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Action by Osborne Anderson against J. R. Brown and others. Judgment for plaintiff, and defendants bring error. Affirmed.

H. A. Ledbetter and F. M. Adams, both of Ardmore, and D. M. Bridges and John Vertrees, both of Waurika, for plaintiffs in error. Guy Green, of Waurika, and H. L. Westphal, of Antlers, for defendant in error.

GALBRAITH, C. The defendant in error, Osborne Anderson, a full-blood Chickasaw

Indian, commenced this action in ejectment in the trial court against the plaintiffs in error to recover possession, and to cancel a conveyance of the allotment of Lottie Hih-cha, who died in December, 1906, leaving him as her sole surviving heir. It was alleged in the petition that the conveyance for this inherited land, which he sought to have canceled, was void for the reason that it had been executed and delivered during his minority. There was a trial to the court and a judgment for the plaintiff, adjudging him to be the owner of the fee in the land, and entitled to possession and canceling the deed, and for damages in the amount of the rental of the land during the time the defendants had been in possession. To review this judgment an appeal has been prosecuted to this court.

[1,2] Motion has been interposed to dismiss the appeal on the ground that there is no assignment in the petition to the action of the court in overruling the motion for new trial. It is argued in support of the motion that the only errors assigned in the petition in error are those occurring at the trial, and in order to bring them here for review it was necessary that a motion for new trial should be filed and acted upon by the court, and the action of the court in denying the motion assigned as error in the petition in error. The judgment appealed from was rendered in December, 1914. The case-made and petition in error were lodged in this court on June 5, 1915. The motion to dismiss was filed July 1, 1916. It appears that on June 28, 1916, application for permission to amend the petition in error was filed, and that an order was made on July 5, 1916, granting such motion. The record as now presented has attached to the case-made a writing, bearing no file mark, entitled, "First amended petition in error," in which the first assignment of error is as follows:

"Because the trial court erred in overruling the motion of the plaintiff in error (defendant below) for a new trial."

It is insisted that the matter of allowing an amendment to the petition in error being discretionary with the court, and the amendment having been made, the motion to dismiss is not well taken, and should be denied. To that view we do not assent. We take it that the permission to amend the record was given pro forma, and that it was not contemplated at the time of giving such permission that any amendment would be made not permitted by the established practice in this jurisdiction, and that it was not intended by granting such permission to hold that the court could by such order extend the time for commencing proceedings in error, or that the plaintiff in error would amend his petition in error by assigning an entirely new assignment of error. Under the established practice in this court much liberality is shown in allowing amendments

to the record in matters of form so as to make it speak the truth, but it has never been held, so far as we are advised, under an order permitting an amendment, that a new and distinct assignment of error was authorized. On the contrary, it has been held that the petition in error cannot be amended after the time has run for commencing proceedings in error by assigning a new assignment of error, for the reason that this would permit filing a new cause of action after the statute of limitation had run.

In *McConnell v. Cory*, 33 Okl. 607, 127 Pac. 259, it was said:

"In the absence of complaint of the action of the trial court in denying the motion for new trial, no cause of action is stated, and to allow such cause to be now stated would not be to grant an amendment, but would be virtually to enlarge the time given in the statute, and to assume a jurisdiction which has been denied, and no laches of either the defendant in error or his counsel could confer such jurisdiction. It is the duty of this court to discover its jurisdiction, and, where it is lacking, decline to exercise it. See *Haynes et al. v. Smith*, 29 Okl. 703, 119 Pac. 246, in which the questions presented by counsel for plaintiff in error are decided adversely to them."

It was clearly not intended by the court in granting permission to amend to enlarge the time given by the statute to commence proceedings in error. We therefore conclude that the plaintiffs in error were not authorized by the permission given to file the amended petition in error with the new and additional assignment as they have done, and therefore this assignment does not operate to bring up for review the questions brought up by such assignment when properly made.

As to the necessity of the assignment under consideration, in *Vandenberg v. Winne*, 155 Pac. 245, the court said:

"The plaintiff in error only complains here of errors that occurred during the trial of the cause, and this court has repeatedly held in a long line of well-considered cases that errors occurring during the trial cannot be considered by the court unless a motion for a new trial, founded upon and including such errors, has been made by the complaining party and acted upon by the trial court, and its rulings excepted to and afterwards assigned for error in the Supreme Court."

And again, in *Oreech v. O., R. I. & P. R. Co.*, 147 Pac. 775, the first paragraph of the syllabus reads:

"Where the only assignments of error called for a review of questions of fact not arising upon the pleadings, and the petition in error fails to assign as error the overruling of motion for new trial, the appeal will be dismissed."

As to whether or not this defect in the petition may be amended, the second paragraph of the syllabus in this case is in point, and is as follows:

"After expiration of the statutory time allowed for filing petition in error in this court, it cannot be amended, setting up new and distinct assignments of error."

Under these authorities we take it that the errors complained of being errors occurring at the trial, in the absence of an as-

signment to the order in overruling the motion for new trial, are not brought up for review by the case-made, and that the motion to dismiss should be sustained, except for the fact that the second assignment of error in the original petition in error is "that the judgment is contrary to law," and that the record being certified as a transcript, and this assignment raising a question appearing on the record, the motion to dismiss should be denied.

[3, 4] It is urged in support of this assignment that when it appeared in the course of the trial that the plaintiff was a full-blood Indian and the subject of the action was restricted Indian lands, that these facts "excluded the court from passing upon the question raised by the pleadings and the evidence." The argument, as presented in the brief, is as follows:

"In other words, it is our contention, that when the pleadings and the evidence disclose that the party suing is an Indian of the full-blood class, and is seeking to cancel conveyances made by him while he was restricted, the jurisdiction of the court is ousted, for the full-blood Indian is a ward of the National government, and unless the suit is brought by the guardian, the national government or some of its agents or representatives, the ward is incapacitated to sue to cancel the conveyances made in violation of the restrictions contained in the treaties and acts of Congress."

It is further argued that inasmuch as the federal government has reserved the right to institute suit for the protection of the restricted Indian in the title to his lands, and may vacate the judgment of the state court, abridging restrictions placed thereon by an act of Congress, as was done in *Bowling v. United States*, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080, that the jurisdiction of the state court over such question is entirely abrogated.

It seems that this argument is fully answered by the Supreme Court of the United States in the *Heckman Case*, 224 U. S. 446, 32 Sup. Ct. 435, 58 L. Ed. 820, in the following excerpt:

"In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the executive department. The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct, as in the *Tiger Case* [221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738]. And, as already noted, the act of May 27, 1908, makes provision for the proceedings by the representatives of the Secretary of the Interior in the name of the allottee. But in the opportunities thus afforded there is no room for the vexation of repeated litigation of the same controversy. And when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose relating to the same property."

To the same effect is the holding of this court in *Bell v. Fitzpatrick*, 157 Pac. 334, wherein it is held that one of the essential elements to the jurisdiction of a court to

render judgment in any case is "the jurisdictional power to adjudicate the particular questions."

The reason why this essential element of jurisdiction was wanting in the court to render judgment in that case was that the court had no power to remove restrictions from lands imposed by an act of Congress as was therein attempted to be done.

The state court is without power to authorize conveyances of land in violation of the congressional restrictions thereon. In the *Bowling Case*, *supra*, the state court by its decree attempted to authorize a conveyance in violation of restrictions prescribed by act of Congress, and thereby exceeded its jurisdiction. Its decree was for that reason void; although the land was subsequently conveyed many times, no one of the grantees had any title, on account of the want of power in the court to make the decree that attempted to authorize the conveyance from the allottee to the first purchaser, and therefore the proper federal agency had authority to invoke the jurisdiction of the federal court to cancel the conveyance of the restricted Indians' land made in pursuance of the decree of the state court.

In *Postoak v. Lee*, 149 Pac. 155, the plaintiff in error was a full-blood Indian, and this court said in regard to his rights to contract:

"The fact that one of the parties to the contract was a full-blood Indian did not incapacitate him or impair his right to enter into this contract. He had the same right as other persons to make contracts generally. The only restriction on this right peculiar to an Indian was in regard to contracts affecting his allotment."

Osborne Anderson, the defendant in error, although a full-blood Indian, was a citizen of the United States and of the state of Oklahoma. No good reason appears why he should be denied the privilege of appealing to the courts of the state the same as any other citizen to enforce his rights to property, even though such property be land upon which restrictions against alienation have been imposed by an act of Congress. The federal jurisdiction over the Indian's land was "forever disclaimed" by the state in section 3 of the Constitution, and the jurisdiction over the same was recognized to be in the United States. In article 12, § 302, *Williams' Constitution*, the homestead and exemption laws are extended "to any Indian or other allottee." There would be little use in giving the allottee the benefit of the homestead and exemption laws if he could not appeal to the state courts to enforce such rights the same as any other citizen. The right of the citizen to appeal to the court and the power of the court to pronounce judgment are separate and distinct things. The state courts have no power to render a judgment enlarging or removing restrictions of alienations on Indian lands placed there by act of Congress, because this power is expressly disclaimed in the Constitution of the state and

remains in the Congress of the United States. Although the state courts cannot enlarge the restrictions upon the Indian's land, no reason appears why they may not enforce rights of an Indian citizen in regard to lands, although such rights are conferred by a treaty or act of Congress.

The trial court found that Osborne Anderson conveyed the land when a minor, and that the conveyance on that account was void, and should be canceled. That judgment is not contrary to law, but is entirely supported by the law, and should be affirmed.

PER CURIAM. Adopted in whole.

MIAMI TRUST & SAVINGS BANK v.
BOTTS, County Treasurer. (No. 7385.)
(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

TAXATION ~~608~~(2)—REMEDIES FOR WRONGFUL TAX—INJUNCTION.

Where a tax for the year 1918 is sought to be levied and collected upon that portion of the capital and surplus of a state bank then invested in public building bonds, under section 7318, Revised Laws of 1910, held that, in an action for injunction where no question is raised as to the legality or applicability of such statute, the tax should be enjoined.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1231; Dec. Dig. ~~608~~(2).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Ottawa County; P. S. Davis, Judge.

Action by the Miami Trust & Savings Bank against A. R. Botts, County Treasurer of Ottawa County, to enjoin the levy and collection of a tax. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

A. C. Wallace, of Miami, for plaintiff in error.

BURFORD, C. The Miami Trust & Savings Bank brought an action for an injunction against the county treasurer of Ottawa county, seeking to enjoin that officer from extending upon the tax rolls or attempting to collect certain taxes about to be so extended on the tax rolls against said bank. The cause was tried upon an agreed statement of facts. The trial court denied the injunction, and plaintiff appeals.

The county treasurer has filed no brief. However, owing to the public nature of the question involved, we have carefully examined the record herein. The agreed statement of facts is as follows:

"It is hereby agreed by and between the parties hereto that the facts upon which the questions involved must be determined are as follows:

"It is agreed: That the plaintiff is a banking corporation, organized and existing under and by virtue of the laws of the state of Oklahoma, and that the defendant is and was county treasurer of Ottawa county, Okl., at all times herein

mentioned. That the plaintiff was engaged in the banking business in Miami, Ottawa county, Okl., on the 1st day of January, 1918, and had a capital stock of \$10,000 and a surplus and undivided profit of \$933.31. That the \$10,000 capital stock of said corporation was on the 1st day of January, 1913, invested in public building bonds of the state of Oklahoma, and that \$395.96 of the surplus and undivided profit of said corporation was on said date invested in real estate, and that this item last above named was assessed to said corporation separately, in the name of said corporation. That the plaintiff corporation was assessed for the year 1913 upon the sum of \$587.36, the same being the sum total of the capital stock, surplus, and undivided profits of said corporation, less the amount of the capital stock, surplus, and undivided profit invested in real estate and public building bonds of the state of Oklahoma, and that the plaintiff paid taxes assessed against it for said year on said sum on the 23d day of January, 1914, and the 26th day of June, 1914, in the sum of \$20.51.

"It is further agreed that on the 10th day of March, 1914, the defendant, A. R. Botts, county treasurer of Ottawa county, Okl., caused to be served upon this plaintiff a registered notice setting forth that certain personal property of plaintiff invested in furniture and fixtures to the value of \$1,800 would be assessed to this plaintiff, on the 7th day of August, 1914, at the office of the county treasurer of Ottawa county, in the city of Miami, and county and state aforesaid, and that at the above time written objections might be made to the proposed listing and assessing. A true and correct copy of said registered notice is attached to this agreed statement of facts, marked 'Exhibit A,' and made a part hereof.

"It is further agreed: That the plaintiff appeared by its attorneys at the time and place mentioned in said notice and filed written objections to the proposed listing and assessment, for the reason and as ground for said objections stated that the plaintiff was a banking corporation under the laws of the state of Oklahoma, and could be assessed only upon its capital stock, surplus, and undivided profits, and further stated in said objection that the \$10,000 capital stock of said banking corporation was on the 1st day of January, 1913, invested in public building bonds of the state of Oklahoma, and that said bonds were nontaxable, and that \$395.96 of the surplus and undivided profit of said corporation was invested in real estate and assessed separately to the plaintiff, and that on the 1st day of January, 1913, it did not have \$1,800 of its capital stock, surplus, and undivided profit invested in furniture and fixtures as set out in said notice. That said objections to said assessment as aforesaid, were by the defendant, county treasurer, overruled, and the county treasurer stated and threatened that he would forthwith assess said property as set forth in said notice, and place the same upon the tax roll of said county, and issue a warrant for the collection of the taxes due thereon. That pursuant to said threat the plaintiff herein procured from this court, and caused to be issued upon said defendant, A. R. Botts, a temporary restraining order, restraining said A. R. Botts from listing said property and collecting said taxes aforesaid, which said restraining order is now in full force and effect.

"It is further agreed: That the furniture and fixtures sought to be taxed by said defendant and of the value of \$1,800 were used by said plaintiff on said 1st day of January, 1913, in its banking room in the conducting of its business as a banking corporation, and consisted of safes, counters, desks, etc., used in said banking business, and that the same was carried on the books of said bank as an asset, in the amount stated therein, and that said furniture and

fixtures were carried on the books of said corporation and set forth in its published bank statement as furniture and fixtures. That the taxes on said sum of \$1,800 for the year 1913 would amount to \$82.91 if same were taxable.

"It is further agreed that the court shall and may consider the petition of the plaintiff and the answer of the defendant herein for the purpose of ascertaining the issues involved herein.

"A copy of the assessment sheet of said banking corporation is hereto attached, marked 'Exhibit B,' and made a part hereof.

"It is further agreed by the parties hereto that the foregoing statement of facts are and constitute all the material facts in this case, as raised by the issues herein, and that the court shall decide the issues raised by the pleadings upon said statement of facts in lieu of any and all further evidence."

It appears that both parties below relied upon section 7318, Revised Laws of 1910, as being the governing statute, and that no question of its validity as a taxing statute or its applicability to plaintiff was raised. This statute provides:

"7318. *Corporations and Banks.*—All corporations organized, existing or doing business in this state, for profit, other than public service corporations assessed by the state board of equalization, including national banks, state banks, and trust companies, shall be assessed upon the net value of their moneyed capital, surplus, and undivided profits, as the same existed on the first day of March of each year, in the county, town, district, or city, where such corporation is located, less the assessed valuation of any real estate located in this state owned by such corporation and listed separately in the name of such corporations. 'Moneyed capital,' as used in this section, shall include money actually invested in the business of such corporation, whether represented by certificates of stock, debentures, or bonds."

The date of assessment above fixed was changed from March 1st to January 1st, by the Session Laws of 1910-11, p. 333.

Applying this statute, it seems clear that, aside from real estate, it is immaterial what property the corporation owned (save and except certain other property referred to in other sections of the statute not material here), the assessment was to be upon the "net value of the moneyed capital, surplus and undivided profits" of the bank. It must be taken as settled by the decision of this court in No. 7912, *In re Assessment of First National Bank of Chickasha* (not yet officially reported) 160 Pac. 469, that so much of the capital stock and surplus of the bank as was invested in public building bonds of the state of Oklahoma was exempt from ad valorem taxation. Whether or not the fixtures were actually bought out of the capital stock, surplus, and undivided profits, and whether or not such fixtures should be properly classed as part of the undivided profits, is, we take it, not before us for decision for the reason that the agreed statement of facts shows definitely the exact amount of capital, surplus, and undivided profits of the bank, and that all these funds, not invested in real estate, were invested in public building bonds except \$587.36 upon which taxes for 1913 had already been paid. Both the parties and

the district and this court are bound by these agreed facts. Under such statement, it is clear that all the taxable assets of the bank had been taxed or were invested in the exempt bonds.

The judgment of the district court is reversed, with directions to set aside the former judgment and enter a judgment in accordance with the prayer of the petition.

PER CURIAM. Adopted in whole.

FALLS CITY CLOTHING CO. v. SWEAZEA. (No. 7721.)

(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 1008(2)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

Where a jury is waived and a cause is tried to the court, a general finding of the court is given the same weight and effect as the verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964; Dec. Dig. \Leftrightarrow 1008(2).]

2. APPEAL AND ERROR \Leftrightarrow 994(3), 1011(1) — REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

Where, in such cases, there is a conflict in the evidence on the issues joined, determination of the question of fact therein is for the court; and this court, on review, will not weigh the evidence, or determine as to the credibility of witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8904-8905½, 8983-8988; Dec. Dig. \Leftrightarrow 994(3), 1011(1).]

3. APPEAL AND ERROR \Leftrightarrow 1010(1)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

And where there is any evidence reasonably tending to sustain the judgment, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8979-8981; Dec. Dig. \Leftrightarrow 1010(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Canadian County; Geo. W. Clark, Judge.

Action by the Falls City Clothing Company against Ira Sweazea. Judgment for defendant, and plaintiff brings error. Affirmed.

W. M. Wallace, of El Reno, for plaintiff in error. James I. Phelps, of El Reno, for defendant in error.

BLEAKMORE, C. This action was commenced in the district court of Canadian county by Falls City Clothing Company, as plaintiff, against Ira Sweazea and S. P. Moody, as defendants, to recover a balance due on an account for clothing alleged to have been sold to them as partners. Sweazea alone was served with process and answered. A jury was waived, and there was trial to the court resulting in a general finding and judgment for the defendants, from which plaintiff has appealed.

The gist of the grounds for reversal urged by plaintiff in its brief is that there was no

evidence tending to support the judgment.

It appears from the evidence that Sweazea and Moody had been partners in the mercantile business at Portales, N. M.; that Sweazea had sold his interest in the partnership to one Reagan, and the business was thereafter conducted under the firm name of Reagan & Moody. The testimony of the witnesses on behalf of plaintiff strongly tends to establish the fact that the goods in question were ordered by Moody in October, 1911, and delivered to the firm of Sweazea & Moody in January and February, 1912, prior to the dissolution of that partnership. The wife of Reagan, who succeeded Sweazea in the business, testified that the dissolution of such partnership occurred on February 15, 1912. Defendant's evidence is that the firm was dissolved in October, 1911, before the clothing was ordered; that Moody had no authority to order the same on the partnership account, of which fact the plaintiff and its salesman who obtained such order had been notified by defendant. This is denied by plaintiff's witnesses.

[1] It will be observed that the evidence was in this respect conflicting on the material issues of fact, and there was some evidence reasonably tending to sustain the finding and judgment of the court. In such a case, the general finding of the court, on appeal, is entitled to the same weight and effect as the verdict of a jury. *J. I. Case Threshing Mach. Co. v. Lyons & Co.*, 40 Okl. 356, 138 Pac. 167.

[2, 3] The rule is well established that, where evidence is conflicting, this court will not examine the same to determine where the weight lies; but, if there is any evidence reasonably tending to support the finding or verdict, it will not be disturbed on appeal. *Sands v. Bradley & Co.*, 36 Okl. 649, 129 Pac. 732, 45 L. R. A. (N. S.) 396; *Tulsa Ry. Co. v. Jacobson*, 40 Okl. 118, 136 Pac. 410.

"Where there is a conflict in the evidence on the issues joined, the determination of the question of fact thereon is solely for the jury.

"(a) This court on review, where there is a conflict in the evidence on an issue in the trial court, will not weigh the evidence or determine as to the credibility of the witnesses; that, under the law in this jurisdiction, being solely within the province of the jury." *O., R. I. & P. Ry. Co. v. Brazzell*, 40 Okl. 460, 138 Pac. 794.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

BABCOCK v. ORCUTT et al. (No. 7690.)
(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. SUBROGATION §16 — FORECLOSURE — EFFECT OF VOID PROCEEDING—SUBROGATION TO RIGHTS OF MORTGAGEE.

The grantee of a purchaser at a void judicial sale, where the grantee and the purchaser both

acted in good faith, and without notice of the irregularities in the proceedings, becomes the equitable assignee of the mortgagee, and where such grantee goes into the actual possession of the land under his deed from the purchaser, he occupies the position of a mortgagee in possession and entitled to be subrogated to all the rights of the mortgagee.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 37, 41-43, 79; Dec. Dig. §16.]

2. SUBROGATION §16 — FORECLOSURE — RIGHTS OF PURCHASER — SUBROGATION TO RIGHTS OF MORTGAGEE.

Where the grantee of a purchaser at a void judicial sale goes into actual possession of the land in good faith, believing himself the owner of the title, and without notice of any irregularities in the judicial proceedings, and pays off a prior existing mortgage at maturity and redeems the land from such mortgage, which mortgage he assumed and agreed to pay in his deed from the purchaser, he has such an interest in the land as will give him the right to redeem it from the mortgage lien, and he becomes the equitable assignee of the mortgagee and occupies the position of a mortgagee in possession, and is subrogated to all the rights and equities of the mortgagee.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 37, 41-43, 79; Dec. Dig. §16.]

Commissioners' Opinion, Division No. 4.
Error from District Court, Comanche County;
Cham Jones, Judge.

Action by F. H. Babcock against George A. Orcutt and others. Judgment in part for plaintiff, and in part for defendants. The plaintiff brings error, and files case-made with petition in error, and defendants E. F. Applegate and another also file objection in error, attached to the same case-made. Reversed, with directions.

George L. Zink and James H. Cline, both of Hobart, for plaintiff in error. B. M. Parmenter, of Lawton, for defendants in error.

DE GRAFFENREID, C. Plaintiff in error will be denominated plaintiff, and defendants in error defendants. Plaintiff filed his petition in the district court of Comanche county containing two causes of action:

First cause of action alleges in substance:

First. That defendants George A. Orcutt and Alvina Orcutt, his wife, on June 23, 1909, executed a note to the defendant Central Investment Company for \$1,300, bearing 6 per cent. interest, and to secure payment of the same they executed a mortgage on the land described in the petition, and which land is the subject-matter of this suit. Which mortgage was duly recorded, and at the said time the Orcutts were the owners of the land, and that on July 17, 1909, the Central Investment Company for valuable consideration assigned said note and mortgage to Isabell W. Daggett.

Second. That after the execution of the above note, to wit, June 23, 1909, the Orcutts executed to the Central Investment Company a second promissory note for the sum of \$130, and at the same time executed a second mortgage on the same land to the Central Invest-

ment Company to secure the payment of this note.

Third. On October 12, 1909, the Orcutts sold the land covered by these two mortgages to J. Y. Morgan, subject to these mortgages.

Fourth. Morgan and wife afterwards sold the land to Applegate and took three promissory notes, aggregating \$550 as the purchase price, which notes were secured by the mortgage on the same land, making the third mortgage.

Fifth. The Orcutts defaulted in payment of the \$130 note to the Central Investment Company, which was the note secured by the second mortgage, and on August 12, 1911, the Central Investment Company brought suit in the district court of Comanche county against George A. Orcutt, Alvina Orcutt, J. Y. Morgan, and E. F. Applegate for the sum due on said note secured by said second mortgage and for foreclosure of the second mortgage lien subject to the right of Isabell Daggett under the first mortgage; said cause being No. 3159. On December 8, 1911, judgment was rendered in said cause in favor of plaintiff for \$243.45, and attorney fees for \$50, and in favor of J. Y. Morgan for \$500.96, the foreclosure of the third mortgage, both to be subject to the mortgage of \$1,300 executed to the Central Investment Company, owned by Isabell W. Daggett.

Sixth. On July 25, 1913, said land was sold under this judgment foreclosing the lien at sheriff's sale, and was bid in by the Central Investment Company for \$250, being less than its judgment. Which sale was afterwards confirmed by the court, and deed was duly executed by the sheriff to the Central Investment Company, conveying said land. After deed had been taken by the Central Investment Company it then paid certain taxes due upon said land.

Seventh. On February 18, 1914, the Central Investment Company sold the land to the plaintiff, F. H. Babcock, and executed warranty deed to said land, subject to the mortgage held by Isabell W. Daggett, and in which deed the plaintiff assumed the payment of said Daggett mortgage, and plaintiff thereupon went into the actual peaceable possession of said land and continued in possession up to now.

Eighth. That afterwards, to wit, on July 1, 1914, the principal note which had been assigned to Mrs. Daggett for \$1,300 became due, and that the amount due upon said note on said date was \$1,378, which amount the plaintiff Babcock paid, and the note was surrendered to him by Isabell W. Daggett, and the mortgage canceled on the record.

Ninth. At the time of the institution of the suit No. 3159, the owner of the title to said land, Applegate, was a nonresident of the state, and the plaintiff in that suit undertook to obtain service on him by publication, but the notice of the suit was not published a sufficient length of time, which defect was not discovered by any of the parties until after

the note and mortgage owned by Mrs. Daggett had been paid off by plaintiff. The judgment was therefore void as to the defendant Applegate, the owner of the land.

Tenth. At the time that the plaintiff purchased the land from the Central Investment Company, he did so, relying on the regularity of the judgment of foreclosure and confirmation of the sale and the sheriff's deed, without any notice of any defect in the judicial proceeding.

Eleventh. The plaintiff prays for judgment against the Orcutts for the sum of \$1,502, and attorney fees, and costs, and that he be declared the equitable assignee of Isabell W. Daggett as to the note and mortgage paid by him, being the first mortgage, and that he have a foreclosure of said mortgage and that it be held superior to all other mortgages.

For second cause of action plaintiff in substance asks that he be declared the equitable assignee of the Central Investment Company for the amount paid by him to the purchasers at said void sale, and for all taxes paid by said purchasers and all taxes paid by him, and that he be subrogated and declared the mortgagee in possession of all the rights of the Central Investment Company.

The defendant Central Investment Company filed its answer, admitting the truth of the allegations of the petition, and claiming no interest in the land or subject-matter of the suit. The defendants Applegate and wife filed an answer and cross-petition, in which they admit all the statements in paragraphs 1, 2, 3, 4, 5, and 6 in plaintiff's petition. And defendants admit the execution and delivery of the note and mortgage to Morgan for \$550, and admit that Morgan and wife sold and conveyed them the land in controversy. And defendants further admit the allegation contained in the eighth paragraph, and also the ninth paragraph. They admit all statements and facts alleged in paragraph 10. They further admit facts contained in paragraph 11, except that they deny that plaintiff was in possession of said land under a color of title, but admit that he was in possession; they admit the allegation in paragraph 12, but deny that plaintiff had color of title, and deny the claim of Morgan and the Applegates constituted a cloud upon the plaintiff's title, and deny, by reason of the facts set out in the first cause of action, plaintiff should be subrogated to the note and mortgage held by Isabell W. Daggett, and deny his right to foreclose the mortgage. Defendants further admit the allegation in paragraph 13, except they deny that plaintiff is entitled in equity, in the event of redemption of said real estate, to have the said sum of \$78 and \$45 taxes paid.

For answer to the second cause of action the defendants Applegate deny that the plaintiff should be subrogated to and declared the equitable assignee for the money judgment rendered in favor of the Central Investment Company.

For answer the defendants Morgan admit the execution and delivery of all the notes and mortgages as alleged in plaintiff's petition, but they deny that the plaintiff is the equitable assignee of the Central Investment Company, and deny that the plaintiff is the equitable assignee of Isabell W. Daggett, and that he is not entitled to be subrogated to their rights in any manner, but that the payment of said mortgage by Isabell Daggett was voluntary, and that he cannot become subrogated to their rights. That the mortgage of Isabell Daggett had been fully paid, and the liens canceled, and that the plaintiff had no right, title, or interest whatever in said land.

This case was tried to the court without a jury on an agreed state of facts, the substance of which is as follows:

First: The Orcutts, owners of the land, gave a first mortgage to the Central Investment Company, defendant, to secure a promissory note of \$1,300.

Second. Orcutts, the owners of the land, gave a second mortgage to the defendant the Central Investment Company, to secure a note of \$180.

Third. Afterwards the Orcutts sold and conveyed the land to the defendant J. Y. Morgan.

Fourth. The defendant Morgan sold and conveyed the land to the defendant Applegate.

Fifth. The defendant Applegate mortgaged back by third mortgage on the land to Morgan to secure the purchase price of \$550.

Sixth. The Central Investment Company for valuable consideration assigned and transferred the first mortgage of \$1,300 to Isabell W. Daggett.

Seventh. While Applegate was the owner of the land, the second mortgage became due. There was an attempted foreclosure. This is admitted to be void because of the want of service of summons upon the owner of the fee-simple title, Applegate, who being a nonresident of the state, service by publication was not complete. Under this foreclosure the land was sold to the Central Investment Company, which sale was confirmed by the court and deed executed by the sheriff and delivered to the Central Investment Company, and after this the Central Investment Company conveyed the land to plaintiff by warranty deed, subject to the mortgage held by Isabell W. Daggett, and in which deed the plaintiff assumed and agreed to pay the Daggett mortgage.

Eighth. Plaintiff thereupon went into the actual and peaceable possession of the land, and has continued in possession until the trial of this cause. It is further admitted that plaintiff was a bona fide purchaser of the land from the Central Investment Company without any notice of defect in the judicial proceeding; that he made no exami-

nation of the public record, and knew nothing of the void foreclosure proceeding.

Ninth. Plaintiff, Babcock, when the Daggett, or first, mortgage became due, paid the same to Mrs. Daggett and had it released of record without any knowledge of the defect or irregularity in the judicial proceeding, and that he paid the same in good faith, relying upon the regularity of the judicial proceeding and the deed of the sheriff, and believed in good faith that he was owner of the fee-simple title.

Tenth. After paying the Daggett mortgage he then for the first time discovered the invalidity of the foreclosure proceeding, and then instituted this proceeding as a new foreclosure, claiming to be a mortgagee in possession, and as having the right to be subrogated to the rights of the purchaser at the void foreclosure proceeding, and also the right to be subrogated to the rights of Isabell W. Daggett.

Counsel for the plaintiff sets out several assignments of error, the first three of which are:

"Said district court erred in refusing to adjudge and decree to plaintiff, F. H. Babcock, the full relief prayed for by him in said cause, and erred in denying the relief prayed for by him against the defendants J. Y. Morgan and Corine Morgan."

Second. "The district court erred in adjudging that plaintiff was not entitled to subrogation to the Daggett note and mortgage, upon the payment and discharge of same by him while in possession of said premises as a grantee of the purchaser at the judicial sale had under the foreclosure proceedings."

Third. "The court erred in rendering judgment and decree in said cause in favor of J. Y. Morgan and Corine Morgan, and in fixing the priority of the same as first and superior to the judgment entered in favor of plaintiff against the other defendants in said cause."

[1] We will first consider the rights of the purchaser or the grantee of a purchaser at a void judicial sale. The doctrine is announced in 37 Cyc. 455, 456, 457, as follows:

"A purchaser at a void sale to foreclose a mortgage is subrogated to all the rights and remedies of the mortgagee and can enforce them as the mortgagee could have done had the sale not been made, and the purchaser's grantee has the same rights and remedies as the purchaser."

In the case of *Equitable Mortgage Co. et al. v. Gray et al.*, 68 Kan. 100, 74 Pac. 614, it was held by the court that a purchaser at a mortgage foreclosure sale, which was defective for lack of necessary party defendant, is entitled to all the rights of a mortgagee in possession. This was a case where the mortgagee was in the penitentiary under sentence of death, and was not served with process. Decree of foreclosure was entered, sale had and confirmed, and the purchasers went into possession and paid the taxes thereon for a number of years. When later the mortgagor, having been pardoned, instituted an ejectment suit for possession, the court said:

"One who assumes possession of land under color of foreclosure proceedings believed by him

to be valid, however defective they may be in fact, cannot be dispossessed in an action of ejectment by the mortgagor before payment of the mortgage debt. * * * The Equitable Securities Company, having bought the land at the sheriff's sale under the decree of foreclosure, and entered thereon peaceably, was entitled to all the rights of a mortgagee in possession. A sale under the decree operated as an assignment to the purchaser of the interest of the mortgagee in the premises"—citing *Stark et al. v. Brown*, 12 Wis. 572, 78 Am. Dec. 762; *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002; *Sheldon on Subrogation*, § 31; *Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. 808, 40 L. Ed. 1022.

In the case of *Capell v. Dill et al.*, 82 Kan. 652, 109 Pac. 286, a foreclosure was begun by the assignee of a mortgage and publication service had against the mortgagor. The mortgagor was dead. Judgment was entered, the land subsequently sold, and was purchased by one Rice. Rice sold the land, and his grantee paid the taxes, and then conveyed to Capell. In this case the court said:

"A grantee in good faith, holding possession under a sheriff's deed in foreclosure proceedings which did not divest the title of the mortgagor, is properly subrogated to the rights of the mortgagee, and considered as a mortgagee in possession.

"In the circumstances stated above, the heirs of the mortgagor will not be given a decree quieting their title against the party so held to be a mortgagee in possession, nor will they be awarded the possession, until they first satisfy the mortgage debt, although an action thereon would be barred by the statute of limitations."

The same question has been before the Supreme Court of our state in the case of *Romig et al. v. Gillett*, 10 Okl. 186, 62 Pac. 805. *Gillett* made his note to *Romig*, and mortgaged a tract of land to secure the same, and then deeded the land subject to the mortgage to *Myrtle Gillett*. The land was located in Garfield county, and *Romig* began a foreclosure suit and secured a default judgment against the *Gilletts*. The *Gilletts* lived in Kingfisher county, and had been served by publication notices; sale was had, and *Romig* became purchaser. *Romig* then sold the land to *Harding*. Shortly after the sale to *Harding*, his grantee, *Gillett*, owner of the fee-simple title, appeared and moved to set aside the judgment. The judgment was set aside, and *Harding* appealed to the Supreme Court of Oklahoma, where the judgment was affirmed. The case was then taken to the Supreme Court of the United States, and the judgment reversed. 187 U. S. 111, 23 Sup. Ct. 40, 47 L. Ed. 97. In its opinion (17 Okl. 324, 87 Pac. 325) in the litigation had thereafter, Justice *Hainer* used this language:

"That *Harding* being a grantee of the mortgagee in possession, his right and his possession could not be disturbed by the mortgagor or his grantee, *Myrtle Gillett*, until the mortgage debt and interest and all proper charges were fully paid. In other words, the maxim that 'he who seeks equity must do equity,' applies, and before the rights of *Harding* could be determined, and his possession disturbed, it devolved upon *Myrtle Gillett*, the grantee, of the mortgagor, to do full equity."

In the syllabi the court announced the law as following:

"A mortgagee who enters into possession peaceably, as purchaser under foreclosure proceedings, cannot be dispossessed by the mortgagor or his grantees so long as the mortgage remains unsatisfied."

The second syllabus is as follows:

"Under the facts in this case *H.*, as the grantee of *R.*, the purchaser at the foreclosure sale, stands in the shoes of the mortgagee, and his right to relief must be measured and determined by the well-recognized principles of equity."

We think that the above case is squarely in point, and clearly points out the rights of all the parties to suit at bar, and that the right of redemption in defendants, to redeem the land from the indebtedness held against it by *Babcock*, a mortgagee in possession, with the right to have credited on said indebtedness the rentals received by *Babcock* while in possession.

In the case of *Harding v. Gillett et al.*, 25 Okl. 199, 107 Pac. 665, the Supreme Court of our state, speaking through Mr. Justice *Hayes*, and again reviewing the facts in the above case, reannounced the conclusion of the court to the same effect as to the rights of a grantee of a purchaser at a void judicial sale.

In the case of *Olson v. Peterson*, 88 Kan. 850, 128 Pac. 191, *Oliver Olson* and his wife were made joint grantees in a deed, the land formerly belonging to *Oliver Olson*, and a mortgage had been executed against it. He conveyed the land to defraud creditors, and, having settled with them, the land was reconveyed to him and his wife jointly. The wife died, and two years later *Olson* paid the mortgage, and then placed a new mortgage on the land, after which he conveyed the land to *Peterson*, subject to the last mortgage, and *Peterson* assuming to pay the same. The heirs of *Mrs. Olson* brought suit in ejectment, and the court held that *Peterson* was entitled to be subrogated to the rights of the mortgagee named in the mortgage that had been discharged by *Olson*; the court using this language:

"By his conveyance to *Peterson* the latter became the assignee of whatever rights *Oliver Olson* had to subrogation."

And, after citing *Sheldon on Subrogation*, quoted therefrom as follows:

"It is merely necessary that his payment should have been made in good faith for the protection of an interest which he believed himself to have in the estate, and in discharge of a burden actually resting upon the property, so that his payment has increased the value of the estate for the benefit of those who turn out subsequently to be entitled to the title.' Whatever rights *Oliver* would have had to reimbursement from the appellees passed to *Peterson*. Applying the foregoing principles of equity to the facts, it follows that the heirs of *Alma Olson*, who subsequently turn out to be entitled to a portion of the lands, the value of which was increased by the payment made by the assignee of appellants, should reimburse the latter to the extent of their proportionate shares in the lands. The tendency of courts everywhere is to extend, rather than

to restrict, the principle of subrogation, modifying it to meet the circumstances of each case where in accordance with recognized maxims it should be allowed in equity and good conscience."

In the case of *Wagg v. Herbert et al.*, 19 Okl. 525, 92 Pac. 250, the court said:

"Equitable principles must control a full and complete settlement of the rights of the parties to this action. Wagg is entitled to be paid for the principal indebtedness, together with the interest at the rate specified in the note and mortgage, for all taxes, assessments, and other proper charges and expenses necessary for the management and protection of the estate, and he is responsible to Mrs. Herbert for rents and profits to be applied upon the indebtedness. And the rights of all subsequent purchasers in good faith for a valuable consideration, without notice of the rights of defendants in error, should be fully protected according to recognized principles of equity"—citing authorities.

The Supreme Court of our state again in the case of *Harrill v. Weer*, 26 Okl. 313, 109 Pac. 539, in an opinion of Justice Hayes, said:

"It is a well-settled rule that the purchaser at a void foreclosure sale under a mortgage becomes subrogated to all the rights of the mortgagee, and is to be regarded and treated as an equitable assignee of the security to secure him for the purchase money paid by him and applied upon the payment of the mortgagor's debt."

See, also, *Kleburg, Void Judicial and Execution Sales*, par. 478, and authorities there cited; *Bryan v. Kales*, 162 U. S. 412, 16 Sup. Ct. 802, 40 L. Ed. 1020.

We are of opinion from the above citations that when the Central Investment Company in good faith purchased the land at the judicial sale, though the same was void, without notice, of any defects in the judicial proceeding, and afterwards conveyed the land to the plaintiff in error, who in good faith and without any notice of such irregularities purchased the same, and then took possession of the land, he was the equitable assignee of the Central Investment Company, the mortgagee, and was thereby a mortgagee in possession and was subrogated to all the rights and equities of the Central Investment Company.

[2] We next consider the question as to whether or not the plaintiff in error became subrogated to the rights of Isabell W. Daggett, the holder and owner of the first mortgage for \$1,300, which plaintiff paid off after the same matured and while in possession of the land under a purchase from the Central Investment Company, and without any notice of any defect in his title.

It is clear that the plaintiff paid off this mortgage and redeemed the land therefrom in good faith, believing that he was the owner of the fee-simple title, and that it was done by him for the purpose of protecting his rights as owner of the land.

Section 3839, Stats. of 1910, provides:

"Every person having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed."

It is contended by the defendants that the plaintiff cannot become subrogated to the rights of Isabell W. Daggett for the reason that he is a volunteer in the payment of said note and mortgage to Mrs. Daggett, and therefore cannot be subrogated to her rights, and counsel in his brief cites the case of *Kahn v. McConnell et al.*, 37 Okl. 219, 181 Pac. 682, 47 L. R. A. (N. S.) 1189; but this case is distinguishable from the case under consideration for the reason that in said case McConnell was the owner of the land and there was a first mortgage on it to secure an indebtedness to the First National Bank of Roff. The defendant Wright approached McConnell to buy the land, and McConnell referred him to the bank, stating that if he could satisfy the bank he would sell him the land. Wright then went to the bank and paid off the indebtedness of McConnell, took up his notes, and had the bank cancel the mortgage lien upon the record. He delivered the notes and mortgage duly canceled to McConnell, and McConnell then sold him the land.

It afterwards developed that there was a second lien on the land, which Wright did not know of, and in a suit to foreclose the second lien, Wright contended that he should be subrogated to the rights of the bank, and the court properly held that Wright was a volunteer, and could not become subrogated to the rights of the bank so as to defeat the second lien. It will be seen from this case that at the time Wright paid off the indebtedness to the bank and had the lien canceled he had no interest whatever in the property, but was merely paying the same so that he might afterwards become the purchaser; consequently he does not come within the provisions of the statute above quoted. Now, in the case under consideration, Babcock unquestionably had an interest in the land at the time that he paid the Daggett mortgage, as he had already purchased what he supposed was a fee-simple title, and was then immediately subrogated to the rights of the Central Investment Company, and consequently he does come squarely under the provision of the above statute. Again it is contended by counsel for defendants that because Babcock assumed the payment of the Daggett mortgage in the deed which he took from the Central Investment Company, that it thereby became his obligation, and for this reason he cannot be subrogated. In this contention we cannot agree. It is true he assumed to pay the mortgage, and it became his personal liability, still this assumption was made to relieve the Central Investment Company, and to protect the title which he thought he owned. The owner of the land had received this money and mortgaged the land to secure the payment. The subsequent purchasers bought subject to this mortgage, and if the contention of defendants is true, then Applegate, the owner of the title, could dispossess plaintiff and avoid the payment

of this very mortgage which he bought subject to. This equity will not permit. Equitable Mortg. Co. et al. v. Gray, 68 Kan. 100, 74 Pac. 614, and cases there cited; also Olson v. Peterson, 88 Kan. 350, 128 Pac. 192.

It cannot be successfully contended that, while the plaintiff was in the actual possession of the land, under the circumstances as shown in this case, the owner of the title, Applegate, could successfully maintain an action against him for possession of the land, until he had paid off and satisfied the Daggett mortgage, and we see no reason why the rights of Morgan should be any higher than the owner of the title. Morgan accepted the third mortgage with a full understanding at the time that there were two mortgages ahead of his, and he is in the same position now that he would have been if the land had not been sold at the void sale, therefore he is not injured in any whatever, and cannot be heard to complain because the plaintiff should be subrogated to the rights of Mrs. Daggett. It is but simple justice and good conscience that the plaintiff should now stand in the shoes of Isabell W. Daggett, and that he be held as an equitable assignee of the interest of Isabell W. Daggett, and that he be declared a mortgagee in possession and subrogated to all the rights and equities of Isabell W. Daggett. We are of opinion, however, that the plaintiff will not be entitled to charge against this land the costs and attorney fees in the previous foreclosure proceeding, but that he is entitled to charge against the land the full amount due the Central Investment Company at this time, together with all taxes paid by the Central Investment Company on this land and whatever taxes have been paid by the plaintiff, if any, and also the full amount due under the Daggett note and mortgage, and deduct therefrom the reasonable rental value of the land, and that his liens be foreclosed to satisfy same.

The judgment of the lower court is reversed, and the court below is directed to set aside its judgment rendered in this cause, and to enter a decree in conformity with this opinion.

PER CURIAM. Adopted in whole.

MISSOURI, K. & T. RY. CO. v. ROSE.
(No. 7111.)

(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

RAILROADS \S 405 — CONSTRUCTION AND MAINTENANCE—INJURIES TO ANIMALS—LIABILITY.

Where a railway company has notice that "arsenic dip"—a poisonous fluid in appearance resembling water—is escaping from one of its tank cars to the ground, and collecting in a pool on its right of way, accessible to domestic animals running at large, and fails to exercise ordinary care to keep such animals away from

such pool, held to constitute negligence and that the company is liable for injury resulting to animals from drinking out of such pool.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1893-1898; Dec. Dig. \S 405.]

Commissioners' Opinion, Division No. 2 Error from County Court, Osage County; Paul B. Mason, Judge.

Action by J. W. Rose against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. Wilberforce Jones, of Cushing, for defendant in error.

GALBRAITH, C. This appeal is from a judgment rendered upon the verdict of a jury in favor of J. W. Rose, the defendant in error, for \$50 and interest, in an action for damages arising from the loss of one Jersey milch cow, charged to have been killed by the carelessness and negligence of the railway company. The facts briefly stated are as follows: Mr. Rose was a resident of the unincorporated town of Prue, Osage county, Okla., and owned one Jersey milch cow that was accustomed, with other village cows, during the daytime, to run at large upon the commons of that community. The plaintiff in error operated a railroad through the village of Prue, and upon its station ground established and maintained stock pens, and as a part of the equipment of the pens was a dipping vat for treating cattle afflicted with the Texas Fever Tick. On the 14th day of April, 1913, the railway company placed a tank car filled with "prepared dip," or "arsenic dip," on its switch near the stock pens and in close proximity to the dipping vat. A rubber hose was attached to the tank and extended across to the vat, and in that way the dip was intended to be transferred from the car to the vat. In some way, not disclosed by the evidence, the hose became detached or the tank struck a leak, and the dip escaped to the ground, and running across the main track into an excavation along the right of way formed a pool. A citizen of the village discovered this leak early in the morning about 7 o'clock, and advised the agent of the railroad company of the fact, and that some two or three barrels of fluid had run out upon the ground. The agent, thinking that it was a water tank that was leaking, paid no attention to this notice, and again along in the afternoon of the same day the defendant in error discovered that the tank was leaking and telephoned the agent, and also went to the station and advised him, and they went to the tank car together, and the agent attempted to stop the leak, but was unable to do so. The agent then telegraphed the company's live stock department to send a man to stop the leak. This man came the

following day. On this 14th day of April the Rose cow was out upon the commons as usual. When she came in at night it was discovered that she was ill, and the next morning she was dead. Rose then made an attempt to discover the cause of death, and went down to the tank car and found the pool of dip that had formed on the right of way, and saw cow tracks leading to the pool and across it, and recognized tracks made by his cow. He then caused a post mortem to be had upon the body of the cow, and a portion of the contents of the stomach were removed and sealed and sent to the chemical department of the State University for analysis. The returns from the analysis showed the presence of arsenic poison sufficient to cause the death of an animal. It also appeared from the evidence that the agent of the railroad company knew that the plaintiff's cow and the cows of other residents of the village were at large upon the commons, and he saw them around the tank car on this day. The dip in the tank car had been diluted with water in the usual proportions—twenty to one—and was ready for use, and it resembled water in appearance.

It is contended on the part of the railway company that the cow was a trespasser upon its right of way, and that it was liable only for wanton injury inflicted upon her. That neither the pleadings nor the evidence would justify a conclusion that the injury in this case was the result of a wanton or willful act. The argument offered in support of this conclusion is shown by the following short excerpts from the brief:

"There is neither pleading nor proof in this case that the herd law had been suspended at the time and place of the accident, and under the repeated decisions of this court the herd law must be presumed to have been in full force and effect, and the cow was therefore unlawfully at large."

Also:

"In view of the fact that the cow was unlawfully at large, she was a trespasser upon the tracks of the defendant railway company, and if this had been a suit for the negligent operation of defendant's train, the rule governing it would be that the employees of the defendant, in the operation of its train, would have owed no duty whatever with respect to the cow except to use ordinary care to prevent injury to her after they had actually discovered her presence and peril upon the track."

The contention that the cow was unlawfully at large and therefore a trespasser upon the company's right of way is presumed from the fact that there was no proof in the record that Osage county had been released from the operation of the herd law and is based upon the decision of this court in *St. L. & S. F. R. Co. v. Brown*, 82 Okl. 483, 122 Pac. 136. That decision, however, became final on March 12, 1912. On March 25, 1913 (being chapter 94 of the Session Laws of 1913), the Legislature passed an act regulating the running at large of domestic animals, etc., the first section of which reads in part:

"The board of county commissioners of any county in this state where domestic animals were not restrained from running at large at the time of the adoption of the Constitution of this state, are hereby authorized to exempt their county or any stock district thereof from the provisions of sections 1 and 2, art. 1, c. 1, Session Laws of 1903, as to any one or all classes of domestic animals mentioned herein," etc.

In this condition of the law we are not sure that a presumption would arise from the mere absence of proof in the record that the herd law was in force in Osage county, in April, 1913. The testimony to the effect that it had always been the custom for the cows to run at large in that community is not contradicted. In any event we do not think that this case should be determined upon presumptions, since there is no necessity for doing so. The action was instituted on the theory that the liability of the company was based upon its negligence, and the cause was tried in the county court upon that theory. The court in its instructions to the jury clearly submitted the cause on that theory in instruction No. 2 as follows:

"You are instructed that if you believe from a preponderance of the evidence that the defendant had a car in its yards in the town of Prue, Okl., containing a liquid substance that was of a poisonous character and likely to cause death to animals or stock drinking the same, then it would be the duty of the defendant to exercise ordinary care in preventing the escape of such substance; and if you further find that the defendant failed to exercise such care, and by reason thereof such substance escaped from such car, and that the cows of plaintiff's drank from such liquid so escaping, and from the effects thereof died, then the defendant would be liable if it failed to exercise reasonable care in guarding such substance from the cows of plaintiffs, after it had notice they were in the vicinity thereof."

Even upon the contention of the plaintiff in error that the cow was a trespasser upon its right of way the liability of the company would be established under the rule announced in the *Brown Case*, supra, wherein the court said:

"This court has refused to follow the rule announced in Texas and other states, making the company liable for only wanton and willful negligence, where the animal killed was unlawfully running at large, and it would be inconsistent with the statute restraining animals from running at large; to require a lookout to be kept where animals could be at large only unlawfully; and we believe the correct rule to be that a railway company is required to exercise only ordinary care to avoid injuring trespassing animals after they are discovered on or in dangerous proximity to the track."

The evidence clearly shows that notice was brought to the railway company early in the morning of the 14th that this tank car was leaking, and that a second notice was brought to the agent in the afternoon of that day, and that he then attempted to stop the leak, and that the company did not send a man around to stop the leak until the following day; that the agent knew on this day that this plaintiff's cow, with others, was running at large on the commons, and saw them

around this tank car during the day of the 14th.

The evidence does not disclose that this "arsenic dip" had an odor, offensive or otherwise, but it does show that it resembled water. The section foreman, when he saw it escaping from the tank, thought it was water. He was deceived by its appearance, and the cow may have been likewise deceived, and thus led to drink it. The company is bound to have known the dangerous character of this dip. When, with this knowledge, this poisonous fluid was permitted to escape from the tank and accumulate in a pool accessible to the cow, and no steps were taken to prevent her from drinking it, the company failed to discharge the duty it owed her, even though she was, as contended by the plaintiff in error, a trespasser, viz. "to exercise only ordinary care to avoid injuring her." Whether the company exercised ordinary care to prevent injury to the cow after the discovery of her peril was a question for the jury, and their finding was that it did not, and there is evidence to support this finding.

There are other errors assigned, but none of them seem to be well taken. There is evidence to support the finding of the jury that the company was negligent, and that this negligence was the proximate cause of the injury sustained by the defendant in error.

The judgment appealed from is therefore affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. JACKSON.
(No. 8022.)

(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §204(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

In an action brought by a servant under the federal Employers' Liability Act (Acts April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), for damages for personal injuries arising from the negligence of the master, where the negligence alleged as causing or contributing to the injury does not constitute a violation of any of the federal statutes enacted for the safety of the employé, the defense of assumption of the risk as it existed at common law is open to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. §204(1).]

2. MASTER AND SERVANT §250½, New, vol. 15 Key-No. Series—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.

In such cases the provisions of the Constitution of Oklahoma (Const. art. 23, § 6), requiring the submission of questions of assumption of the risk to a jury, do not apply.

3. MASTER AND SERVANT §288(1)—DIRECTED VERDICT—PROPRIETY.

Where in such cases all the evidence, including that of plaintiff himself, shows a clear

case of assumption of the risk, it is error to sustain a verdict for the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068, 1069, 1087, 1088; Dec. Dig. §288(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Comanche County; Cham Jones, Judge.

Action by Samuel Jackson against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

C. O. Blake and B. J. Roberts, both of El Reno, for plaintiff in error. J. A. Diffenderfer, of Lawton, for defendant in error.

BURFORD, C. [1] This was an action for damages for personal injuries brought by Samuel Jackson against the Chicago, Rock Island & Pacific Railway Company. The cause is conceded by all parties to be brought under and to be governed by the provisions of the federal Employers' Liability Act. There is little or no conflict in those portions of the testimony material to a decision here. It appears that the plaintiff was one of a number of men engaged in loading rails upon a flat car. There were about 80 of these rails. Four or five of them were more or less bent or crooked. These crooked rails were loaded last. The method of loading was that stakes were placed at the west end and also upon the farther side of the car. Plaintiff and his fellow workmen then lifted the rail and placed the end behind the stakes on the west end of the car, and then threw the east end upon the car. When one of the crooked rails were so thrown, it bounded back and injured one of the muscles of plaintiff's leg. The negligence alleged is that no stake was placed at the east end of the car to prevent the rail from falling back and off the car. There was evidence that the method employed in loading these rails was the usual and customary method employed in this section. There was no evidence that the placing of a stake at the east end of the car would make such work more safe. We are asked by the defendant in error to say from common knowledge and experience that a stake at both ends of the car would constitute a safer method of loading than that employed in the instant case. Doubtless such a stake would have probably prevented this particular injury, but whether placing a stake at each end of the car would render loading rails from the side generally more safe is an entirely different question. Obviously in loading from the side of the car—and there is no evidence that any other place of loading was available or more safe, if available—one end of the rail would be shoved behind the stake at one end of the car, but the same could not be true when the other end was loaded. There, if a stake be placed at both ends of the car, the rail must

necessarily be lifted up and over the stake, and in handling heavy steel rails we are not at all sure that such method might not be fraught with more danger than the one here employed. Assuming, however, without deciding, that there was evidence to sustain the jury's finding of negligence, it seems the plaintiff must fail upon another ground. It appears from all the testimony that plaintiff was a man of mature years; that he had worked as a section hand, taking up and laying rails upon the Cotton Belt Railway, and upon the Rock Island, and for other roads in other kinds of railway work; that he knew that the rails they were loading might fall back. Plaintiff testified:

"Q. But you yourself knew they were liable to fall back and you were guarding against that? A. Yes, sir."

If it were negligence to fail to provide a stake at the east end of the car, that fact was as open and obvious to the plaintiff as to any one else. Clearly from his own testimony he knew that the rails might fall back and injure him. He knew and appreciated the risk arising from the alleged negligence, and, knowing it, went ahead with the work without protest. Nothing could more clearly establish the defense of assumption of the risk as known at common law. This defense comprehends, not only the assumption of the risks ordinarily incident to the employment, but also the risks arising from the master's negligence in providing a safe place to work after the—

"employé becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. * * * When the employé does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty." *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 55 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *St. Louis Cordage Co. v. Miller*, 126 Fed. 496, 61 C. C. A. 477, 63 L. R. A. 551; *Gila Valley G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521, and cases cited.

This cause being brought under the federal Employers' Liability Act, and there being no contention that the failure to provide the stake was a violation of the Safety Appliance Act, or any other federal statute, "enacted for the safety of employes" the defense of assumption of the risk as it existed at common law was open to the carrier. 35 U. S. Stat. at L. p. 65; *Seaboard Air Line v. Horton*, supra; *St. L. & S. F. R. Co. v. Snowden*, 149 Pac. 1083 (not yet officially reported); *Southern R. Co. v. Crockett*, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. Ed. 1564.

[2, 3] Whatever may be the apparent force of the contention that the provision of the

Oklahoma Constitution (Const. art. 23, § 6), requiring the submission of the defense of assumption of the risk as a question of fact to the jury, applies to cases such as the present one, upon the theory that the right to the defense is preserved under such provision, and only the method of determining it varied thereby, and of the reasoning by analogy from the decision in *Minn. & St. L. Ry. Co. v. Bombolis*, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, and of *St. L. & S. F. R. Co. v. Brown*, 241 U. S. 223, 36 Sup. Ct. 602, 60 L. Ed. 966, the decision of this court in *St. L. & S. F. R. Co. v. Snowden*, supra, is conclusive that these provisions cannot affect a suit brought under the federal statute, upon the ground that if the defense permitted is "that of the common law" (*St. L. & S. F. R. Co. v. Snowden*, supra), then in cases where the evidence is undisputed and the circumstances permit of but one conclusion, the question must be decided by the court as a matter of law, and not by the jury as a matter of fact, since such is the common law, and such must be the result in our courts in these cases where the federal act creating the liability likewise allows the common-law defense (*St. L. & S. F. R. Co. v. Snowden*, supra; *Toledo, S. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. Ed. 671; *So. Pac. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; *Burke v. Union Coal Co.*, 157 Fed. 178, 84 C. C. A. 626; 26 Cyc. 1479, and cases cited).

In this cause the court submitted the question of assumption of the risk to the jury. The plaintiff's evidence clearly established the defense. Under the doctrine of the *Snowden* Case the cause ought not to have been submitted to the jury. Having been submitted, it was error to sustain a verdict for the plaintiff.

For the reasons given, the cause is reversed, for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

CHOATE et al. v. STANDER et al.
(No. 7296.)

(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT §183(2)—RIGHTS OF PRINCIPAL—SUIT IN NAME OF PRINCIPAL.

A principal may maintain in his own name an action upon a written contract made in the name of the agent.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 692-694, 696; Dec. Dig. §183(2).]

2. BILLS AND NOTES §489(6)—ACTIONS—EVIDENCE—ANSWER.

In an action by S. upon an undorsed note made payable to C., where the answer of the defendants alleges that the note was executed in consideration of a contract for the convey-

ance of lands by S. to defendants, and that the payee, C., acted as the agent of S. in the transaction, such answer admits the ownership of the note in S., and S. may maintain the action in his own name, and no proof that he is the owner and holder of the note is required, even though such ownership be denied in the answer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1613-1615; Dec. Dig. § 489(6).]

3. PRINCIPAL AND AGENT § 23(1)—ACTIONS—EVIDENCE.

Evidence examined, and held not to establish an agency to substitute other notes for notes given by the defendants.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23(1).]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by Maggie P. Stander and T. A. Stander against John W. Choate, Ralph W. Day, and E. V. Weaver. Judgment for plaintiffs, and John W. Choate and Ralph W. Day bring error. Affirmed.

B. O. Young, of Oklahoma City, for plaintiffs in error. Jno. H. Wright and Clarence J. Blinn, both of Oklahoma City, for defendants in error.

RUMMONS, C. This action was commenced in the district court of Oklahoma county, by the defendants in error, hereinafter styled plaintiffs, against John W. Choate, Ralph W. Day, plaintiffs in error, and E. V. Weaver, hereinafter styled defendants, to recover the sum of \$335.14 upon five promissory notes executed by defendants Choate and Day and to foreclose a lien upon certain real estate in Oklahoma county for the amount due upon said notes.

The petition of the plaintiffs alleges the execution and delivery of said five promissory notes to Edward Croak, and alleges that at the same time as part of the same transaction, plaintiffs being the owners of the real estate described in said petition, executed and delivered to the defendants Choate and Day a written contract, agreeing to convey said real estate to said defendants; that the purchase price of said real estate, except for the sum of \$27.50 paid in cash, was evidenced by said promissory notes, and alleged that before the maturity of said notes the payee, Edward Croak, sold and assigned said notes by delivery to plaintiffs, who became and are now owners and holders of each of said notes. Plaintiffs pray judgment upon said notes for the sum of \$335.14, and for foreclosure of the lien created by said contract on the real estate described in said petition.

The defendant E. V. Weaver made default, and the defendants John W. Choate and Ralph W. Day filed their answer, which consists of a general denial of all the allegations in the petition, except such as are specifically admitted. Defendants admit the execution and delivery of said notes, and allege that

plaintiffs were wife and husband, and the owners of the real estate described in the petition, and on the date of the execution of said notes plaintiffs agreed to sell said real estate to the defendants for the sum of \$275, of which sum \$27.50 was paid in cash, and the balance of the purchase price was evidenced by the several notes herein sued upon, aggregating \$247.50, and said defendants agreed to purchase said lots on the terms above set forth. That said agreement of sale was reduced to writing, and is the contract alleged and set up in plaintiffs' petition. Defendants further allege that at the same time stated by the contract, there entered into between plaintiffs and defendants, that plaintiff and defendants entered into numerous other similar contracts for the purchase of other lots in said addition, and that all of the lots so purchased by the defendants were afterwards by them resold to other purchasers; these purchasers paying to said defendants their equity in cash, and giving notes to said defendants in sums equal to the amounts covered by the notes given by said defendants to the plaintiffs, the purchasers from defendants receiving assignments of defendants' contracts of purchase from plaintiffs. That in every case of a resale by defendants, except as to the lots in controversy herein, plaintiffs accepted from defendants the notes of such purchasers in exchange for the original notes given by defendants to plaintiffs. Defendants further say that in all of these transactions said Edward Croak acted as the agent and attorney in fact for said plaintiffs, who were the real parties in interest at all times; that the plaintiffs were not purchasers for value of said notes before maturity. Defendants further allege that they resold said lots and received from the purchaser his notes in the sum of \$247.50, and defendants allege that they took said notes to the office of said Edward Croak to exchange them for the notes herein sued upon; that the said Edward Croak was out of his office at the time, but that defendants found there one Trentman, the agent of Croak and the agent of plaintiffs; that Trentman then and there accepted said notes in exchange for the notes herein sued upon, and the notes of said purchaser were then and there properly indorsed and delivered to said Trentman, who stated that Edward Croak or plaintiffs had the notes herein sued upon, and that he would get them and deliver them to defendants at a later date. Defendants further allege that they subsequently saw said Edward Croak, and fully advised him of the transaction herein described, and that the said Edward Croak said that it was all right, but that he could not return their notes to them then, as they were not in the office; that he would get them and deliver them to said defendants later. Defendants further allege that al-

though often requested said Edward Croak and plaintiffs have neglected and refused to return the notes herein sued on to defendants or either of them, and defendants further allege that by reason of the facts above set forth the notes sued on by plaintiffs have been paid in full and the contract extinguished and terminated by agreement of all the parties thereto.

To this answer the plaintiffs filed a verified reply, denying generally the allegations in said answer not admitted in plaintiff's petition, and denying specifically that Edward Croak was the agent and attorney in fact of the plaintiffs in the manner and for the purposes set forth in the answer, and denying specifically the agency of Trentman.

The cause was tried to a jury, and at the opening of the trial the trial court held that the burden of proof was upon defendants; thereupon defendants demurred to the evidence of plaintiffs, which demurrer was by the court overruled and exceptions allowed. At the conclusion of the testimony defendants moved the court to direct the jury to return a verdict for the defendants for the reason that the plaintiffs had failed to show that they are the owners and holders of the notes sued upon. Thereupon the plaintiffs moved the court to discharge the jury and enter judgment for the plaintiffs, for the reason that the evidence introduced by the defendants did not constitute a defense to the cause of action of plaintiffs. The court overruled the motion of the defendants, and allowed an exception, and sustained the motion of plaintiffs, to which the defendants excepted, and entered judgment for the plaintiffs in the sum of \$333.30, and for foreclosure of the lien upon the real estate described in the petition. The defendants having unsuccessfully moved for a new trial, bring this proceeding in error to reverse the judgment of the court below.

The defendants assign five errors of the court, which are argued under two heads. The assignments of error are as follows: (1) That the court erred in overruling motion of plaintiffs in error for a new trial. (2) That the court erred in overruling the demurrer of plaintiffs in error to the evidence of defendants in error. (3) That the court erred in refusing and ruling out competent and legal evidence on the part of plaintiffs in error. (4) That the court erred in overruling the motion of plaintiffs in error for the court to direct the jury to return a verdict for plaintiffs in error. (5) That the court erred in sustaining the motion of defendants in error to discharge the jury and enter judgment for defendants in error.

The second, third, and fifth assignments of error are argued together by defendants, and it is contended that said assignments of error are well taken, for the reason that the notes sued upon were made payable to Edward Croak, and that no indorsement of said notes by said Edward Croak appeared there-

on, and no evidence was offered by plaintiffs that title thereto had been transferred to them from said Edward Croak. Defendants cite numerous authorities upon two propositions: First, that the allegation in an action upon a promissory note by one other than the payee that the plaintiff is the owner and holder thereof may be put in issue by an answer not verified; second, that in an action upon a promissory note by one other than the payee thereof, where nothing appears by way of indorsement or otherwise to indicate the ownership of plaintiff therein, and the allegation in the petition of ownership in the plaintiff is put in issue by an unverified answer, the burden is upon the plaintiff to establish ownership, and unless evidence be offered to establish that fact a demurrer to the evidence should be sustained.

[1-3] We agree with the soundness of the propositions contended for by defendants, but are unable to see their applicability to the instant case, for the reason that the contract for the sale of the real estate involved herein for which the notes in controversy here were given was executed by Edward Croak as attorney in fact for the plaintiffs, and defendants in their answer affirmatively allege that the plaintiffs agreed to sell said real estate to the defendants, and that the notes in suit were executed and delivered in payment of the balance of the purchase price of said real estate. They further affirmatively allege that Edward Croak, in all of the transactions, acted as the agent and attorney in fact of plaintiffs.

It has been settled by this court that:

"A principal may maintain an action on a written contract made by an agent in his own name, and by parol evidence the agent may prove that his principal was the real party in interest." *Schmucker v. Higgins-Roberts Grain Co.*, 28 Okl. 721, 116 Pac. 184.

And that:

"When the agreement is executed by an agent in his own name, * * * the principal may maintain a suit and enforce the contract, and it is immaterial whether the principal was actually known during the transaction, or whether the other party supposed that he was dealing with the agent personally, entirely on his own behalf." *Shenners v. Adams*, 148 Pac. 1023.

The defendants having by their answer alleged and admitted that the notes were given as part of the purchase price of lands sold them by the plaintiffs, and that Edward Croak, the payee, was the agent of plaintiffs in the transaction, the plaintiffs were entitled to sue upon these notes in their own names, and were relieved by the allegations and admissions in the answer from offering any proof that they were the real parties in interest and the owners and holders of the notes. We therefore conclude that there is no merit in the second, third, and fifth assignments of error.

Under the second head defendants argue the fourth assignment: That the court erred in refusing and ruling out competent and legal evidence on the part of plaintiffs in er-

ror. Defendants were permitted to offer evidence showing that they sold the real estate here in controversy and took notes from the purchasers thereof to the amount of their notes; that they delivered the same to one Trentman, who was claimed to be associated with Croak and the agent of plaintiffs, but that Trentman did not deliver up their notes, because he was not in possession of them. Defendants offered evidence seeking to prove that they entered into an agreement with Croak and Trentman by which they were to substitute the notes of their purchasers for their own. Numerous objections were made to this line of examination, which were sustained by the court, upon the ground that the agency of Croak and Trentman to make this substitution for plaintiffs was not shown. The defendants complain of this action of the court, and insist that they were entitled to show these agreements. We do not deem it necessary to set out the questions to which objections were sustained in this opinion.

The defendants offered the plaintiff T. A. Stander as a witness in their behalf, and in connection with his examination introduced the contract between plaintiffs and Croak, under which the sale to defendants was made. The plaintiff Stander, upon cross-examination, denied that he ever had given any authority to Croak to make the substitution of notes upon which defendants rely as a defense.

The contract offered in evidence is quite voluminous, but we think it necessary to a proper consideration of this assignment of error that the material parts thereof be set out in full. They are as follows:

"I. The parties of the first part hereby give and grant unto the party of the second part, his heirs and assigns, the sole and exclusive right to negotiate sales of all lots and blocks contained in said Stander's first addition to Oklahoma City, Oklahoma, as well as any other additions that may be platted and dedicated in pursuance of this contract out of and contained in said quarter section.

"II. The parties of the first part hereby agree to and with the party of the second part that they will file for record a duly authenticated plat of Stander's first addition to Oklahoma City, Oklahoma; the party of the second part to bear all the expenses incident to the survey, mapping and record of said plat.

"III. The parties of the first part agree to and with the party of the second part to accept the sum of eighty-seven 50-100 dollars (\$87.50) for each of said lots and the price as hereby fixed as to sum to be paid to the parties of the first part, provided that in any event the total sum to be paid to the parties of the first part shall not exceed the sum of seven hundred dollars (\$700.00) per acre, and said sum of seven hundred dollars (\$700.00) per acre is to be the full payment to the parties of the first part for said property, but it is expressly agreed that the party of the second part may sell each and all of said lots for a sum in excess of eighty-seven 50-100 dollars (\$87.50) per lot and that the excess of said eighty-seven 50-100 (\$87.50) or seven hundred dollars (\$700.00) per acre shall be the property of the party of the second part and shall be accepted by him as full compensation for all that he may do in effecting the sale of said lots and otherwise pro-

moting the sale of Stander's first addition to Oklahoma City, Oklahoma, and any other additions that may be platted and dedicated in pursuance of this contract out of or contained in said quarter section.

"IV. The parties of the first part hereby agree to and with the party of the second part, his heirs and assigns, that in advancing and promoting the sale of said property, the party of the second part shall have the right to do all such grading, laying of sidewalks, tree planting and cultivating as are calculated to add to the value and beauty of said Stander's first addition to Oklahoma City, Oklahoma, and any subsequent additions that may be platted and dedicated in pursuance of this contract.

"V. The parties of the first part hereby require, and it is made an essential condition of this contract, that the party of the second part shall pay to the party of the first part not less than twenty-five thousand dollars (\$25,000.00) in cash and notes secured by first lien on said property, within six months from the date hereof, and provided, further, that if said payment of twenty-five thousand dollars (\$25,000.00) in cash and notes is not made within the time provided in this paragraph, then this contract, at the option of the first parties, is to become null and void.

"VI. The parties of the first part hereby agree to and with the party of the second part that the lots in said addition may be sold on a contract executed by the party of the second part as agent of the parties of the first part to purchasers, and the parties of the first part hereby constitute, appoint and empower the party of the second part their attorney in fact for that purpose, as though the parties of the first part had signed said contract in person, hereby ratifying and confirming any and all such contracts made by the party of the second part in accordance with the conditions of this contract. This provision is understood by the parties to this contract to be made for the purpose of making Edward Croak the attorney in fact for Maggie P. Stander and T. A. Stander, wife and husband, for the purposes as expressed in this paragraph. Said contract above referred to, to require a payment in cash of not less than 20 per cent. of the value of each lot at the time of sale, providing that out of said cash payments, the first parties are to receive one-half, or 60 per cent. of the cash so received, and the balance of the purchase price due to the first parties on said each lot so sold to be evidenced by notes as due under each of said contracts of sale, said notes not to run longer than six, twelve and eighteen months, to bear interest at not less than 8 per cent. per annum and to be equal in amount, or as nearly so as it is practicable to make them.

"VII. The parties of the first part further agree to and with the party of the second part that upon the request of the party of the second part so to do, they will execute and deliver warranty deeds to purchasers of said lots when said purchasers shall have paid the full amount for said lot or lots."

This contract is the only evidence offered by the defendants as to the authority of Edward Croak to make the agreement to substitute the notes of their purchasers for those of defendants, and there was no evidence as to the authority of Trentman to act in the matter. It will be seen from an examination of this contract that the only authority delegated to Edward Croak by the plaintiffs was to sell the lots embraced in their addition, and to deliver to the plaintiffs one-half of the cash by him received and notes secured by liens upon the real estate sold for the balance unpaid up to the amount of the price

agreed upon between plaintiffs and Croak for said addition. This contract nowhere gives to Croak authority to do anything further with the notes received for deferred payments, except to deliver them to the plaintiffs. Croak had no further control over the notes executed for the purchase price of this realty, and it does not even appear that he had authority to collect the same.

One seeking to charge another with the acts of a purported agent has the burden of establishing such agency. *Gast v. Barnes*, 44 Okl. 107, 143 Pac. 858.

The defendants having wholly failed to show the agency of Croak to make the substitution upon which they rely, we conclude that the court committed no error in sustaining objections of plaintiffs to evidence tending to show agreements and conversations between defendants and Croak to carry into effect the substitution of the notes.

Finding no reversible error in the record, the judgment of the court below should be affirmed.

PER CURIAM. Adopted in whole.

BLACKWELL v. KERCHEVAL.

(Supreme Court of Idaho. Oct. 11, 1916.)

1. PRINCIPAL AND AGENT §166(1)—AUTHORITY OF AGENT—"RATIFICATION."

The general rule is that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all the material facts, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 627-628; Dec. Dig. §166(1).]

For other definitions, see *Words and Phrases*, First and Second Series, Ratification.]

2. PRINCIPAL AND AGENT §166(1) — AUTHORITY OF AGENT—RATIFICATION—ACCEPTANCE OF BENEFITS.

A principal does not ratify the unauthorized acts of his agent by accepting the proceeds or fruits thereof if knowledge of it did not come to him in time to enable him to repudiate the entire transaction without essential injury, or where all parties to the transaction cannot be placed in statu quo.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 627-628; Dec. Dig. §166(1).]

3. PRINCIPAL AND AGENT §164(1)—AUTHORITY OF AGENT—RATIFICATION—ACTS SUBJECT.

Where the evidence establishes that the unauthorized act of the agent was at the time a personal transaction of the agent made with a third party and was not intended by the third party or the agent to be made on behalf of the principal thereafter sought to be charged, there can be neither an express ratification

nor an implied ratification by a retention of the benefits.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 622, 624, 625; Dec. Dig. §164(1).]

4. PRINCIPAL AND AGENT §174—AUTHORITY OF AGENT—RATIFICATION—QUESTION FOR COURT OR JURY.

The question whether certain letters disclose the ratification of a previously unauthorized act of an agent, by which he seeks reimbursement from his principal, in the absence of ambiguity or a tendency to establish ratification, is primarily for the court to determine, and not for the jury.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 725; Dec. Dig. §174.]

5. TRIAL §159—TAKING QUESTIONS FROM JURY—NONSUIT—SUFFICIENCY OF EVIDENCE.

Where the plaintiff fails to make out a case for a jury, it is the duty of the trial court to dismiss the action and sustain a motion for nonsuit.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 359-367; Dec. Dig. §159.]

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Action by F. A. Blackwell against R. F. Kercheval, Public Administrator, administrator of the estate of Wilson Kistler, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 27 Idaho, 537, 149 Pac. 1060.

John P. Gray, of Coeur d'Alene, for appellant. C. H. Potts, of Coeur d'Alene, and R. J. Danson and George D. Lantz, both of Spokane, Wash., for respondent.

BUDGE, J. This is an action brought by the appellant against R. F. Kercheval, public administrator, and as such administrator of the estate of Wilson Kistler, deceased, to recover the sum of \$29,548, together with interest on \$24,480 thereof since the 1st day of November, 1913. This appeal is from a judgment of dismissal entered upon a motion for nonsuit. The only error assigned and complained of is that:

"The court erred in granting the motion for a nonsuit and in entering judgment thereon."

The main facts in this case, briefly stated, are as follows:

One Wilson Kistler of Lock Haven, Pa., was a stockholder in the Spokane & Inland Empire Railway Company, a corporation organized by the appellant herein and one J. P. Graves of Spokane. In January, 1909, the appellant sold his stock in the above-named corporation, and advised Kistler to dispose of his, but he decided not to sell. During that year, Graves, who had purchased not only the stock of the appellant but also other blocks of stock, sold his holdings, which constituted the control of the Spokane & Inland Empire Railway Company, to the Great Northern Railway Company.

Kistler visited Idaho in May, 1909, and after looking over the property of the Blackwell Lumber Company, concluded to and did

purchase \$25,000 worth of stock in said company, and at the date of said purchase stated to one Schenker, private secretary to Blackwell, the appellant herein, that he hoped that Blackwell would be able to dispose of his (Kistler's) stock in the Spokane & Inland Empire Railway Company; that he desired to turn that investment and take additional stock in the Blackwell Lumber Company. To this end Kistler by numerous letters urged Blackwell to dispose of his (Kistler's) stock in the Spokane & Inland Empire Railway Company, that he might invest in stock of the Blackwell Lumber Company. After some correspondence between Blackwell and Kistler relative to the disposal of the latter's stock in the railway company and a transfer of the investment to the Blackwell Lumber Company, some time during the summer of 1909, one Davidson, secretary of the Inland Company, advised Blackwell that he believed he could handle the Kistler stock through Graves, and thereupon gave Blackwell a memorandum in writing by which he agreed to take the Kistler stock; whereupon Blackwell telegraphed to Kistler to send on his certificates of stock in the Inland Company, properly indorsed. The stock was in due time forwarded to Blackwell, and turned over to Davidson, who gave his receipt therefor, in which he stated that he had received 510 shares of Inland stock and agreed to pay therefor \$24,480. This transaction between Blackwell and Davidson was had on or about the 14th day of October, 1909. On October 15, 1909, Blackwell wrote Kistler, informing him that he had not received the money for the stock, but expected to within a few days; that the certificates had been turned in to Graves; and that when the money for the stock was received he would turn it over to the secretary and treasurer of the Blackwell Lumber Company and forward certificates of stock in that company. On October 26, 1909, Blackwell again wrote Kistler that he had not received the money from Graves, but was in hopes that he would within a few days. On the 1st day of November, 1909, Davidson not having the money, Blackwell insisted on having a note, payable to himself, which Davidson gave him on that date, for \$24,480, payable 60 days after date; whereupon Blackwell indorsed the Davidson note, as follows: "Pay Blackwell Lumber Company or order," and delivered the same to the Blackwell Lumber Company, by which company it was indorsed and cashed at the Old National Bank of Spokane, Wash., after being discounted. Thereafter the Blackwell Lumber Company, by Blackwell's directions, sent Kistler a certificate for 250 shares of the capital stock of the Blackwell Lumber Company of the par value of \$100 per share. On the 2d day of November, 1909, Blackwell wrote a letter to Kistler, which we do not deem necessary to set out in *hæc verba*, but of which we will set out only such portions as we think are important so far as this case

is concerned. Blackwell began this communication by informing Kistler that he had had quite a time in getting rid of his Inland stock, and among other things said:

"I did this business through Mr. Davidson, secretary of the Inland Empire System, and insisted, in view of the fact that he said the stock would be taken up, before I wired you to send it on, that he take up the stock regardless of whether he could dispose of it or not. Yesterday Mr. Davidson gave me his note for \$24,480, the proceeds of the stock at 48 [meaning \$48 per share]."

"I have accepted this note and turned the same over to the Blackwell Lumber Company. Mr. Davidson is worth the money, and I think will meet the note. That is a chance the Blackwell Lumber Company has taken, or rather that I took, as I have indorsed the note."

Thereafter in the course of his letter he asked Kistler to send his check for \$520 more, which, together with the \$24,480, would complete his purchase of \$25,000 of the capital stock of the Blackwell Lumber Company, and upon receipt of which Blackwell said:

"I will turn that over to the Blackwell Lumber Company, and this will close up the transaction."

On November 8, 1909, Kistler answered Blackwell's letter of November 2, 1909, and among other things in the letter stated that he inclosed a draft for \$520 in accordance with Blackwell's request, and further on in the letter said:

"I hardly expected that you would take the trouble in closing up the matter and go as far as you did in reaching a conclusion where a body might have supposed that there would have been enough interest with the representatives of the Inland Empire Railroad Company to at least have made an effort to protect innocent stockholders. I would not expect that you should take any chances in the closing of this matter, and if in the future anything should turn up with this that would cause you any inconvenience, if you will please let me know, I will take the matter up and see that you are fully protected."

The note given by Davidson to Blackwell, for \$24,480, and discounted at the Old National Bank of Spokane, Wash., was not paid at maturity, but was renewed from time to time; the interest thereon being paid by Davidson up until approximately the 1st day of September, 1910, at which time Davidson informed Blackwell that Graves, upon whom he relied to take up the stock, had failed to do so and offered to return the stock to Blackwell, at the same time informing Blackwell that he could not pay the interest any longer and he had no money to take up the note. Blackwell refused to settle the matter in this way, and Davidson thereupon, at Blackwell's request, gave him two notes in lieu of the original note of \$24,480, one of which was for \$12,480, and the other for \$12,000. The note for \$12,480 Blackwell paid, or in other words paid the Old National Bank that amount on the original note of \$24,480, and held Davidson's note payable to himself for \$12,480. The other note for \$12,000 was also made payable to Blackwell, and was indorsed and discounted by him at the Old Na-

tional Bank, where it was at the time of the trial of this action.

On September 21, 1910, Blackwell wrote to Kistler about other business matters, and in his letter, among other things, he used the following language:

"In connection with this I might add that I am likely to have to take back the Spokane & Inland stock which I thought I had sold for you; think it was 510 shares. * * * Mr. Davidson, secretary of the company, gave me a letter agreeing to take this stock off my hands. He expected to put it in the sale that J. P. Graves and himself made to the Hill interests. As the stock was not here to put in the first lot sent in to the Hill interests, it, together with Mr. Grinnell's and a lot of other holdings, was made into a second statement. Davidson and Graves expected that Hill would take that also, but up to this writing he has never done so.

"Mr. Davidson gave me his three [two] months note for the stock, which note has been twice renewed. Personally he is not worth the amount, and now he wants me to take the stock back. I do not know how the matter will come out.

"While I consider the stock perhaps a good buy at \$48 per share, I would very much prefer Blackwell Lumber Company stock at par; besides that, the lumber company needs the money."

To this particular part of Blackwell's letter, Kistler made no reply.

In 1911, approximately a year later, Blackwell addressed another letter to Kistler, in which he used the following language with reference to the Inland stock transaction:

"In connection with this, I might also state that I have never yet gotten my money for the Inland stock which I took up for you and for which you received stock of the Blackwell Lumber Company (paid for in cash by me), Mr. Graves having failed to come through with the purchase of same as anticipated. The common stock of the Inland Empire road is now quoted at about \$15, so you see I am holding the sack in that transaction. However, in that you are not to blame, and I am not complaining. I merely state the fact to show that we are trying to act fair with all our friends."

Mr. Kistler died about the month of January, 1914, and some time thereafter R. F. Kercheval was appointed as the administrator of his estate.

It will be conceded in this case at the outset that when Blackwell sold the Kistler stock in the Inland Company and took a note in payment in lieu of cash, he thereby exceeded his authority, and thereupon became liable to Kistler for the value of the stock. It is from this liability that Blackwell seeks to be relieved and reimbursed upon the theory that Kistler, subsequent to the sale of the stock, agreed, in effect, to assume the Davidson note, in his letter to Blackwell of date November 8, 1909, and by his failure to reply to Blackwell's letter of September 21, 1910, as well as by his subsequent acts and conduct, all of which acts and conduct counsel for respondent contend constituted a ratification of Blackwell's unauthorized act.

The trial court, after hearing all of the evidence offered by appellant, reached the conclusion that it failed to establish a ratifi-

cation, and thereupon granted respondent's motion for a nonsuit. The correctness of the court's holding is the sole question presented for review by this appeal.

[1] Ratification, as used in the law of principal and agent, may be defined as the acceptance and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract, without authority to do so (31 Cyc. 1245), or, as stated by numerous authorities, it is the acceptance by the principal of a previously unauthorized act or contract by one who assumed to act as his agent in doing the act or making the contract, without authority, and relates back to and takes effect from the making of such contract. The act done or contract made must be on behalf of the principal; otherwise it is not subject to ratification. It is also absolutely essential in order to bind the principal and relieve the agent that the former had full knowledge of all of the material facts relating to or in any manner connected with the unauthorized act.

The fact that the agent was not fully informed, or was honestly mistaken, as to what the actual facts really were, will not ordinarily change the rule.

Counsel for appellant first contend in their brief that Kistler, by his express warranty in his letter of date November 8, 1909, ratified the unauthorized act of appellant in the sale of Kistler's stock, or in other words we might say that counsel insist that Kistler in his letter of the above date expressly and unqualifiedly promised and undertook to save Blackwell harmless when he was informed by Blackwell in his letter of November 2, 1909, that he had sold his Inland stock and taken a note therefor in lieu of cash. If Kistler's letter is subject to such a construction, when construed in the light of subsequent correspondence between Blackwell and Kistler, relating to the sale of the latter's Inland stock, counsel's contention would be eminently correct, but a careful examination of the entire record forces us to the conclusion that Kistler's letter of November 8, 1909, is not subject to the construction contended for by counsel for appellant. It is quite evident that Kistler at the time he wrote the letter of date November 8, 1909, was not in possession of all of the material facts connected with the sale of his Inland stock, and in this connection we do not wish to impute to Blackwell the intentional suppression of any of the material facts. In reaching a decision in this case it may be conceded that Blackwell was unaware of some of the material facts when he wrote Kistler on the 2d day of November, 1909, informing him that he had been successful in disposing of his stock to Davidson, and that he had taken Davidson's note in payment for the stock in lieu of cash, and when he further stated that: "Davidson is worth the money,

and I think will meet the note. That is a chance the Blackwell Lumber Company has taken, or rather that I took, as I have indorsed the note," when in truth and in fact Davidson was not worth the money, and consequently was unable to and did not meet the note at maturity.

It would be inconsistent to presume that had Kistler known the foregoing facts he would have written Blackwell on November 8, 1909, as follows:

"I would not expect that you should take any chances in the closing of this matter, and if in the future anything should turn up with this that would cause you any inconvenience, if you will please let me know, I will take the matter up and see that you are fully protected."

The above statement by Kistler in his letter was based solely upon what was contained in Blackwell's letter of November 2, 1909.

Had Blackwell told Kistler in his letter of November 2, 1909, that he had sold the stock to Davidson personally, that without authority he had accepted Davidson's note for the purchase price in lieu of cash, that Davidson was not financially responsible, that Graves had not legally bound himself to pay for the stock, and that whatever chance there was to be taken in the transaction Kistler would be required to take, and then had Kistler, being in possession of all of the material facts, written to Blackwell and said, "If in the future anything should turn up with this that would cause you any inconvenience, if you will please let me know I will take the matter up and see that you are fully protected," there is no question but that he would be bound.

When we consider the information that was given to Kistler and the facts as they really were which were unknown to him, we find no difficulty in applying the correct rule of law to the facts in this case, which is that before the principal can be held to have ratified the unauthorized act of his agent, all the material facts of the transaction must have been fully and correctly reported to him, and he must have had the opportunity to adopt or repudiate the act of the agent with a full knowledge of all of the facts of the transaction; and if the agent failed to correctly report all of the material facts there can be no ratification, nor is it material that the agent acted in good faith, or that his misrepresentations of the facts were innocently made, or that he reported the facts as he understood them, or all the facts that were known to him at the time. The principal must have been fully and correctly informed of all of the material facts at the time of the ratification. He could not ratify that which he did not know. 31 Cyc. 1253-1256.

The rule is well stated in Clark & Skyles on Agency, vol. 1, p. 268:

"That the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all of the material facts. If the material facts be

either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud. The general rule is perfectly well settled, that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all the material facts, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption or assent to the previously unauthorized act of an agent." Findlay v. Hildenbrand, 17 Idaho, 403, 105 Pac. 790, 29 L. R. A. (N. S.) 400; Bank of Owensboro v. Western Bank, 13 Bush (Ky.) 526, 26 Am. St. Rep. 211.

[2, 3] It is next contended by counsel for appellant that Kistler, with full notice and knowledge that the agent had accepted the note from Davidson, and had indorsed and discounted it, accepted the benefits of the negotiation and sale of the Davidson note, and received and held the stock of the Blackwell Lumber Company which was purchased as the result of that negotiation; that these facts were communicated to Kistler in Blackwell's letter of September 21, 1910, in which, in reference to the Inland stock, Blackwell said:

"I am likely to have to take back the Spokane and Inland stock which I thought I had sold for you; think it was 510 shares. And the story in connection with this is quite a long one. Mr. Davidson, secretary of the company, gave me a letter agreeing to take this stock off my hands. He expected to put it in the sale that J. P. Graves and himself made to the Hill interests. As the stock was not here to put in the first lot sent in to the Hill interests, it, together with Mr. Grinnell's and a lot of other holdings, was made into a second statement. Davidson and Graves expected that Hill would take that also, but up to this writing he has never done so.

"Mr. Davidson gave me his three [two] months note for the stock, which note has been twice renewed. Personally he is not worth the amount, and now he wants me to take the stock back. I do not know how the matter will come out.

"While I consider the stock perhaps a good buy at \$48 per share, I would very much prefer Blackwell Lumber Company stock at par; besides that, the lumber company needs the money."

As above stated, counsel insist that the letter above quoted constitutes a ratification of Blackwell's unauthorized act in selling the Kistler stock and taking a note therefor in lieu of cash, and that it was the duty of Kistler in order to relieve himself from such ratification to have immediately upon receipt of the above letter, which counsel insist informed him of all of the material facts, to have at once written Blackwell and stated to him in substance:

"Now that I find out that Davidson is not worth the money I do not ratify your first contract and do not agree to hold you harmless."

In other words, it was the duty of Kistler either to repudiate promptly the acts of Blackwell, or he must be held to have ratified such acts by remaining silent.

This last letter, it will be remembered, was written a considerable time after Black-

well's letter of November 2, 1909, in which he told Kistler that he had accepted the Davidson note and turned it over to the Blackwell Lumber Company; that Davidson was worth the money; that he thought he would meet the note; and that if he failed to meet the note that was a chance the Blackwell Lumber Company had taken or rather that he took; and after Kistler sent on the \$520 as requested by Blackwell, in order to make up his last subscription of \$25,000 to the Blackwell Lumber Company's stock, and after the stock in the Blackwell Lumber Company had been issued to Kistler, which latter act made it impossible to place the parties in statu quo. This being true, ratification became impossible.

This letter was followed by Blackwell's letter of July 17, 1911, in which he wrote to Kistler, among other things, that Graves had failed to come through with the purchase of the Inland stock as anticipated, and that common stock of the Inland Company was quoted at \$15. "So you see I am holding the sack in that transaction. However, in that you are not to blame, and I am not complaining."

It is necessary to construe the correspondence as a whole in order to determine its meaning and the intention of the parties.

As a matter of fact we think that a fair construction of the letter above set out, and others in the record, does not in any way indicate that Blackwell intended to hold Kistler personally responsible for the failure of Davidson to meet his obligation. The letters, when considered in connection with other correspondence between Blackwell and Kistler, with regard to this stock transaction, bear out but one construction, and that is that when Blackwell sold the Inland stock to Davidson he was acting for himself and not for Kistler, and that he was willing at that time to assume the risk, if any, incident to such transaction.

As early as July 30, 1909, Kistler wrote to Blackwell, and among other things, he said:

"I hope that my stock of the Spokane Inland Railroad can be soon turned, as I wish to place the same with the Blackwell Lumber Company."

On the 11th day of August, 1909, Blackwell wrote to Kistler, and in his letter will be found the following:

"If you can see your way clear to take some more Blackwell Lumber Company stock [meaning in addition to the \$25,000 he then already had], will be pleased to have you do so, and in the meantime will do my best to dispose of your Inland common holdings."

In reply to the last letter, on August 18, 1909, Kistler wrote to Blackwell with reference to the matter of purchasing Blackwell Lumber Company stock and said:

"At this season of the year we are receiving our bark supply which takes considerable money, and it does not exactly suit me just at this time to take any additional stock in the Blackwell Lumber Company. Hope you will

succeed in changing my investment in the Inland Empire Railroad Company, as I always had calculated to make a turn on that investment and take stock in the Blackwell Lumber Company for the same."

On October 15, 1909, Blackwell wrote Kistler, informing him that he had received his favor of October 9, 1909, inclosing Inland certificates of stock; that he had turned the same in to Graves, and presumed he would have the money for them within a few days, and when he received the money that he would turn it over to the secretary and treasurer of the Blackwell Lumber Company and forward the certificates of stock in that company, which, he further says, "I believe is in accordance with our agreement." Then followed the transfer of the Inland stock to Davidson, the discounting of the note received by Blackwell from Davidson, the payment to the Blackwell Lumber Company of \$24,480, and the remittance by Kistler of \$520, to make up the \$25,000, all of which supported the testimony of Schenker, secretary to Blackwell, to the effect that when Kistler was visiting Idaho and went over the Blackwell Lumber Company's operations he told Schenker that if he could sell his Inland stock he would change his investment and take additional stock in the Blackwell Lumber Company.

It is therefore clear that it was Kistler's intention to sell his Inland stock, and to invest the proceeds received therefrom in Blackwell Lumber Company stock, and that Blackwell understood that Kistler would buy additional Blackwell Lumber Company stock, provided he could sell his Inland stock, and not otherwise, and Blackwell, in order that this deal might be consummated, in the interest of his company, was ready and willing to take a chance, which at that time he evidently did not consider to be a very desperate one, on Davidson paying the note when it became due.

The proof in the record strongly supports the idea that Blackwell was reasonably satisfied that Graves, while he would not obligate himself to pay for the stock, would be able to dispose of it to the Hill interests. It is likewise apparent that Davidson was not in a position at the time to purchase the Inland stock and pay cash for the same, and the record shows that he so informed Blackwell at the date of the expiration of the original note, if not earlier. Blackwell and Davidson both, no doubt, honestly believed at the time of the Inland stock transaction that Graves would put the deal through for them, and it was understood, pending the final consummation of the deal, that Davidson would pay the interest on the original note, which he did.

Counsel for respondent is again reinforced in their position that the transaction was a personal one on behalf of Blackwell's company by that portion of the record which shows that when Davidson ceased to pay the

interest on the original transaction, Blackwell did not write to Kistler and request him (Kistler) to pay the interest and renew the note, or take up the note, but he again went to Davidson, and they agreed to divide up the original note into two notes, one of which Blackwell retained personally and the other he discounted at the Old National Bank, and continued to pay the interest as it accumulated and to renew the note of \$12,000 at the Old National Bank from time to time, without calling upon Kistler, during his lifetime, to take up any part of this indebtedness, or to pay the interest thereon, or to return the stock of the Blackwell Lumber Company. This demand was not made until some time after Kistler's death. This being a personal transaction between Blackwell and Davidson, and intended as such, there could be neither express ratification nor implied ratification by retention of benefits.

The fact that the principal received or enjoyed benefits of the unauthorized acts of an agent will not amount to a ratification if he did so in ignorance of the facts, nor will his retention of such benefits after knowledge of the facts amount to a ratification if at the time he acquired such knowledge, and without his fault, conditions are such that he cannot be placed in statu quo, or repudiate the entire transaction without loss. 31 Cyc. 1267, 1269, 1270.

[4] Counsel for appellant in their reply brief strenuously contend that the court committed reversible error in taking upon himself the right to place a construction upon the letters introduced in evidence, under the facts in this case. These letters were offered for the sole purpose of establishing a ratification of an unauthorized act of an agent, and it was clearly the duty of the court to construe them for the purpose of determining whether they showed or tended to show a ratification, and if, from the construction placed upon the letters and other facts and circumstances testified to and appearing upon the trial, there was a total failure of proof to establish a ratification, it was the imperative duty of the trial court to so hold. Whether the court properly construed the letters is another question, but that he had a right to construe them there can be no doubt. From an examination of the record in this case the right of the appellant to recover depends upon the construction of these letters. It is true that the complaint alleges certain acts and conduct upon the part of Kistler, that, had they been proven upon the trial, we are strongly persuaded to believe would have been sufficient to render his estate liable. When this case was before this court upon a former hearing (Blackwell v. Kercheval, 27 Idaho, 537, 149 Pac. 1060), upon a general demurrer to the complaint, we held that the complaint was sufficient, but upon the trial appellant failed

to prove the allegations of his complaint; consequently the trial court was forced to determine this case upon the testimony as finally submitted, and in doing so was clearly within his rights when he construed the correspondence, as well as all of the evidence submitted by the appellant, and we think that the conclusions reached by the trial court are correct.

[5] From what has been said, it follows that the court did not err in dismissing appellant's action and granting respondent's motion for a nonsuit.

The judgment of the trial court must be affirmed, and it is so ordered. Costs are awarded to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

BERLIN MACH. WORKS v. DEHLBOM LUMBER CO.

(Supreme Court of Idaho. Oct. 17, 1916.)

1. JUDGMENT \Leftrightarrow 570(4) — CONCLUSIVENESS — SUFFICIENCY OF JUDGMENT.

A plea of res adjudicata cannot be supported by evidence of another trial had between the same parties, involving the same subject-matter, upon which nothing was determined; nor can the record of such trial have any weight as evidence at a subsequent trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1031; Dec. Dig. \Leftrightarrow 570(4).]

2. TRIAL \Leftrightarrow 397(5) — TRIAL BY COURT — FINDINGS — NECESSITY.

It is the duty of the trial court to make findings upon each and every material issue arising upon the pleadings, upon which proof is offered, and upon its failure so to do the cause will be remanded for additional findings, unless such findings would not affect the judgment entered. It is immaterial whether the issues arise upon the allegations of the complaint and answer or upon affirmative defenses alleged in the answer which, under the statute, are deemed denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 944; Dec. Dig. \Leftrightarrow 397(5).]

Appeal from District Court, Bonner County; Robt. N. Dunn, Judge.

Action by the Berlin Machine Works against the Dehlbom Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for additional findings and judgment in accordance therewith.

G. H. Martin, of Sand Point, for appellant. Allen P. Asher, of Sand Point, for respondent.

BUDGE, J. This action was brought by respondent to recover from appellant one band resaw, No. 285, and attachments, alleged to be of the value of \$1,350. It is alleged in respondent's complaint that the machine was purchased under a written contract which provided, among other things, that title to the band resaw and attachments should remain in the vendor until paid for

in full. It is also alleged in the complaint that prior to the commencement of the action to recover possession of the above-described personal property a proper demand was made therefor and possession thereof refused by appellant; that said personal property was not taken for any tax, assessment, or fine pursuant to a statute, or seized under attachment or execution against the property of respondent. Respondent prayed for judgment for the recovery of the above-described property, or its value in case delivery could not be had.

The appellant in its answer, among other things, denied the ownership or right to possession of the personal property above described in the respondent; denied that the value of said property was as alleged, to wit, \$1,350. The appellant admitted in its answer the purchase from respondent under contract of the personal property described in the complaint, but denied that the said contract had not been carried out by the defendant and that it held the property wrongfully and without lawful right or title; denied that demand had been made upon it for return of the property; and affirmatively alleged that such demand as was made was coupled with conditions not provided for in said contract, and without return of or offer to return the purchase-money notes executed according to the terms of said contract, and without return of or offer to return the purchase money paid according to the terms of said contract. Appellant admitted that the personal property had not been taken for any tax, assessment, or fine pursuant to a statute, or seized under attachment or execution against the property of defendant.

As an additional affirmative defense the appellant alleged in its answer that there had been a former adjudication of the rights of the respondent under its contract, in a former action brought in the district court of the Eighth judicial district of Idaho on the 10th day of June, 1910, which action was brought by the respondent against the Bradford-Kennedy Company, wherein the appellant herein intervened, and joined with the said Bradford-Kennedy Company in resisting the respondent's right to the possession of the identical personal property sought to be recovered in this action, and as a further defense, and by way of counterclaim, the appellant set out the execution of the contract upon which this action is brought, the shipment to it by the respondent of the resaw and attachments involved in this litigation, and alleged that prior to March 1, 1910, it paid to the respondent on the purchase price of said resaw the sum of \$739, and that at the time of the execution of said contract it executed and delivered to the respondent three promissory notes, one for \$300 due in four months, one for \$250 due in five months, and one for \$300 due in seven months, with interest at 7 per cent., and that the respondent never offered to return the money paid or

any part thereof, nor offered to return to appellant the notes above referred to, and affirmatively alleges that upon the plaintiff's election to rescind said contract on or about March 1, 1910, there became due from respondent to this appellant the sum of \$739, less the expense of returning said resaw to Beloit, Wis., which, it is alleged, did not exceed \$200, and in addition thereto appellant alleges that it became entitled to the possession of said promissory notes, and prays judgment against respondent, should the relief in its answer be denied, that it then have judgment against respondent for \$739, less the cost and expense of returning said resaw and attachments to Beloit, Wis., and in addition thereto for the possession and cancellation of its said promissory notes.

Upon the issues thus made, briefly stated as above, the cause was tried by the court without a jury. The court, after hearing the evidence, made its findings of fact and conclusions of law, and entered its judgment, wherein it adjudged and decreed that the respondent was entitled to the immediate and exclusive possession of the resaw, style No. 285, and attachments, and that in case delivery could not be had that respondent was entitled to judgment against appellant for \$1,350, its value, less such amounts as defendant may have paid thereon. And it was further adjudged and decreed that appellant was entitled to the return of the unpaid notes. This appeal is from the judgment. The appellant assigns and relies, for a reversal of this cause, upon five assignments of error, which are as follows: First, the court failed to make findings of fact, conclusions of law and judgment upon the defendant's counterclaim; second, the court failed to make findings of fact or conclusions of law as to the right of the appellant to the possession of the purchase-money notes; third, the court failed to make findings of fact, conclusions of law, and judgment as to the affirmative defense pleaded by the defendant, namely, prior adjudication of the matter in controversy; fourth, the court erred in failing to sustain said defense of prior adjudication and in failing to dismiss the plaintiff's action; fifth, the court erred in denying the appellant judgment for the purchase money paid, less the cost of returning the resaw in controversy to Beloit, Wis.

[1] We will first consider appellant's third and fourth assignments of error, which involve the question of former adjudication. It appears from the record that after the appellant purchased the machinery described in respondent's complaint the same came into the custody of the Bradford-Kennedy Company, a corporation. Suit was thereupon instituted by respondent to recover possession of its property from the Bradford-Kennedy Company. An answer was filed by the latter company to the complaint of the respondent, and by permission of the trial court the ap-

pellant here was permitted to file its complaint in intervention.

On the 17th day of November, 1911, said cause being at issue, the same came regularly on for trial before the court and a jury upon the complaint of the Berlin Machine Works, plaintiff, against the Bradford-Kennedy Company, defendant, and the Dehlbom Lumber Company, intervener. After the evidence of all the parties was offered and submitted, the Berlin Machine Works made a motion for a nonsuit against the intervener, Dehlbom Lumber Company, which motion was by the trial court granted, and the complaint of the intervener dismissed. The trial court thereafter, upon motion of the Bradford-Kennedy Company and the intervener, dismissed the action of the Berlin Machine Works against the Bradford-Kennedy Company. Judgments were thereupon entered accordingly. An appeal was prosecuted to this court by the Berlin Machine Works from the judgment of dismissal of its complaint against the Bradford-Kennedy Company. Upon motion the appeal was dismissed in this court upon the ground that the Dehlbom Lumber Company, intervener, had not been served with notice of appeal. *Berlin Machine Works v. Bradford-Kennedy Co.*, 21 Idaho, 669, 123 Pac. 637. In support of its plea of former adjudication the appellant relies upon the foregoing record evidence, which was admitted in evidence over the objection of counsel for respondent, and was uncontradicted. However, the court made no finding upon this issue. If the evidence warranted a finding to the effect that there had been a prior adjudication between the parties to this action on the subject-matter involved in this controversy, necessarily judgment would have been for the appellant, and resulted in a dismissal of respondent's complaint. It was one of the material issues, and therefore clearly the duty of the court to make findings thereon.

We have concluded, in view of the fact that we have the original record before us upon which counsel for appellant relies in support of his affirmative allegation, in his answer, of prior adjudication, that it will not be necessary to remand this cause upon this ground, but the findings will be corrected by the trial court. Upon investigation we are satisfied that the contention of appellant of former adjudication is not tenable. There was no final adjudication upon the merits of the action brought by the Berlin Machine Works against the Bradford-Kennedy Company and the Dehlbom Lumber Company, intervener. It is a well-established rule that a judgment of nonsuit does not terminate the rights of the parties, and is no bar to a new action. *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243. It is likewise true that a trial upon

which nothing was determined cannot support a plea of *res adjudicata*, or have any weight as evidence at another trial. *Gould v. Evansville, etc., R. Co.*, 91 U. S. 526, 23 L. Ed. 416; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 142, 3 Sup. Ct. 99, 27 L. Ed. 878; *Nevills v. Shortridge*, 146 Cal. 277, 79 Pac. 972.

[2] We come now to a consideration of the first, second, and fifth assignments of error, viz. that the court failed to make findings upon defendant's counterclaim to which reference has heretofore been made in the statement of facts. An examination of the findings discloses the fact that the trial court failed to make any findings of fact with reference to appellant's counterclaim. This, we think, under the well-established rule in this state, was error. It is alleged in the counterclaim, among other things, that the contract for the sale of the resaw was entered into as alleged in respondent's complaint, and shipped to appellant from respondent's factory; that prior to the 1st day of March, 1910, the appellant paid to respondent on the purchase price of said resaw the sum of \$739; that at the time of the execution of said contract the appellant executed and delivered to respondent three notes, of which mention has heretofore been made; that respondent has never offered to return the money or any part thereof, nor has it returned or offered to return to appellant the notes. The appellant further alleges that upon the election of respondent to rescind the contract for the purchase of the machinery there became due, under its terms, from respondent to appellant, the sum of \$739, less the expense of returning said resaw to respondent's factory at Beloit, Wis., which, appellant alleges, would not exceed \$200, and prays judgment against respondent for \$739, less the cost and expense of returning the resaw to Beloit, Wis., and for cancellation and surrender of the three promissory notes. The trial court failed to find upon the issues thus made by appellant's counterclaim, viz. whether under the terms of the contract for the sale of the resaw and attachments, and its subsequent repossession by respondent, it thereupon became indebted to appellant in the sum of \$739, or any part thereof, or whether, under the terms of the contract, upon failure to pay in full for the resaw and attachments, it was the duty of the consignee to return the resaw to Beloit, Wis., and pay the expenses incident thereto, which amount should be deducted from the cash payments theretofore made upon the resaw, whether failure to return voluntarily said resaw forfeited all payments made upon the purchase price, or whether as offer by respondent to appellant to refund, in whole or in part, payments theretofore made upon the resaw, was a condition precedent to its right to the possession of the resaw. The court also failed to find whether or not it was incumbent upon the respondent to return

or offer to return the particular three unpaid promissory notes as a condition precedent to its right to the possession of the resaw. The court found as a fact that the resaw was worth \$1,350. That was the contract price of the machinery when purchased by the appellant. Whether it was the intention of the trial court to find under the terms of the contract of purchase that the payments made were in the nature of liquidated damages or for rent, and subject to forfeiture, we are not informed. The contract contains no such stipulation.

Adopting the latter portion of the court's finding of fact No. 4, that "the actual value of said personal property herein described is \$1,350," unless, under the terms of the contract or under the evidence submitted on the trial, the purchase money paid by appellant upon the contract can be applied as liquidated damages, or rent for the use of the personal property, and thus forfeited, clearly appellant would be entitled to a finding in its favor and judgment based thereon for return of the purchase money paid, less the expense of returning the machine to Beloit, Wis. If there were no depreciation in the value of the personal property, as found by the trial court, and payments made thereon are not subject to forfeiture, the respondent could not retake the property and withhold the entire amount of the purchase price paid thereon. An examination of the contract will disclose the following provision: In case of rejection of the resaw and attachments, or failure to pay therefor as provided in the contract, consignee shall at once return and deliver the property in good order to consignor, f. o. b. Beloit, Wis., and the expense of so doing shall be paid by the purchaser. In the absence of any further stipulation or proof of forfeiture of the purchase money paid, while the authorities are divided, it would seem to us that the contract by its terms limits the forfeiture, and that the trial court should be controlled thereby. Parties may, in contracting, provide penalties for nonperformance, but unless they do so in unmistakable language courts will not insert them.

The trial court's fifth finding of fact is as follows:

"That the plaintiff is entitled to the immediate, peaceable, and exclusive possession of said personal property described in paragraph 2 of these findings, on surrender to defendant of the unpaid notes of defendant amounting to \$700 now held by plaintiff."

This finding would seem to indicate that, if the respondent surrendered unpaid notes amounting to \$700, it would then be entitled to the immediate, peaceable, and exclusive possession of the machinery involved in this litigation. This finding is somewhat indefinite and uncertain. It is alleged in appellant's affirmative defense by way of counterclaim that at the time of the execution of the contract for the purchase of the machinery involved in this litigation the appel-

lant executed and delivered to the respondent three promissory notes, one for \$300 due in four months, one for \$250 due in five months, and one for \$300 due in seven months. From the record it appears that all of the above notes are dated January 9, 1909. These are the notes that are sought to be canceled by the appellant, and, from an examination of the contract, are the only notes given in connection with this transaction. These clearly cannot be the notes referred to in the court's fifth finding of fact. The cancellation of these notes was one of the material issues made by the pleadings and upon which evidence was introduced. It therefore became the duty of the court to find upon this issue. If it was the intention of the trial court that the above-described notes were to be canceled and surrendered as a condition precedent to the right of the respondent to the exclusive possession and right to the possession of the resaw and attachments, a finding should have been made by the trial court upon this issue. The finding as made, to which attention has been called, is not, in our opinion, a sufficient finding upon this issue.

In its finding of fact No. 3 the court finds, among other things, that the appellant has at all times in said complaint mentioned held said personal property wrongfully and unlawfully and without lawful right or title. This finding of fact would seem to conflict with finding No. 5. If it was the duty of the respondent company, before it could lawfully repossess itself of the personal property described in its complaint, to surrender to appellant the unpaid notes "of defendant amounting to \$700 now held by plaintiff," which was a condition precedent, the possession by appellant of such personal property would not be unlawful, until a fulfillment of the condition precedent, viz. the surrender or offer to surrender to defendant the unpaid notes of defendant amounting to \$700 now held by plaintiff. *Segrist v. Crabtree*, 181 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125. This finding of the court is not based upon any evidence in the case. The material issue between respondent and appellant, upon which it was the duty of the court to find, was, "Was the respondent required, as a condition precedent to its right to the possession of the personal property described in its complaint, to surrender or offer to surrender the unpaid promissory notes described in appellant's affirmative answer and counterclaim?" upon which the court failed to find.

In its judgment the court decrees, *inter alia*, that the respondent is entitled to the exclusive possession of the personal property described in its complaint, and that in case delivery cannot be had thereof, it is entitled to judgment against appellant for \$1,350, the value of said personal property, less such amount as defendant may have paid

thereon. The court failed to find what amount, if any, had been paid on the purchase price of the personal property by the appellant to the respondent. Consequently this part of the judgment is not sustained by the findings.

If we could construe the court's language in its findings of fact to mean that the unpaid purchase notes were to be returned to the appellant as a condition precedent to the right of the respondent to the possession of the personal property, still the judgment could not be sustained, because the court has utterly failed to find the amount of the purchase money paid by the appellant to the respondent, and has decreed in its judgment that the respondent shall have judgment, in case delivery of the personal property cannot be had, for \$1,350, less such amount as appellant may have paid thereon. Therefore it would be impossible to determine from the findings the amount that should be deducted from the judgment of \$1,350.

Turning now to the contract, the basis of respondent's cause of action, we find the following provision:

"That in case of failure to pay any of the payments as herein agreed that all shall at once become due and payable, and that the consignor or its agent may (at its option), without legal process, take possession of and return to consignor at Beloit, Wisconsin, the above-described property, and that the expense of so doing shall be paid by the purchaser."

While this was one of the material issues raised by the affirmative allegations in appellant's answer and counterclaim, and upon which proof was offered, no finding upon this issue was made by the trial court. It would seem from the stipulations of the contract heretofore quoted that in any event the expense of returning the personal property to Beloit, Wis., must be borne by the consignee. It was affirmatively alleged in appellant's counterclaim that it was entitled to judgment against the respondent for \$739 paid on the purchase price of the personal property, less the expense of returning such property to Beloit, Wis. There was no finding of the trial court upon this issue. Should the court reach the conclusion under the terms of the contract, or under the evidence as a whole in this case, that as a condition precedent the respondent must pay or tender to the appellant the payments made upon the purchase price of the personal property, by the appellant, less the expense of returning the property to Beloit, Wis., it would follow that judgment for such amount as the court may find would be for the appellant. The trial court failed to find the amount paid upon the purchase price of the machinery, the expense of returning the property under the contract to Beloit, Wis., and whether or not the payments made upon the purchase price were forfeited under the facts in the case or under the terms of the contract; all of which questions of fact were material is-

suues raised by the pleadings, upon which it was the duty of the trial court to find.

This court held on rehearing in the case of *American Mining Company v. Trask et al.*, 28 Idaho, 650, 156 Pac. 1139, that where it appears that the trial court has failed to make findings of fact upon each and all of the material issues made by the pleadings, the judgment will be reversed, and the cause remanded for additional findings.

In the case of *Jensen v. Bumgarner*, 25 Idaho, 355, 137 Pac. 529, this court held that there must be a finding of fact upon each and every material issue made by the pleadings, and the failure to so find upon each and every material issue is ground for reversal.

In *Lorenzi v. Star Market Company*, 19 Idaho, 674, 115 Pac. 490, 35 L. R. A. (N. S.) 1142, this court held that, where a defendant files a separate answer setting up affirmative matter constituting a defense, it is error for the trial court to fail to make findings on the issues thus raised, where a finding favorable to the defendant on the issue presented would defeat the plaintiff's right of recovery.

As stated by this court in the case of *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490, the rule is well established in this state that, when the court fails to find on all of the material issues, the judgment will be reversed, unless a finding thereon either for or against the successful party would not affect the judgment entered, which rule the court holds applies to all material issues made by affirmative defenses, and, quoting from 2 *Spelling on Appellate Practice*, § 591, says:

"It is immaterial whether the issue arise upon allegations in the complaint, and denial in the answer, or upon an affirmative defense pleaded in the answer, and treated as denied by the plaintiff."

All affirmative allegations contained in appellant's counterclaim were, under the statute, deemed denied by the respondent, and therefore became material issues in the case, and it was the duty of the trial court to make findings upon all the material issues raised in appellant's affirmative defenses, upon which proof was submitted. As this record now stands, we are unable to determine from the court's findings of fact and conclusions of law upon what the judgment of the trial court is based, in the absence of specific findings upon all of the material issues.

An examination of the judgment suggests a query as to its finality wherein the court decrees that the respondent is entitled to the possession of the resaw and attachments, and, in case delivery cannot be had, to judgment against defendant for \$1,350, its value, less such amount as defendant may have paid thereon. What amount has been paid must be ascertained from some source other than the court's findings, conclusions of law, or the judgment itself.

The judgment in this case is reversed, and the cause remanded, with instructions to the

trial court to make additional findings upon all of the material issues arising from the pleadings, and to make and enter its judgment in accordance therewith. Costs are awarded to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

CITY OF COEUR D'ALENE v. PUBLIC UTILITIES COMMISSION OF IDAHO et al.

(Supreme Court of Idaho. Oct. 17, 1916.)

1. TELEGRAPHS AND TELEPHONES ¶26½, New, vol. 17 Key-No. Series—REGULATION—DECISION OF PUBLIC UTILITIES COMMISSION—REVIEW.

Held, that the evidence is sufficient to support the finding of the commission to the effect that the rates, tolls, rentals, and charges of the defendant company at Coeur d'Alene are not unreasonably high and exorbitant.

2. TELEGRAPHS AND TELEPHONES ¶26½, New, vol. 17 Key-No. Series—REGULATION—DECISION OF PUBLIC UTILITIES COMMISSION—REVIEW.

Where two telephone systems are being consolidated, and during the time of the consolidation changes are made and poor service is occasioned by reason of the overhauling of the switchboard and the remodeling of practically the entire central station of the system, the connecting of all lines on one system and the breaking in of new help, and the commission finds that the company will overcome such service difficulties when such changes are completed, and further finds that the company thereafter will render first-class service, this finding will not be disturbed on a review by this court, under the evidence in this case.

3. TELEGRAPHS AND TELEPHONES ¶26½, New, vol. 17 Key-No. Series—REGULATION—DECISION OF PUBLIC UTILITIES COMMISSION—REVIEW.

Where the commission has taken the evidence of the city as to the value of the plant, for rate-making purposes, but denies any deduction from such value on account of depreciation, as suggested by the city's expert witness, and finds "that the plant is in first-class condition and as good as new and is capable of rendering 100 per cent. efficient service," such finding will not be disturbed, since it is supported by the evidence.

4. TELEGRAPHS AND TELEPHONES ¶26½, New, vol. 17 Key-No. Series—REGULATION—CHARACTER OF SERVICE.

Where, before the consolidation of two telephone company lines, a four-party service had been given, and after the consolidation the four-party service was eliminated and a two-party service established, the commission was justified in refusing to reinstate such four-party service without further proof of the necessity therefor than appears in the record.

5. TELEGRAPHS AND TELEPHONES ¶26½, New, vol. 17 Key-No. Series—REGULATION—CHARACTER OF SERVICE.

Held, that the commission has full authority, under the provisions of sections 33 and 34 of the Public Utilities Act (Sess. Laws 1913, p. 269), to prescribe rules and regulations for the performance of any service or the furnishing of any commodity supplied by a public utility, and may upon a proper showing order four-party service discontinued and two-party service installed.

6. TELEGRAPHS AND TELEPHONES ¶26½, New, vol. 17 Key-No. Series—REGULATION—SALARIES OF OFFICERS.

Where the value of a utility plant for rate-making purposes has been established and the rate fixed that may be charged for the commodity, and the officers of the company are paid higher salaries than are reasonable, and the excess is paid out of the rate of interest that might properly be paid on the fixed value of the plant, the city has no cause for complaint on account of such excess payment of salaries.

Original proceeding by the City of Coeur d'Alene for a writ of review to the Public Utilities Commission of the State of Idaho, and another, to review the action of the Commission in fixing rates to be charged for telephone service. Decision of Commission affirmed.

James H. Frazier, of Coeur d'Alene, for plaintiff. Chas. H. Craig, of Harrison, for defendants.

SULLIVAN, C. J. This action involves an original application to this court by the city of Coeur d'Alene, a municipal corporation, for a writ of review directed to the Public Utilities Commission of this state, and to the individual members thereof, praying that this court review the order of said commission dismissing the complaint filed with said commission, and the order denying a rehearing in said matter.

The writ was issued as prayed for, and the matter is before this court for a determination of the issues involved.

It appears from the record that the Interstate Utilities Company was operating a telephone system in the city of Coeur d'Alene, and the complaint alleges that the rates charged by said company for said utility were unreasonable, exorbitant, and excessive, and that by reason of said unreasonable rates a large number of patrons of said telephone company had discontinued their telephones, and the service rendered by said telephone company was very poor and unsatisfactory.

Said public utility answered the complaint, admitting that the service rendered was faulty and inadequate, to a certain extent, but that such condition was due to cramped operating conditions pending the installation of a new switchboard and other apparatus; that the consolidation of the Interstate Telephone Company with the Pacific Telegraph & Telephone Company was demanded by the city officials of said city, but denied that it was making excessive profit from the exchange in Coeur d'Alene.

Upon the issues made by the pleadings a hearing was had and witnesses on behalf of the parties were examined, and thereafter the defendant Public Utilities Commission made and entered an order holding that the rates, tolls, rentals, and charges of said telephone company at Coeur d'Alene were not unreasonable or exorbitant, and dismissed the

plaintiff's complaint. Thereafter the city filed an application for a rehearing in said matter, and the Interstate Utilities Company filed its answer, denying the allegations and facts set forth in the petition for rehearing, and thereafter a rehearing was denied.

The main assignment of error involves the question of the sufficiency of the evidence to support the decision of the commission.

It is also contended that at the time of the hearing the city desired to have the books of said Interstate Utilities Company audited in order that it might present such audit and facts therein contained to said commission for the purpose of adjusting the rates of said company; that at said hearing the city of Cœur d'Alene and the defendant Interstate Utilities Company stipulated that the auditor of said Public Utilities Commission should examine and audit the books of said Interstate Utilities Company, and that such audit and examination should be used by the Public Utilities Commission in adjusting the rates of said defendant company; that said Public Utilities Commission failed to have said books so audited, and decided said matter without auditing said books. It is contended that the city was prejudiced by this action of the Public Utilities Commission, and that said commission exceeded its jurisdiction in denying the application of the plaintiff for a rehearing; that the evidence is not sufficient to support the findings of the commission in its holding that said Interstate Utilities Company was not charging unreasonable and exorbitant rates.

[1] It is contended that the evidence introduced on behalf of the city shows and proves that the defendant Interstate Utilities Company was charging unreasonable and exorbitant rates to its telephone patrons in the city. The commission found substantially that:

"The rates, tolls, rentals, and charges of the defendant company at Cœur d'Alene are not unreasonable, high, and exorbitant."

This finding, under the provisions of section 63a of said Public Utilities Act, must be regarded by this court as *prima facie* just, reasonable, and correct. We have examined the evidence, and find that it is amply sufficient to sustain said finding.

[2] It is contended by the applicant that the evidence shows that the service of the defendant telephone company was very poor and unsatisfactory. The commission found as follows:

"The objections in regard to the service seemed to have been pretty generally overcome at the time of the hearing. The officers of the company seemed to be making an honest effort to overcome all the difficulties in regard to service and the commission feels that the company will overcome all service difficulties, and the commission would not be justified in making any specific order in the premises at the present time. With the local exchange in its present condition, and with proper help, the company should render first-class service."

The findings of the commission show that the poor service at the time this proceeding was brought was occasioned by reason of the overhauling of the switchboard and the remodeling of practically the entire central station equipment, the connecting of all the lines on one system, and the breaking in of new help. Two systems had been consolidated, and during the time of the consolidation and changes made necessary by it, the service was probably not what it ought to have been under other conditions. We think the evidence sustains this finding of the commission.

[3] It is next contended that the evidence shows the value of said Interstate Utilities Company's plant at said city to be worth less than the sum of \$81,251.48, the value as found by the commission. It appears that the commission arrived at those figures after examining the tables submitted by the plaintiff's own expert. In fact, it substantially took the testimony of the city which established that value. The only variation between the figures arrived at by the commission and those of the city's witness Ingersoll appears in the latter's assertion that "a further deduction should be made for accrued depreciation." The commission apparently thoroughly sifted this claim and said:

"That the plant is in first-class condition and as good as new and is capable of rendering one hundred (100) per cent. efficient service. That being true, we must find under the rule announced by our Supreme Court in the case of *Murray v. Public Service Commission*, P. U. R. 1915F-436, that no deduction should be made in this case for accrued depreciation." 27 Idaho, 603, 150 Pac. 47.

The commission further said:

"This commission does not wish to be understood as finding and determining that the valuation of defendant's plant at Cœur d'Alene, as herein assumed, to wit: The sum of \$81,251.48, is the true and correct valuation for rate-making purposes. In no event could the amount be less than that amount, but as hereinbefore stated, for the purposes of this case only, we have assumed that the valuation is the reasonable valuation of this plant for rate-making purposes."

[4] It is next contended that the evidence introduced on behalf of the city proves that the defendant telephone company was not justified in eliminating a four-party service, and for that reason the commission was unauthorized to make an order permitting the said Utilities Company to eliminate such service. Upon that point the commission found:

"That the defendant company has eliminated this four-party service from each of its other fifteen exchanges in North Idaho. The four-party residence service is no longer used by the Mountain States Telephone & Telegraph Company in southern Idaho. We must conclude that that class of service was discontinued with the object of rendering more efficient service. Under such circumstances this commission does not feel that it would be justified in ordering such service reinstated in Cœur d'Alene without more cogent proof of the necessity therefor."

[5] It appears that the commission has sanctioned, as a general practice throughout

the state, the elimination of more than two-party line service within exchange limits, and the evidence does not show that there was any reason for making an exception in favor of Cœur d'Alene. There is nothing in the contention that the commission had no authority to make an order permitting said telephone company to eliminate such service. Sections 33 and 34 of the Public Utilities Act, p. 269 (Laws 1913), give the commission the power to prescribe rules and regulations for the performance of any service or the furnishing of any commodity supplied by a public utility.

As to the contention that the city has been prejudiced in said rate hearing by the failure of the commission to examine the books of the defendant company, and that injustice has been done to said city for that reason, in attempting to criticize the act of the commission for its failure to have its auditor examine the books of the defendant, counsel seems to have overlooked the fact that the commission based its decision almost entirely on the figures furnished by the city itself. The commission arrived at the value of the plant for rate-making purposes after examining the tables submitted by the witness Ingersoll and the testimony given by him. That being true, the city should not be permitted to complain of a finding based on its own evidence.

The commission found as follows:

"However, this commission does not find it necessary to determine upon a valuation for rate purposes in this case, but for the purposes of this case only, it will assume that the valuation presented by Mr. Ingersoll is the correct appraisal.

"In view of the fact that the defendant has not asked for any increase of rates in this case, and from the further fact that an increase of rates might and probably would result in a decrease of revenues, and for the purpose of demonstrating that the rates now in effect are not excessive, we have accepted the complainant's valuation, that being the lowest possible valuation, under the evidence, that the commission could find."

[8] The city complains that certain officials of the telephone company, and in particular the president, are paid an exorbitant salary. The fact that the telephone company saw fit to pay its officers exorbitant salaries out of the rates it was authorized to charge and only pay a very small per cent. or dividend on the value of its plant per annum, is a question in which the city is not interested so long as the salaries and the rate per cent. or dividend on the value of the plant do not exceed the rate authorized by the commission to be collected. It appears that the president of the company is the owner of about 90 per cent. of the capital stock. That being true, if he desires to pay himself a large salary and take it out of the interest which the company was authorized to collect on the value of its plant, certainly the city could not complain.

We conclude that the commission has passed fully and completely upon all matters of which the city complains, and the commission's findings are fully supported by the evidence. Since we do not find that the commission has exceeded its jurisdiction or violated its authority or infringed any constitutional right of the city, the decision of the commission must be affirmed; and it is so ordered. Costs awarded to defendants.

BUDGE, J., concurs.

MORGAN, J. (concurring). Had the Public Utilities Commission agreed that it would audit, or cause to be audited, the books of the Interstate Utilities Company, and that it would consider the result of the audit as evidence in the case, and had it failed to do so but rendered its decision without making such examination, whereby the plaintiff was precluded from offering proof to establish the facts which such an inspection of the books would have disclosed, as counsel for plaintiff contends, I would be in favor of directing a new trial. I find, however, that the following is what counsel relies upon as a stipulation:

"After the conclusion of the case, Mr. Frazier stated: 'I would like to have the commission audit the books.'

"To which Commissioner Graham answered: 'Before the case is disposed of, if there is any need of it, if Mr. Miller can get around to it we can have him audit the books, or we may get at it in some other way.'

"Commissioner Ranstedt: 'Do you desire the commission, or its auditor, to make an audit of the books?'

"Mr. Frazier: 'Yes; I would like to have that done.'

"Commissioner Ranstedt: 'If the commission should find it necessary to audit the books of the telephone company, why we will have Mr. Miller make an audit. We will determine that when we come to consider the case.'"

It will be observed that this is not an agreement that the audit would be made unless the commission, upon consideration of the case, deemed that action to be necessary in order to enable it to reach a correct decision. An examination of the record convinces me that it was fully justified in concluding that an audit of the books was not necessary.

I concur.

ROBERTS v. PACIFIC TELEPHONE & TELEGRAPH CO. (No. 12964.)

(Supreme Court of Washington. Oct. 24, 1916.)

APPEAL AND ERROR 424 — NOTICE OF APPEAL—SURETY ON COST BOND.

Where the party at whose instance a cost bond was given filed in the Supreme Court an express waiver of all rights under the bond, there is no necessity for service of a notice of appeal on the surety.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2152-2154; Dec. Dig. 424.]

En Banc. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Ernest Napoleon Roberts against the Pacific Telephone & Telegraph Company. Judgment for the plaintiff, and defendant appeals. Motion to dismiss the appeal denied.

Post, Russell, Carey & Higgins, of Spokane, for appellant. Robertson & Miller and E. W. Robertson, all of Spokane, for respondent.

ELLIS, J. Plaintiff in this, an action for personal injuries, was required, on defendant's demand, to furnish a bond for costs pursuant to Rem. & Bal. Code, § 495. He secured a verdict. Judgment was entered thereon. Defendant appealed.

The notice of appeal was served upon plaintiff, but not upon the surety in his costs bond. For this reason plaintiff has moved that the appeal be dismissed, citing our recent decision in *Shippen v. Shippen*, 153 Pac. 247. In that case we held that since by the act of 1909, Rem. & Bal. Code, § 496, the Legislature provided that when a judgment shall be rendered against the principal for costs secured by a costs bond a judgment for such costs shall be entered against the surety as of course, and since that act was passed in the light of the fact that this court had held from the beginning of our statehood, that a similar provision as to the entry of judgment against the surety upon a forthcoming bond (Rem. & Bal. Code, § 577) made such surety a party so interested in the result of the action as to entitle him to notice of an appeal, for the same reason the surety upon a costs bond is, under the act of 1909, a party so interested as to be entitled to notice of an appeal. The rule, though illogical and needlessly severe, has been steadily followed by this court since its first announcement in principle in *Cline v. Mitchell*, 1 Wash. 24, 23 Pac. 1013, and in terms in *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933. A majority of this court being disinclined to overrule *Long Bell Lumber Co. v. Gaston*, 78 Wash. 598, 139 Pac. 641, and the many prior decisions which it follows, our decision in *Shippen v. Shippen*, supra, was inevitable. But, since the only possible interest the surety as such can have in the result of the action is referable to his liability upon the bond, it is manifest that when that liability has been removed his interest vanishes and he is no longer entitled to notice. Acting upon this theory, the defendant, appellant here, has filed in this court a waiver in the broadest terms of any right that it might have upon any contingency to any judgment for costs against the sureties upon the costs bond filed in the superior court, and stipulating and agreeing that such costs bond may be held for naught and forthwith canceled. The costs bond was given solely for defendant's benefit and at its instance. There is no reason either in law or in morals why it should not be permitted to waive all

rights under the bond by an express and explicit disclaimer. Having done so, it can no more claim any right under the bond or against the bondsman as such than if the bond had never been given. The bondsman, therefore, no longer has any interest in the result of the action or in the appeal. The reason of the rule in the *Shippen* Case being no longer present, that rule should no longer apply. We therefore hold that, when in such a case the party at whose instance a costs bond was furnished shall file at any time before the final decision in this court an express waiver of all rights under the bond, there shall be no necessity for service of notice of appeal upon the bondsman in order to perfect the appeal.

The motion to dismiss is denied.

MORRIS, C. J., and PARKER, MOUNT, HOLCOMB, MAIN, and CHADWICK, JJ., concur. **FULLERTON, J.,** concurs in the result.

GARDNER v. FREDERICK et al. (No. 13623.)

(Supreme Court of Washington. Oct. 24, 1916.)

En Banc. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Sarah Elizabeth Gardner against Minnie Alice Frederick and another. Judgment for the plaintiff, and defendants appeal. Motion to dismiss appeal overruled.

Clyde H. Belknap and Fred M. Williams, both of Spokane, for appellants. John M. Gleeson, of Spokane, for respondent.

PER CURIAM. Plaintiff-respondent has moved to dismiss this appeal upon two grounds: (1) That the notice of appeal was not served upon the surety in a costs bond filed by plaintiff in the lower court; (2) that the appeal bond is not conditioned as required by the governing statute, Rem. & Bal. Code, § 1722.

To meet the first ground, appellants have filed in this court a written waiver releasing the surety in the costs bond from all liability thereon. Under our recent decision in *Roberts v. Pacific Telephone & Telegraph Co.*, 160 Pac. 753, the motion on the first ground must be denied.

We have examined the appeal bond and find that its conditions present a substantial compliance with the statutory requirements.

The motion is overruled.

TALKINGTON v. WASHINGTON WATER POWER CO. (No. 13793.)

(Supreme Court of Washington. Oct. 24, 1916.)

En Banc. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

Action by J. A. Talkington, guardian ad litem for Willard Talkington, a minor, against the Washington Water Power Company. Judgment for the plaintiff, and defendant appeals. Motion to dismiss appeal denied.

Merritt, Lantry & Merritt, of Spokane, for appellant. Post, Russell, Carey & Higgins, of Spokane, for respondent.

PER CURIAM. Plaintiff-respondent has moved to dismiss this appeal on the ground that the notice of appeal was not served upon the

surety in a costs bond filed by plaintiff in the court below. Defendant-appellant has filed in this court a written waiver of any claim that it might have had upon any contingency against such surety by reason of such bond and stipulating and agreeing that such bond may be forthwith canceled and held for naught. The case thus falls within our decision in *Roberts v. Pacific Telephone & Telegraph Co.*, 160 Pac. 753, which has just been filed.

Following that decision, the motion is denied.

STATE ex rel. PORT OF SEATTLE et al. v. SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY et al. (No. 13798.)

(Supreme Court of Washington. Nov. 4, 1916.)

1. MUNICIPAL CORPORATIONS \S 860 — PORT DISTRICT — USE OF FUNDS — OPPOSITION TO PROPOSED LEGISLATION.

Under Laws 1913, c. 62, creating the port of Seattle as a municipal corporation with express power to build and operate docks, harbor improvements, and terminal facilities, the board of port commissioners have no implied authority to spend public funds of the district raised by taxation to defeat Laws 1915, c. 46, a referendum measure to be submitted at a general election increasing the board of port commissioners from three to seven members, and limiting the total bonded indebtedness of any port of the first class to $2\frac{1}{4}$ per cent. of the assessed valuation of taxable property in the district, in no event to exceed \$5,750,000.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 1815-1818; Dec. Dig. \S 860.]

2. MUNICIPAL CORPORATIONS \S 59 — POWERS — IN GENERAL.

A corporation exercising powers of the state possesses only those powers expressly granted, or such as are necessarily or fairly implied in or incidental to those expressly granted, and those essential to its objects and purposes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. \S 149; Dec. Dig. \S 59.]

En Banc. Proceeding by the State of Washington, on the relation of the Port of Seattle, a municipal corporation, Robert Bridges, and others as Commissioners thereof, against the Superior Court of the State of Washington in and for King County, and Edward H. Wright, Judge of the Superior Court acting in and for such county, to review an order granting an injunction in the case of C. O. Qualheim against the Port of Seattle and the Port Commissioners. Order affirmed.

C. J. France, of Seattle, for plaintiffs. Halverstadt & Clarke and W. M. Whitney, all of Seattle for defendants.

MOUNT, J. This is a proceeding to review an order of the lower court granting an injunction in the case of C. O. Qualheim, Plaintiff, v. The Port of Seattle, and Robert Bridges, C. E. Remsburg and Carl A. Ewald, as Port Commissioners of the Port of Seattle, Defendants.

The plaintiff in that case alleged that the

Legislature, in 1915, enacted a law amending the Port District Act of this state, being chapter 46 of the laws of that year. This amendment increased the number of port commissioners, and limited the bonded indebtedness of port districts of the first class. It is alleged that the port commissioners, for the purpose of defeating that enactment, are attempting to secure a nullification thereof by means of a referendum, and, for that purpose, the port commissioners have wrongfully, unlawfully, and without authority, expended large sums of the funds of said port district for the purpose of advertising, lobbying, and printing circulars, which have been scattered over King county and a considerable portion of the state; that the port commissioners, unless restrained from so doing, will expend other large sums of port funds for the purpose of carrying on a political campaign against said chapter 46; and that, by reason of said unlawful expenditures, the rate of taxation in King county will be increased, and the taxpayers of King county will be compelled to repay the money so unlawfully expended. It is also alleged that the plaintiff is a resident and taxpayer of King county. An application was made to the court below for a restraining order. After a hearing upon that application, the superior court of King county, on the 18th day of October, entered an order enjoining the defendant port of Seattle, and the port commissioners, their agents and servants, from expending, or causing to be expended, any of the funds of the port of Seattle, for the purpose of defeating the operation and effect of chapter 46 of the Laws of 1915. This writ is to review that order.

The amendment to the Port District Act, being chapter 46 of the Laws of 1915, was made the subject of a referendum under the Constitution. It is now designated as referendum measure No. 8, to be printed on the official ballot, to be approved or rejected at the general election on November 7th of this year. By reason of the reference, this chapter has not yet become a law. This amendment is intended to increase the board of port commissioners from three to seven members, and provides that the total bonded indebtedness of any port of the first class shall be limited to $2\frac{1}{4}$ per cent. of the assessed valuation of taxable property in said district, but in no event shall the total bonded indebtedness ever exceed the sum of \$5,750,000.

[1, 2] The question presented is whether the board of port commissioners is authorized to expend public funds, raised by taxation, to defeat proposed legislation affecting that corporation. It is contended by the relators that, while the port of Seattle is a municipal corporation, it is also a business corporation, and has the power to expend the money of the corporation to the best interest thereof.

It is not contended, as we understand the brief of the relators, that there is any express provision in the law authorizing the port commission to expend money belonging to the corporation for political purposes, but it is argued, in substance, that, because this corporation is in the nature of a business corporation, engaged in commercial enterprises in competition with private individuals engaged in similar enterprises, and is conducting such business as an agency of the state, it has a right to expend its moneys in such way as the port commissioners deem for the best interest of the corporation; that, inasmuch as the powers of the corporation are general in their character, the power is implied to the trustees to apply the money of the corporation as, in their opinion, will best promote the affairs of the corporation. There can be no doubt that a corporation, exercising powers of the state, possesses only those powers expressly granted, or such as are necessarily implied. The general rule is stated by Dillon on Municipal Corporations, at section 89, as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. * * *

In the case of *Tacoma Gas & Electric Light Co. v. City of Tacoma*, 14 Wash. 288, 44 Pac. 655, this court said:

"It is a well-settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment. * * *

And in *Young v. State*, 19 Wash. 634, 54 Pac. 36, this court said:

"* * * It is well settled that public officers have, and can exercise, only such power as is conferred upon them by law, either statutory or constitutional, and that the government is not bound by the unauthorized acts of its officers or agents. * * *

See, also, *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130. In this latter case, it is said:

"A municipal corporation is limited in its powers to those granted in express words, or to those necessarily or fairly implied in or incident to the powers expressly granted, and also to those essential to the declared objects and purposes of the corporation. 1 Dillon, Mun. Corp. (4th Ed.) § 89. * * * It is a general principle that a municipal corporation cannot usually exercise its powers beyond its own limits, and if in any case it has authority to do so, it must be derived from some statute which expressly or impliedly permits it. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601. The doctrine of ultra vires is applied with greater strictness to municipal bodies than to private corporations. 1 Smith, Modern Law of Corp. § 661. Upon this

subject the Supreme Court of Minnesota has said: 'A different rule of law would in effect vastly enlarge the power of public agents to bind a municipality by contracts not only unauthorized, but prohibited, by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent. * * *'

It is plain from these authorities that, unless the port of Seattle may be fairly implied to have the power to expend money in the way here proposed, it has no such authority. It is not claimed that there is any express provision authorizing the port of Seattle to expend money as is here attempted. The powers of the corporation, as defined by the act creating it (chapter 62 of the Laws of 1913), are general in their character. They are stated as follows:

"* * * To lay out, construct, condemn, purchase, acquire, add to, maintain, conduct and operate any and all systems of seawalls, jetties, wharves, docks, ferries, canals, locks, tidal basins and other harbor improvements, rail and water transfer and terminal facilities within such port district. * * *

The port commissioners have, no doubt, implied authority to spend the money of the port for any of these purposes, but clearly the purpose for which this money is being spent is not and cannot be reasonably implied from the powers named. This corporation, the port of Seattle, is a creature of the state. It is in the nature of a municipal corporation engaged in the business of building wharves and docks and harbor improvements, and in operating and maintaining the same. Its powers are given by the state. If the state desires to limit those powers, the port itself and its commissioners have no special interest therein. They are simply agents of the state, and it seems absurd to say that an agent of the state may be permitted to expend money of the state for the purpose of defeating a proposed curtailment of the powers of that corporation by the state. No such power is expressly granted to the corporation, and it is not a necessarily or fairly implied incidental power to those expressly granted. It may be convenient for the port and the port commissioners to desire no change in its powers, but the curtailment of these powers, as is proposed, is clearly not indispensable, and for that reason alone the courts ought not to construe in favor of such corporations the power here sought to be exercised. In *James v. City of Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957, this court held that the city of Seattle had no power to pay the expenses of councilmen on a visit to other cities to inform themselves concerning waterworks, street paving, terminal facilities, street lighting, and other municipal matters. We there said:

"And we think the rule thus announced is the established one, and in consonance with all sound authority. The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The terms of the

trust are fixed by legislation, and no expenditure of money belonging to the city can be made without express authority, or implied authority by reason of a necessary granted power."

See, also, *Minot v. Inhabitants of Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592; *Frankfort v. Winterport*, 54 Me. 250; *Westbrook v. Deering*, 63 Me. 231; *Henderson v. City of Covington*, 77 Ky. (14 Bush) 312; *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 839.

In this last-named case, it was said:

"The question of local self-government is one which has engaged the attention of the courts since the formation of the Union. A few states have adopted the view that the municipalities have an inherent right to local self-government not dependent upon legislative authority, and that this right was brought to this country from the rule adopted in the Anglo-Saxon countries from which our laws descended. This view is entertained by the courts of Indiana, Kentucky, and Michigan; while practically all the rest of the jurisdictions hold that municipal corporations have only such power as is conferred upon them by the Legislature, and that the Legislature, in the absence of constitutional inhibition, controls such municipalities absolutely. This is the view of the Supreme Court of the United States, which, in *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440, held in substance that a municipal corporation was but a department of the state, and that the Legislature could give it all the powers it was capable of receiving, or that it might deprive it of every power, leaving it a corporation in name only, and could create and re-create changes in its government as it chose. In addition to the overwhelming weight of authority, this is the view that has been taken by this court. In *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835, in discussing the constitutionality of the state aid road law and in commenting thereon, it was said: 'Our Constitution is a limitation of power, and such rights and powers of local government as are not conferred upon counties by the language of the Constitution remain with the state and may be exercised by the Legislature as the lawmaking power of the state. Rules and regulations for local county government and control, except as otherwise provided for in the Constitution, are as much within the control of the state as those matters which are more general and state wide.'"

We are of the opinion, therefore, that the port of Seattle and its commissioners have not authority to expend the money of the corporation in an endeavor to defeat any law which has been passed by the Legislature, and referred to the people for approval or rejection. The approval or rejection of the amendment proposed to the port of Seattle is a matter of no concern to the port itself, or its commissioners. As stated above, this corporation is a branch of the state government, municipal in its character, and its authority is limited to the powers expressly granted or necessarily inferred from express grants. If the port commissioners may take the money of the port, acquired by taxation upon property within the district or otherwise, for political purposes, or purposes other than those for which the port was organized, then there is no limit upon the port commis-

sioners in expending the money of the port. The commissioners might determine that the best interests of the business of the port required that the individual members of the commission be perpetuated in office, and, because of that reason, use the funds of the port to insure their own election. We are clearly of the opinion that, when the port was created, no thought was held by any person that the money raised by the port could be used for political purposes, or any purpose other than for the direct use of the port and its business.

We find no error of the lower court in granting the injunction. The order is therefore affirmed.

MORRIS, C. J., and MAIN, ELLIS, HOLCOMB, CHADWICK, and PARKER, JJ., concur.

STATE ex rel. SEARS et al. v. GILLIAM,
Judge of the Superior Court. (No. 18802.)

(Supreme Court of Washington. Oct. 31, 1916.)

1. JUDGES \S 7—VACANCY IN OFFICE—APPOINTMENT—ELECTION.

Under Const. art. 4, § 5, providing that if a vacancy occurs in the office of judge of the superior court the Governor shall appoint a person to hold the office till the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term, the appointee's right to hold the office ends, when one is elected and qualifies to fill the unexpired term, which qualification may be at once, and is not deferred to the time for qualifying for a new term; but if there is no election for the vacancy the appointee holds till the one elected for the next regular term qualifies at the regular time.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 24-28; Dec. Dig. \S 7.]

2. ELECTIONS \S 126(5)—PRIMARY ELECTION—JUDGES—UNEXPIRED TERMS—VOTING BY STICKERS.

Under the primary election law, Rem. & Bal. Code, § 4842, providing that where there is a vacancy in the office of judge candidates may announce themselves for either the long or the short term, "and the ballots shall be arranged accordingly," there can be no nomination for an unexpired term unless candidates have announced therefor; section 4843, authorizing stickers, applying only where the primary ballot calls for selection of a candidate for an office or unexpired term, of which the public has had notice.

[Ed. Note.—For other cases, see Elections, Dec. Dig. \S 126(5).]

Original proceeding by the State, on the relation of Edward N. Sears and others, against Mitchell Gilliam, Judge of the Superior Court, King County, to review his decision in mandamus proceedings. Decision sustained.

Edward N. Sears and Richard Gowan, both of Seattle, for plaintiff in error. Alfred H. Lundin and S. M. Brackett, both of Seattle, for defendant in error.

CHADWICK, J. On the second Monday in January, 1915, Hon. John E. Humphries qualified as a superior judge for King county for the term ending the second Monday in January, 1917. On or about May 15, 1915, Judge Humphries died, and John S. Jurey was appointed by the Governor of the state to fill the vacancy. Judge Jurey qualified and has ever since acted as such superior judge.

Provision is made in the Constitution for the appointment of a person to fill a vacancy occurring in the office of superior judge, and fixing the term of such appointed officer which is until the next general election and until his successor is elected and qualified. At the 1907 session of the Legislature, the direct primary law was adopted as the lawful method of nominating candidates for public office. In *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728, the court recognized that under this state of the law "there was indeed a short and a long term for which a judge might have been nominated. * * *"

The primary election for this year was held on the 8th day of September. There were no filings of candidates for the so-called short term or the interregnum between the general election to be held on the 7th day of November, 1916, and the 8th day of January, 1917, at which time all persons elected at a general election for a full term are competent to qualify. Const. art. 4, § 5. Nevertheless a certain number of the electors of the county of King, by writing the name of the office and term intervening between the election and the time when a regular term will begin, and the names of these relators, voted for these relators for the office of superior judge for the short term. Allying themselves to be candidates regularly nominated as such, they sought remedy in the lower court by way of mandamus to compel the county auditor to place their names upon the general election ballot, and to give notice of such election for the time provided by law. The writ was denied, and the case is brought here for review. A right conclusion rests upon a construction of the Constitution:

"If a vacancy occurs in the office of judge of the superior court, the Governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term."

[1] This section of the Constitution was construed in *State ex rel. Linn v. Millett*, 20 Wash. 221, 54 Pac. 1124. Hon. Charles Ayer was elected at the general election held in November, 1896, to the office of superior judge for Thurston county for the full term beginning the following January. He qualified and continued to discharge the duties of his office until his death, which occurred in March, 1898—a time, as will be noticed, prior to the regular biennial election intervening between the commencement of the

term of his office and its ending, which, under the Constitution, would be in January, 1901. Hon. Byron Millett was appointed to fill the vacancy. He was commissioned to hold the office "until the next general election." This was the limit of the Governor's authority. At the next general election (inasmuch as we are treating an office having a term of four years, we shall call the intervening election a biennial election), Linn received a majority of the votes.

The question arose as to whether he was entitled to the office immediately following a declaration of the result of the election, or whether his right to fill the "remainder of the unexpired term" began the second Monday of the succeeding January. Linn qualified, and demanded the office. Millett refused to vacate, and the issues, as just stated, were submitted to the Supreme Court upon Linn's application for a writ of quo warranto to try title to the office. The decision of the court was rested squarely upon that part of article 4, § 5, which we have quoted. After stating the issue: "The respondent's position is that since, under the Constitution, the different state officers are required to qualify on the second Monday in January succeeding their election, the relator in this case is not entitled to take office until such time; while the relator's position is that, having been elected to fill an unexpired term, he is entitled to qualify and take office as soon as the result of such election has been declared"—the court said:

"We think the relator's position is well taken, and that the respondent's position cannot be maintained. The provision of the Constitution which fixes the second Monday in January succeeding their election as the time when the different state officers, including superior judges, shall qualify, relates exclusively to original terms or terms beginning in January following the election; while the provision of paragraph 5, art. 4, supra, which controls this case, applies only to cases where a vacancy exists, and the party elected is to serve the remainder of a term then current. The commission of the Governor only entitles the holder to retain office until his successor is elected and qualified, and the word 'remainder,' as found in that section, relates to the term existing at the date of the election, not to a term beginning some months later. We have in this state biennial elections. If respondent's position is correct, and a vacancy should occur at any time within two years prior to the last election preceding the commencement of a new term, the provision of the Constitution referred to, which requires a successor to be elected at the next ensuing election, would be meaningless, because if he could not qualify until the January following his election, it would follow that the term would have already expired—a condition which we think is not contemplated by any fair construction of the Constitution, and certainly not within the letter of it."

A related question was considered by the court in *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25. In the discussion following, the court held that the provision of the Constitution fixing terms applied only to judges who had been elected; that:

"There is no limitation, either express or implied, upon the Legislature to make appointive terms extend to an election. The limitation is that, where a vacancy occurs which extends beyond an election, then an appointee shall hold until the next succeeding general election, and until the qualification of a judge to fill the vacancy. * * *

"The term of an appointive judge, therefore, is not fixed, except that it cannot extend beyond an election and the qualification of his successor, or to the end of the term. When the term of judges elected was fixed at six years, it was intended thereby to distinguish elected judges from appointed judges, and to fix the terms of elected judges for a definite time, and to limit the terms of appointed judges to the next election. Within that limit the legislative power is complete. It may provide for a term of any length of time up to the succeeding general election. This term is appointive. But if a vacancy is created which extends beyond an election, the provisions of the Constitution apply, and the Legislature has no authority to change or modify the 'terms' therein contained. The act in question does not attempt to change or modify the terms of judges elected. It undertakes to create a vacancy and to terminate the vacancy, at a fixed time before an election can take place, and before an elective term may begin; and this, we hold may be done, because there is no fixed constitutional appointive term."

It is plain therefore that, if a person is appointed to fill a vacancy occurring in the office of superior judge before the next succeeding biennial election, his term is limited to the next general election, and the one elected to fill the "remainder of the unexpired term" is entitled to the office from the time of his election and qualification without reference to the time fixed for the beginning of regular terms. On the other hand, it is plain that, if a vacancy occurs between the biennial election and a general election when superior judges are to be selected (*State ex rel. Dyer v. Twichell*, 4 Wash. 715, 31 Pac. 19), the one holding by appointment holds only until "the election and qualification of a judge to fill the vacancy * * * which election shall be at the next succeeding general election."

Judge Jurey was appointed after the last biennial election, and before the oncoming general election; consequently his term, as appointee, ends at the general election, or when a judge is elected to fill the vacancy and has qualified, or, as it is further and more exactly stated in the Constitution, for the remainder of the unexpired term. That is the term for which Judge Humphries was originally elected. Unless "a person" is elected to fill the remainder of the term—that which we call the short term—Judge Jurey will continue in office until the one elected can qualify for the regular term which will be in January, 1917.

[2] The remaining question is whether the relators have been nominated, and can insist upon being candidates for the unexpired term, the time elapsing between November 7, 1916, and the second Monday in January, 1917.

There were no filings for the office of superior judge for this short term. Relators

claim only as the recipients of certain votes cast at the primary election. That they may not now insist upon the right to go upon the general election ballot seems evident for the reasons that we shall proceed to enumerate. The direct primary law was adopted as an efficient and, except as qualified therein, an exclusive means of selecting candidates for the offices created by the Constitution or defined by statute. Its only purpose " * * * was to select candidates whose names shall appear on the official ballot." "It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office to be voted for at the general election. * * *" It is a "process of selection to determine the candidates whose names shall appear upon the ballot." *State ex rel. Zent v. Nichols*, supra. By the same authority, it is held that the primary election law is not an essential part of the general election law. Hence it follows that no duty rests upon the county auditor to prepare a ballot for unexpired terms unless there is a filing for such unexpired term. That the Legislature had in mind that a nomination for an unexpired term depended upon a filing, and that it should not be left to the concern of the voter in the absence of a filing, is sustained in a degree by reference to paragraph 38 (*Rem. 1915 Code*, par. 4842) of the primary law, which provides, in terms, that, where there is a vacancy in the office of judge, candidates may announce themselves for either the long or the short term, "and the ballots shall be arranged accordingly," being mindful, as we must presume, that, if there were no announcements, the vacant office would not be referred to on the ballot, and, as the Constitution says, the appointed judge would hold over until his successor was elected and qualified. The ballots are "arranged accordingly"; that is, describing constitutional and statutory offices to be filled for full terms and such unexpired terms as may have been the subject of announcement. It follows that no elector may assume to use the ballot for the selection of a candidate for an office not designated upon the ballot, and for which no voting arrangement is made. We are further sustained in our thought that this must be so by a consideration of the whole act, especially paragraph 8 (*Rem. 1915 Code*, par. 4843).

The law seems to contemplate that the people shall have full notice of the primary election and of the offices to be filled; that the auditor shall "publish the names of all persons for whom nomination papers have been filed"; that "the names of all candidates for the office of Supreme and superior court judges shall be published and posted in a separate list without party designation." The purpose of the primary law is not to create offices or to fill them; only to select candidates to be voted for at the general election. It emphasizes the personal equation and seeks, by positive provisions, to give notice

of the names of men who aspire to office rather than to emphasize the office itself. It is true that names may be written in, or stickers may be employed (paragraph 8); but this is so only where the primary ballot calls for the selection of a candidate for an office or an unexpired term named in the ballot and of which the public has had notice.

If any one aspires to fill an unexpired term existing because of a previous vacancy, he is not without remedy. He may file for the unexpired term, and compel, by appropriate proceedings, the submission of his candidacy. He cannot, without previous announcement, compel his nomination unless the people have had notice that there is an office to be filled.

It follows, there being no announcements of candidacy, and therefore no notice to the public, that no one will be elected to fill the unexpired term for which Judge Humphries was elected and of which Judge Jurey is now the incumbent. Nor does it follow that the office will be vacant. By the terms of the Constitution, the incumbent will hold the Humphries' term until a successor to that term is elected and qualified. There being no candidates selected in the manner provided by law, and the time having passed when there can be, the obvious conclusion is that there is no vacancy to fill, for, by the fundamental law, Judge Jurey may, if he so will, continue to discharge the office until the one who may be elected to succeed to the full term is able to qualify, which will be on the second Monday of January, 1917.

It may be that what we have said may seem to be out of time with the act of 1911 (Laws 1911, p. 614), the constitutional provisions with reference to Supreme and superior court judges being identical. It is there provided: "A person elected judge of the Supreme Court to fill a vacancy for an unexpired term shall not qualify until the second Monday in January succeeding his election"—indicating that, if a person was elected for the short term, he could not qualify until the succeeding January; that a person being elected, the term of the appointee would, for that reason, end; and that a vacancy would result notwithstanding an election for the unexpired term.

It would not follow. If such were the law, the one elected might be called upon to vacate the office on the day fixed for his qualification, in favor of one who had been elected for the regular term, being on the second Monday in January succeeding his (the candidate for the short term) election. If this act be treated as a limitation within which a judge, who has been elected to fill a vacancy, shall qualify, it might be sustained; but, if it be taken as a legislative construction of the Constitution, it cannot be, for the right to the unexpired term after election comes from the Constitution. The term is continuing, and cannot be limited or abridged by

either the Legislature or the court. The Legislature cannot limit the term of an officer duly elected to an office having a term defined in the Constitution. *State ex rel. Murphy v. McBride*, supra.

Much of the argument was given over to the question whether the election to fill a vacancy occurring in the office of superior judge was general or special. With that, we are not free to concern ourselves. The Constitution provides that all such elections shall be at the next succeeding general election. It does not say a special election shall be held at the time and place general elections are held, but is careful, as it seems to us, to exclude the thought that judicial officers can be voted for at any other than general elections. Otherwise, it would have provided for a special election to be held immediately upon the happening of a vacancy, rather than to give the power of appointment to the Governor pending such election.

We hold that the relators are not entitled to have their names printed on the official ballot, and that there is not, and from the failure to nominate in the manner provided by law, cannot be, a vacancy for the unexpired portion of Judge Humphries' term.

MORRIS, C. J., and MOUNT, PARKER, MAIN, HOLCOMB, ELLIS, and FULLERTON, JJ., concur.

STATE ex rel. MILLS v. HOWELL, Secretary of State. (No. 13812.)

(Supreme Court of Washington. Oct. 31, 1916.)

1. ELECTIONS \S 151—"CONTEST"—PRIMARY NOMINATION—LIMITATION.

Under Rem. Code 1915, \S 4829, providing for presentation, within five days after the completion of canvass by a canvassing board, of application by affidavit to correct or remedy mistake or wrongful act by any canvassing board, etc., of a primary election, and allowing any candidate "who may desire to contest" the nomination of any candidate for the same office to proceed by such affidavit, an application by a candidate for judge for mandamus to require the secretary of state to certify his name to the several county auditors as nominee at the primary, together with other candidates, on the ground that, while the total primary vote he received was lower than that of other candidates whose names were certified, yet none of the candidates received a majority, was too late where it was filed nine days after the completion of the canvass of the returns of the primary election by the state canvassing board, since such an application involved a "contest" for the nomination, notwithstanding relator was not contesting the fact that others were also nominated.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. \S 138; Dec. Dig. \S 151.

For other definitions, see *Words and Phrases*, First and Second Series, *Contest*.]

2. MANDAMUS \S 11—MOOT QUESTION.

Where an application for mandamus is filed too late, the Supreme Court will not examine on their merits other questions raised by the application, in order to settle disputed questions

of law, since, if it did, the result would be simply dictum, and of no binding force.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 88; Dec. Dig. ¶ 11.]

Mandamus, by the State, on the relation of Edgar G. Mills, against I. M. Howell, as Secretary of State. Writ denied.

T. J. Casey and W. D. Lane, both of Seattle, for plaintiff in error. W. V. Tanner, Atty. Gen., and L. L. Thompson, of Olympia, for defendant in error.

MOUNT, J. This is a proceeding in *mandamus* to require the secretary of state to certify the relator's name to the several county auditors in the state as a nominee for judge of the Supreme Court. It is alleged in the petition that the relator was a candidate at the primary election for that office; that at the said election there were 565,103 votes cast for judges of the Supreme Court, and that 282,552 votes is a majority thereof; that the following candidates received the following number of votes:

Emmett N. Parker.....	124,218
Mark A. Fullerton.....	124,103
George E. Morris.....	119,897
Edgar G. Mills.....	109,699
C. E. Claypool.....	87,186

—that none of the candidates received a majority of the votes cast; that the secretary of state has arbitrarily and unlawfully certified that there were only 237,794 votes cast for the offices of judges, and that none of the candidates have received a majority of said votes, and the respondent Howell arbitrarily and unlawfully refuses to certify the name of the petitioner as a nominee, and has certified that the first three candidates named have received a majority of the votes, and are therefore entitled to go upon the election ballot without opposition.

This petition was filed on October 26, 1916, and an order to show cause was issued against the secretary of state, who makes a return to the effect that, in accordance with the provisions of section 4828 of Rem. Code 1915, the state canvassing board, composed of the secretary of state, the state treasurer, and the state auditor, met in the office of the secretary of state, at Olympia, on the 17th day of October, 1916, for the purpose of canvassing the returns of the primary election held on September 12, 1916; that the said canvassing board completed the canvass of the returns on October 17, 1916, and on that day prepared and filed with the respondent a certified statement showing that the total number of votes cast for judges of the Supreme Court did not exceed 235,459 votes; that the candidates Parker, Morris, and Fullerton received a majority of the votes cast, and were therefore entitled to go upon the election ballot for the November election unopposed; that thereafter, as secretary of state, he certified to each and every county auditor in the state these names to be placed upon the ballot.

[1] The Attorney General, representing the

respondent, contends that this application, being filed nine days after the completion of the canvass of the returns of the primary election by the state canvassing board, was filed too late, under the provision of section 4829, and that this court now has no jurisdiction to determine the merits of the application. This contention must be sustained. Section 4829, Rem. Code 1915, provides:

"Whenever it shall appear by affidavit to any judge of the Supreme Court or superior court of the county that any error or omission has occurred or is about to occur in the printing in the name of any candidate on official ballots, or that any error has been or is about to be committed in printing the ballots, or that the name of any person has been or is about to be wrongfully placed upon such ballots, or that any wrongful act has been performed or is about to be performed by any judge or clerk of the primary election, the county auditor, canvassing board or member thereof, or by any person charged with a duty under this act, or that any neglect of duty by any of the persons aforesaid has occurred, or is about to occur, such judge shall, by order, require the officer or person or persons charged with the error, wrongful act or neglect, to forthwith correct the error, desist from the wrongful act, or perform the duty, and to do as the court shall order, or to show cause forthwith why such error should not be corrected, wrongful act desisted from, or such duty or order not performed. Failing to obey the order of such court shall be contempt. Any candidate at such primary election who may desire to contest the nomination of any candidate for the same office at said primary election may proceed by such affidavit so presented: Provided, that such affidavit may be presented within five days after the completion of the canvass by said canvassing board, and not later, and the candidate whose nomination is so contested shall, by order of such judge, duly served, be required to appear and abide by the orders of the court to be made therein."

The record shows that the canvassing board completed the canvass of the returns in the office of the secretary of state on the 17th day of October, 1916, and filed its report on that day. This application was not presented to this court until the 26th day of October, 1916, or 9 days after the completion of the canvass by the state canvassing board. The statute above quoted provides that:

"Such affidavit may be presented within five days after the completion of the canvass by said canvassing board, and not later. * * *"

It is plain, therefore, that the relator in this case has not filed his application within the time limited by statute. The relator contends that he is not contesting other nominations for the same office, but it seems quite clear that this is a contest for the nomination. The word "contest," used in this statute, refers, of course, to the causes for contest which are named in the first part of this section. If the canvassing board, or any officer named therein, has made an error in the count, or has done wrongful or negligent acts to the detriment of any candidate, that would be reason for contest, and the word "contest," as used in the provision above referred to, clearly relates to the causes therefor, as therein stated. It seems too plain for argument that the relator here is contesting for the nomination, even though he is not con-

testing the fact that others were also nominated. The limitation of 5 days was placed within this statute for a good reason. Under the provision of section 4800 of Rem. Code 1915, it becomes the duty of the secretary of state to certify to the clerk of the board of county commissioners of each county within the state the names of candidates nominated for state and district offices. This must be done not less than 20 days nor more than 30 days before a general election. After nominations are made, tickets must be printed and distributed to the various voting precincts throughout the state. This necessarily requires time, and as the time is short between the date of the canvass of the primary election returns and the date of the election, it becomes necessary to hasten the time when contests of any kind may be instituted, and the Legislature concluded that 5 days' time after the canvassing board had made its report was ample time within which contests might be instituted, and they therefore said that these contests "may be presented within five days after the completion of the canvass by the canvassing board, and not later. * * *" If contests were delayed after that time, and may be brought at any time before the election, the result might follow that no election could be had upon important offices at the November election. The fixing of this 5-day limitation was a reasonable one, and unless contests are instituted within the time the courts have no jurisdiction thereover. *State ex rel. v. Nichols*, 51 Wash. 79, 97 Pac. 1087.

[2] Counsel for the relator insist that, if we should conclude that the application was filed too late, we should examine into the merits of the case, in order to settle disputed questions which arise upon the primary law. Were we to do this, the result would be simply dictum, and of no binding force. The relator certainly knew that he must file his application within the 5 days' time, and if he was satisfied that he had a meritorious case, he no doubt would have done so. Not having done so, this court cannot determine questions over which it has no jurisdiction.

The writ is therefore denied.

MAIN, HOLCOMB, and ELLIS, JJ., concur.

CHADWICK, J. (concurring). Without taking issue with the argument made by the majority, it seems to me that there are other and more controlling reasons for denying the petition of relator. The relator did not receive a majority of the votes cast, or if he did receive such majority, he is not, under the law, entitled to have his name placed upon the general election ballot. There has been much, and it seems to me, unnecessary confusion in considering the question of the majority of votes cast with reference to judicial offices. The confusion comes from a disposition to treat the words "majority of the votes cast" as synonymous with a majority of

all the ballots—that is to say, the paper ballots—cast by the electors.

The word "ballot," in the sense in which it has thus been employed, is not in the statute, and cannot be read into it by any right rule of construction. It might be so held if there were but two candidates running, and one to elect; but, from the nature of things, the words "majority of the votes" cannot be held to be a majority of the paper ballots cast when there are several candidates and several places to be filled, and there is no compulsion or duty upon the voter to vote for the full number to be elected. If we were to accept the terms as synonymous, we would be compelled to say that a ballot, if the voter voted for two names, would be two-thirds of a vote, and if he voted for one name, one-third of a vote. Such a construction would lead not only to the ridiculous, but to the impossible as well.

Taking, therefore, the plain words of the statute, "a majority of the votes cast," every individual expression of the elector's will is a vote. Each vote cast for a candidate is a vote. It is admitted that there were individual expressions of the electors as follows:

Judge Parker	124,218
Judge Fullerton	124,103
Judge Morris	119,897
Edgar G. Mills	108,699
C. E. Olapool	87,186

Loosely considered, it may be said that a candidate, where three are to be elected, is running against the field; but it cannot be so, for that would be running one candidate for one of the *three* positions, against, not one other place or candidate for the same place, but against *two* other places and all candidates. He would be against three fields. For the purpose of the argument, we may assume that the Supreme Court is a body divisible into nine parts. Three parts are to be filled. A certain number of the electors register their choice for Judge Parker for one of these places. It does not follow that, because they vote for two other men for two *other* places, they have cast either one or two votes against Judge Parker. The candidate has no interest in the other places. Nor has the elector who votes for Judge Parker any intention of reducing his vote, or, which is the same thing, creating by his vote a standard that will record his vote for others, or any part of it, against the affirmative expression of his will. It follows by this reasoning that if there are two candidates, and one received more votes than his opponent, he alone is entitled to go upon the general election ballot, and by the same reasoning, if there are four candidates and two places to be filled, or six candidates and three places to be filled—that is to say, double the number of candidates, or a less number than double the number—the three receiving the highest vote receive a majority of all the votes cast.

To illustrate: There are three places to

fill. Judge Parker has 124,218 votes. He is entitled, under the law, to the first place on the ballot unopposed, unless some one of the several candidates can show that he, as an individual, has a greater number of votes for the same place. Each candidate, in turn, must fail, for none can say, "I have more votes for any of the places to be filled than Judge Parker has." The relator, having received less than candidates Parker, Fullerton, and Morris, is in no position to challenge their right to go upon the ballot as majority candidates.

Upon this theory, it will always be possible to determine a majority, whereas counsel for relator frankly admits that, upon his theory, either no one may receive a majority, or a greater number than one-half of the candidates (double the number being on the primary ballot) can receive a majority. To hold that, where there are three nominations to be made and there are six or a lesser number of candidates, all of the candidates, or any greater number than three, can receive a majority of the votes cast, would be to violate every canon of reason and common sense. It would be to say that the Legislature provided for a selection by majorities, and then deliberately provided a scheme whereby majorities (although there were candidates equal to double the number or less of the places to be filled) could not be obtained.

We are bound to give life to all the words of a statute, if it can be done. To hold to the contrary of my conclusion would write the word "majority" out of the statute, and invite the abuse of "plunking" for one candidate; whereas, every elector should perform his full duty as a citizen and vote for three. The only way other than this to save one candidate for one place from measuring the votes for one place against the votes for all the other places would be to force the presumption that every elector had performed his whole duty and had voted for three men. There is no showing that they did not do so, and the presumption might be sustained in principle. Upon this theory, there were 565,103 votes cast. This divided by three, the number of places to be filled, the votes—ballot votes—would be 188,367. A majority would be 94,184. Clearly, then, the three having the higher number of votes would be the nominees, for there cannot be more than three *majority* nominees upon the ballot, as I shall hereafter attempt to show. To rule otherwise would be to rule that 2 and 2 do not make 4, or that a fraction may be more than the whole.

But if it be held by some strange process of reasoning that the relator did receive a majority of all the votes cast, he is still not entitled to have his name upon the ballot. The statute, Rem. Code 1915, par. 4842, reads as follows:

"When there are to be elected at any general election one or more judges of the Supreme

Court, or of the superior court of any county, the candidates for each respective office whose names are to be placed on the general election ticket shall be determined as follows: The number of candidates equaling the number of judicial positions to be filled who receive the highest number of votes at the primary election, and an equal number of candidates for such positions, providing there are such candidates, who receive the next highest number of votes, shall be the candidates for such respective offices and their names shall appear on the general election ballot under the designation of such respective offices: Provided, however, that where any candidate for any such office shall receive a majority of all votes cast at such primary election for such office, the name or names of such candidates receiving such majority shall be printed separately on the general election ballot, under the designation "Vote for _____," and the name or names of no opposing candidate or candidates shall be printed on such ballot in opposition to such candidate or candidates, but spaces equaling the number of such majority candidates shall be left following such name or names, in which the voter may insert the name of any person for whom he wishes to cast his ballot."

If there be any doubt or uncertainty in the statute requiring construction, we are not compelled to go beyond the statute for a rule of construction. The Primary Election Law (Laws 1907, c. 209), as we said in a former opinion, is intended to be a comprehensive scheme for the selection of candidates to go upon the general election ballot, and it is a familiar rule of construction that where one part of an act is ambiguous or uncertain, if the Legislature has put a construction upon some analogous part of the act, the court will follow the legislative interpretation, to the end that, if confusion is to be prevented in the one case, it ought to be prevented in the other by the same method that has been suggested by the Legislature.

In paragraph 4827, it is provided:

"In the event that there are more than one position of the same kind to be filled and more candidates of any political party receive majorities of the votes of such party cast at such election than there are positions to be filled, then in that event the number of candidates equal to the number of positions to be filled receiving the highest number of votes shall be the nominees of such political party for such positions."

True it is that this section refers to candidates of political parties, but under the rules of construction that I have suggested, we may adopt it as a guide reflecting the will of the Legislature. And now, in this case, granting, for the sake of argument only, that the relator did receive a majority of all the votes cast (which does not appear upon the face of the returns), it leaves a greater number of candidates than there are positions to be filled, and the words "the one having a majority" of all the votes cast must be construed as the one having the greater number of votes cast, for it is obvious that, as between majority candidates, pluralities must prevail. Otherwise, the intent of the statute would be entirely overcome.

Another reason for saying that this provi-

sion has application to judges of the Supreme and superior courts is that it could have no application to any other condition. Legislative positions are the only positions outside of the office of judges of the Supreme and superior courts where there is more than one position of the same kind to be filled, and, as to the legislative positions, it is elsewhere provided that the persons receiving a plurality of the votes are the candidates for the positions, and the only candidates for the positions, regardless of whether they received a majority of the votes or not. Hence this provision, in reality, can apply only to the nonpartisan offices of judges of the Supreme and superior courts.

The relator is not entitled to have his name upon the ballot, and the writ is properly denied.

PARKER, Co. Atty., v. MORGAN, Dist. Judge.
(No. 2935.)

(Supreme Court of Utah. Sept. 19, 1916.)

1. DISTRICT AND PROSECUTING ATTORNEYS \S 2(5)—REMOVAL—GROUNDS—"COLLECTION OF ILLEGAL FEES."

It is not a collection of illegal fees, within Comp. Laws 1907, \S 4580, providing for removal of officers for such offense, for the county attorney to charge more for stenographic work than he pays his stenographer, the statute covering only fees in excess of those fixed by law for certain services.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. $\S\S$ 6, 7; Dec. Dig. \S 2(5).]

For other definitions, see Words and Phrases, First and Second Series, Illegal Fee.]

2. PROHIBITION \S 3(5)—RIGHT TO MAINTAIN—OTHER REMEDY.

Where an accusation against the county attorney charged acts not prohibited by Comp. Laws 1907, \S 4579, under which it was brought, and the court therefore had no jurisdiction, the officer's remedy under section 4577 by appeal was inadequate, so that he could maintain prohibition to prevent removal under such accusation.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. $\S\S$ 5-8; Dec. Dig. \S 3(5).]

Prohibition by George P. Parker, County Attorney of Utah County, against A. B. Morgan, Judge of the Fourth Judicial District. Application for peremptory writ granted.

Cheney, Jensen & Holman, of Salt Lake City, for plaintiff. J. W. N. Whitecotton and Grant C. Bagley, both of Provo, for respondent.

FRICK, J. This is an original application to this court for a writ of prohibition to prohibit Hon. A. B. Morgan, who is judge of the district court of Utah county, from proceeding in a certain action wherein the plaintiff, as county attorney of such county, is accused of having "willfully, knowingly, and corruptly" collected illegal fees from said Utah county in the sum of \$22.65. There are various charges for different amounts, but

they all arise in the same way, and hence it is not necessary to do more than to refer to said charge of \$22.65.

The facts constituting the alleged offense, briefly stated, arise as follows: The plaintiff in this and the defendant in the proceeding which is sought to be prohibited by this writ is county attorney of Utah county; his salary as county attorney, it is alleged, "is fixed by law and an ordinance of said county" at the sum of \$1,425 per annum paid in monthly installments. In addition to said salary it is also alleged said county has paid, and "undertakes to pay," plaintiff as county attorney for the services of keeping a clerk or stenographer in his office; that the plaintiff presented a claim against said Utah county for clerk hire or stenographer's services for a sum which was \$22.65 in excess of what he actually paid to said stenographer; that he appropriated said \$22.65 to his own use and benefit, which, it is alleged, is contrary to the provisions of Comp. Laws 1907, \S 4580, which, so far as material here, reads as follows:

"When an accusation in writing, verified by the oath of any taxpayer, shall be presented to a district court, alleging that any officer within the jurisdiction of the court has been guilty of knowingly, willfully, and corruptly charging and collecting illegal fees for service rendered * * * in his office * * * the court must cite the party charged to appear before the court."

A hearing is then provided for, and the section then concludes:

"And if, on such hearing, it shall appear by the verdict of the jury that the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and taxed with such costs as are allowed in civil cases."

There are other sections which have a bearing upon the question presented here, one of which is section 4579. In that section it is, in substance, provided that in case the county attorney is accused, the accusation against him must be made by a grand jury or by the Attorney General.

It is contended by the plaintiff that in case the county attorney is accused, the remedy provided for by section 4579, supra, is exclusive and therefore the district court of Utah county is without jurisdiction to proceed under section 4580, supra. We have had occasion to consider and determine the question in a very recent case, namely Carbon County v. Hamilton et al., 160 Pac. 765. We there stated the history of the several sections now under consideration, and, following the Supreme Court of California, held that the remedies provided for in section 4579 and in section 4580 for the removal of certain county officers, including the county attorney, were cumulative. We further held that under our statute a taxpayer may inaugurate and prosecute such a proceeding independently, or that under Comp. Laws 1907, \S 511, subd. 3, a proceeding to remove such an officer may be instituted and pro-

ecuted under the direction of the county commissioners. It is not necessary to add anything to what we there stated upon this point.

[1] Plaintiff's counsel, however, further contend that, conceding that the remedies under sections 4579 and 4580 are cumulative, yet the district court of Utah county is without jurisdiction for the reason that the plaintiff has not violated any provision of section 4580. In that connection counsel contend that, although it be further conceded that the \$22.65, which it is alleged plaintiff received from Utah county for stenographer's services was in fact in excess of the salary he was entitled to, yet that the receipt and appropriation thereof by plaintiff does not constitute the offense of "charging and collecting illegal fees for services rendered or to be rendered in his office," which is denounced in section 4580. Counsel, in the course of their argument, in referring to the accusation filed against the plaintiff, say:

"The facts pleaded in the information merely show, if anything, the presentment of a false and fraudulent claim, and not the collection of illegal fees within the purview of said section." Section 4580.

The statute, in express terms, is limited to the collection of illegal fees, that is, fees not allowed by law "for services rendered or to be rendered in his office." This, manifestly, was not intended to cover every unauthorized claim that may be presented by a county official against the county, but it covers only, as expressed in the statute, illegal fees; that is, fees that are in excess of those fixed by law for official services rendered by the county attorney. For example. Let it be assumed that the county attorney is, by law, permitted to charge 50 cents or \$1 to prepare a certain official document, but he has "knowingly, willfully, and corruptly" charged 75 cents or \$1.25 for his services, then he has violated the provisions of section 4580, and, if judicially established, the court must remove him from his office. If, however, he employs a clerk or stenographer and pays him \$50 per month for his services, but files a claim against the county for \$60 per month, which is allowed and paid by the county, he, at most, has filed an excessive claim against the county. While it may be that the county attorney is not legally entitled to anything in excess of what he actually pays his stenographer, it may also be that the services rendered by the stenographer to the county are worth the \$60 claimed by the county attorney. But, be that as it may, it is sufficient for the present to determine that such a claim does not constitute the offense described in section 4580. In this connection it should also be kept in mind that the effect of the statute is penal, and may be more or less drastic upon the removed county officer. In view of that fact courts should not include within it acts which

are not expressed or clearly implied. In the course of the opinion in *Law v. Smith*, 34 Utah, 394, 98 Pac. 300, we had occasion to point out that not all excessive claims filed by a county officer against the county come within the provisions of section 4580. We are of the opinion that the charge against the plaintiff comes within the rule laid down in that case, and hence does not come within the provisions of the sections last referred to. The Supreme Court of Idaho, in which state a similar statute is in force, has followed the rule laid down by us in *Law v. Smith*, supra, in the cases of *Coleman v. Wanamaker*, 27 Idaho, 342, 149 Pac. 292, and *McRoberts v. Hoar*, 28 Idaho, 163, 152 Pac. 1046.

[2] It is, however, further contended that this application must fail if for no other reason than that the plaintiff has a speedy and adequate remedy at law. The statute (Comp. Laws 1907, § 4578) provides that in case an officer is removed from office by the district court he may appeal to this court, but in taking the appeal the judgment of removal remains in full force and effect until reversed by this court. The officer thus stands removed from his office, although the proceeding against him may, by this court, be held wholly without force or effect, that is, this court may finally hold that the district court had no jurisdiction to proceed against him. One of the grounds upon which this application is based is that the acts alleged in the accusation filed against the plaintiff do not come within section 4580, upon which the accusation is based, and that for that reason the district court is without jurisdiction to proceed, and we so hold. In view of that fact the plaintiff might thus be removed from office by the district court upon an accusation which has no foundation in law. That court would thus have no jurisdiction to proceed. An appeal would therefore not be an adequate remedy. In 3 *Suth. Code Pl. Pr. & F.* § 7121, the author says:

"* * * But appeal is not an adequate remedy where change of venue has been granted from that court, or the court has no jurisdiction, and costs for transporting witnesses are not recoverable, or where an attachment is wrongfully continued pending an appeal, or a public officer is removed from office pending an appeal as to his malfeasance."

It follows that a peremptory writ as prayed for should therefore be issued. Such is the order.

STRAUP, C. J., and McCARTY, J., concur.

CARBON COUNTY v. HAMILTON et al.
(No. 2937.)

(Supreme Court of Utah. Oct. 16, 1916.)

1. COUNTIES ~~§~~48—POWERS OF COMMISSIONERS—REMOVAL OF OFFICERS.

Under Comp. Laws 1907, § 511, subd. 3, authorizing county commissioners to direct prosecutions for officers' delinquencies, and sec-

tion 4580 as to accusations against officers by the grand jury, or by taxpayers, the county commissioners, having power to prosecute for delinquencies, also have power to direct prosecutions by individuals.

[Ed. Note.—For other cases, see Counties, Dec. Dig. ¶48.]

2. COUNTIES ¶48—POWERS OF COMMISSIONERS—EXPENDITURES—RECOVERY.

Even if county commissioners proceeded irregularly by directing an individual to prosecute the sheriff and county attorney for alleged delinquencies, the irregularity, if any, should have been raised in that proceeding, and not in suit by the county to recover moneys alleged to have been expended illegally therein.

[Ed. Note.—For other cases, see Counties, Dec. Dig. ¶48.]

3. COUNTIES ¶54—POWERS OF COMMISSIONERS—REMOVAL OF OFFICERS.

In such case, the irregularity, if any, would not, standing alone, make the order of prosecution void and without legal effect.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. ¶54.]

4. COUNTIES ¶59—POWERS OF COMMISSIONERS—EXPENDITURES—RECOVERY.

Since Comp. Laws 1907, § 511, subd. 3, authorizes county commissioners to direct prosecutions of officers for delinquencies, the mere fact that the county is not nominally or pecuniarily interested in ouster suit by an individual, directed by the commissioners, does not make the act of the commissioners void or warrant recovery from them of sums expended in such suit.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 83, 84; Dec. Dig. ¶59.]

5. COUNTIES ¶47—POWERS OF COMMISSIONERS.

County commissioners can exercise only such powers as are conferred upon them expressly or by necessary implication of statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. ¶47.]

Appeal from District Court, Carbon County; A. H. Christenson, Judge.

Action by Carbon County against William T. Hamilton and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

O. S. Price, of Price, and Allen T. Sanford, of Salt Lake City, for appellants. Thomas Fouts, of Price, for respondent.

FRICK, J. Carbon county, in its corporate capacity, instituted this action against the defendants B. Randolph, Wm. T. Hamilton, and Joseph R. Sharp as the county commissioners of said county. The other parties were made defendants as bondsmen of said commissioners. The action was commenced to recover from said defendants certain moneys which, it is alleged, said commissioners disbursed and expended without authority of law. Three actions were commenced, but were consolidated in the district court and thereafter proceeded as one action, and we shall so treat them. The defendants answered the complaint and as a defense to the action in substance averred that during the years 1912, 1913, and 1914, one C. C. McWhinney was the county attorney of said Carbon county, and that during said years one

Thomas F. Kelter was the county sheriff; that said county attorney and said sheriff had willfully failed, neglected, and refused to prosecute certain gamblers and to suppress gambling which was carried on and conducted openly and notoriously in said county by certain gamblers and others, and which was permitted by said county attorney and said sheriff, although they had officially been requested by said county commissioners to institute and prosecute proper proceedings against said gamblers and to suppress said gambling; that said commissioners had applied to the Attorney General of the state of Utah for aid, advice, and assistance in the premises, but had received none; that for the reason that said county attorney and said sheriff had knowingly and willfully failed, neglected, and refused to discharge their official duties as aforesaid, said county commissioners ordered and directed one George N. Hill to institute proceedings in his name against both the said county attorney and against said sheriff to remove them from their respective offices; that said county attorney was necessarily disqualified to act in said actions, and for that reason said county commissioners, on behalf of said Carbon county, employed certain attorneys to prosecute the actions commenced by said Hill against said county attorney and said sheriff; that said commissioners, in the name of said county, agreed to pay, and did pay, to the attorneys employed by them, for the purposes aforesaid, certain moneys belonging to said county for attorney's fees and for expenses, etc.; that the moneys so expended and disbursed, as aforesaid, were necessarily expended and disbursed for the purpose aforesaid, and the amount sought to be recovered in this action is the amount so paid, expended, and disbursed, as aforesaid. Carbon county filed a general demurrer to the answer and the district court sustained the demurrer and entered judgment against the defendants for the several amounts stated in the complaint. The defendants appeal.

It is insisted that the district court erred in sustaining the demurrer to the answer and in entering judgment against them for the moneys expended and disbursed by the county commissioners as aforesaid. It will be observed that the county, by its demurrer, admits the facts stated in the answer regarding the willful neglect and misconduct of the county attorney and county sheriff. The present theory of the county is outlined in its brief in the following words:

"It is true that the county attorney was defendant in one case, and that the county sheriff was the defendant in the other case, and it is probably true that the county attorney and the county sheriff were in collusion, so that the county attorney would have been disqualified to conduct these suits; but these facts will not excuse the county commissioners for paying out county money to aid a private person in con-

ducting civil suits to which the county was not a party."

In other words, the county now takes the position that, although the county attorney and the county sheriff not only willfully and knowingly refused to prosecute the gamblers and to suppress gambling in Carbon county, and that they both willfully disregarded the order of the county commissioners to perform their official duties in that regard, yet proceedings instituted at the request and upon the direction of the county commissioners by said Hill to remove said county attorney and said sheriff from office were merely private proceedings in which the county had no interest whatever, and therefore the moneys expended and disbursed for the purposes before stated by the commissioners were disbursed without authority of law, and therefore the judgment is right and should prevail. Upon the other hand, the county commissioners contend that under the different statutes of this state, when considered together, it was their duty to prosecute delinquent officials, and the fact that the prosecutions were commenced in the name of Hill is not controlling. One of such statutes relied on by the county commissioners, among other things, prescribes the general powers and duties of the county commissioners of the several counties of this state as follows:

"To supervise the official conduct of all county officers and officers of all precincts, districts and other subdivisions of the county (except municipal corporations); see that they faithfully perform their duties; direct prosecutions for delinquencies; and, when necessary, require them to renew their official bonds, make reports, and present their books and accounts for inspection." Comp. Laws 1907, § 511, subd. 8.

We have a further statute (Comp. Laws 1907, § 4580) which, so far as material here, reads:

"When an accusation in writing, verified by the oath of any taxpayer, shall be presented to a district court, alleging that any officer within the jurisdiction of the court has * * * knowingly, willfully, and corruptly refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court."

The statute then provides for a hearing, and concludes thus:

"And if, on such hearing, it shall appear by the verdict of the jury that the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and taxed with such costs as are allowed in civil cases."

Other provisions are contained in several other sections of the statute. In section 4566 it is provided that either the grand jury or county attorney may present accusations against "any district, county, precinct, municipal, or school district officer, or officer of any board of education, for any high crime, misdemeanor, or malfeasance in office." In section 4579 it is provided that, in case the county attorney is charged, the accusation must be made by the grand jury or by the Attorney General of the state, and that the

judge of the district court must "appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the county attorney of an adjoining county and require him to conduct the proceedings."

[1] All of the sections we have referred to, except section 511, subd. 3, are taken from the Penal Code of Montana. See Rev. Codes Mont. 1907, §§ 8991-9006 (Pen. Code 1895, §§ 1530 to 1545, inclusive). Practically the same provisions are also found in the California Penal Code constituting sections 758 to 772 of that compilation. Several of the sections above referred to, including section 4580, supra, have frequently been before the Supreme Court of California, as appears from the annotator's notes to said sections, to which we refer. Section 4580, supra, was before the court in the case of Coffey v. Superior Court, 147 Cal. 525. It was there held that the proceedings against an offending officer "may be inaugurated by a grand jury," as provided in our section 4566, supra, "or by a private individual," as provided by our section 4580, supra, which is section 772 of the California Penal Code. In other words, it is there held that prosecutions may be inaugurated under either section, and that the remedies provided therein are cumulative. By referring to the history of the several sections of the California Penal Code it will be seen that section 772, which corresponds to our section 4580, was originally passed as an independent act. In 1872, however, it was added to the other sections numbered 758 to 771, inclusive, as section 772. The California Supreme Court's construction, therefore, that the remedy provided in our section 4580 is cumulative is clearly sound. It should not be assumed that in adopting an additional section upon the same subject the Legislature did not also intend the additional remedy provided in such section as being cumulative. In addition to the provisions contained in the California and Montana statutes we have the provisions found in section 511, subd. 8, to which we have already directed attention. It is there provided that the county commissioners of the several counties of this state must see that the several officers in that section enumerated, among which are county attorneys and county sheriffs, "faithfully perform their duties." In case the officers fail or neglect to discharge their official duties it imposes the duty upon the commissioners to "direct prosecutions for delinquencies." It would thus seem that the statute has conferred ample authority upon the county commissioners of this state to institute proceedings against and to prosecute any and all officers mentioned in section 511, subd. 3, in case of official delinquency. It would also seem that, being given the power to prosecute, they also have the power to direct prosecutions.

[2-4] It may be that in directing Mr. Hill to institute proceedings against the alleged

delinquents and to prosecute them the commissioners proceeded irregularly. Such irregularity was a matter, however, to be raised and considered in that proceeding. If, however, it were now conceded that the proceedings were irregular, even grossly so, yet that fact, standing alone, would not, as the county now insists, make the act of the county commissioners in directing the prosecutions void and without legal effect. Neither is the contention sound that the action of the county commissioners in paying the money for the purposes aforesaid was illegal and without authority of law because the county was not a party to and was not, as a corporate entity, pecuniarily interested in the action or proceedings against the county attorney and the sheriff. It must not be overlooked in this connection that the statute authorizes the county commissioners to "direct prosecutions for delinquencies" generally and not only in cases where the county, as a corporate entity, is pecuniarily interested or to which it is a party. While, as already suggested, the commissioners may not have proceeded in the most approved manner, and may have erred, yet they nevertheless did not act or proceed without authority of law, and hence, as pointed out in *Salt Lake County v. Clinton*, 39 Utah, 482, 116 Pac. 1075, money disbursed by them, although paid irregularly or erroneously, cannot be recovered in an action instituted against them for that purpose.

[8] It is quite true, as contended by the county, that the doctrine that county commissioners can exercise such powers only as are expressly or by necessary implication conferred upon them by the statute is elementary. The duty to require all county officers to "faithfully perform their duties" and to "direct prosecutions for delinquencies" is expressly imposed upon the commissioners. The duty being imposed, the power to discharge such duty and to make it effective is therefore necessarily implied. The statute does not, as the county contends, limit the commissioners to actions only in which the county is pecuniarily interested and to which it is a party. The statute having imposed no such limitation, the courts are not authorized to impose one. Moreover, as pointed out by the Supreme Court of California in *Coffey v. Superior Court*, supra, the several statutes provide for cumulative remedies against delinquent officers. Why then may not the county commissioners, upon whom is cast the special duty to see that the laws are enforced in the county and to prosecute delinquent officers who fail or neglect to perform their official duties in that regard, either inaugurate or direct prosecutions and defray the expenses necessarily incurred out of available county funds? And in case the county attorney is the accused party, or is otherwise disqualified, why may not such commissioners employ other counsel and allow them reasonable com-

pensation for their services? If they may not do that, then they cannot discharge the duties imposed on them by the statute. Again, why say that the commissioners cannot employ counsel except in cases to which the county is a party or in which it has a direct pecuniary interest? Are not the taxpayers interested in having the laws enforced? Is it not to their interest to have the officers discharge their official duties? Is it not a notorious fact, universally acknowledged, that the real weakness of popular local government lies in the lax enforcement of the laws relating to what are known as police powers by the local officers whose duty it is to enforce them? Is it not a matter of general knowledge that public officers, upon whom the taxpayers rely for protection, too often shut their eyes to the offenses committed by gamblers, confidence men, prostitutes, and like offenders? Where such conditions prevail, and every one knows that they do now and then prevail, of what use are our penal laws? Under our form and construction of government all communities must rely upon the honesty and integrity of their officers. If they refuse to arrest and prosecute gamblers, government becomes a mere farce. As pointed out by the Supreme Court of California the Legislature had the power, and by the enactment of the several statutes has provided cumulative remedies by which officers who knowingly and willfully fail and neglect to perform their official duties may be, expeditiously and without great expense, removed from office. Removal from office is the only penalty that such statutes impose. So far as the pleadings show the county commissioners, in good faith, attempted to discharge their legal duty as they understood the law. They should be commended rather than penalized for that so long as there is any law justifying their acts and conduct, although they may have acted irregularly and erroneously.

It is not necessary to refer to the numerous cases cited by counsel. Neither side has found a case precisely in point, and we have found none. No case has, however, been cited—and we have found none—in which a doctrine contrary to the one we have invoked and followed has been announced. Nor have we found any statute in which the duty to prosecute delinquent officers is imposed upon the county commissioners in terms and as broad as it is in our own statute. Our conclusion, therefore, is principally based upon the provisions contained in our statute.

The judgment is reversed, and the cause is remanded to the district court of Carbon county, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed. Appellants to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

GROSTEIT v. MILLER. (No. 2907.)

(Supreme Court of Utah. Oct. 16, 1916.)

1. APPEAL AND ERROR \S 627(2), 639(1), 773(3) —**DISMISSAL—NONCOMPLIANCE WITH RULES.**

Though Supreme Court rules 6, 10 (97 Pac. viii), as to contents of abstract and time of filing it and serving brief, be not complied with, yet no prejudice resulting, and there be no delay in the hearing, appeal will not be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2744-2747, 2749, 2829, 3104, 3108, 3126; Dec. Dig. \S 627(2), 639(1), 773(8).]

2. APPEAL AND ERROR \S 1001(1)—**REVIEW OF FINDINGS.**

The jury's findings will not be disturbed so long as there is some substantial evidence in support thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3928-3933; Dec. Dig. \S 1001(1).]

3. APPEAL AND ERROR \S 639(1)—**RECORD.**

The court may refuse to search for questions, answers, and rulings, they not being in the abstract, and neither it nor the brief stating where they can be found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2829; Dec. Dig. \S 639(1).]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by Frank Grosteit against Peter Miller. Judgment for plaintiff, and defendant appeals. Affirmed.

Gustin, Gillette & Brayton, of Salt Lake City, for appellant. George M. Sullivan, of Salt Lake City, for respondent.

FRICK, J. The plaintiff brought this action to recover damages for personal injuries which he alleged he suffered through the negligence of the defendant. The plaintiff recovered judgment in the district court of Utah county, and the defendant appeals.

[1] Plaintiff's counsel has interposed a motion to dismiss the appeal upon the grounds: (1) That the defendant "failed to file his abstract within the 15 days after the filing of the transcript, as required by rule No. 6 of this court (97 Pac. viii)"; (2) that the abstract filed does not comply with said rule 6; and (3) that the defendant failed to serve his printed brief within the time required by rule 10 of this court (97 Pac. viii). Counsel for plaintiff in his brief insists, and in his oral argument also vigorously contended, that we should enforce the foregoing rules and dismiss this appeal. Unless we do so, he contends, the rules of this court will be practically nullified and set aside without any reason therefor. Counsel, in our judgment, fails to grasp the real purpose and effect of the rules. Those rules are merely directory and have been adopted for the convenience of the court and counsel, to prevent

unnecessary delays, and to promote the administration of justice in this court. The rules, therefore, are intended merely as a means to an end, and, as such, are the servants and not the masters of this court. While it is true that defendant's counsel have failed to file their printed abstract, and have also failed to serve their brief within the time required by the rules referred to by counsel, and without obtaining an extension of time for doing so, yet the case was heard on the precise day on which it would have been heard if the rules had been strictly followed in every particular. It is also true that the abstract in some material parts does not comply with rule 10 of this court. When plaintiff's counsel was asked at the hearing, however, whether either he or his client had been or was prejudiced by reason of counsel's failure to observe the rules in the particulars stated in the motion to dismiss the appeal, he frankly conceded that no prejudice or injustice whatever had resulted, and that he insisted upon his motion upon the sole ground that the rules of this court had in fact not been complied with. To grant a motion upon those grounds might, and in many cases of necessity would, result in a denial of the right of review in this court. Injustice might, therefore, result from the strict and literal enforcement of the rules when no one would or could be injured or prejudicially affected by disregarding the objections that the rules have not been strictly complied with. Whenever unnecessary delay results from a failure to comply with any one or more of the rules of this court, or if the respondent in an action is in any way injured or prejudiced by their nonobservance, we shall not hesitate to enforce obedience to our rules if in doing so prejudice or injustice may be prevented. Where, however, a non-compliance with the rules does not and cannot harm any one in his legal rights, we, in all cases, reserve the right to exercise our judgment and discretion in the matter, and shall either enforce or refuse to enforce the rules as justice and right may require. For the reasons stated, the motion to dismiss the appeal should be, and it accordingly is, denied.

[2] We now proceed to a consideration of the merits of defendant's appeal. His counsel contend that the evidence is insufficient to sustain the verdict of the jury, and that for that reason the judgment should be reversed. The plaintiff was engaged as a mucker in defendant's metal mine. The plaintiff had had no experience as a metal miner, and so informed the defendant at the time he was employed, and the defendant employed him as a mucker merely. On the day of the accident the plaintiff assisted one Thornton, who was an experienced miner, and also employed by the defendant, to put

in timbers or stulls at or near the face of the tunnel which was being driven into the mountain to hold up or support the roof of said tunnel. When Thornton and the plaintiff had put some of the timbers or stulls in place the defendant arrived and informed them that one of the stulls was too high and ordered that it be lowered. The defendant accordingly instructed Thornton to remove the stull, and directed the plaintiff to take out some earth in the bottom of the tunnel so as to lower the stull in question. While plaintiff was in the act of taking out the earth for the purpose aforesaid, and while he was down upon his knees, some rocks and earth fell upon him from the roof of the tunnel, and he sustained the injuries complained of. It is now urged by defendant's counsel that the evidence is insufficient to justify the finding of negligence on the part of the defendant, and that the plaintiff as matter of law assumed the risk. Without pausing here to state the evidence in detail or to enlarge upon the reasons which impel the conclusion reached, it must suffice to say that counsel's contentions should not prevail. The law, with respect to the questions before stated, was properly stated in the court's instructions to the jury, and, in view of the circumstances under which plaintiff received the injuries complained of, there is at least some substantial evidence in support of the finding of the jury on both questions. The mere fact that the evidence may not be strong, or may, in our judgment, be doubtful, is not sufficient to authorize us to interfere with the jury's findings so long as there is some substantial evidence in support of the verdict. This assignment must therefore fail.

[3] Three other assignments relating to the rulings of the court in admitting and excluding answers to certain questions propounded to the witness Thornton are also urged. The questions are not even printed in defendant's abstract, nor is any statement contained, either in counsel's brief or in the abstract, with respect to where the questions and rulings are contained in the bill of exceptions, if in fact they are contained therein. Under such circumstances counsel cannot complain, if we refuse to institute a search for the alleged questions and answers and rulings of the court. The questions complained of are, however, set forth in the assignments of error, which are printed in the abstract, and from the face thereof the defendant could not have been prejudiced by, and the plaintiff could not have gained any advantage from, the court's rulings.

For the reasons stated, the judgment is affirmed, with costs to the plaintiff.

STRAUP, C. J., and McCARTY, J., concur.

DORAN v. FIRST NAT. BANK OF CLOVIS.
(No. 1842.)

(Supreme Court of New Mexico. Oct. 4, 1916.)

(Syllabus by the Court.)

1. ESTOPPEL \S 56, 57—**EQUITABLE ESTOPPEL**
—**REQUISITES.**

Estoppel by conduct can arise only where the person setting up the estoppel has been caused, by the conduct of the person to be estopped, to take a position to his detriment which he would not have taken but for his reliance upon such conduct. Nor will estoppel arise from the mere retention of a promissory note of a third party by a person's attorney, where no benefits are accepted therefrom, and where the same was received by the person's agent without authority. [Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 142, 143; Dec. Dig. \S 56, 57.]

2. PRINCIPAL AND AGENT \S 169(1)—**AUTHORITY OF AGENT—UNAUTHORIZED ACTS—RATIFICATION.**

Under the same circumstances, mentioned above, and where the person sought to be estopped did nothing except to assert his original rights, ignoring the unauthorized acts of his agent, there is no ratification of such acts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 637; Dec. Dig. \S 169(1).]

3. PRINCIPAL AND AGENT \S 124(1)—**AUTHORITY OF AGENT—QUESTIONS FOR JURY.**

Where there is a conflict of evidence as to the actual authority of an agent, it is error to direct a verdict, if the case turns upon that point.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 724; Dec. Dig. \S 124(1).]

Appeal from District Court, Santa Fé County; E. C. Abbott, Judge.

Action by Paul Doran against the First National Bank of Clovis. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions to award a new trial.

M. C. Spicer, of Socorro, for appellant.
Patton & Bratton, of Clovis, for appellee.

PARKER, J. Appellant brought an action in the district court of Santa Fé county to recover the value of two notes, dated October 2, 1912, for \$500 each, and executed by the Liebelt Company, a corporation, and by the Liebelt brothers, individually, to one Otto Liebelt, which said notes were indorsed to the plaintiff. The appellant delivered the notes to the appellee bank for collection. The appellant thereafter demanded from the appellee bank the return of the notes, but the bank refused to deliver the same, and thereupon the action was instituted as for conversion of the same. The appellee bank answered, admitting the receipt of the notes for collection, but alleging that after such receipt by it the appellant and one B. D. Oldham entered into a contract, whereby it was mutually agreed between appellant and the said Oldham that appellant should assign and transfer to said Oldham the said notes in consideration of the promissory note of the said Oldham; that pursuant to the said contract the said Oldham executed

his promissory note, payable to the order of appellant, dated January 29, 1914, for the sum of \$1,105, which said note was received and accepted by the appellant in exchange for and in lieu of the said two notes for \$500; that pursuant to the said contract between appellant and the said Oldham, the defendant delivered the said two \$500 notes to the said Oldham; and the said contract between appellant and the said Oldham was evidenced by certain letters, copies of which were attached to the answer. Appellant filed a reply in which he denied that he ever made any such contract with the said Oldham, or that he ever received and accepted any note from the said Oldham in exchange for the Liebelt notes. He alleged that he had no knowledge as to whether the said Oldham ever executed to appellant the said promissory note for \$1,105. At the close of the trial, upon motion of the appellee, the court instructed the jury to find the issues for the defendant which was done. Appellant filed a motion to set aside the verdict and to enter judgment for the plaintiff, or, in the alternative, for a new trial. This motion was denied and judgment dismissing the complaint was entered upon the verdict. Appellant appeals.

It appears from the transcript that the said Oldham was cashier of the appellee bank when the notes were placed in said bank, and he so continued until January 13, 1914. Afterwards he made the trade for the Liebelt notes. Letters were written between Oldham and one Thomas Doran, who pretended to act for the appellant and who signed appellant's name to the letters as if he were the writer thereof, which resulted in Oldham delivering to the said Thomas Doran his personal note for \$1,105 in lieu of the Liebelt notes. At the time these letters were exchanged appellant knew nothing about them. The correspondence was carried on in the name of appellant by the said Thomas Doran, who likewise intercepted the replies, both from Oldham and, afterwards, from the appellee bank. Upon receipt of the Oldham note the said Thomas Doran, who was the father of appellant, placed it as collateral with the Capital City Bank in Santa Fé to secure a certain note of appellant, signing appellant's name by way of indorsement. On July 23, 1914, the said Thomas Doran and M. C. Spicer, attorney for appellant, took the Oldham note from the Capital City Bank and left the receipt of Thomas Doran therefor. The Oldham note remained in the possession of Spicer until the day of the trial, when it was produced by him. On July 24, 1914, the attorney, Spicer, wrote two letters to the appellee, signing himself as attorney for appellant, making a demand upon it for the return of the two Liebelt notes. At this time the appellant had not seen or consulted with the attorney, Spicer, but his father, Thomas Doran, at the request of appellant, had consulted the said Spicer in re-

gard to this matter. The demand contained in these two letters of the attorney is the only demand shown in the case to have been made upon the appellee bank for the return of the Liebelt notes, and was relied upon by the appellant at the trial. Afterwards, in September or October, appellant admits that he regularly employed the said Spicer as his attorney in this matter. Just prior to the bringing of this action, which was the 5th day of October, 1914, the attorney, Spicer, testified that he had a conference with the appellant in which he advised him of all of the steps that he had theretofore taken at the suggestion and request of Thomas Doran, and that appellant approved the same.

Counsel for appellee attempt to justify the judgment upon several grounds:

[1] 1. The first proposition advanced is to the effect that the appellant, by reason of his conduct and his failure to disaffirm and repudiate the transaction, is estopped from denying the agency and authority of his father, Thomas Doran, in trading the Liebelt notes to the said Oldham, and is estopped from denying the authority of the defendant bank to surrender the Liebelt notes to the said Oldham.

In this connection it is to be remembered that the trade for the Liebelt notes by the said Oldham with the said Thomas Doran was made about January 29, 1914. It was made in pursuance of a contract evidenced by letters between the said Thomas Doran, signing the appellant's name, and the said Oldham. The appellant had no knowledge whatever of the transaction, and had never given any specific authority to make this trade. The Liebelt notes were delivered by the defendant bank to the said Oldham without any authority from the appellant or any communication with him, or even with the said Thomas Doran. They surrendered these notes to Oldham months before the appellant had even constructive notice of the trade or of the receipt of the Oldham note by Thomas Doran, he having received constructive notice thereof not earlier than July 23, 1914. He did not have actual notice, according to the testimony, of the receipt of the Oldham note until December, 1914, or January, 1915, when his father told him about the same, and never saw the same until the day of the trial. There is no allegation nor proof that the appellee bank, had it had notice of the disaffirmance of the alleged contract made by Thomas Doran at the earliest time at which the appellant received constructive notice of the Oldham trade could have recouped its loss and recovered the Liebelt notes back from the said Oldham. The damage had been done by the surrender of the Liebelt notes many months before this, and the appellee bank, under all these circumstances, was, so far as appears, never put in any position to its detriment by any act of the appellant after he received

constructive notice. Under such circumstances there can be no estoppel. Estoppel in pais of this kind can arise only where the person setting up the estoppel has been caused, by the conduct of the person to be estopped, to take a position to his detriment which he would not have taken but for his reliance upon such conduct. See 10 R. C. L., Estoppel, § 19 et seq. See, also, *King v. Stroup*, 160 Pac. 367, recently decided by this court, as an illustration of estoppel by conduct. Nor was any use ever sought to be made of the Oldham note by appellant or his attorney, but it was simply retained by the said attorney in his files as a part of the papers and evidence in the case. There was no election to accept the note in lieu of the Liebelt notes by the appellant, and, so far as appears, no demand for its return was ever made upon him by the maker of the note. The appellee bank was in no way concerned with the Oldham note, and had never had anything to do with the same. It was not a party to any contract between Oldham and the appellant, whereby the form of the obligation was to be changed from the Liebelt notes to the Oldham note.

[2] 2. Counsel for appellee bank further seeks to justify the judgment upon the theory that the conduct of the appellant was such as to amount to a ratification as to the agency of the said Thomas Doran to make the said contract with the said Oldham and a ratification of the authority of the appellee bank to surrender the Liebelt notes to the said Oldham. The testimony shows that from the earliest time the appellant received constructive notice of the existence of the Oldham note by its being placed in the hands of the attorney, Spicer, he never pursued any course toward the appellee bank other than to attempt to recover from it the Liebelt notes. Under such circumstances, and those mentioned in the preceding paragraph, there was no ratification of the alleged contract between Oldham and the said Thomas Doran, and the appellee bank is in no position to assert any such ratification. It surrendered the Liebelt notes without authority and took no steps whatever to communicate with the plaintiff as to its authority to do so.

[3] 3. Counsel for the appellee bank admit that there was a conflict in the evidence as to whether there was actual authority from the appellant to Thomas Doran, his father, to attend to this business, and, consequently, the court had no right to take the case from the jury if the case turned upon this question. This is clearly so, and it was error under the circumstances to direct a verdict.

It follows that the judgment of the lower court was erroneous and should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

STATE ex rel. COOLE, State Controller, v. HILL et al. (No. 2250.)

(Supreme Court of Nevada. Nov. 9, 1916.)

INTOXICATING LIQUORS ~~§ 95~~—STATE LICENSES FOR CITY RETAIL SALES—DISPOSITION OF AMOUNT.

Under Revenue Act 1915 (St. 1915, c. 178) § 3, requiring persons disposing of liquor "in less quantities than a quart," in a city, to take out a county license from the sheriff; section 6, requiring persons selling liquor either at retail or wholesale, in addition to other licenses, to take out a state license, section 8, providing for the sheriff, as ex officio collector, issuing, and collecting for, a retail state liquor license to one engaged in selling liquor in quantities less than five gallons, section 9, requiring one selling liquor in quantities in excess of five gallons to take out a wholesale state liquor license, section 10, providing that monthly the sheriff shall pay to the county treasurer "all" money received by him for state liquor licenses, "in like manner and form as is hereinafter provided for the payment of county license moneys," and that in a county having a city therein he shall pay to it one-half of the "amount" of license moneys collected for disposition of liquors in less quantities than a quart, within its limits, half of the amount from state as well as county licenses for such disposition in quantities less than a quart is to be paid the city, and the balance only to the county treasurer, so that such half payable to the city is not included in "all moneys received" by the county treasurer for state liquor licenses "in accordance with the provisions of this act," for which section 11 requires him to account to the state treasurer, the word "amount," in section 10, referring to the total of two sums (citing Words and Phrases, Second Series, Amount).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 101; Dec. Dig. ~~§ 95~~.]

Original mandamus proceeding by the State, on relation of George A. Cole, State Controller, against Harry H. Hill, former Treasurer of the County of Washoe, and others. Writ denied.

George B. Thatcher, Atty. Gen., for Petitioner. L. D. Summerfield, of Reno, for respondents.

MCCARRAN, J. This is an original proceeding in mandamus, instituted by petitioner, as state controller, to compel the treasurer of Washoe county to pay over certain moneys in his hands, received from the sheriff of that county as ex officio license collector. The authority for the act sought to be required of the county treasurer is found in the several sections of an act of the Legislature of 1915 entitled:

"An act to provide revenue for the support of the government of the State of Nevada and to repeal all acts and parts of acts in conflict herewith." Stat. 1915, p. 236.

Section 3 of the act, among other things, provides:

"Any person or persons who may dispose of any spirituous, malt, or fermented liquors or wines, in less quantities than one quart, within the confines, or within one mile thereof, of any city or town shall, before the transaction of any such business take out a county license from the sheriff of the county in which he or

she proposes to do such business, and pay therefor the sum of thirty dollars per quarter year, or proportionate amount for fractional quarter as hereinafter provided. * * *

Section 6 of the act provides:

"Every person, firm, company, or corporation manufacturing or selling, either at retail or wholesale, any spirituous, malt, or vinous liquors, shall, in addition to other licenses provided by law, take out a state liquor license as hereinafter provided, which license shall not be transferable by sale, assignment, or otherwise."

Section 8 of the act provides:

"The sheriffs of the respective counties, as ex officio collectors of licenses, shall issue and collect all state liquor licenses, and shall, upon the payment of one hundred (\$100), issue a retail state liquor license to any person, firm, company, or corporation engaged in selling spirituous, malt, or vinous liquors in quantities less than five gallons, and the word 'Retail' shall be written in red ink across the face of such license. * * *"

Section 9 provides:

"Any person, firm, company or corporation disposing of spirituous, malt, or vinous liquors in quantities in excess of five gallons shall be considered a wholesaler or rectifier, and shall pay a state liquor license of one hundred and fifty dollars (\$150) per annum, and the word 'Wholesale' shall be written across the face of such license, in red ink."

The section of the act most vital to the determination of the matter at bar, and which we are asked to construe here, is section 10, which in its provisions is as follows:

"On the first Monday in each month the sheriff shall pay over to the county treasurer all moneys received by him for state liquor licenses in like manner and form as is hereinafter provided for the payment of county license moneys; and the duties and liabilities of the sheriff, treasurer, and auditor with relation thereto shall be the same as hereinafter prescribed with relation to county licenses. The county treasurer shall between the second and third Mondays in each month, forward to the state controller a certified detailed statement of all moneys paid to him by the sheriff in accordance with this section, which statement shall show the number of each license, whether wholesale, retail, or druggists, to whom and date issued, period covered, amount of each license, and total amount received; which statement shall be furnished to the county treasurer by the sheriff and shall be the basis of the monthly settlement. In every county in this state which now has or may hereafter have a duly incorporated city government, it shall be the duty of the license collector of said county to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt or fermented liquors, or wines, in less quantities than one quart, within the corporate limits of said city."

It must be observed that section 3 of the act contemplates the requirement of a state liquor license, in addition to other licenses provided by law, for every person, firm, company, or corporation manufacturing or selling liquors either at retail or wholesale. This section is complete within itself, and the words therein contained must be given their ordinary and usual significance.

Section 8 requires the taking out of a state liquor license, to be known as a retail license, and to be required of all per-

sons, firms, companies, or corporations engaged in selling liquors in quantities less than five gallons.

By section 9 a state liquor license, designated as a wholesale license, is required to be taken out by all persons, firms, companies, or corporations disposing of liquors in quantities in excess of five gallons.

Manifestly the latter part of section 10, which requires the license collector to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt, or fermented liquors, etc., in less quantities than one quart, does not apply to state wholesale liquor licenses, because by the provision of section 9, authorizing the issuance of such license, the provision is made that such license shall be issued only to those disposing of the liquor in quantities in excess of five gallons. The term "in excess of five gallons," as used in section 9, is exclusive of the term "in less quantities than one quart" as used in section 10. But does the term "in quantities less than five gallons," as used in section 8 with reference to state retail licenses, include that which is comprehended by the term "in less quantities than one quart" as used in section 10 applicable to the division of license moneys and the payment of one-half of the sum into the city treasury?

The whole contents of sections 3, 4, 5, 6, 7, 8, 9, and 10 have to do exclusively and entirely with liquor licenses. Hence it will not be seriously contended, we apprehend, that any part of section 10 has to do with or refers to the payment or turning over of license moneys other than that secured from the several classes of liquor licenses.

Some contention is made that the word "all" as used in the first part of section 10 precludes the idea of a division of the money received by the license collector for state liquor licenses only. As we view this expression used in section 10, it must be read in conjunction with that which follows, and applies with equal force to the disposition required to be made by the license collector of county liquor licenses. All moneys received by the license collector for state liquor license must, as we view the provisions of the first part of section 10, be paid over to the county treasurer in like manner and form as is provided for the payment of county license moneys.

So we inquire: What is the manner and form provided by this statute for the turning over of county liquor licenses by the license collector? Indeed, we find no other provision in the statute in which the manner and form of paying over the license collected by the sheriff to another custodian, either state, county, or municipal; is provided for, save and except that manner and form prescribed in section 10 itself. So we look to section 10 for that manner and form in

which or by which county licenses are to be turned over from the license collector to another custodian. The words "manner and form" are, as we view them, expressive of the statement to be rendered and the segregation to be made by the license collector as the same are provided for in the section. So the manner and form of paying over state liquor license moneys is the same manner and form that is to be followed in the paying over of county liquor license moneys.

This brings us to the significant part of section 10, which, unless we declare certain of its expressions to be devoid of meaning, is significant of the manner and form for the turning over by the license collector of liquor license moneys collected within his jurisdiction. It prescribes:

"In every county in this state which now has, or may hereafter have a duly incorporated city government, it shall be the duty of the license collector of said county to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt or fermented liquors, or wines, in less quantities than one quart, within the corporate limits of said city."

Section 8 of the act in substance provides that persons disposing of liquor in less quantities than one quart within the confines of any city shall take out a county license. Section 6 provides, in substance, that those who dispose of liquor in less quantities than one quart must secure a state retail liquor license in addition to other licenses. In these two sections, it will be observed, the specific designation is made of those who dispose of liquor in less quantities than one quart. These sections provide that both state retail liquor license and county liquor license shall be carried by the parties disposing of the liquor in a specific way, to wit, in less quantities than one quart. The same significant term is used in the latter part of section 10, wherein the manner and form of turning over the amount of moneys collected from licenses so issued is provided for; and there it is prescribed in substance that one-half of the amount of license moneys collected from any person disposing of liquors in less quantities than one quart shall be paid into the city treasury where an incorporated city exists within the county.

In that manner and form prescribed by the statute for the disposition of the moneys collected no designation is made or exception created as to moneys collected from that class of dealers who dispose of liquor in quantities less than one quart and who must operate under the two licenses. If it were the intention of the Legislature that the division of money should apply only to moneys collected from county licenses, we assume that that body would have found it as convenient to so declare, as was done in section 15 of the very same act, where, in dealing with another class of license, to wit, dancehouse licenses, we find the statute to read:

"All moneys received for licenses under the provisions of this section shall be paid three-quarters into the county treasury and one-quarter into the state treasury for general county and state purposes respectively."

True it is that in sections 8 and 9 the licenses provided for thereunder are designated as state licenses; but the very fact that the latter part of section 10 makes no such designation as affecting a division of the money by the license collector is to our mind conclusive of the proposition that it was the intention of the Legislature that it should apply to state and county licenses with equal force. Had the Legislature intended otherwise, it would have so designated, at least by a substantial intimation. The first part of section 10, providing that the sheriff shall pay over to the county treasurer "all moneys received by him for state liquor licenses," if it stood alone in these words, might bear out the contention that the word "all" was intended to apply to state moneys only; but the term "in like manner and form as is hereinafter provided for the payment of county license moneys" fixes the proposition, and emphasizes the conclusion that all state liquor license money was to be subject to the same "manner and form" of distribution as was provided for with reference to county license moneys, and as to the latter the division by the license collector is provided for specifically.

Section 11 is referred to as tending to clarify the situation. The county treasurer is by section 11 required to include in his regular semiannual statement with the state treasurer "all moneys received by him on account of state liquor licenses in accordance with the provisions of this act." What are "all moneys received by him for state liquor licenses in accordance with the provisions of this act?" The answer to that interrogatory comes from section 10, wherein it provides for a segregation of the money, not by the county treasurer, but by the county license collector before he renders his accounting to the county treasurer. Hence "all moneys received by him [the county treasurer] for state liquor licenses" signifies all moneys turned over from the county license collector to him as county treasurer. Those are all of the moneys for which he can be accountable, because the segregation takes place before the county license collector renders his statement to the county treasurer.

If it had been the intention of the Legislature to require the county treasurer to account to the state treasurer for all the moneys collected from state licenses, language to this effect could easily have been used. How comprehensive and effective of the purpose it would have been if the Legislature had said the county treasurer shall include in his regular semiannual statements with the state controller all moneys collected on account of state liquor licenses

But not so. The Legislature, evidently mindful of the purpose sought to be accomplished, said:

"The county treasurer shall include in his regular semiannual settlements with the state treasurer all moneys received by him on account of state liquor licenses."

And then, to further emphasize that there were provisions in the bill which affected moneys collected from state liquor licenses by the county license collector, the Legislature inserted the words "in accordance with the provisions of this act."

It is asserted that, inasmuch as the latter part of section 10, providing as it does for the division of liquor license moneys, was an independent statute enacted by the Legislature of 1893 (Stat. 1893, p. 25), and that when this provision stood as an independent act no such construction was placed upon it as that contended for by respondent, and inasmuch as the sheriff of Washoe county construed the language of the statute of 1893 in the manner now contended for by petitioner, therefore this language, when incorporated into another statute which of itself repeals the act of 1893, should receive the same construction. This contention, we think, falls by the weight of its own position as it stands in the history of legislation upon the subject of revenue derived from liquor licenses in this state. It was not until 1905—12 years after the enactment of the statute of 1893—that the Legislature of this state provided for a state wholesale and a state retail liquor license (Stat. 1905, p. 228), and in that act a specific provision appears, wherein it is set forth:

"The sheriffs of the respective counties of this state are hereby required to make quarterly statements to and settlements with the state controller in the matter of the licenses herein authorized and required to be issued and collected, and to pay into the State Treasurer quarterly all moneys by them severally collected for such licenses, taking his receipt therefor."

The provisions of the act of 1905 referring to state retail and state wholesale liquor licenses were engrossed into what might be termed, at least for the purpose of convenience, a compilation of certain license acts theretofore enacted. By the statute of 1915, construction of which we are required to make here, all of the wholesale and retail liquor license acts, both state and county, were embodied into one law. The provision of the act of 1905, whereby the sheriffs of the several counties were "required to make quarterly statements to and settlements with the state controller, * * * and to pay into the state treasurer quarterly all moneys by them severally collected," was dropped out of the law, and in the place of such provision the Legislature of 1915 said:

"On the first Monday in each month the sheriff shall pay over to the county treasurer all moneys received by him for state liquor licenses

in like manner and form as is hereinafter provided for the payment of county license moneys."

And as a further provision and specific direction in place of the provision of the act of 1905 the Legislature of 1915 said:

"In every county in this state which now has or may hereafter have a duly incorporated city government, it shall be the duty of the license collector of said county to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt or fermented liquors, or wines, in less quantities than one quart, within the corporate limits of said city."

Not alone one-half of the county license moneys collected, as is contended for by petitioner, but "one-half of the amount of license moneys collected," are the words of the statute. How are we to read into this provision a something not there found? How shall we say that this provision shall apply only to a certain class of liquor licenses, eliminating another class?

The word "amount," as used in the latter part of section 10, must be given its ordinary and usual meaning and significance. In Webster's dictionary it is held to mean "the sum total of two or more particular sums or quantities," and courts have held that the word "amount" referred to the total of two sums. See Words and Phrases Judicially Defined, Second Series. The term, used as it is in the latter part of section 10, must, as we view it, be construed as referring to the total of all license moneys collected from any person or persons disposing of liquor in less quantities than one quart. If the word "amount," as used in the latter part of section 10, were intended to apply only to the total of county liquor licenses, why was it not so expressed by the Legislature? And when the term is used, as here, at the conclusion of a section of the law, which section has to do exclusively with the disposition and segregation of moneys collected by the county license collectors without specifying an exception, how can the word "amount" be construed as having a more limited significance than that of its usual and ordinary acceptance?

The latter part of section 10, as we view it, directs the division of license moneys to be applicable to both state and county licenses issued to parties disposing of liquor in less quantities than one quart.

The writ prayed for should be denied.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

MILLER v. THOMPSON. (No. 2214.)

(Supreme Court of Nevada. Oct. 14, 1916.)

1. PLEADING ~~237~~(3)—AMENDMENT—PRAYER.

Under Rev. Laws, § 5081, providing that where the variance is not material, a finding

according to the evidence or an immediate amendment may be ordered, amendment of prayer of the complaint may be allowed at conclusion of plaintiff's case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 605, 606; Dec. Dig. § 237(3).]

2. CONTRACTS § 93(5)—VALIDITY—IMPOSSIBILITY OF PERFORMANCE—MISTAKE.

The contract whereby plaintiff abandons public lands, on which she has located mining claims, in consideration of the payment to her by defendant of \$100 a month, till sale of 160 acres of the land, and agreement of defendant to make application for withdrawal, under the Carey Act (Act Aug. 18, 1894, c. 301, 28 Stat. 372) of said lands and other lands, and to appropriate and develop them thereunder, the same to be sold, and a fifth of the proceeds of sale to be paid to plaintiff, is void as impossible of performance, and made under a mutual mistake; said act not allowing of sale of withdrawn land by the one withdrawing it, but only development of an irrigation system and sale of water therefrom to settlers, who make entry on the land and buy it from the state.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 419; Dec. Dig. § 93(5).]

Appeal from District Court, Ormsby County; Frank P. Langan, Judge.

Action by Bessie Miller against W. B. Thompson. Judgment for plaintiff, and defendant appeals. Reversed.

C. O. Whittemore, of Los Angeles, Cal., and Platt & Sanford, of Carson City, for appellant. H. C. Price, of Carson City, for respondent.

McCARRAN, J. This is an action on contract. It appears from the record that the plaintiff had located mining claims on the open public domain in Fish Lake Valley, in Esmeralda county, Nev., the land embraced within the claims amounting to some 65,000 acres.

The contract entered into by the parties and on which this action is founded was in part as follows:

"That for and in consideration of the sum of one hundred dollars (\$100) in hand paid by the second party to said first party, the receipt whereof is hereby acknowledged, and other valuable considerations passing from second party to first party, and the further payment to first party by second party of the sum of one hundred dollars (\$100) per month, on or before the first day of each and every month, beginning May first, 1912, during a period of time hereinafter fixed, said money to be placed to the credit of first party in the First National Bank of Los Angeles, California; and in further consideration of the terms and conditions hereinafter expressed, said first party hereby agrees to relinquish, release and abandon certain mining claims and tracts of government land situated in Fish Lake Valley, Esmeralda county, state of Nevada, approximating sixty-five thousand (65,000) acres, the abandonment of said lands having been placed in the hands of second party at the time of the signing of this agreement.

"As a further consideration for this agreement, said second party hereby agrees to make application under the law known as the 'Carey Act,' in the state of Nevada, for withdrawal of all of said lands so relinquished and abandoned by first party and her associates, and also to make application for withdrawal under said Carey Act of certain other tracts of land in said

Fish Lake Valley, Esmeralda county, state of Nevada; the whole of said lands so applied for to be approximately one hundred thousand (100,000) acres more or less; and in the event such application is approved by the proper state and United States government officials, said second party shall appropriate and develop such of said lands as he deems practical and capable of development, according to the provisions of said Carey Act; the same to be sold and disposed of to the best ability of the parties hereto; and said first party hereby agrees to use her best endeavors to assist second party in the sale of said lands and the promotion of the enterprise herein provided for, she to receive no commission on sales made by her, it being hereby agreed that second party shall be allowed such agents' commissions as he deems necessary and advisable to be paid in making sales of said lands, no part of such commissions to be paid by first party.

"It is expressly provided that the second party shall have the full and complete control and management of said business and the enterprise provided for herein and the right to make such disposition of any and all of said lands as he deems best, provided, however, that he shall pay to first party one-eighth of any and all money received from sales of land procured under this agreement, or its production, and that a monthly accounting shall be rendered by second party to first party of all sales made, and the money coming to first party under said accounting shall be placed monthly to her credit in the First National Bank of Los Angeles, California.

"It is further agreed that the payment of one hundred dollars (\$100) per month by second party to first party, hereinbefore provided for, shall cease at the time of the sale of any of the aforesaid lands amounting to one hundred sixty acres (160). * * *

"It is further agreed that all of the terms and conditions herein expressed shall be binding upon both of the parties hereto and upon their and each of their heirs, executors, administrators and assigns."

[1] Two questions are presented in the case at bar, one having to do with the right of the plaintiff in the court below to amend the prayer of her complaint at the conclusion of the presentation of her case and before the judgment was entered. The other, which we deem the more serious, is that the evidence is insufficient to warrant the judgment and decree of the trial court.

In so far as the question of the right of the court to admit of the amendment to the prayer of the complaint is concerned, the action of the court in this respect comes under the rule, which we believe well supported by authority, that a pleading may be amended so long as the facts alleged as the basis of the recovery remain the same, so that a new cause of action is not interposed; and under this rule a pleading may be amended by amending the prayer so as to enlarge or modify the extent of the relief sought. *Johnson v. White Mountain Creamery Ass'n*, 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610; *Rettig v. Newman*, 99 Ind. 424; *Western Union Telegraph Co. v. Brown*, 62 Tex. 536; *Hogueland v. Arts*, 113 Iowa, 634, 85 N. W. 818.

The section of our Code applicable to the matter (Rev. Laws 1912, § 5081) provides:

"Where the variance is not material, as provided in the next preceding section, the court may direct the fact to be found according to the evidence, or it may order an immediate amendment, without costs."

In the case of *Buckley v. Buckley*, 12 Nev. 423, this court held in substance that when the facts alleged in a supplemental pleading occurred after the original pleadings were filed and were consistent with and in aid of the original pleadings and did not bring into the case any new cause of action or any controversy that was not in fact included in the issue originally made, supplemental pleadings should be allowed if asked for so as to protect the rights of the respective parties.

The basis of the controversy in the matter at bar was the contract, which was of a continuing nature. The amount due on the contract at the time of the filing of the complaint was, by reason of the very nature of the contract itself, less than that which would have accumulated by reason thereof at the time of the rendition of judgment. It was not a new cause of action nor a cause of action based upon a new or distinct ground. It was the same cause of action based upon the same instrument.

In the case of *Maionchi v. Nicholini*, 1 Cal. App. 690, 82 Pac. 1052, the Supreme Court of California, under Code provision quite similar to ours, held that the court might direct a fact to be found according to the evidence, and may order an amendment to the original pleading sufficient to cure an immediate variance, and which would make the pleading conform to the proof; further, that this might be done without serving a copy upon the adverse party or his attorney, providing, however, that the adverse party was not actually misled by such amendment to his prejudice.

This same principle was discussed in the case of *Ennis Brown Co. v. Hurst*, 1 Cal. App. 752, in the same volume of the *Pacific Reporter* at page 1059, wherein the court held that it was proper for the trial court to permit of an amendment to the complaint after the evidence had been closed and the cause had been submitted and taken under advisement and before decision; and to the same effect is the case of *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955.

In the case of *Rambos v. Stansbury*, 13 Cal. App. 649, 110 Pac. 472, it was held that when in the trial of a cause evidence was offered as to subject-matter of an amendment subsequently made to the complaint, the court did not abuse its discretion in permitting such amendment where such would conform to the proof.

In the case of *French v. McCarthy*, 125 Cal. 509, 58 Pac. 154, the Supreme Court of California, having under consideration a matter of contract, held that where the defendant appears and answers in an action on a contract, the terms of which are set forth

in the complaint, and there is a want of conformity between the prayer of the complaint and the facts set forth, the court is authorized to permit an amendment at the trial by inserting a larger sum in the prayer.

The case of *French v. McCarthy*, supra, presented a problem affecting an amendment to the prayer of a complaint in an action where a contract continuing in its nature was involved, and where, after the action had been commenced, additional payments were made on the contract so as to involve a sum in excess of that due and owing on the contract at the time of the commencement of the action.

In the case of *Finnegan v. Ulmer*, 31 Nev. 523, 104 Pac. 17, this court, in quoting from its former decision in the case of *McCausland v. Ralston*, 12 Nev. 202, 28 Am. Rep. 781, affirmed a rule which we think applicable to the case at bar, wherein it said:

"Courts in allowing pleadings to be amended are necessarily clothed with discretionary powers which cannot, owing to the varying circumstances of each particular case, be governed by any general rule. The vital question is whether the court has grossly abused its discretion in this respect, or whether, by the allowance of the amendments, manifest injustice has been done to appellant."

The amendment allowed by the court, and which was to the prayer of the complaint, introduced no new allegations, made no additional parties, did not complicate the suit, nor increase the expense of litigation, nor did it make new issues of fact or incur the record. Early authorities on the subject of pleading addressed themselves to the subject thus:

"If the bill be found defective in its prayer for relief, or in proper parties, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. But the substance of the bill must contain ground for relief." *Lyon v. Tallmadge*, 1 Johns. Ch. (N. Y.) 184.

[2] Does the evidence support the judgment and decree of the trial court? It is the contention of appellant here that the contract in question was one which by its very terms made performance impossible, and that the contract was unconscionable. Moreover, it is contended that the contract was void, inasmuch as there was a want of consideration.

We may say at the outset that the terms and conditions imposed by the contract are, if not rare, at least unusual and novel. The plaintiff, respondent here, had located a vast tract of the open public domain by means of mining locations. These locations, being made under the authority of a federal statute applicable to the subject and pursuant to state laws in conformity therewith, contemplated at the very outset the mineralized character of the land covered by the locations. Indeed, it would be difficult for one to even imagine that respondent would assert that these claims were on other than

mineralized domain, for the mere assertion of such a contention would of itself defeat the right of respondent to locate the territory under the mining law. The validity of each claim located by respondent depended upon the discovery of mineral. *Overman S. M. Co. v. Corcoran*, 15 Nev. 149; *Golden v. Murphy*, 81 Nev. 395, 103 Pac. 394, 105 Pac. 99.

The act of making a location and the maintenance of the same upon the public lands looks for its validity to the assertion of the locator that the same is mineralized, and that the discovery of mineral has been actually made. *Golden v. Murphy*, supra.

For the maker of a mining location to declare that the territory embraced within the lands of his location was nonmineral in character would be the equivalent to declaring his location to be null and void, and his right to possession, use, or occupancy of the public domain under the mining laws of the land would automatically cease.

The contract here in question was one which to our mind indicates a joint adventure entered into by the parties for mutual gain, and this to be acquired from the sale and disposition for agricultural purposes of the very lands to which respondent here claimed title under her declaration that she held a valid location based upon the discovery of mineral.

The agreement entered into provides that:

"As a further consideration for this agreement, said second party hereby agrees to make application under the law known as the 'Carey Act,' in the state of Nevada, for withdrawal of all of said lands so relinquished and abandoned by first party and her associates; * * * and in the event such application is approved by the proper state and United States government officials, said second party shall appropriate and develop such of said lands as he deems practical and capable of development, according to the provisions of said Carey Act; the same to be sold and disposed of to the best ability of the parties hereto."

The contract further provided that the appellant here, the second party to the instrument, should pay to the first party one-eighth of any and all money received from sales of land procured under the agreement.

It might be well at this juncture to note that the act of Congress known as the Carey Act (Act Aug. 18, 1894, c. 301, 28 Stat. 372), and that under which the parties here were to carry out the provisions of their contract, is one enacted "to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers." 28 Stat. L. 372, 422, § 4. The act was passed that its provisions might be in furtherance of a former act of Congress entitled "An act to provide for the sale of desert land in certain states and territories." Act March 3, 1877, c. 107, 19 Stat. 377, U. S. Comp. St. 1913, §§ 4674-4676. The act, among other things, provides that the land may be withdrawn from the public domain and segregated to the state under rules and regulations pre-

scribed by the Secretary of the Interior. The law itself, as well as the regulations prescribed by the Secretary of the Interior, provide, among other things, that an application for the withdrawal of the lands from entry and their segregation under the act shall be accompanied by an affidavit, based upon personal examination, that the lands sought to be withdrawn are desert in character as contemplated by the Carey Act, and are non-mineral. Hence we have here a rather anomalous situation presented by the contract in question, in which the respondent, plaintiff in the court below, set up as a valuable consideration the abandonment of a right to the control and possession of public domain under the assertion that the same was mineral in character. This abandonment, however, the sole and only consideration on the part of respondent, was made in furtherance of a scheme in which, according to the terms of the contract, she was jointly interested, the success of which scheme depended upon the nonmineralized character of the very land which she claimed to relinquish. If the public domain over which respondent's mining claims were located was non-mineral, then she had no right or claim or title, under the mining laws, to the land embraced within her claims. If the territory covered by the mining claims was mineralized in character, it was impossible to carry out the scheme contemplated by the contract, in which scheme she was jointly interested and by the success of which alone she could claim anything from appellant herein. If the land in question was nonmineral, respondent had no right to control or possession of the territory covered by the claims; hence she conveyed nothing of value as a consideration. If the land was mineral in character, that of itself ipso facto defeated the scheme and made the thing sought to be carried out under the contract impossible; hence performance by the appellant was impossible.

That the contract is void as being impossible of complete execution is made manifest when we view it from another angle. The contract provides for the payment of \$100 per month to respondent by appellant; said payments to continue during a period of time as fixed by a specific section of the contract which reads as follows:

"It is further agreed that the payment of \$100 per month by said second party to first party, hereinbefore provided for, shall cease at the time of the sale of any of the aforesaid lands amounting to 160 acres."

The contract, among other things, provides:

"The whole of said lands so applied for to be approximately 100,000 acres more or less; and in the event such application is approved by the proper state and United States government officials, said second party shall appropriate and develop such of said lands as he deems practical and capable of development, according to the

provisions of said Carey Act, the same to be sold and disposed of to the best ability of the parties hereto.

By the act of Congress known as the Carey Act, no land is acquired by any person, company, or corporation, unless (if a natural person) he should become an entryman, in which case 160 acres would be the maximum acreage such entryman might acquire. The Carey Act by its several provisions contemplates the establishment and perfection of reclamation projects, the same to supply water for the irrigation of a given tract of land, and when completed, the person, whether natural or artificial, conducting the same, derives his or its profits from the sale of the water rights to actual settlers on the lands covered by the reclamation project. The act provides for temporary withdrawal of the public lands from entry. An application for a temporary withdrawal of lands under the provisions of the act means that the applicant proposes to irrigate the lands requested to be withdrawn from public entry and desires time to make the necessary surveys, maps, plats, determinations, and specifications to comply with the government requirements. The object of the temporary withdrawal is to protect the applicant from interference by persons attempting to acquire lands within the project other than through the procedure established for Carey Act projects. One who seeks to carry out a reclamation project under the Carey Act must file with the state engineer of the state of Nevada an application for a water right commensurate to the acreage sought to be reclaimed. Rev. Laws 1912, § 3068. The effect of the temporary withdrawal is to withhold the lands for one year from entry under public land laws.

One who seeks to perfect a project under the Carey Act, as we read the law, has nothing whatever to do with the sale or disposal of the land covered by the project. When the irrigation system is in condition to deliver water to settlers, the price at which water rights will be sold to such settlers having been fixed by contract between the state Carey Act Commission and the party in charge of the project (R. L. 1912, § 3071), the lands are thrown open for entry and allotment of not exceeding 160 acres to each entryman. The payments for the land are made by the entryman to the state, and the patent issued for the land is from the state to the entryman. The right to the use of the water, and not the land, is sold by the party perfecting the project to the actual settler. Stat. 1911, p. 84; 28 Stat. L. 872-422.

A contract to do a thing which cannot be performed without a violation of the law is void, whether the parties knew the law or not. 6 R. C. L. 694.

The contract here in question assumes the carrying out of a scheme made impossible by the very law under which the scheme was

to be perfected. If we read the contract correctly, it assumes the right of the parties to sell and dispose of the land and acquire a profit from such sale and disposition. The right of sale is expressly reserved by the federal statute to a third party, namely, the state. If the contract had contemplated the development of an irrigation system and the sale of the water therefrom to settlers upon the public domain under the system, the contract would have assumed the performance of that which under the law was within the power of the contracting parties.

It may, we think, be safely said that the contract here in question assumed the existence of an essential fact, namely, the right of one or both of the parties to sell and dispose of the lands under the law known as the Carey Act. This was a false assumption, and a contract based upon such has been said to be one where there is no meeting of the minds in reality, and hence no contract. *Nordyke & Marmon Co. v. Kehlor*, 155 Mo. 643, 58 S. W. 287, 78 Am. St. Rep. 600.

The obligation imposed upon the appellant herein to pay to the respondent the sum of money specified until the first sale of 160 acres had been accomplished contemplated a termination of the obligation by an incident made impossible by law. If the contract had provided that the sum specified should be paid to respondent each month until the first entryman had filed upon the land under the project, or until the first entryman, having filed on 160 acres under the project, had assumed the obligation of paying for the water for 160 acres, or until the first entryman had made payment to the state, or until the first entryman had paid for water for the first 160 acres, then, under either of these, a condition might be presented capable of accomplishment by one or both of the parties. The contract here in question was subject to implied conditions incapable of performance by respondent or by the joint efforts of the parties, and hence unenforceable. *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 491. This condition arose not by subsequent acts or conditions, but was embodied into the very contract itself at the time of its making, inasmuch as the terms of the contract were made impossible by operation of the law which the contract itself sought to put in motion.

It will not be assumed from the language of the contract that it was the intention of the parties at the time of making the instrument that the appellant was to pay to respondent a sum of money each month indeterminate as to time. It is rather to be concluded that the intention of the parties was to terminate the payments on the transpiring of an event, to wit, "at the time of the sale of any of the aforesaid lands amounting to 160 acres."

Through an ignorance of the law, the parties may have believed, at the time of making

this contract, that such an act was possible. But inasmuch as the sale and disposition of the land was not a matter within the control or regulation of either of the parties, but rather a matter solely within the power of a third party—the state—the conditions under which the respondent here might have carried out the obligations imposed by the contract were not within his control. It would appear here as though the agreement was founded upon a false conception as to the law under which its terms were to be carried out and upon the operation of which law performance was contingent. This precludes the idea of a meeting of the minds. A contract or agreement founded on a false conception as to a matter or thing then existent is null in so far as it may be operative against the party who misconceives. *Frevall v. Fitch*, 5 Whart. (Pa.) 325, 34 Am. Dec. 558.

It has been said that where a contract was made under a mistaken idea or belief that future legislation would be enacted, which legislation was never enacted, and the failure for the enactment of the same was not imputable to either of the parties, the contract is not enforceable. 6 R. C. L. 620. If this rule is applicable to legislation not yet enacted, it is equally applicable to laws in existence at the time of the making of the contract, the effect of which makes the conditions of the contract legally impossible of accomplishment.

In the case of *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621, the Supreme Court of Pennsylvania gave expression to that which we find to be a general rule; namely, that if the agreement in question was made under a mistaken impression that facts essential to the contract did exist or would afterwards exist, and if the contracting parties were prevented from performing by causes over which the parties had no control, the contract is unenforceable. There the court said:

"We perceive no distinction either in principle or authority, where the parties contract, either with a view to existing facts, or facts merely in contemplation between the parties, dependent on future events or contingencies. In either case, when the basis of the contract fails without the assent of the parties, to attempt to enforce the agreement is inequitable."

The principal thing in the minds of the contracting parties, as disclosed from the very language of the contract itself, was the sale and disposition of lands which at the time of the making of the contract were of the open public domain of the United States. It was the accomplishment of the ultimate purpose of the contracting parties, namely, the sale of the land, which was to terminate the obligation imposed upon appellant here. They were mistaken when they assumed that either of the parties might sell or dispose of the public domain under the law known as the Carey Act. They were mistaken when they assumed that the Carey Act, the law which their joint venture was to set in mo-

tion, permitted the sale of the land by the individuals, associations, or corporations at whose instance the land would be withdrawn from public entry. In our judgment we assert a correct rule of law, fairly applicable to the matter at bar, when we say that where certain facts assumed by both parties to a contract are the basis of the contract, and it subsequently appears that such facts do not exist, or by a law then existent are made impossible or inoperative, the contract is void. *Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750.

In 6 Ruling Case Law, at page 621, we find a statement which we believe well supported by authority, to the effect that if an agreement is induced by a mistake common to both parties, without which mistake the agreement would not have been made, and the mistake was in respect to the subject-matter of the contract, the agreement is inoperative and void. "This rule," says the authority, "which has been adopted as a part of the common law, is based upon the idea that in such cases no contract has been consummated, that the minds of the parties have never met in respect to the real subject-matter of the contract. It is not a case of a mere failure of consideration, for that implies the existence of a contract, while a mutual mistake prevents the existence of one."

Where parties assume to contract, and there is a mistake as to the existence of a subject-matter, it is, we think, a correct statement of the law that under such conditions there is no contract because of the want of mutual assent necessary to create one.

We quote from 6 Ruling Case Law, p. 621, that which we deem applicable to the matter at bar, to the following effect:

"If by mutual mistake a contract is founded upon a condition impossible of performance because of the assumption of the existence of a fact which cannot exist, and its adoption by both parties as the sole standard by which to test the performance of the condition, the contract cannot be enforced, and it is immaterial who furnished the information upon which the condition is predicated, or that the person pleading the mistake had the means of discovering it, or by care and diligence might have avoided it." *Nordyke & Marmon Co. v. Kehlor*, supra.

It is unnecessary for us to dwell upon the motion to strike or the motion to dismiss the appeal, inasmuch as the matter touched upon in our decision and by reason of which we conclude that a reversal must ensue is a matter appearing upon the face of the judgment roll. The pleadings in the case are properly a part of the judgment roll, and the contract in question being an essential part of the pleadings in this case, it was unnecessary for us to go further than to determine the fact as to whether the judgment was supported by the pleadings. Our conclusion in the matter is arrived at from the judgment roll alone. Hence it was unnecessary for us to consider any of the phases of the appeal that might have been affected by

the motion to strike. The motion to dismiss the appeal was not well taken as against the appeal from the judgment alone, inasmuch as the time for such an appeal had not expired.

The judgment is reversed. It is so ordered.

NORCROSS, C. J., concurs.

COLEMAN, J. I concur in the order, and will later file an opinion stating my views.

COLEMAN, J. While I concur in the order of reversal, I cannot agree with the interpretation put upon the contract in question by the court, as expressed in the following language:

"For the maker of a mining location to declare that the territory embraced within the lands of his location was nonmineral in character would be equivalent to declaring his location to be null and void, and his right to possession, use, or occupancy of the public domain under the mining laws of the land would automatically cease."

In my opinion, there is not one word in the contract to justify this construction. Whether the mining claims mentioned in the contract were located as lode mining claims or as placer claims, for oil or other minerals, does not appear. It is a well-known fact that there have been many thousands of acres of land located and patented as mineral or nonmineral that might have been, with propriety, located and patented as of the other class. In some instances land has been held to be mineral by the courts and agricultural by the Land Department, both tribunals acting upon substantially the same evidence. A striking example of this was brought to our attention in the recent case of *Earl v. Morrison*, 39 Nev. 120, 154 Pac. 75. Suppose in that case the locator under the scrip (who finally prevailed), realizing the delay, enormous expense, and other inconveniences incident to prolonged litigation both in the courts and before the Land Department, had entered into an agreement with the placer locators, whereby it was agreed that they should cancel their scrip locations and permit the placer locators to proceed to patent without contest, upon the condition that the placer locators might work the land for mineral, and that the scrip locators might cultivate it, each so operating as not to interfere with the other, and that after all the mineral was exhausted the land should be conveyed in fee to the scrip locators, would any one say that there would be no consideration for the canceling of the scrip location? I think not.

Suppose Jones and associates should locate a tract of land as a placer claim for the purpose of mining for oil. The land has all the indications that oil can be found by prospecting. They are all poor men. Shortly after the oil locations are made, Brown and associates, men of wealth, come along and say to Jones and associates:

"The land which you have located for oil will grow fine alfalfa, and there is a large stream of water near by with which it can be irrigated. We are going to town and enter the land under the Desert Act and appropriate the water for irrigation purposes. Now, we do not care for the oil, and if you will abandon your locations for oil, we will patent the land under the Desert Act and enter into a contract with you that you may go upon the land and prospect for oil as soon as we get our patent, and that your operations shall be without hindrance from us."

Jones and associates, having no money with which to litigate, and knowing that some of the best agricultural land in the world produces the highest quality of oil, accept the proposition, abandon the placer location, and Brown and associates procure their patent. Jones and associates go upon the premises, put down a well, and get oil. Brown and associates eject them. Would any one say that Jones and associates would have no remedy? What is the difference between the supposed case and the one at bar?

We will suppose another case. John Smith, a poor prospector, with barely sufficient resources to maintain his existence while developing his property, locates ground as a placer mining claim, which has all the indications to justify its location as such, and 90 days thereafter opens up within its boundaries a true fissure vein of high-grade gold ore. Three days after opening up this fissure, John Doe, a wealthy man, goes upon the property and locates the fissure vein in his own name. John Doe goes to John Smith and says:

"The vein which I have located on your placer was a 'known vein' at the time you located your placer claim, though you may not have known of its existence. It having been a known vein, you cannot hold it under your placer location; but I do not want a lawsuit with you. Now, if you will abandon your placer location so that I can perfect patent to my lode location without litigation, I will give you an undivided one-third interest in my lode claim."

Smith, being a poor man, accepts the proposition, and a written agreement is entered into accordingly, whereupon the placer location is abandoned and a relocation of the lode claim, so as to take in all the ground allowed by law, is made by Doe, and the claim is patented in his name. But thereafter he refuses to acknowledge any rights in John Smith because he had abandoned his placer location to enable Doe to acquire title to a valuable lode claim. Is it not clear that a court of equity would compel John Doe to do equity? We think it is. So far as appears in the record, the case at bar is not materially different from either of the supposed cases.

I cannot agree with the view expressed that the agreement entered into between the parties indicates a joint adventure. A joint adventure is nothing more nor less than a partnership limited to a single transaction. In other words, to constitute a joint adventure there must enter into the undertaking the elements of a partnership, such as a sharing of the losses and of the profits. There is

nothing of that kind in this case. While respondent was to assist in promoting the project, she was not to participate in the profits. She was to receive a monthly payment which was not made contingent upon their being profits.

As to the position taken in the opinion of the court, that the contract is void because it was impossible of complete performance, I need only to say that there is no doubt but that the contract is incapable of performance according to its letter, for the reason that no land withdrawn pursuant to the terms of the Carey Act can be sold except by the state, and not for more than \$1 per acre. When we consider this fact, and the further fact that in projects of this character the law permits the promoter to sell to the purchasers of land a perpetual right to water to be appropriated for use upon the land, we are inevitably forced to the conclusion that it was the intention of the parties that the right to the payment in question should turn, not upon the sale of 160 acres of land, but upon the sale of a water right for 160 acres of land.

If we were to undertake to ascertain the real intention of the parties to the contract, I think we might take into consideration the subject-matter of the contract, the existing federal and state statutes, the situation of the parties at the time of its execution, and all other surrounding facts and circumstances. If this view is correct, the question arises as to whether or not the contract is capable of reformation so as to be made to read in accordance with the intention of the parties.

In re HARTUNG'S ESTATE. (No. 2217.)

(Supreme Court of Nevada. Nov. 9, 1916.)

1. CHARITIES — 38 — CONSTRUCTION — DESIGNATION OF LEGATEES — CHARITABLE INSTITUTIONS — BEQUEST TO FRATERNAL ORDER TO ESTABLISH AN ORPHANS' HOME "WORTHY OF ITS NAME."

Under a will devising the residue of an estate to an Independent Order of Odd Fellows, the income therefrom to be paid over to them annually, if within five years from testator's death the order established a home for orphans "worthy of its name," the words "worthy of its name" did not require the expenditure thereof of the sum of \$25,000 as specified for a school building in another paragraph of the will, but the will made the order itself judge as to whether or not the home was worthy of its name, subject to the right of the courts to finally determine the question.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 66; Dec. Dig. 38.]

2. CHARITIES — 38 — CONDITION — ESTABLISHMENT BY FRATERNAL ORDER OF A HOME "WORTHY OF ITS NAME."

A devise conditioned upon establishing by fraternal order of an orphans' home "worthy of its name" was satisfied by the establishment of a home which, considering the strength of the order in the state, the population of the state, and the general conditions existing there-

in, compared favorably with similar institutions of the order elsewhere.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 66; Dec. Dig. 38.]

3. CHARITIES — 38 — CONDITIONS — PERFORMANCE — SUFFICIENCY — ESTABLISHMENT OF ORPHANS' HOME "NEAR" A CITY.

A devise conditioned on the establishment of an orphans' home "near" a city was satisfied by its establishment within the city corporate limits; the apparent intention by such direction being to confine the location of the home to the vicinity of the city, and not to exclude it from the city limits.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 66; Dec. Dig. 38.]

For other definitions, see Words and Phrases, First and Second Series, Near.]

4. PERPETUITIES — 8(7) — CHARITABLE GIFT — "PUBLIC CHARITY."

A bequest of the income of the residue of an estate to a fraternal order if the order established an orphans' home as provided therein did not violate the common-law rule against perpetuities, such home being a public charity, since its use was not confined to any privileged or special class of orphans.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 66, 66; Dec. Dig. 8(7).]

For other definitions, see Words and Phrases, First and Second Series, Public Charity.]

5. CHARITIES — 4 — CONSTRUCTION OF BEQUEST — CHARITABLE USE.

A bequest of the income of an estate, to be paid over to a fraternal order annually, if within five years from testator's death the order established an orphans' home as provided therein, held not void as imposing no imperative duty upon the order to devote the money to a charitable use, since under the will the income was to be used in the maintenance of the home.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 7, 9, 10; Dec. Dig. 4.]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

In the matter of the estate of Arthur Hartung, deceased. From an order denying motion by the Board of Regents of the University of Nevada for a new trial and from final decree of distribution, the Board of Regents appeals. Affirmed.

George B. Thatcher, Atty. Gen., and Hoyt, Gibbons & French, of Reno, for appellant. Thomas E. Kepner and C. E. Mack, both of Reno, for respondent.

COLEMAN, J. This is an appeal by the board of regents of the University of Nevada from an order denying its motion for a new trial and from a final decree of distribution in the matter of the estate of Otto Hartung, deceased. This is the second appeal growing out of the construction of the will of Mr. Hartung, the former decision being reported in 39 Nev. 200, 155 Pac. 353.

The portions of the will necessary to an understanding of the questions involved read:

"Tenth, I give, devise and bequeath all the residue of my estate, both real and personal, as follows:

"(A) To the Independent Order of Odd Fellows of the state of Nevada the income from my estate to be paid over to them by my executors and trustees annually, if within five

years from the date of my death the said Independent Order of Odd Fellows of the state of Nevada, does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada, and to be known by the name of the 'Royal D. Hartung Home for Orphans and Foundlings' but if the Independent Order of Odd Fellows of Nevada does not accept the provision of this bequest, within the time herein mentioned, then * * *

"(C) I give and bequeath all my estate, both real and personal not otherwise herein devised, to the board of regents of the State University of Nevada. * * *

The lower court found that the Independent Order of Odd Fellows had established the home as contemplated by the terms of the will.

Appellant urges on this appeal: (1) That the Independent Order of Odd Fellows (hereinafter referred to as appellee) did not establish a home "worthy of its name"; (2) that the home, having been established within the corporate limits of the city of Reno, was not a compliance with the terms of the will, which provided that it should be established "near" Reno; (3) that the devise and bequest to appellee offends against the common-law rule against perpetuities; and (4) that the bequest is void because no imperative duty is imposed upon appellee to devote the bequest to a charitable use. We will consider these questions in the order mentioned.

[1] It is strenuously contended by counsel for appellant that the home established by appellee is not worthy of its name. It is urged that since the testator, by paragraph B of his will, required that the Reno school district erect a building to cost not less than \$25,000, in case it should acquire the property of testator, that it must be concluded that the testator had in mind that appellee should erect a home to cost equally as much. We are unable to adopt this view. It is to us evident at a glance that the testator did not have in mind that the home to be erected by appellee should cost \$25,000, for if so he would have specified the amount, as he did in paragraph B of his will. Having thought of requiring the school board to erect a building to cost \$25,000, it would have been the most natural thing in the world for the testator to have designated that amount as the cost price of the home had he had such an idea in his mind. The very words "worthy of its name" convince us that he had no such idea, for the reason that, having decided upon \$25,000 as the cost price of the school, and the ease with which he could have fixed a similar figure as the cost of the home had he so contemplated, he sought to express an entirely different idea, and used an expression which was evidently the result of mature reflection.

It is obvious that the testator meant to convey a distinct idea by the words which he used, and it is equally obvious that he intended that the appellee should be the judge as to whether or not the home established was "worthy of its name," subject to the

right of the courts to finally determine the question. Taking this view, we must determine whether the home established by appellee is one worthy of its name.

[2] Since the standard of everything is established by a comparison of it with other things, we must necessarily compare the home established with other similar homes; and we think, too, that it is only right in so doing to take into consideration the strength of appellee in Nevada, the population of the state, and the general conditions existing therein. Only one witness gave testimony relative to similar institutions in other states, and from his testimony the home in Reno, everything considered, compares very favorably with similar institutions elsewhere; and, in considering this testimony in connection with other testimony and the population of the state, we cannot say that the lower court was not justified in holding that the home in question is worthy of its name.

[3] The next point urged is that appellee failed to comply with the terms of the will, in that the home which was established is "in" Reno, instead of "near" Reno. The will reads:

"If within five years from the date of my death the said Independent Order of Odd Fellows of the State of Nevada does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada. * * *

It is the contention of appellant that it was the intention of the testator, as expressed in the will, that a home for orphans and foundlings should be established, not within the corporate limits of the city of Reno, but "near" the city of Reno, and that the establishment of the home within the city limits was a failure to comply with the terms of the will, and hence that appellee had forfeited all claim to the property of the testator. On the other hand, it is claimed by appellee that by the language of the will the testator did not intend to designate the place where the home should be established, but that he intended that wherever the home should be established it should be for "orphans and foundlings near Reno."

We would do violence to no rule of construction we know of if, after a consideration of the language and punctuation of the clause in question, we should adopt the idea suggested by appellee; but we do not deem it necessary to determine this point, since, in the view we take, the judgment must be affirmed. All of the authorities hold that the word "near" is a relative term, but we are satisfied that as a general rule the word is used to designate a place slightly removed from a given point. Of course, there are exceptions to this rule; a notable one being the use of the word in diplomatic parlance as "near the Court of St. James." The real question, of course, is to ascertain the intention of the testator; and, as Mr. Dwarria says:

"Where the intention of the testator is clear and obvious, it has been held that it will com-

trol the legal operation even of technical words." Dwarria, p. 178.

"It is a familiar rule that the court will vary the strict meaning of words when necessary to effect the intention of the testator." *Old Ladies' Home v. Hoffman*, 117 Iowa, 719, 89 N. W. 1067.

The question is: What idea did the testator desire to express by the language used? As one who had been a member of the Independent Order of Odd Fellows for years, he, no doubt, knew that the jurisdiction of the Grand Lodge of the Independent Order of Odd Fellows took in the entire State of Nevada, and he knew that, unless he indicated some locality as the place where the home should be established, appellee could establish it at any place in the state, no matter how remote from the center of population; and, with this idea in mind, we are of opinion that by the language used he intended that the home should be established in the vicinity of Reno, which was his place of residence in his lifetime, the seat of the State University, the largest city in the state, and the center of population, rather than at some remote place. The court, in the case of *Old Ladies' Home v. Hoffman*, supra, had under consideration a case similar to the one at bar, in which the following language is used:

"It may be conceded that a condition precedent to the taking of a bequest must be literally performed, but the trouble in this case does not arise over the application of this rule. The difficulty here is to determine what the condition is; for, if the intent of the testator was to require her beneficiary to be located within the corporate limits of Muscatine, the defendants have no case. But was that her intention? Her primary purpose was to endow an orphans' asylum which should be connected with her home city. If none should be in existence at the end of five years from her death, her bequest was then to go to an old ladies' home located there. Her thoughts were first of all for the fatherless and motherless waifs of the community, and they were the primary objects of her bounty. Can it be said that she intended to deprive them of the great benefits to be derived therefrom simply because the home which should be provided for them should be located just across a geographical line, though in fact recognized as one of the charitable institutions of the city she named? We think not. To us it is quite clear that she did not have in mind strict geographical lines, and that her sole purpose, as to locality, was to endow an institution which should be so clearly connected with her home city as to be recognized as a part thereof, and this is clearly the situation the defendant occupies."

We think that what was said in that case is peculiarly applicable to the case at bar, and we are satisfied that it was not the intention of the testator that those who selected the site for the home should search out the boundaries of the city of Reno to be sure that the home might be at least an inch outside of those boundaries, or forfeit its claim to the property bequeathed. Had the appellee placed the home one inch outside the corporate limits of the city of Reno, it would have been a compliance with the terms of the will, according to appellant's theory, not-

withstanding the fact that at the very moment of its establishment a movement was under way to extend the city boundaries so as to take in the site of the home thus established.

[4] Does the bequest offend against the common-law rule against perpetuities? We think not. It is not contended that a bequest to a public charity offends against this rule, either at common law or under our constitutional provision, but it is insisted that the bequest in question is not to a public charity. Appellant relies with great confidence upon the case of *Troutman v. Home*, 66 Kan. 1, 71 Pac. 286, to sustain its contention. Instead of sustaining appellant's contention, we think the case is authority to the contrary. In that case the testator bequeathed her property to "orphans of deceased Odd Fellows," while the testator in the case at bar left his property for "orphans and foundlings," without limitation to any particular orphans and foundlings. In that case the court quotes from a Pennsylvania case which clearly shows the distinction between the case at bar and the Kansas case. The language quoted reads as follows:

"A public use, whether for all men or a class, is not one confined to privileged persons. The smallest street is public, for all have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger, is private. Would Girard College be a public charity if the male children entitled to admission were limited to sons of deceased Masons or Odd Fellows? If Pennsylvania Hospital closed its gates to all but Methodists or Baptists having recent injuries, the people would not believe it a purely public charity in the intentment of their Constitution. A charity for the poor of a parish or township is public; but not if confined to poor Presbyterians in the municipality. Public charities may be restricted to a class of the people of the state or of a municipal division; at the same time, they must be general for all of the class, within the particular municipality. 'Thus a blind asylum is only for the blind in the community.' If it be completely public, all the blind in that community are on an equal footing, and, should its capacity be insufficient for all, there is no mistaking justice in the order of admission. To open its doors only to the blind of a particular religious denomination, or of a beneficial association, or of a political party, shuts them against the public. A known and recognized class, though not generally poor, or diseased, or decrepit, may be the subject of a public charity, as sailors; yet, if the endowment were limited in its benefits to sailors who are members of a designated sect, there could hardly be two opinions of its character."

The point is so clearly distinguished that we do not deem it necessary to elaborate.

[5] It is also urged that the bequest is void because no imperative duty is imposed upon appellee to devote the money to a charitable use. We cannot accede to this construction of the will. Upon our former consideration of this will (*In re Hartung's Estate*, supra) we held that the proceeds of the residue of the estate should go to appellee "so long as it maintained the home." We interpreted the will then to mean that such proceeds should be used in the maintenance

of the home. From a reading of the will we can arrive at no other conclusion. If such had not been the intention, the testator would have bequeathed the property directly to appellee, instead of creating an active trust and directing that the proceeds be paid annually to appellee.

Perceiving no error in the record in this case, it is ordered that the judgment be affirmed.

NORCROSS, C. J., concurs.

McCARRAN, J. I concur. As to the first proposition urged against the appellee, the Independent Order of Odd Fellows, to wit, that the home by that order established was not one "worthy of its name," as that expression was intended by the testator, it appears manifest to me that the expression thus used in the will was not one which was to constitute a measure of value estimable in dollars and cents, but, on the other hand, was an expression used by the testator in connection with and in the spirit of the object sought to be accomplished, namely, the establishment of a place for orphans and foundlings worthy of the name of home. If the reasoning is correct, the amount invested in the place established as a home was not the guiding motive or the uppermost thought of the testator; rather was it that the place when established should afford to those who were the recipients of its charity the protection, comfort, affection, and guidance contemplated by the word "home"; and, as I view the record and expressions made in the will, it may not be far-fetched to say that the expression "a home worthy of its name" may have emanated from the remembrance borne by the testator of the home, and protection, the affection, and guidance which he in his lifetime had given to his adopted boy, whose name, it was designated by the will, should be perpetuated by this establishment which the testator sought to support by the income from his estate.

The second proposition, that the home es-

tablished by the Independent Order of Odd Fellows did not comply with the terms of the will, inasmuch as it is in fact "in Reno," rather than "near Reno," must be resolved in the light of the record before us, as well as from the expressions contained in the will, and from both we must as best we can arrive at the intention of the testator. The activities of his life were centered in and about Reno. The property the income of which was to be devoted to the support of the home he sought to have established was located in Reno. He had been in his lifetime an accumulator and creator of property within the city of Reno. It would appear as though his life's earnings and accumulation had been devoted, in a small degree, at least, to the upbuilding of that community. His adopted son, Royal D. Hartung, in honor of whose memory he sought to have this institution created, had been reared and had spent the years of his life with the testator within the city of Reno. It was a charitable institution that would perpetuate the name of Royal D. Hartung, one that by its nature would blend with the life of Royal D. Hartung, that the testator sought to have established. As it appears to me from the record here, the end sought to be accomplished by the testator was to endow an institution for orphans and foundlings, the existence of which should perpetuate the name of Royal D. Hartung within the community in which the life of the latter had been passed. It was, as I view it, the principle to be carried out in the locality designated that was uppermost in the mind of the testator, rather than the question of its technical position within or without the boundary lines of the city of Reno.

As to the third and fourth contentions, i. e., that the devise and bequest offend against the law of perpetuities, and that the bequest is void because no imperative duty is imposed upon the appellee to devote the bequest to a charitable use, I think it unnecessary to emphasize the conclusion reached by Mr. Justice COLEMAN.

PHILLIPS (DAHLSTROM et al., Interveners) v. SNOWDEN PLACER CO. et al.
(No. 2213.)

(Supreme Court of Nevada. Nov. 9, 1916.)

1. JUSTICES OF THE PEACE § 44(9)—LIENS—ENFORCEMENT—JURISDICTION—CONSTITUTIONAL AND STATUTORY PROVISIONS—"SUM INVOLVED."

Const. art. 6, § 8, enacted while St. 1861, c. 15, was in force in the territory, providing for the foreclosing of all liens in one action, requires the Legislature to fix the powers of justices of the peace, and authorizes it to confer jurisdiction upon them, concurrent with the district courts, of actions to enforce mechanics' liens wherein the amount does not exceed \$300. Rev. Laws, § 5714, is to the same effect, and section 2224 allows any number of lien claimants to join in the same action and the court to consolidate separate actions; and section 2227 provides that such liens may be enforced by an action in any court of competent jurisdiction, and, as amended by St. 1907, c. 90, applies to mechanic's lien proceedings in justice's court where the sum involved does not exceed \$300. *Held*, that the words "sum involved" mean the sum involved in the several liens embraced in a suit, and that a justice's court had no jurisdiction of an action to foreclose mechanics' liens, where the total amount of the liens exceeds \$300, notwithstanding each of the liens is for a less amount.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 168, 169; Dec. Dig. § 44(9); Action, Cent. Dig. § 552.]

2. CONSTITUTIONAL LAW § 16—CONSTRUCTION—DEBATES.

In the construction of a constitutional provision, it is not improper to examine the debates on the subject, though they are not authoritative, as it is the text of the Constitution which was adopted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 16; Dec. Dig. § 16.]

3. JUSTICES OF THE PEACE § 141(2)—APPEAL—JURISDICTION—JURISDICTION OF LOWER COURT.

The general rule is that the district court acquires no jurisdiction to try a cause on appeal from a justice's court, where the justice's court was without jurisdiction to entertain the case and render judgment therein.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 472; Dec. Dig. § 141(2).]

4. JUSTICES OF THE PEACE § 141(5)—APPEAL—JURISDICTION—DISTRICT COURT—CONSENT.

Where the justice's court had no jurisdiction of a suit to enforce mechanics' liens wherein the aggregate amount involved exceeded \$300, but where the district court had original concurrent jurisdiction of the subject-matter, without such limitation as to amount, and where the defendant therein, after judgment for the plaintiff and the intervening claimants, appealed to the district court, where trial was had without any question being raised as to its jurisdiction, he was estopped to thereafter question the district court's jurisdiction on the ground that it had no greater jurisdiction on appeal than the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 475; Dec. Dig. § 141(5).]

5. APPEAL AND ERROR § 907(2)—FINDINGS—PRESUMPTION—EVIDENCE TO SUPPORT.

Where the evidence is not included in the transcript, the Supreme Court is bound to assume that it supports the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2913, 2916; Dec. Dig. § 907(2).]

6. MINES AND MINERALS § 113—MECHANICS' LIENS—POSTING OF NOTICES—SUFFICIENCY—STATUTE.

Under Rev. Laws, § 2221, providing that an improvement on land with the owner's knowledge shall subject the owner to a lien unless, within three days after his knowledge of the improvement, he gives notice that he will not be responsible therefor by posting a notice in writing to that effect in some conspicuous place upon the land, etc., a notice posted at the collar of a mine shaft, which the owner, when he entered into an agreement with the contractor, knew would necessarily be destroyed in preparing the shaft for mining operations, and which was so destroyed prior to the contractor's employment of the claimants, was not binding upon the claimants, as a notice must be so posted as, under ordinary conditions, it will remain a reasonable length of time, though a written notice in lead pencil would be as good as any other notice.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 234; Dec. Dig. § 113.]

7. MINES AND MINERALS § 117—MECHANICS' LIENS—PROCEEDINGS—COSTS.

In a suit to foreclose mechanics' liens for work done under a contractor for mining work, brought in a justice's court, the allowance of costs to the plaintiff and intervening claimants in that court was erroneous.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239; Dec. Dig. § 117.]

Coleman, J., dissenting in part.

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action to foreclose a mechanic's lien by George A. Phillips against the Snowden Placer Company and others, in which Charles O. Dahlstrom and Louie Amedeo, lienholders, were permitted to intervene. Judgment in the district court in a trial de novo on appeal from a justice's court, in favor of the plaintiff and the interveners. Motion for new trial denied, and defendants appeal. Modified and affirmed.

This case involves the foreclosure of a mechanic's lien in the sum of \$200 claimed by the plaintiff, and a similar lien for the sum of \$280 claimed by Louie Amedeo, also a similar lien for \$255 claimed by Charles O. Dahlstrom; the liens being respectively claimed against the Black Cat mining claim, situate in Manhattan mining district, Nye county, Nev.

The facts, as shown in the record, disclose that the appellants Wilson and Wilson were the owners of the Black Cat mining claim, and that they leased the claim to the Snowden Placer Company; that the Snowden Placer Company operated the ground by placer mining, and in the course of such operations employed the plaintiff, Phillips, and the interveners, Amedeo and Dahlstrom, to perform work upon the ground. The

Snowden Placer Company having failed to pay the plaintiff and interveners the respective sums claimed by them, a lien was filed by plaintiff, and the liens of the interveners, Amedeo and Dahlstrom, were filed for record on the same day.

Subsequently suit was commenced in the justice court of Manhattan township to foreclose the lien of Phillips, in which suit the justice court made an order on November 1, 1913, that the said Amedeo and Dahlstrom be permitted to intervene, and such intervention was thereupon had. The Snowden Placer Company made no appearance. The defendants Wilson and Wilson appeared and filed their answer, alleging that they were the owners of the Black Cat mining claim; that the mining operations conducted thereon, according to their information and knowledge, were conducted by one R. T. Ashley; and that they had no knowledge of mining operations conducted on said claim by the Snowden Placer Company.

A trial was had in the justice court before a jury, and resulted in a disagreement, and thereupon the trial of the cause was set and a jury was again had, and a verdict was returned in favor of the plaintiff and against the defendants Wilson and Wilson to the extent of their interest as owners of the mining claim described in the complaint, and a judgment was entered in favor of Phillips for \$200, with interest at 7 per cent. per annum from October 9, 1913, with costs of suit, and \$3 for filing lien claim, also for the sum of \$260 in favor of Amedeo, intervener, together with \$3 cost of filing lien claim, also for the sum of \$255 in favor of Charles O. Dahlstrom, intervener, together with \$3 cost of filing lien claim, and \$75 attorney's fee allowed by the justice court.

An appeal was thereupon taken from the justice court to the district court, and the trial was had, and the district court ordered that judgment be entered in favor of plaintiff in the sum of \$195, with \$50 attorney's fee; for the intervener Amedeo, \$250, and \$60 attorney's fee; for the intervener Dahlstrom, \$250, and \$60 attorney's fee. From the judgment, and from an order denying a motion for a new trial, an appeal has been taken to this court.

H. R. Cooke, of Tonopah, for appellants.
H. H. Atkinson, of Tonopah, for respondents.

NORCROSS, C. J. After two trials in the justice court and a trial de novo in the district court on appeal from the judgment of the justice's court, the question of the jurisdiction of the justice's court to try the case originally, and of the district court to try the case as on appeal, is raised for the first time on appeal to this court. The question, however, is one of great importance, not only to the parties to the present action, but because it goes to a matter of procedure based on the organic law of the state.

[1] Section 8 of article 6 of the state Constitution, in part, reads:

"The Legislature shall determine the number of justices of the peace to be elected in each city and township of the state, and shall fix by law, their powers, duties and responsibilities: Provided, that such justices' courts shall not have jurisdiction of the following cases, viz.: * * * Of cases that in any manner shall conflict with the jurisdiction of the several courts of record in this state: And provided further, * * * the Legislature may confer upon said courts, jurisdiction concurrent with the district courts, of actions to enforce mechanics' liens, wherein the amount (exclusive of interest) does not exceed three hundred dollars. * * *"

By statute it is provided that the justices' courts shall have—

"concurrent jurisdiction with the district courts of actions for the enforcement of mechanics' liens, where the amount of the lien sought to be enforced, exclusive of interest, does not exceed three hundred dollars." Rev. Laws, § 5714, subd. 11.

There is some slight difference in the wording of the Constitution and the wording of the statute cited supra; but as the Legislature cannot by statute confer a broader jurisdiction upon justices' courts than that authorized by the Constitution, we need only consider the language of the Constitution.

It is the contention of counsel for appellant that the language of the Constitution, cited supra, does not contemplate the conferring of jurisdiction upon justices' courts of an action to foreclose two or more mechanics' liens where the aggregate amount of the liens exceeds \$300; notwithstanding each of the several liens sought to be foreclosed in one action is for an amount less than \$300. We agree with this contention of counsel. Our attention has not been called to a similar provision appearing in the Constitution of any other state which has been construed. At the time this provision was under consideration by the constitutional convention, it was contended by Mr. Brosnan (afterwards a justice of this court) that none of the state Constitutions distinctly defined the jurisdiction of justices of the peace, but that such jurisdiction was a matter which the Legislature was empowered to fix, citing "American Constitutions." Nevada Constitutional Debates, p. 691.

Examining the history of this provision of our Constitution, we find that the original proposed draft of the section recommended by the committee did not contain such provision. In this connection we find the following resolution offered by Mr. Banks:

"Resolved, that article 6 be referred to the judiciary committee, with instructions to so amend the same as to give to justices of the peace jurisdiction in all cases of forcible entry and unlawful detainer, and mechanics' liens, where the amount involved does not exceed three hundred dollars." Nev. Const. Debates, p. 688.

Discussing this proposed amendment, Mr. De Long is reported (page 688) as saying:

"Suppose we confer jurisdiction, as he proposes, to the extent of \$300, in cases of mechanics' liens. There may be one mechanic who claims a lien of only \$300, and he brings his suit

before a justice of the peace. But the law requires that all other parties holding liens on that property, when he commences to foreclose, shall come forward and present their claims, and it is a principle of equity that the first claimant shall be estopped from proceeding until all the other claims are united with his. Consequently, there are several men having liens, to the amount of \$10,000, perhaps, on the same building. They cannot present that case in a justice's court, because the court cannot render a judgment for such an amount; and what are you going to do? It is evident that you cannot settle it by one suit, and consequently you must permit a multiplicity of suits. Suppose we engraft in the article the provision which the gentleman suggests, what is to be done in a case where there is one lien of \$10,000 and another of \$300? Both liens must be paid, and the proper way is to have them all come in together, that the chancellor may make his decree in such manner that full and fair equity may be done to all; but under this provision, the \$300 man would be obliged to go off and commence suit on his own hook. It would certainly increase the difficulties in the way of obtaining justice for the poor man."

To these remarks Mr. Banks is reported (page 689) as replying as follows:

"I wish to reply to that portion of the speech of the gentleman from Storey (Mr. De Long), in which he refers to mechanics' liens, and what would be the course of proceeding in such a case as the one to which he has referred. Now suppose, for instance, that this amendment be adopted, and one man brings his suit under the mechanic's lien law, claiming that he is entitled to receive some amount less than \$300; then others come in with their claims, amounting in the aggregate to a sum which exceeds \$300. At the very worst, all that is then required is to transfer the case to a court of competent jurisdiction. Such has been the practice in California, and no doubt it will be in this state, if we shall adopt this proposition."

The form of the provision as finally adopted was drafted by Judge Brosnan. Debates, pp. 700-702. Relative to the final draft, the following colloquy is reported (page 702) as occurring between Delegates Banks and Brosnan:

"Mr. Banks: Then I understand from the gentleman from Storey that, in case of the foreclosing of mechanics' liens, suit may be brought, within the amount of \$300, in a justice's court. That is, it may be brought either in a justice's court, or the district court, provided the amount involved is less than \$300.

"Mr. Brosnan: The mechanic having a lien to that amount has his choice of courts."

[2] Relative to the consideration to be given expressions made in debate by delegates to the constitutional conventions, this court in *State ex rel. Lewis v. Doron*, 5 Nev. 409, said:

"It is not improper in this connection to examine the debates upon the subject, though of course they are not authoritative, nor is any binding effect to be given them, as it is the text of the Constitution which the people adopted."

See, also, *Moore v. Orr*, 30 Nev. 470, 98 Pac. 398.

It is the "amount" which cannot exceed \$300 according to the language of the section. What amount? The amount of one particular lien, or the amount of several liens which the action may be instituted to foreclose? The law in force in the terri-

tory of Nevada at the time of the adoption of our Constitution, as the law of the state now provides, made provision for the foreclosing of all liens in one action. St. 1861, p. 87. Referring to the lien law of California, the Supreme Court of that state in *Mars v. McKay*, 14 Cal. 128 (decided in 1859), said:

"The idea of a multiplicity of suits in cases like the present is expressly excluded. The statute requires that every lien on the same property shall be litigated and enforced in the same action, and every suit brought to enforce a particular lien must be regarded as a proceeding to enforce all the liens against the same property."

The lien law adopted in 1875, now in force in this state, contemplates the foreclosure of all liens in one action. It is provided in section 12 (Rev. Laws, § 2224):

"Any number of persons claiming liens may join in the same action; and when separate actions are commenced the court may consolidate them."

By section 15 (Rev. Laws, § 2227) it is also provided:

"Said liens may be enforced by an action in any court of competent jurisdiction," etc.

The provisions of this section clearly contemplate the foreclosure of all liens in one action and one judgment. By an amendment (St. 1907, p. 192) the provisions of this section—

"as to action on, trial of, and sale of premises under mechanics' liens, shall be applicable to such actions in a justice court, where the sum involved does not exceed three hundred dollars."

What did the Legislature mean by the words "sum involved" as used in this amendment? We think the words here used are susceptible to no other meaning than the sum involved in the several liens embraced in the suit. This, we think, may be taken as a construction by the Legislature of the provisions of the Constitution, and is entitled to consideration as a construction by a co-ordinate branch of government. In the recent case of *Daly v. Lahontan Mines Co.*, 39 Nev. —, 153 Pac. 285, we said:

"Trial courts, in actions to foreclose one or more liens, where it appears that there are other lien claimants, and especially where it appears that other suits are pending for the foreclosure of all or a portion of such other liens, should endeavor within all reasonable limitations to protect the rights of all lien claimants in one judgment."

In *Elliott v. Ivers*, 6 Nev. 290, this court said:

"The statute undoubtedly contemplates a formal suit, a publication of notice, an appearance upon the part of lien claimants other than those commencing the suit, and a disposition of the entire matter of liens against the property affected, in one proceeding."

See, also, *Lonkey v. Wells*, 16 Nev. 271, 277; *Skyrme v. Occidental M. Co.*, 8 Nev. 231.

We think the provision of the Constitution in question ought to be so construed as not to confer jurisdiction upon justices' courts to foreclose mechanics' liens, where the total

amount of all the liens involved in the suit exceeds \$300. We think the wording of the section is more in harmony with this construction than the one to sustain a more extensive jurisdiction. The construction is in harmony with what seems to have been the intent of the framers of the Constitution, and better accords with the provisions of the statute as it existed both before and since the adoption of the Constitution. If any other construction were given to this provision of the Constitution, we would have this anomalous situation. Several liens might be filed upon a certain property, some of which were for amounts less than \$300, and some of which were for amounts exceeding \$300. If suit were instituted in the justice's court upon one or all of the liens less than \$300, those in excess of \$300 could not be exhibited and foreclosed in that action. Another suit would have to be instituted in the district court upon these latter liens. The statute could not be complied with in either case, unless the suit in the justice's court was abandoned or dismissed and the liens involved in that suit exhibited in the district court. As all lien claims must be recorded within a prescribed time, it is an easy matter for a litigant to determine whether the total amount of the liens will be in excess of the jurisdiction of the justice's court.

[3, 4] It is contended by counsel for appellant that the judgment rendered by the district court is void, because the district court had no greater jurisdiction on appeal than did the justice's court in the trial originally. This court in a number of cases has held that the district court acquired no jurisdiction to try a cause on appeal from a justice's court, where the justice's court was without jurisdiction to entertain the case and render judgment therein. *Fitchett v. Henley*, 31 Nev. 341, 102 Pac. 865, 104 Pac. 1060, and authorities therein cited. It must be conceded that this is the general rule, which is supported by many authorities. 24 Cyc. 641. The rule in many instances has been harshly applied. It is a rule, however, not without exceptions.

"While it has been held that, where the justice of the peace had no jurisdiction of the subject-matter of an action, the parties cannot confer jurisdiction on the appellate court by consent, the better view seems to be that, where the appellate court has original as well as appellate jurisdiction of the cause, jurisdiction of both the subject-matter and the person may be conferred upon it by waiver or consent." 24 Cyc. 643.

In *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 456, 142 N. W. 44, 46, the court said:

"But we can see no distinction in principle between this case and that of *Johnson v. Erickson*, supra. There, in a justice court proceeding, title to real property was brought in issue, whereupon, under the statute, it became the duty of the justice to forthwith certify the cause to the district court, but instead of so doing he dismissed it. Upon appeal it was urged, the same as here, that the district court was

without jurisdiction because of the rule 'that the district court by virtue of an appeal succeeds only to the jurisdiction of the justice court, and that where the justice court has no jurisdiction the appellate court acquires none.' The court there says: 'In this case the justice not only had authority to transfer the case to the district court, but it was his express duty to do so. The distinction between this case, and those where there is no jurisdiction or no authority to transmit, is apparent. In such cases there is neither right nor duty to certify the case, and of course an appeal would not give jurisdiction.'

* * * The proceedings are irregular, but were made so by the error of the justice in rendering a judgment of dismissal, instead of certifying the case; and for this error the plaintiff is in no way responsible. * * * We are of opinion that when a justice has, by disregarding the statute, made it necessary to appeal, the district court acquires jurisdiction, and that it is error for the district court to refuse to entertain the action and to dismiss the appeal; and this view is in harmony with the opinion of other courts under similar statutes. There the justice pronounced an unauthorized judgment when, instead, he should have certified the case to the district court for further proceedings; yet the appeal from such unauthorized judgment was held to vest jurisdiction of the subject-matter in the appellate court, which ordinarily would have been transferred there without appeal by the order of the justice. Here the justice court, having conceded jurisdiction of person and subject-matter, proceeds unauthorizedly, after it had become its mandatory duty to transfer the cause for trial to another justice court, and accordingly enters judgment, void because of want of power to enter any judgment at all, but from which defendant has seen fit to appeal generally upon both law and fact and demand a trial de novo in the appellate court. The statutes concerned in *Johnson v. Erickson*, and in the case at bar, are in effect analogous, both superseding jurisdiction to determine the merits. If an appeal from a void judgment of dismissal, as in *Johnson v. Erickson*, confers appellate jurisdiction of subject-matter, most certainly under these circumstances the appeal so taken generally must be held to confer jurisdiction of subject-matter as well as person upon the appellate court."

See *Johnson v. Erickson*, 14 N. D. 414, 105 N. W. 1104; *Heard v. Holbrook*, 21 N. D. 348, 131 N. W. 251.

In the case at bar, the justice's court had jurisdiction of the action as brought upon the Phillips complaint. It was also an action of which the district court had concurrent jurisdiction. It was not until Dahlstrom and Amedeo intervened to enforce their liens that it appeared that the justice's court was without jurisdiction to proceed to trial and judgment. When Dahlstrom and Amedeo intervened, it was, we think, the duty of the justice to certify the case to the district court. The situation was then analogous to that of a case where title to real property is raised by answer or by evidence upon the trial. The jurisdiction to proceed to trial was not raised by defendant. After trial and judgment in favor of the plaintiff and intervening lien claimants, defendant took his appeal to the district court, where trial was again had without any question being raised as to the jurisdiction of either court. The question of jurisdiction was apparently not thought of until after appeal to this court.

It may be conceded that the judgment of the justice's court was a nullity, and no appeal, in the strict sense of the law, would lie therefrom. But the appeal had the effect of causing the case to be certified to the district court. Both parties proceeded to try the case upon the merits without questioning the jurisdiction. The subject-matter of the action was such that the district court had original jurisdiction to try. The parties submitted themselves without question to the jurisdiction of the court. This is not a case of an attempt to confer by consent jurisdiction of a subject-matter beyond the court's jurisdiction. Rather it should be regarded as a waiver of any technical objection which might have been raised as to the manner of acquiring jurisdiction. Where parties, without objection, proceed to the trial of a case, the subject-matter of which is within the original jurisdiction of the court, the rule of estoppel ought to apply against a subsequent questioning of jurisdiction. The modern tendency of courts is to break away from technical rules of practice. The sooner many rules, around which are encircled the halo of time-honored recognition, are modified, restricted, or entirely discarded, the sooner will courts perform the real function for which they were created, the adjudication of controversies between litigants upon their real merits. When that time arrives, and it is fast approaching, the occasion for dissertations by eminent lawyers, jurists, and laymen upon the "sporting theory of justice" will have ceased.

[5, 6] Defendants interposed the defense of nonliability, based upon the posting of certain notices upon the premises. The statute provides:

"Every building or other improvement * * * constructed upon any lands with the knowledge of the owner * * * shall be held to have been constructed at the instance of such owner * * * and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner * * * shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situate thereon." Rev. Laws, § 2221.

Relative to the matter of notices, the court made the following findings:

"That on or about the 1st day of March, 1913, when said agreement of March 1, 1913, between the defendants Wilson and Snowden Placer Company was entered into, there was already posted from previous operations a notice that the defendants Wilson of the Black Cat mining claim would not be responsible for debts incurred or labor or materials furnished for any operation upon said Black Cat mining claim, but that said notice was in a damaged condition from exposure to the elements; that said notice was posted at the collar of a shaft which the defendants Wilson knew would be used by the Snowden Placer Company for operations, as soon as it commenced to work under the agreement of

March 1, 1913, upon the Black Cat mining claim, and through which said shaft the said Snowden Placer Company would conduct all of its mining operations; that the said defendants Wilson knew that the notice thus posted upon a board, nailed at the inside of the collar of the shaft, would necessarily be destroyed in preparing said shaft for mining operations; that the said notice posted at said shaft was therefore not posted in good faith, by the defendants Wilson, so as to give notice to workmen employed by Snowden Placer Company in its operations upon said Black Cat mining claim; that said notice was destroyed on or before March 10, 1913, while said shaft was being prepared for mining operations by employees of said Snowden Placer Company.

"That the said Thomas Wilson, on March 1, 1913, posted a notice on the transformer house of said Black Cat mining claim of the same purport to that which was posted at the shaft heretofore mentioned, and wrote the same in lead pencil upon paper which had long been exposed to the elements, and which defendant Thomas Wilson knew would not remain legible and intelligible for as long a time as under ordinary conditions an ordinary notice would be expected to remain, and that said notice was not posted in good faith to give notice for a reasonable length of time to workmen who would work upon said premises for the defendant, Snowden Placer Company; that said notice was illegible and unintelligible when plaintiff and interveners commenced their work upon the said Black Cat mining claim for Snowden Placer Company, defendant herein, and remained illegible and unintelligible to and including August 20, 1913, and was not posted in a conspicuous place on said claim, when said employment ceased; that said Thomas Wilson, on or about May 15, 1913, posted a notice on the engine house of said Black Cat mining claim of the same purport to that which was posted at the shaft heretofore mentioned, and wrote the same in lead pencil upon a piece of cardboard which the defendant Thomas Wilson knew would not remain legible and intelligible for as long a time as an ordinary notice would be expected to remain so, and therefore said notice was not posted in good faith to give notice for a reasonable length of time to workmen who were or would be working upon said Black Cat mining claim for the defendant Snowden Placer Company; that said notice was illegible and unintelligible at the time that the plaintiff and interveners commenced working upon the said Black Cat mining claim for the defendant Snowden Placer Company, and remained illegible and unintelligible up to and including the 20th day of August, 1913."

But one case is cited by respective counsel as an aid to the court in determining the question of the sufficiency of the notices posted as found by the court, to wit, the case of *Marshall v. Cardinell*, 46 Or. 410, 80 Pac. 652. From the opinion in that case we quote:

"The statutory manner of giving notice is by posting a written announcement, presuming, no doubt, that when once posted it will remain a sufficient length of time to impart knowledge to the persons it is intended to affect. The language is not to keep it posted, but to give notice by posting, and when once posted it will fulfill the mandate of the statute. Of course, if the notice were torn down immediately, or very soon after, by the one who posted it, there would be an apparent attempt to evade the statutory injunction, and the act would probably not be accounted as giving notice by posting; but if posted in good faith, with the intent and purpose that it should remain as long as a notice would remain in a place of that nature under ordinary

conditions, it would seem that the intendment of the statute had been observed and the notice given."

The evidence is not included in the transcript, in which case we are bound to assume that the evidence supports the findings. It is found, however, that three notices were posted, and it is a question whether the court made proper legal deductions from the findings relative to these notices.

The first notice considered was posted at the collar of the shaft. It appears from the findings that this was a notice posted prior to the agreement entered into with the Snowden Placer Company. This notice, primarily intended for "previous operations," was "in a damaged condition from exposure to the elements." To what extent it was damaged does not appear, but in view of other portions of the findings this fact is immaterial. It is found that at the time appellants entered into the agreement with the Placer Company they knew this notice "would necessarily be destroyed in preparing said shaft for mining operations"; that said notice was so destroyed prior to respondents being employed by the Placer Company. The statute says a notice shall be posted "after" knowledge of the construction or intended construction, etc. Assuming, however, without deciding, that a prior notice would meet the requirements of the statute, we are clearly of the opinion that persons employed after the destruction of such notice ought not to be bound thereby, where it appears that the work contemplated necessitated a destruction of such notice.

The second notice discussed in the findings was posted March 1, 1913, the day the agreement was entered into between appellants and the Placer Company. This notice was written "in lead pencil upon paper which had long been exposed to the elements, and which Thomas Wilson knew would not remain legible and intelligible for as long a time as under ordinary conditions an ordinary notice would be expected to remain." This notice was found to have been "posted on the transformer house of said Black Cat mining claim." It was further found that it "was not posted in a conspicuous place on said claim." A notice posted on a transformer house might or might not be said to be posted in a conspicuous place. Ordinarily it would, we think, be very apt to comply with the requirements of the statute. The evidence is not before us, and we are bound to accept the finding that it was not in a conspicuous place.

Much has been said in the briefs of counsel for appellant that the court, in effect, held that a notice must not only be posted but must be maintained. We do not so understand such to have been the position of the court below. A notice must be so posted as under ordinary conditions it will remain a reasonable length of time; otherwise there would be no object in posting a notice at all.

A notice written in lead pencil would be as good as any other notice, but whether a notice so written and exposed to the elements would remain a reasonable length of time is a question of fact for the court below to determine from the evidence, and which this court could not disturb without reviewing the evidence.

The third notice considered was posted on the engine house May 15, 1913, 2½ months after the agreement with the Placer Company was entered into. It is not found that this notice was not posted in a conspicuous place. This notice was not posted within the time prescribed by the statute, nor has counsel cited any authorities holding that such a subsequent notice would be binding. Upon that question we express no opinion, further than to say that we are inclined to the view that such a notice would be a valid notice, but would have no retroactive effect. The court found this notice, also, to have been "illegible and unintelligible at the time that the plaintiff and interveners commenced working." It is further found that the defendant Wilson knew when he posted this notice that "it would not remain legible and intelligible for as long a time as an ordinary notice would be expected to remain so."

As before stated, the evidence is not before us, and none of these findings are attacked upon the ground that they are not supported by the evidence. So far as this court knows, the defendants may have admitted the very facts found. It must be conceded that the findings present questions of law to this court in a very unsatisfactory way. The law only says that a notice shall be posted. It says nothing about maintaining such a notice. It will not do, however, to say that the mere posting of any sort of a notice in a conspicuous place complies with the statute. A notice might be posted, so written that it would not remain intelligible for a day. Such a notice manifestly could not be held to comply with the law. The purpose of the statute is to give actual notice. The law only exacts a reasonable compliance with the statute, but what is a reasonable compliance must depend upon the facts of each particular case. A notice written in lead pencil on a piece of cardboard, or upon a piece of paper which had been exposed to the elements, might in every respect comply with the statute. If, however, it was so posted that any person of ordinary common sense would know that it would in a few days be effaced from exposure to the elements, a court would be justified in holding such a posting not to be a compliance with the statute.

We cannot say as a matter of law in this case that the judgment is contrary to the findings.

[7] The objection to the allowance of costs in the justice's court is well taken.

The judgment will be modified by strik-

ing therefrom the costs in the justice's court, and, as so modified, it is affirmed.

MCCARRAN, J., concurs.

COLEMAN, J. I concur in the opinion and order of the court, except as herein indicated.

There is no question but that the justice of the peace had jurisdiction of the subject-matter and of the parties in the original suit brought by the plaintiff, Phillips. Pursuant to the constitutional provision quoted in the opinion of the court, the Legislature, in 1913, conferred upon justices of the peace concurrent jurisdiction with the district courts in actions for the enforcement of mechanics' liens where the amount of the lien sought to be enforced, exclusive of interest, does not exceed \$300. St. 1913, c. 235, p. 360. There is no doubt in my mind but that the judgment in favor of Phillips and against the defendants is valid, for the reason that, jurisdiction having been acquired by the justice of the peace, it was not lost by his making an order which he had no power to make. Certainly the making of an order which was void could not operate so as to oust the court of a case of which it had jurisdiction.

In the opinion of the court the remarks of Mr. Banks, a member of the constitutional convention, are quoted, wherein he stated that in cases which had arisen in California (similar to the one at bar) the practice was to transfer them to a court of competent jurisdiction. I am unable to find that justices of the peace of California had jurisdiction to foreclose mechanics' liens on real estate prior to the date of the holding of our constitutional convention in 1864. The jurisdiction of justices of the peace in California was fixed by an act entitled "An act concerning the courts of justice of this state, and judicial officers," passed May 19, 1853. Comp. Laws Cal. 1850-53, p. 738. Section 67 of the act mentioned enumerates the subjects over which justices of the peace should have jurisdiction, but the foreclosure of mechanics' liens is not one of them. Section 68 reads:

"The jurisdiction conferred by the last section shall not extend, however—1st. To * * * 2d. Nor to an action for the foreclosure of a mortgage or the enforcement of a lien on real property. * * *"

It is therefore obvious that there never could have been such a practice in California. Mr. Banks probably had in mind a provision contained in section 581 of an act of California entitled "An act to regulate proceedings in civil cases, in the courts of justice of this

state," passed April 29, 1851 (Comp. Laws Cal. 1850-53, pp. 623, 624), wherein it is provided that in actions in the justice of the peace court, if it shall appear that the title of real estate is involved, the proceedings shall be suspended and the case certified to the district court. We have such a provision in Nevada (Rev. Laws, § 5721), but I do not think any one would contend that authority is given under that act to certify up a mechanic's lien suit. It is an elementary rule that courts of justices of the peace are of special and limited jurisdiction and that they must look to the statute for their authority to act. Since there is no statutory provision empowering justices of the peace to certify to the district court such cases as the one at bar, I am of the opinion that any such order would be void. *Paul v. Armstrong*, 1 Nev. 82; *Corthell v. Mead*, 19 Colo. 391, 35 Pac. 741; *Storey v. Mueller*, 21 Cal. App. 301, 131 Pac. 764; 18 Am. & Eng. Ency. of Law (2d Ed.) p. 17.

Notwithstanding the fact that the Dahlstrom and Amedeo judgments were void, the entire case was appealed to the district court. All of the matters which were considered and acted upon by the justice of the peace were within the original jurisdiction of the district court. If the Phillips suit had been commenced in the district court, instead of in the justice court, there is no question but that Dahlstrom and Amedeo could have intervened, and a valid judgment have been rendered in favor of all of the parties. If Dahlstrom and Amedeo had not undertaken to intervene in the justice court, and judgment had been entered in that court for Phillips, and an appeal had been taken by the defendants, we see no reason why Dahlstrom and Amedeo could not have intervened in the district court. In fact, as I view the situation, that, in legal effect, is what must be held to have occurred; for the matter stood, when it reached the district court on appeal, as though there had been no intervention, as the justice of the peace had no power to authorize such procedure.

Hence I am of the opinion that, since appellants went to trial in the district court upon the theory that Dahlstrom and Amedeo were in fact interveners, it is too late for them to urge their objection in this court for the first time. *McKenty v. Gladwin*, 10 Cal. 227; *Smith v. Penny*, 44 Cal. 161; *People v. Reis*, 76 Cal. 269, 18 Pac. 309; *Sanxey v. Iowa City Glass Co.*, 68 Iowa, 707, 17 N. W. 429.

Holding the views expressed, I am of the opinion that the plaintiff, Phillips, should recover judgment for costs in both the justice and the district courts.

WARREN v. GLASGOW & WESTERN EXPLORATION CO., Limited. (No. 2210.)

(Supreme Court of Nevada. Nov. 9, 1916.)

1. WORK AND LABOR — 29(2)—PLEADING—PROOF AND VARIANCE.

Under a complaint on quantum meruit for services, where a specified contract is proved fixing the price therefor, the stipulated price becomes the quantum meruit in the case.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 57; Dec. Dig. — 29(2).]

2. LIMITATION OF ACTIONS — 50(3)—SERVICES OF ATTORNEY.

Where, by an attorney's contract, he was entitled to \$100 per year for general legal services, he had a cause of action for each year's services so rendered, and recovery by him for more than four years prior to action was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 275; Dec. Dig. — 50(3).]

Appeal from District Court, Humboldt County; Edward A. Ducker, Judge.

Action by H. Warren against the Glasgow & Western Exploration Company, Limited. From judgment for plaintiff, defendant appeals. Modified and affirmed.

T. A. Brandon, of Winnemucca, for appellant. L. G. Wilson, of Winnemucca, and J. A. Langwith, of Golconda, for respondent.

NORCROSS, C. J. This is an appeal from a judgment and an order denying defendant's motion for a new trial. Plaintiff brought his action upon contract and prayed judgment in the sum of \$1,491.68 and costs.

After alleging the corporate capacity of defendant, the complaint alleges:

"That between the 16th day of December, 1898, and the 15th day of November, 1913, the plaintiff has continuously and at all times between said dates rendered services to the defendant, at its instance and request, as state agent, and resident agent upon whom process might be served, for the defendant in and for the state of Nevada, and as attorney for the defendant at its request, in counseling and advising the defendant and in attending in and about the business of the defendant and in prosecuting and defending certain suits for the defendant. That said services are reasonably worth the sum of \$100 per year for each and every year between the 16th day of December, 1898, and the 15th day of November, 1913. That the defendant has not paid the same or any part thereof."

Defendant's answer, among other alleged defenses, set up the statute of limitations as a bar to plaintiff's claim for compensation for services rendered prior to four years preceding the termination of such services.

By reply to defendant's answer, plaintiff and respondent denied the alleged bar of the statute of limitations, upon the ground that the services rendered were continuous. Judgment was rendered for the full amount prayed for.

Among the findings of the court appear the following:

"That the plaintiff, in the state of Nevada, for the period of 14 years and 11 months, continuously (which said period began the 16th day of December, 1898, and ended on the 15th day of November, 1913), rendered and performed services for the defendant, at its instance and request, as state agent, and resident agent of a foreign corporation upon whom process may be served within the state of Nevada, and also an attorney at law at its instance and request in counseling and advising the defendant and in attending in and about the business of the defendant and in prosecuting and defending certain suits for the defendant. That said services were performed in an uninterrupted and continuous manner, and were performed under no employment that was for any definite period. That said services were reasonably worth the sum of \$100 for each and every year embraced in the period of their performance, as aforesaid; that is to say, in the aggregate, the sum of \$1,491.68²³/₁₀₀."

It is contended that the findings, supra, are not supported by the evidence.

Relative to the contract in question, we quote the following from the testimony of plaintiff and respondent:

"Q. What has been your relations with the defendant? A. I have been the state agent and attorney for the defendant. Q. By whom were you employed? A. By Otto Stahlman. Q. Who was Otto Stahlman? A. General manager for the defendant company. Q. When did the employment commence? A. In the fall of 1898. Q. State the facts and circumstances as you remember them, Mr. Warren, attending the contract, if any, under which your services were performed. A. Mr. Stahlman and Mr. Farron came to my office and told me what they were going to do; that they were going to take charge of the operations of the Glasgow & Western Exploration Company and the Adelaide Star Mines Company. They discussed generally what the operations would be, stating where the operations were to be carried on and what property they had acquired; and they asked me if I wouldn't act locally for them and advise them in respect to general matters respecting the carrying on of their business. I asked them who they were acting for, under what authority. Mr. Stahlman told me that he was the general manager of both companies. * * * And that Mr. Farron was the superintendent of mining, and that they were foreign corporations, owned by Scotch and English people. He represented that their operations would be very large and extensive. And they wanted to know what was necessary for such corporations to do in order to engage in business in this state. I advised them what was necessary to do to begin with, and he asked if I wouldn't act for them in small general matters and what it would be worth. We discussed the things to some extent, and I advised them, among other things, that they would have to employ an agent, that the law of this state required them to file certified articles of incorporation in every county in which they were engaged to do business, and required them to retain an agent to whom local process could be made. They asked me if I could act for them as agent, and I told them I could. We discussed then the compensation, and I told them those matters were of small moment, that they would very likely have no suits at all, and finally they suggested themselves \$200 a year, if that would be sufficient compensation for acting for them in a general way and for acting as agent, a hundred dollars for each company. I said, 'Yes,' but that I didn't care to act for them in that way, except that I was to have their general business, and we discussed what the general business would be, as to compensation, and

finally concluded that I was to be paid for any special work I did, separately; no amount was fixed as to that. * * * Well, they told me that I was to have all the business; that I was to have \$200 a year for acting as agent and giving them advice in a general way; that I was to have all their business in this county and any other business, law business, or matters outside of being agent and giving a little advice, I was to have that business. * * * I received from the company in Glasgow, through the mail, certified copies of its articles of incorporation, of both companies, and later, as I state, I filed these articles in the different counties in which the companies were engaged in business, and later on, I won't say whether it was in the fall of that year or the early part of the next year, I received two appointments as agent, one for each company, in writing, under the signatures of the officers of the company and under the seal of the company, and I filed these certificates of appointment as agent with the secretary of the state of Nevada."

Upon cross-examination plaintiff testified:

"Q. You had a conversation with them there? A. Yes. Q. In which it was agreed, as you testified, to receive \$100 a year. For what? A. As attorney in small matters, trifling things and as state agent. * * * Q. Did I understand you to say that you were to be paid in addition? A. Yes, sir. Q. For any work that you did? A. Any special work that I did, I was to be paid for it. Q. Then this hundred dollars was simply to act as a retainer? A. General retainer, to act as agent. Q. How long was that to last? A. Until it was stopped. Q. Indefinitely, in other words? A. Yes, there was no fixed time. * * * Q. Did you render any bill for that service? A. I don't think so. Q. Why not? A. Because I felt I had the money coming and that the company would take care of me. Q. In other words, you let it run until you got a bill of \$1,500 against each of these companies, for which you never presented a bill? A. I never presented a bill for acting as state agent."

[1] The contract proved in this case was for a stipulated price per year for the value of the services to be rendered. The action, however, is to recover the reasonable value of the services, which is alleged to be the same as the amount shown by the testimony to have been stipulated. This is immaterial so far as the right to recover is concerned, for as held in *Burgess v. Helm*, 24 Nev. 249, 51 Pac. 1026:

"Under a complaint on a quantum meruit for services, where a specified contract is proved, fixing the price for services, the stipulated price becomes the quantum meruit in the case."

[2] We think the defense of the statute of limitations interposed in this case should

have been well taken. By the terms of the contract proven, respondent was entitled to be paid \$100 per year for his services. He could have presented a claim at the end of each year, and he had a cause of action for each year's services so rendered. *Ennis v. Pullman Co.*, 185 Ill. 161, 48 N. E. 439; *Mosgrove v. Golden*, 101 Pa. 605; 2 R. C. L. 1056. See, also, *Osborn v. Hopkins*, 180 Cal. 501, 117 Pac. 519, Ann. Cas. 1913A, 413, and note.

From the opinion of Magruder, C. J., speaking for the Court in *Ennis v. Pullman Co.*, supra, we quote:

"It seems to be claimed that this is a case of indefinite hiring, and that the statute did not begin to run until the whole service was ended. We cannot concur in this view. Where an attorney is conducting a single suit, it has been held that the statute of limitations cannot commence running until the services contracted for have been performed by the ending of the suit, or by the termination of the retainer in some other mode. *Walker v. Goodrich*, 16 Ill. 341. But where attorneys are regularly employed at a salary given for advice and legal superintendence and other services rendered from day to day, there is no reason why they should not stand upon the same footing as other salaried employees, so far as the statute of limitations is concerned. *Mosgrove v. Golden*, 101 Pa. 605; *Adams v. Ft. Plain Bank*, 86 N. Y. 255; *Hale's Ex'r v. Ard's Ex'rs*, 48 Pa. 22; *Phillips v. Broadley*, 11 Jur. 264.

"Ordinarily, when a man is employed under a general agreement which fixes no term of service, and continues in service a long time, the hiring will be treated as a hiring by the year. *Mosgrove v. Golden*, supra; *Davis v. Gorton*, 16 N. Y. 255 [69 Am. Dec. 694]. In case, however, of such long continued employment, the statute will ordinarily bar a claim for all outside of the five years immediately before the commencement of the action, unless there is evidence to take it out of the operation of the statute. *Mosgrove v. Golden*, supra; *Thompson v. Reed*, Adm'r, 48 Ill. 118; *Freeman v. Freeman*, 65 Ill. 106."

A number of other questions have been raised in the assignments of error and discussed in the briefs, but we think they are not of sufficient merit to require consideration here.

The judgment will be modified by reducing the same to the sum of \$400, and, as so modified, the judgment is affirmed.

McCARRAN and COLEMAN, JJ., concur.

STATE v. ALLEN. (No. 20437.)

(Supreme Court of Kansas. Oct. 7, 1916. On Rehearing, Nov. 18, 1916.)

(Syllabus by the Court.)

1. WITNESSES \S 392(1) — IMPEACHMENT — ADMISSIBILITY OF EVIDENCE.

In a prosecution for murder the defense was justifiable homicide. The defendant's daughter, a young woman under 17 years of age, testified that she met the deceased by appointment at a place near a public road in the daytime, and had been talking to him for about an hour previous to the homicide; that at the instant her father fired the shot which killed the deceased, she was sitting in a buggy and deceased was standing on the ground beside her with one arm about her neck and the other about her ankles attempting to drag her from the buggy and to commit a criminal assault upon her. She further testified that more than a year previous to the homicide when deceased was working for her father on a ranch where she lived, he had once criminally assaulted her and at another time had attempted to do so, and that she had informed her father of these occurrences, and that deceased was discharged from her father's employ, that she bitterly hated the deceased because of his treatment of her and never had wanted to see him again and would not have wanted to speak to him if she had met him. *Held*, that for the purpose of affecting the credibility of the witness, it was not error to admit in evidence letters written by her to the deceased after he quit her father's employ, containing expressions of friendship and affection and tending strongly to impeach her testimony as to the relations between herself and the deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251; Dec. Dig. \S 392(1).]

2. WITNESSES \S 392(1) — IMPEACHMENT — ADMISSIBILITY OF EVIDENCE.

For the same reasons it is *held* that it was proper to admit in cross-examination a written statement signed by the same witness in the presence of the county attorney and others a day or two after the homicide, in which she stated that at the time the shot was fired the deceased was standing at one side of the buggy talking, with his left hand on the back of the buggy or around her shoulder and the other hand resting on the buggy bed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251; Dec. Dig. \S 392(1).]

3. JURY \S 70(8) — SELECTION OF JURORS — DUTY OF COURT.

Where in a criminal prosecution the court sustains the defendant's challenge to the array and discharges the panel because the original names in the jury box have not been properly selected from the assessment rolls, it is the duty of the judge, under section 4624 of the General Statutes of 1909, to select a sufficient number of jurors for the term and to name those selected, and it is not error to refuse to summon the township trustees and require them to select the lists of jurors. *State v. Schmidt*, 74 Kan. 627, 87 Pac. 742.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 324, 330, 340; Dec. Dig. \S 70(8).]

4. HOMICIDE \S 129 — INFORMATION — SUFFICIENCY.

An information which charges that the defendant "did then and there unlawfully, feloniously, willfully, deliberately, with premeditation and with malice aforethought and with a deadly weapon, to wit, a gun, then and there loaded with powder and ball, shoot at one Alfred Tucker, and did then and there with the deadly weapon

on aforesaid and in the manner and with the weapon aforesaid shoot and kill him, the said Alfred Tucker, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Kansas," sufficiently informs the defendant that the charge against him is murder in the first degree, and the omission to employ the words "purposefully" and "maliciously" in describing the act of shooting and killing, is *held* in this case not such a defect or imperfection as tends to the prejudice of the substantial rights of the defendant upon the merits.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 197, 198; Dec. Dig. \S 129.]

5. CRIMINAL LAW \S 628(3) — TRIAL — INDORSEMENT OF WITNESSES ON INFORMATION.

In this case it is *held* that there was no abuse of discretion in permitting the indorsement of certain names of witnesses upon the information immediately before the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1410; Dec. Dig. \S 628(3).]

6. HOMICIDE \S 163(2) — EVIDENCE — ADMISSIBILITY.

In this case it is *held* that there was no error in the exclusion of testimony offered for the purpose of showing the general reputation of deceased where he formerly resided in another state as to his being immoral and unchaste, and also to show that he had contracted there a common-law marriage, and that a child had been born of such marriage, information respecting these matters not having reached the defendant until after the homicide, and the facts not tending in any way to establish a defense nor to affect the situation or appearances at the time of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 312-317; Dec. Dig. \S 163(2).]

7. HOMICIDE \S 308(5) — INSTRUCTIONS — DEGREE OF OFFENSE.

Counsel for defendant requested the court not to submit any instructions except upon the law of murder in the first degree. Of its own motion the court instructed upon the law of murder in the first and second degrees, and the jury returned a verdict of murder in the second degree. *Held*, that since the evidence shows beyond question that defendant was guilty of murder in the first or second degree or that he was innocent, there was no error in the omission of the court to instruct the jury with reference to the lesser degrees.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 646; Dec. Dig. \S 308(5).]

8. WITNESSES \S 267 — CROSS-EXAMINATION — SCOPE AND EXTENT — DISCRETION OF COURT.

The rule that the extent to which cross-examination shall be allowed is determined by the circumstances of the case and rests largely in the discretion of the trial court followed, and *held*, that the defendant's right of cross-examination was not unduly restricted, and *held* further, that defendant suffered no prejudice from rulings on the admission of evidence offered by the state.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. \S 267.]

Appeal from District Court, Meade County. George B. Allen was convicted of murder in the second degree, and appeals. Affirmed.

John Madden, of Parsons, Wallace G. Hughes, of Guymon, Okl., J. P. McLaughlin, of Osage City, F. M. Davis and R. W. Griggs, both of Meade, and C. E. Cooper, of Parsons, for appellant. S. M. Brewster, Atty. Gen.,

Frank S. Sullivan, of Meade, and J. W. Davis, of Greensburg, for the State.

PORTER, J. George B. Allen was charged with murder in the first degree, in killing Alfred Tucker on the 5th day of October, 1914, in Meade county. He was found guilty of murder in the second degree. The verdict was approved by the trial court, and from the judgment of conviction he appeals.

Alfred Tucker had been employed on the defendant's ranch in Meade county from the spring of 1912 till the latter part of August, 1913, when he was discharged or left the employ of defendant and went to Clark county where he worked at different places near Englewood. While living at the ranch he became acquainted with defendant's daughter, Tina Allen, who was then about 16 years of age. After he went to Clark county he and Tina Allen corresponded at frequent and regular intervals; the correspondence indicating that their friendship had ripened into a strong attachment. The letters received by the deceased from Tina Allen were preserved by him and were found among his effects; some of them were offered in evidence.

The day before the homicide Alfred Tucker had assisted in driving a bunch of horses from Englewood to a farm near Meade. He had received a letter from Tina Allen in which she agreed to meet him at the railroad bridge on the afternoon of October 5th. The appointment was carried out. The place where they met is about a mile from the city of Meade and on or close by a much-traveled public highway. They were seen there in conversation by a number of passersby, among whom was Con Wasson, who waved his hand and called to them, and they returned his salute. He went into town and told his brother Glen Wasson that he had seen Tucker and Tina Allen out by the railroad bridge. At this time the defendant was cutting feed for Glen Wasson at a place east of Meade and about three-quarters of a mile from the railroad bridge. Glen Wasson went to the field where Allen was and informed him that his daughter and Tucker were out by the railroad bridge, that they had their horse tied out where everybody could see it, and said that he did not think it looked well for a young lady to be out there with a young man. There was testimony to the effect that Allen became very angry, turned white and said he would kill Tucker, referring to him by a vile name, and that he at once got down from his binder, left it standing in the field, secured his horse and buggy, and drove away. Although he was then about a mile southeast of the railroad bridge, he drove east a distance of one mile, turned north, and drove one mile, where he crossed the public highway running east and west, which passed within a short distance of the railroad bridge where his daughter and Tucker were. He did not take this east and west road, but drove another mile north where he

turned west, continuing for 2 miles, and then south along a private road to his residence about a quarter of a mile distant. There he requested one of his employes to water his horse and to tie it in front of the house. He secured two guns, one of them a 38-caliber Winchester rifle, loaded them, and put them in his buggy. He was at this time about three-quarters of a mile north of the railroad bridge. He first went to the portico of his house and looked down in the direction of the bridge to see if he could discover his daughter and Tucker. He then got into his buggy and drove back north to the public road, then west and south almost three miles, crossed the railroad track and turned east along the public highway close by the railroad track.

From where he turned east to the bridge a person traveling on the highway is concealed from the view of a person on the opposite side of the railroad because of the high embankment. The testimony offered by the state showed that Alfred Tucker was killed by a 38-caliber rifle bullet which entered his back 6 inches below the point of his left shoulder and came out on the opposite side. The testimony of the state tended also to show that the defendant approached the deceased under concealment of the embankment until he reached a point under the bridge, and from that position fired the shot which resulted in Tucker's death. Immediately after the homicide he returned to Meade and informed the coroner that there was a man down by the railroad bridge who was injured, and he requested the coroner and another person to go out there. These persons went immediately to the place and found Tucker's body lying in the roadway a distance of 128 feet from the center of the bridge. The evidence showed that death had been instantaneous. There was found in a pocket of the deceased the letter from Tina Allen making the appointment to meet him there. No weapons of any kind were found on or about the body.

The defense was justifiable homicide; the killing was not denied, but the defendant contended, first, that the homicide was committed in self-defense, and, secondly, to prevent the commission of a felonious assault upon his daughter. The defendant testified that in August, 1913, he had discharged the deceased from his employ because of having learned first from another employe and subsequently from his daughter that Tucker had attempted to ravish his daughter; that after the deceased had left his employ a friend had informed him that Tucker had said in substance that defendant had driven him off, but he was coming back whenever he got good and ready, and that if the defendant stuck his nose in his business, the defendant would have to shoot quicker than he did. The defendant further testified that when he reached the railroad bridge he got out of his buggy, took the rifle and went under the

bridge; that he saw Tina in the buggy and Tucker standing by the side of it; that Tucker appeared to be trying to pull Tina from the buggy; that one arm was on her shoulder or neck and the other in the region of her knees, and she was pushing back; that he tried to call out to them, but choked and could not speak; that just at this instant Tucker turned his face toward the defendant and defendant saw an expression that was beastly and startled, and that Tucker's right hand dropped towards his hip, and the defendant immediately fired one shot. As before stated, the testimony showed that no weapon was found on the body of the deceased or near it.

[1, 2] The principal witness for the defendant in support of the other theory was the daughter, Tina Allen, who testified to an alleged assault made upon her in the year 1913 by Alfred Tucker, and that she communicated the fact to her father. One of the main contentions in the case arises from the admission on her cross-examination of certain letters written by her to Alfred Tucker covering a period of more than a year after the deceased had left her father's employ. The sole purpose of the introduction of the letters was to affect her credibility as a witness. She testified that she had destroyed the letters received by her from Tucker, but she identified the letters to him shown to her on cross-examination, and admitted they were hers. She had testified that she bitterly hated the deceased because of the assault he had committed upon her, that she never had wanted to see him again, and would not have wanted to speak to him if she had met him. It is contended that the court erred in admitting these letters in evidence. Only portions of them were read to the jury, and the court instructed that they were admitted for the purpose only of affecting the credibility of the witness. Their admission was eminently proper. The letters were filled with expressions of friendship and endearment and tended strongly to impeach the statement of the witness that the deceased had committed an assault upon her as she testified or that there had ever been any ill feeling between them. It may be said of the letters, too, that they are not in any way discreditable to the young lady. While they abound in expressions of affection and endearment and of good humor and friendship, they contain no suggestion of anything improper, and are on the contrary consistent with the purest kind of friendship and love for the deceased. Inasmuch as the defense of justifiable homicide was grounded to a very large extent upon the testimony of the daughter, the jury might well have believed that her story on the witness stand in relation to the alleged misconduct of the deceased toward her was fabricated for the purpose of the defense. She had testified that just before she heard the report

of the gun the deceased was trying to pull her out of the buggy and she was holding back so that he could not; that one of his hands was around her shoulder and neck and the other around her ankles. A day or two after the homicide she made the following written statement:

"I met Alfred Tucker down near the railroad bridge by appointment a little after 3 o'clock Monday afternoon, October 5, 1914, some time between 4 and 5 o'clock, to the best of my judgment. I was sitting in the buggy north of the railroad bridge about where the creek bed is. Alfred was standing on the east side of the buggy, one hand, his left hand, on the back of the buggy, or it may have been on my shoulder, talking. The other hand rested on the buggy bed. The buggy was facing the northeast. I heard a shot, and Alfred fell. I looked and saw my father standing under the railroad bridge. He called to me to come to him, and I did. His horse and buggy were standing in the road south of the bridge, facing the east. Father got in the buggy with me and we drove to town, his horse following. Alfred had not mistreated me in any way that day nor attempted to mistreat me, but he had before when he was working for father some time in August, 1913."

The foregoing statement was made at her home in the presence of the county attorney, his deputy, and Mrs. Lucy Bunch, and at a time when Tina's father was in jail. It has been repeatedly held that on the cross-examination of a witness whose testimony may be affected by friendship or enmity toward either party, great latitude of cross-examination is permissible. As a general rule the party against whom a witness is produced has a right to show everything which may in the slightest degree affect his credibility. *State v. Collins*, 33 Kan. 77, 5 Pac. 368. The extent to which a witness may be cross-examined on collateral and irrelevant matters rests in the sound discretion of the trial court. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406. There was no abuse of discretion here. The letters written to the deceased and the written statement to the county attorney were admissible on cross-examination for the purpose of discrediting the story told by the daughter.

Obviously the jury was not impressed with the story of the daughter to the effect that the deceased either had been, before the defendant arrived upon the scene or was at the time defendant fired the shot, attempting to commit a criminal assault. The correspondence between the parties and all the circumstances rendered her story highly improbable. The prearranged lovers' meeting at a place on or near a much-traveled highway, the length of time they were at the bridge, which must have been considerably more than an hour, because the young lady testified that she left school at Meade at 3 o'clock and at once drove to the place, and the evidence, indicate that the defendant came to the place of the homicide between 4 and 5 o'clock—all these facts and circumstances and the friendly correspondence between the daughter and the deceased were

undoubtedly given weight by the jury. The jury doubtless took into consideration the fact that the defendant could have gone to the place where he was informed his daughter and Tucker were by traveling a distance of less than one mile, and that instead of doing this he drove to his home by a circuitous route, secured and loaded his rifle, and that there he was less than three-quarters of a mile from the place where Tucker and Tina were, but instead of traveling that distance, he deliberately drove the remainder of the more than 9-mile circuit for the purpose of concealing his approach and enabling him to come within shooting distance of Tucker without the latter's knowledge. The claim that he shot in self-defense under the impression that Tucker was about to shoot him was contradicted by the location of the wound, the circumstances testified to by his daughter at the trial to the effect that Tucker was standing with his back toward the bridge, as well as by the written statement made by the daughter to the county attorney, which was that Tucker was standing with his right hand resting on the buggy bed when she heard the crack of the rifle.

[3] There is a complaint that the jury was not selected according to law. The court sustained the defendant's challenge to the array, and discharged the panel because the original names in the jury box had not been selected from the assessment rolls of the previous year. Thereupon the judge proceeded to select a jury for the term, following the provisions of section 4624 of the General Statutes of 1909, which requires the judge to select a sufficient number of jurors for the term and to name those selected, whenever for any cause the lists have been improperly returned. It is contended that the township trustees should have been summoned and required to select the lists of jurors. Aside from the fact that such a method would have been cumbersome and the cause of unnecessary delay, the procedure which the court followed is authorized by the section of the statute just cited. It was so decided in the case of *State v. Schmidt*, 74 Kan. 627, 87 Pac. 742. In the opinion in that case the distinction between the situation here and that involved in *State v. Edwards*, 64 Kan. 455, 67 Pac. 834, cited in support of defendant's contention, was pointed out. Moreover, there is nothing to indicate that defendant suffered any prejudice by the manner in which the jurors were selected.

[4] It is complained that the information does not charge a public offense. There was no motion to quash, but the point was raised by an objection to the introduction of testimony. The information charges that the defendant—

"did then and there unlawfully, feloniously, willfully, deliberately, with premeditation and with malice aforethought and with a deadly weapon, to wit, a gun, then and there loaded with powder

and ball, shoot at one Alfred Tucker, and did then and there with the deadly weapon aforesaid and in the manner and with the weapon aforesaid shoot and kill him, the said Alfred Tucker, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Kansas."

It is insisted that the information does not charge that the killing was done purposely and maliciously. We think that by a fair construction of the language used, the information charges that the killing was unlawful, felonious, willful, deliberate, premeditated, and with malice. The omission to repeat the words "purposely" and "maliciously" in describing the act of shooting and killing might have been regarded as fatal when the courts were more concerned in the intricate search in all criminal reviews for technical grounds of reversal, but much progress has been made in recent years in the way of disregarding such technicalities. Section 110 of the Criminal Code (Gen. St. 1909, § 6686) expressly forbids us to quash or set aside an indictment or information for certain defects, among which is enumerated:

"Seventh. For any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

And section 293 of the Criminal Code (Gen. St. 1909, § 6867) declares that:

"On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

It would lengthen this opinion unnecessarily to attempt to cite all the cases in which the foregoing provisions have been applied and judgments of conviction affirmed. Under section 110, supra, may be cited *Ft. Scott v. Dunkerton*, 78 Kan. 189, 192, 96 Pac. 50; *State v. Bland*, 91 Kan. 160, 164, 136 Pac. 947; and under section 293 may be cited the recent case of *State v. Marshall*, 95 Kan. 623, 632, 148 Pac. 675.

[5] Over the objections of defendant the court permitted the county attorney to indorse the names of three witnesses upon the information immediately before the trial. The usual complaint is made that this was error. The whole record discloses that defendant was not prejudiced in the slightest by the indorsement of these names. The two Carliles testified to matters which the defendant admitted and about which there was no dispute. J. D. Tucker, the father of the deceased, testified to a few matters of no special importance.

We find no error in the rulings sustaining objections to questions asked on cross-examination of the witness J. D. Tucker. The objections were properly sustained. There was ground to sustain them because the questions were not proper cross-examination and related to incidents which could only have occurred long prior to the homicide while deceased was living in another state.

Willard Tucker was permitted to testify

that deceased came with him and helped drive the horses from Englewood to Meade county. There was no error in permitting the state to offer this testimony to rebut the suggestion that deceased was there only for immoral or other unlawful purposes.

A number of objections have been made as to testimony of certain other witnesses as to facts which the defendant himself admitted, but there could not have been any prejudice resulting from the admission of the testimony.

It is contended that the venue was not proved, but the coroner testified that the body was found in Meade county.

[6] Complaint is made of the exclusion of certain testimony offered for the purpose of showing the general reputation of deceased in the community where he formerly resided in Louisiana, as to his being immoral and unchaste, and also to show that he had contracted there a common-law marriage with one Mary Moncrieff, and that a child had been born of such marriage. When an objection to this character of testimony was sustained, an offer was made to show that information of deceased's former reputation in Louisiana and of the facts in reference to his relations with Mary Moncrieff had been communicated to the defendant prior to the homicide. An affidavit in behalf of defendant filed in support of an application for a continuance of the cause is made a part of the record and shows that the information respecting these matters did not in fact reach the defendant until after the homicide. In determining therefore whether defendant was prejudiced by the ruling we may disregard the offer to show that he had the information prior to October 5, 1914. Some of the testimony was excluded because it violates the rule that reputation and character cannot be shown by evidence of specific acts of wrongdoing; and we think it was all irrelevant because it tended in no way to establish a defense, nor to affect the situation, condition, or appearances at the time the act of homicide was committed.

[7] We discover no error in the instructions. Counsel for defendant requested the court not to submit any instructions except upon the law of murder in the first degree. Of its own motion the court, however, instructed upon the law of murder in the first and second degrees, and, as stated, the jury returned a verdict of murder in the second degree. It was urged on the motion for a new trial and is insisted upon here that the court erred in failing to instruct on the degrees of manslaughter, assault with intent to kill, and other degrees of assault. The defendant was represented by able counsel and ought to be held bound by the solemn request made by them in his behalf as to the instruction of degrees of the crime, unless it can be said that it was the manifest duty

of the court under the evidence to instruct upon the lesser degrees. We think the evidence shows beyond question that the defendant was guilty of murder in the first or second degree, or that he was innocent. His own testimony takes out of the case the question of manslaughter because it shows that the killing was intentional, and done either in self-defense or in defense of his daughter. In some respects the case is similar to that of *State v. Yarborough*, 39 Kan. 581, 18 Pac. 474, where it was held that the defendant was not prejudiced by a failure to instruct as to the several degrees of manslaughter, in view of the evidence which showed: "So, much thought, contrivance, and design were betrayed by the defendant in the mode of possessing himself of the revolver with which he killed the deceased; and so much deliberation and express malice on the part of the defendant were established." 39 Kan. 596, 18 Pac. 482.

In that case the trial court was requested and refused to instruct upon the law of manslaughter. No instruction upon the law of manslaughter was asked in this case, but on the contrary defendant's counsel requested the court not to so instruct.

In the case of *State v. Newton*, 74 Kan. 561, 87 Pac. 757, it is recognized to be "the duty of the trial court to define and instruct in reference to all lower degrees of the crime of which there is any reasonable theory of guilt under the evidence." Syl. par. 2. In that case the court had instructed as to the only degree which the evidence naturally suggested as probable, and the jury returned a verdict of guilty in that degree; the verdict was abundantly supported by the evidence, and it was held not to be "reversible error for the court to omit to define any lower degree of the crime or to instruct in reference to it unless its attention is challenged thereby by a request for such instruction." Syl. par. 3.

In *State v. Curtis*, 93 Kan. 743, 145 Pac. 858, it was said:

"But where the evidence shows beyond question that a defendant is either guilty of murder in the first degree or innocent, it is unnecessary upon the general charge of murder in the first degree to instruct the jury upon any other degree." 93 Kan. 745, 145 Pac. 859.

See, also, *State v. McAnarney*, 70 Kan. 679, 685, 79 Pac. 137.

It is always the rule that the evidence must be looked to, to determine whether instructions should be given as to the lesser degrees. We find nothing in the present case calling for such an instruction, even though it had been requested.

[8] It is complained that in a number of instances the trial court unduly restricted the defendant's right of cross-examination, but we are unable to discover any ground for this contention. The extent to which cross-examination shall be allowed depends always

on the circumstances of the case and rests largely in the discretion of the trial court. *State v. Ross*, 77 Kan. 341, 346, 94 Pac. 270, and cases cited. We have no hesitation in saying that the trial court did not abuse its discretion in the present case in any of the instructions complained of.

We discover no error which would justify us in reversing the judgment of the trial court, and accordingly that judgment is affirmed. All the Justices concurring.

On Rehearing.

PER CURIAM. It is complained that the opinion fails to give due consideration to alleged errors in overruling defendant's motion for a new trial. Affidavits were presented showing that during the closing argument by counsel for the prosecution and at other times during the trial there was applause by the spectators, indicating a feeling against defendant, and that this prejudiced the jury against him. The record shows that counsel for the defendant objected but once to these occurrences, and that the court admonished the spectators to refrain from future demon-

strations, and further admonished the jury to disregard them. Criminal trials are usually public, and the control of matters of this kind is left necessarily to the discretion of the trial court. That court heard the evidence and decided that nothing occurred at the trial which was so prejudicial to defendant as to justify setting aside the verdict, and there is nothing in the record to indicate error or abuse of discretion in the refusal to grant a new trial. This claim of error was intended to be disposed of in the former opinion by the statement that the trial court had not abused its discretion in any of the instances of which the defendant complains.

Another claim of error was not touched on in the opinion and is thought to deserve special comment. It relates to the exclusion of the testimony of Con Wasson concerning what he saw when he passed the railroad bridge on his way to town. This was properly excluded, for the reason that the matters sought to be brought out were not communicated to defendant prior to the homicide.

The affirmance of the judgment and the former opinion will be adhered to.

In re NORTHCUTT.

(Supreme Court of Oregon. Nov. 14, 1916.)

1. INSANE PERSONS §30—GUARDIAN—"INCAPABLE" PERSON.

Persons "incapable of conducting their own affairs" for whom, in addition to insane persons and idiots, L. O. L. § 1319, authorizes the appointment of a guardian, are persons unable without assistance properly to manage and take care of their property, and who would be likely to be deceived, dominated, or imposed on by artful or designing persons; it not being enough that one does not handle his property judiciously.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 43, 45, 61; Dec. Dig. §30.]

For other definitions, see Words and Phrases, First and Second Series, Incapable.]

2. INSANE PERSONS §2—GUARDIAN — INCAPABLE PERSON—EVIDENCE.

Evidence in proceeding for appointment of a guardian for one 77 years old, about to marry and move to another state, with the idea of building a lighting plant, held not to show that he was incapable of conducting his own affairs, within L. O. L. § 1319.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 4-10; Dec. Dig. §2.]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Petition for appointment of a guardian for S. T. Northcutt. Appointment made by the county court was set aside on appeal to the circuit court, and petitioner appeals. Affirmed.

See, also, 148 Pac. 1133.

A petition was filed on December 16, 1914, by Mrs. Eva Palmerton for the appointment of a guardian to manage the estate of her father, S. T. Northcutt, who owns notes and mortgages amounting to about \$26,000. The petitioner is his daughter and only child. The daughter filed a petition asking for the appointment of a suitable person as guardian of the estate of the father, and alleging that by reason of his age and mental and physical infirmities he had been defrauded of considerable property and was incapable of conducting his own business. He answered by saying that he was able to look after his own affairs, and charged that the daughter "is afraid that some portion of his estate will be spent on some person other than herself," and that she filed a petition for a guardian because he had planned to leave the state on account of his health, and because he intended to marry a designated woman who lives in Marion county. The petitioner replied by averring that her only purpose is to protect her father from the machinations and schemes of dishonest and designing persons. After hearing the evidence the county court decided that S. T. Northcutt was not capable of conducting his own affairs and appointed a guardian of his estate. The appointment was set aside upon an appeal to the circuit court, and the petitioner is prosecuting the appeal to this court.

John A. Carson, of Salem, for appellant.
Walter E. Keyes and Charles L. McNary,
both of Salem, for respondent.

HARRIS, J. (after stating the facts as above). [1] The Code confers authority for the appointment of a guardian to manage the estates of designated classes of persons, and unless S. T. Northcutt comes within one of those classes, it would not be proper to appoint another person to manage his affairs. Section 1319, L. O. L., provides that:

"The several county courts, in their respective counties in this state, shall have power to appoint guardians to take care, custody, and management of the estates, real and personal, of all insane persons, idiots, and all who are incapable of conducting their own affairs. * * *"

Section 1319 recognizes different classes of mental incapacity just as other sections of the Code acknowledge degrees of mental weakness. In re Sneddon, 76 Or. 470, 479, 149 Pac. 527. The language of section 1319 includes three classes of persons: (1) Insane persons; (2) idiots; (3) all who are incapable of conducting their own affairs. It is not contended that S. T. Northcutt is an insane person or an idiot, and therefore the inquiry is whether he is one of those persons "who are incapable of conducting their own affairs." The Legislature has defined the words "insane person," in all statutes relating to guardians and wards, to include "every idiot, every person not of sound mind, every lunatic, and distracted person"; but there is no definition in this jurisdiction of the words "incapable of conducting their own affairs." It becomes necessary, then, to ascertain the meaning of the words last quoted before attempting to determine whether S. T. Northcutt comes within that class of persons. The term "incapable" signifies: Wanting in capacity for the purpose or end in view; personal lack of ability or power or understanding to perform duties or exercise privileges. Webster's Dictionary; Century Dict.; 22 Cyc. 40. While the definitions given by lexicographers tell us what is meant by the word "incapable" when used in the abstract, yet they do not furnish a gauge by which the degree of mentality possessed by any given person can be compared and measured so that we can know with reasonable certainty when that person has in fact become one of those who is incapable of conducting his own affairs. In California the Legislature provided a test by which to determine whether any person is incapable of managing his own affairs. Section 1767 of the Code of Civil Procedure (3 Kerr's Cyc. Codes of Cal.) declares that the word "incapable"—
"shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of * * * his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

See, also, *Matter of Daniels*, 140 Cal. 835, 73 Pac. 1053.

The Supreme Court of Oklahoma was called upon to construe a statute of that state which authorizes the appointment of a guardian for any person who is "incapable" of managing his property, and that court adopted the California statutory definition, saying in the course of the reported opinion that:

"This definition in our judgment fairly expresses the meaning intended by our Legislature." *Shelby v. Farve*, 33 Okl. 651, 655, 126 Pac. 764.

Another court has said that:

"A person may be of weak mind, and by reason thereof easily influenced, or dominated by others, so that, in the judgment of men, he ought not to be allowed to manage his affairs." In re *Clark*, 175 N. Y. 139, 67 N. E. 212.

The much cited case of *Emerick v. Emerick*, 83 Iowa, 411, 49 N. W. 1017, 13 L. R. A. 757, holds that:

"Ordinarily a person who has sufficient mental capacity to make a valid agreement in regard to his property, and to manage it with reasonable care, unaffected by another's will, should be permitted to retain it."

The California statutory definition as well as the judicial interpretation of statutes like ours are substantially the same and afford a satisfactory test by which to gauge the legal fitness of a person to manage his own affairs; and therefore, if S. T. Northcutt is unable without assistance properly to manage and take care of his property, and would be likely to be deceived, dominated, or imposed upon by artful or designing persons, then he is incapable of conducting his own affairs within the meaning of section 1219, L. O. L. It must be remembered all the while, however, that a guardian cannot be appointed merely because a person does not manage his property judiciously. *Com. v. Reeves*, 140 Pa. St. 258, 21 Atl. 315; *Emerick v. Emerick*, supra.

[2] S. T. Northcutt has been a resident of Marlon county for many years, and now lives in the town of Turner. By his industry, thrift, and business judgment he has accumulated considerable property. He is a widower, was about 77 years of age when the petition was filed, and he has cared for the daughter and her children and they have made their home with him during much of the time since she has been divorced. He has bought and sold lands in Marion county, and about five or six years ago he purchased a large tract of land, and in two or three years afterwards sold the property at a profit of about \$10,000. One witness referred to him as one who is "quite venturesome for a man of his age, and he is a live—what I would term a live business man," and "wants to be doing all the time." In October, 1913, Northcutt left for New Orleans for the purpose of investigating some property. Upon the advice of a business friend and a banker he took his money in the form of a

letter of credit for \$6,000 or \$7,000 instead of carrying coin with him. While en route on the train he fell in with a woman and two men who were bunco steerers, and, while he denies that he lost his money, nevertheless we shall assume that the sharpers succeeded in relieving him of all or most of the money represented by the letter of credit. Upon his return to Turner, according to the testimony of the petitioner, a man named Harpool interviewed him about investing in land in Arizona, and at some time during the summer of 1914 one Manrod attempted to interest Northcutt in "some kind of a fertilizer" in Mexico. He did not invest, however, in the Arizona land nor in the fertilizer. The daughter testified that her father had been writing poetry ever since she was a little girl. A litterateur acknowledged that, while Northcutt's poetry "is in a class by itself," and while the poems "could be better," and "they won't compare with the best poets," yet "through them all runs a connective chain." The petitioner says that evidence of her father's incapacity is found in the fact that he has been known to arise between 2 and 4 o'clock in the morning and recite poems, and she especially emphasizes instances occurring in 1913 when he would in his imagination address the chairman of a civic organization known as the Cherrians and rehearse poetry, occasionally interspersing the recital with the use of profane language. It turns out, however, that the Cherrians had offered a prize of \$10 for the best poem to be submitted, and, in his own peculiar way, Northcutt was only composing a poem to compete for the \$10. At one time he offered a poem to a moving picture man to ascertain whether the verses could be used in the moving picture business. Only a few weeks before the filing of the petition Northcutt went to Missouri and entered into a contract for the purchase of a section of land. So far as is disclosed by the evidence, the land is worth what he agreed to pay for it, and there is not even an intimation anywhere that he was overreached or dominated or influenced by any one. He has also talked about the feasibility of erecting an electric lighting plant in the town where the section of land is located. He contemplates a change of residence with the hope that a change in climate will relieve him of catarrh. In view of his plan to move out of the state and buy land in Missouri, and possibly install an electric lighting plant, Northcutt intends to call in his loans so that he can use his money in the contemplated investments. He intends to marry a woman who is 53 years of age, and with whom he has been acquainted for about 20 years; and the evidence shows that she is an estimable and respectable woman, notwithstanding the opinion of the petitioner to the contrary. It may be that it is not best for a man 77 years of age to move away

from the place where he has resided for many years and invest his money in land elsewhere, and possibly build a lighting plant, and, while one witness thought the withdrawal of his loans and the purchase of land in another state involved a risk, yet no witness ventured to say that the proposed investments would prove unprofitable. In spite of his penchant for writing poetry, and although he may have been ambitious to have one of his poems dramatized, he has nevertheless made money even in his old age, because one witness gave it as his opinion that Northcutt "had made more money in the last five years than any man in Turner." Standing by itself, his experience with the three swindlers might suggest the propriety of appointing a guardian, but by the same token it would become advisable to conserve the estates of two witnesses who, when testifying, confessed to having been buncoed at one time, and yet each of them is recognized as a successful business man. There is no intimation of any person overreaching Northcutt in any transaction since 1913.

The petitioner said that she did not think her father was competent to manage his affairs. One witness thought that "it was hardly good judgment" for Northcutt to go away and invest heavily. Upon hearing of the perpetration of the swindle a nephew was of the opinion that Northcutt needed a guardian, but after seeing and talking with his uncle the nephew was convinced that a guardian was not necessary. Mrs. Frances Hubbard thought a guardian was needed, and John M. Watson testified about saying that "I thought it was foolish for a man of his age to speculate in land." In addition to the circumstances already narrated and the opinions of the witnesses mentioned, there was some evidence indicating that Northcutt practiced calisthenics while on the much-talked-of New Orleans trip, and there was also some testimony about Northcutt saying that he intended to try to relocate an oil spring which he saw near Salt Lake years ago.

The mayor of Turner testified that Northcutt's business ability "compares favorably with most any man." The cashier of the Turner State Bank said that Northcutt was competent, and Mr. McKinney thought that he was about as able to transact business as the average man. H. W. Smith stated that Northcutt was as capable of transacting business as the average man of his age. E. C. Baker, a hotel keeper, considered "him one of the shrewdest men in Turner when it came to business." J. T. Cannon testified that: "I consider him as shrewd a man in business as there is in the country." Eight other witnesses said that he was competent to transact business. And finally Dr. L. F. Griffith, who has been employed at the state hospital for the insane since May, 1891, tes-

tified that while, generally speaking, it was not good business for an old man to engage actively in business, yet, after making an examination, he found Northcutt "quite remarkably preserved for a man of 77 years of age, both physically and intellectually," and that he was competent to transact business.

Without the evidence of the fraud practiced upon Northcutt in 1913, the record would be barren of any suggestions looking towards the advisability of appointing a guardian; but it is worthy of notice that no attempt was made to appoint a guardian upon his return in 1913, and it was not until a year afterwards, when he planned to marry and talked of moving away and investing in land in Missouri, that the petition was filed. Moreover, some information of the motives prompting the guardianship proceeding is afforded by the frank admission of the petitioner that she objects to her father marrying the lady of his choice. She has no right, however, to say that her father shall not marry nor to say whom he shall marry. *Hogan v. Leeper*, 37 Okl. 655, 133 Pac. 190, 47 L. R. A. (N. S.) 475. It may not be judicious for Northcutt to marry, or to move away, or to invest his money in Missouri, but he had a right to do so unless for some reason he is incapacitated. If men of competent judgment and who have known him for years are to be credited, then at the time of the trial Northcutt was not an incapable person within the meaning of the statute, even though his doings betray some of the foibles which frequently accompany old age.

The decree of the circuit court is affirmed.

MOORE, C. J., and McBRIDE and BEAN, JJ., concur.

TREADGOLD v. WILLARD.

(Supreme Court of Oregon. Nov. 14, 1916.)

1. JUDGMENT \Leftrightarrow 248—FOUNDATION—"PLEADINGS."

Pleadings are the formal written allegations by the parties of their respective demands and defenses, and are employed to state the ultimate facts, which, when uncontroverted, or when established by evidence at the trial, afford the foundation upon which a judgment or decree must necessarily rest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. \Leftrightarrow 248.

For other definitions, see Words and Phrases, First and Second Series, Pleading.]

2. PLEADING \Leftrightarrow 408(3)—SUPPLYING OF AVERMENT BY ADVERSE PLEADING.

In an action for rent, where the averment of the complaint respecting the description of the premises was defective, but the answer set forth a copy of the lease, giving a complete description, such answer remedied the defective state of the complaint, since, if a responsive pleading supplies material averments omitted by an adverse party, the question of who so makes the

indispensable averment is unimportant, though the order of pleading may be irregular.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344-1347; Dec. Dig. ¶403(3).]

3. APPEAL AND ERROR ¶1040(10)—HARMLESS ERROR—OVERRULING DEMURRER.

In an action for rent, where defendant's answer remedied the defective averment of the complaint in respect to lack of proper description of the land, the action of the court in overruling demurrer to the complaint was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4088, 4106; Dec. Dig. ¶1040(10); Pleading, Cent. Dig. § 567.]

4. WHARVES ¶9—LEASE—ESTOPPEL TO DENY LANDLORD'S TITLE—STATUTE.

Under L. O. L. § 798, subd. 5, providing that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation, the lessee of wharfage rights, by accepting the written agreement, was estopped from controverting his landlord's title while retaining possession of the rights secured by the lease.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 4, 5; Dec. Dig. ¶9.]

5. LANDLORD AND TENANT ¶63(3) — ESTOPPEL TO DENY LANDLORD'S TITLE—TERMINATION BY SURRENDER.

A tenant's estoppel to deny his landlord's title ceases when he surrenders to the landlord possession of the demised premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 161; Dec. Dig. ¶63(3).]

6. LANDLORD AND TENANT ¶63(4) — ESTOPPEL TO DENY LANDLORD'S TITLE—TERMINATION—CHARACTER OF SURRENDER.

A tenant's relinquishment of possession of the demised premises to the landlord, which will terminate his estoppel to deny the landlord's title, must be complete, open, and made in good faith.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 162; Dec. Dig. ¶63(4).]

7. WHARVES ¶9 — LEASE — REALTY SUBJECT TO DEMISE.

A wharf resting on piles driven into mud flats was a part of the realty, which could be held under lease; so that taking possession of any part thereof under an agreement of lease created the relation of landlord and tenant.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 4, 5; Dec. Dig. ¶9.]

8. LANDLORD AND TENANT ¶199½—LIABILITY FOR RENT—ESCAPE FROM.

A tenant who enters into possession of demised premises pursuant to the terms of the lease can escape liability for rent thereunder only by being evicted by the holder of the paramount title or by compulsory attornment to him, or, when notified of the assertion of such superior right, by surrendering possession to his landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 761; Dec. Dig. ¶199½.]

9. APPEAL AND ERROR ¶488(2)—INJUNCTION — VIOLATION PENDING APPEAL — PROSECUTION FOR CONTEMPT.

Where a corporation was enjoined from intermeddling with wharf property, the taking of an appeal from the decree, and the giving of supersedeas bond did not render it immune, while the appeal was pending, from prosecution for contempt for a violation of the injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2278; Dec. Dig. ¶488(2).]

10. WHARVES ¶9 — LEASE OF WHARFAGE RIGHTS—OCCUPATION.

Where the lessee of wharfage rights, when notified that his landlord's title was in litigation, tied the raft on which he unloaded passengers and freight from his steamboat to another wharf, but such raft constantly rested against the leased wharf, to which it was attached by a gangplank over which the passengers and freight were landed, such lessee took possession of and occupied the leased wharfage rights.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 4, 5; Dec. Dig. ¶9.]

11. TRIAL ¶139(1)—DIRECTION OF VERDICT—PARTICULAR FINDING OF FACT.

When a cause is finally submitted, if it appears from the evidence received that one of the parties is entitled, as a matter of law, to a particular finding of fact, it is incumbent on the court, when so requested, to direct a verdict to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 832, 833, 838-841; Dec. Dig. ¶139(1).]

Department 1. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by G. T. Treadgold against Frank E. Willard. From a judgment for defendant, plaintiff appeals. Judgment reversed, and plaintiff awarded recovery of the sum demanded in the complaint.

This is an action to recover money. The complaint charges that at all the times stated therein the Walker Warehouse Company was and is a corporation; that it on May 6, 1913, entered into an agreement with the defendant whereby, in consideration of his promise to pay \$10 a month in advance, the corporation permitted him to use and leased to him "certain valuable property," of which he then took possession, and continued to use for eight months; that on December 31, 1913, there was due under the agreement \$70 from him to the corporation when it for a valuable consideration assigned the account to the plaintiff, who ever since has been the owner thereof; and that the defendant has refused to pay any part of the money so due. The amended answer admits the existence of the corporation, and that the defendant entered into a written contract with it, setting forth a copy thereof. It appears therefrom that the corporation leased to the defendant "from month to month all the wharfage rights belonging to the land lying in front of lot 2 in block 3 of Woodland addition to Bandon, Coos county, Or., at and for the agreed price of \$10 per month, to be paid each month in advance." The writing also stipulated that either party might terminate the agreement by giving the other party 80 days' notice of an intention to do so. The remaining averments of the complaint are denied. For a further defense the answer sets forth a copy of the decree rendered by the circuit court of Coos county, Or., in the case of Chris Rasmussen against the Walker Warehouse Company, and alleges that by virtue of such determination the corporation had no wharfage or other rights which it undertook to lease, and

by reason thereof could not enter into a valid agreement in respect thereto; that such wharfage rights were never owned by nor in possession of the corporation; that the defendant never became its tenant, and the pretended lease was without consideration; that about May 8, 1913, the defendant was advised of the decree by Rasmussen, who forbade him from interfering with such wharfage rights, and informed him that, if he intermeddled therewith, a suit would be instituted against him, whereupon the defendant notified the corporation thereof. The reply denied the allegations of new matter in the answer, and averred that at the time the written agreement was signed the defendant knew the wharfage rights were in litigation, and on account thereof covenanted in the lease that upon its termination he would surrender possession of the premises peaceably; that an appeal from the decree specified was taken by the corporation, which thereupon entered into an agreement with Rasmussen whereby it was stipulated that pending a review of the cause the appellant's possession of the demised premises should not be disturbed; that upon an affirmance of the decree peaceable possession of the premises so leased was surrendered to that respondent, who then released the corporation from all liability, including the payment of wharfage; that Rasmussen never evicted Willard, nor did the latter attorn to him or any other person; and that in the eight months during which the defendant was in possession of the wharfage rights he recognized the corporation as his landlord, and expressly promised to pay to it the installments of rent as they severally matured. Based on these issues, the cause was tried, resulting in a verdict and judgment for the defendant, and the plaintiff appeals.

G. T. Treadgold, of Bandon (C. R. Barrow, of Coquille, Chatburn & Gardner, of Bandon, and Geo. C. Guthrie, of Chicago, Ill., on the brief), for appellant. W. C. Chase, of Coquille, for respondent.

MOORE, C. J. (after stating the facts as above). It is maintained that an error was committed in denying a request to direct a verdict for the plaintiff on the ground that no testimony had been received tending to support the averments of the answer. It is insisted by defendant's counsel, however, that since the complaint did not particularly describe the premises alleged to have been leased, the primary pleading did not state facts sufficient to constitute a cause of action, which defect was not waived or remedied by answering over after a demurrer to the complaint interposed on that ground was overruled, and, this being so, no error can be predicated upon any action of the court occurring at the trial.

[1,2] Considering these questions in the inverse order, we find a text-writer saying:

"The declaration or complaint in an action for arrears of rent should allege a lease of described premises for a given term at a certain rent which defendant promised to pay and which has become due and remains unpaid." 24 Cyc. 1210.

See, also, *Kiernan v. Terry*, 26 Or. 494, 38 Pac. 671.

Pleadings are the formal written allegations by the parties of their respective demands and defenses, and are employed to state the ultimate facts which, when uncontroverted or when established by evidence at the trial of a cause, afford the foundation upon which a judgment or decree must necessarily rest. If a responsive pleading supplies material averments that have been omitted by an adverse party, so that the essential facts are thus set forth with sufficient particularity to uphold a judgment or decree based thereon, the question of who so makes the indispensable averment is unimportant, though the order of pleading may be irregular. Thus in 31 Cyc. 714, it is said:

"If a necessary allegation is omitted from a pleading, and the missing allegation is either alleged or admitted by the pleading of the adverse party the defect is cured."

So, too, in *Dice v. McCauley*, 25 Or. 471, 36 Pac. 530, in referring to an ambiguity in the delineation of a border to real property, set forth in an initiatory pleading, Mr. Justice Bean observes:

"The only uncertainty in the description contained in the complaint is the north boundary, and that is obviated by the answer."

To the effect that omitted averments may be supplied by the allegations of an adverse party, see, also, *Turner v. Corbett*, 9 Or. 79; *Ferrera v. Parke*, 19 Or. 141, 23 Pac. 883; *State ex rel. v. Downing*, 40 Or. 309, 58 Pac. 868, 66 Pac. 917; *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515; *Hornefius v. Wilkinson*, 51 Or. 45, 93 Pac. 474.

[3] The answer herein admits the defendant entered into an agreement with the Walker Warehouse Company, and sets forth a copy of the lease which gives a complete description of the demised premises. The defendant's pleading therefore remedies the defective averment of the complaint in respect to the lack of proper description of the land, and renders harmless the action of the court in overruling the demurrer.

Reviewing the refusal to direct a verdict for the plaintiff, the testimony shows that the Walker Warehouse Company, a corporation, claiming to be the owner of the tideland in front of and abutting upon the north end of the lot described in the lease, built on such shoals a wharf the outer or north line of which extended to navigable water in the Coquille river. Chris Rasmussen, the owner of such lot, commenced a suit against the corporation to quiet his title to the premises, alleging in his complaint that the tideland abutting thereon was a part thereof, and on November 16, 1912, he secured a decree enjoining those defendants and all persons

claiming or to claim by, through, or under them, or either of them, from driving any piles between the north line of such lot and the ship channel in that river, and also restraining any interference with that plaintiff's rights or privileges in or to the tideland, from which decree those defendants appealed. The corporation thereafter, and on May 6, 1913, leased to Willard the premises so described for the use of which he paid the first installment of rent in advance. The defendant made a small log raft, which, floating with the tides, rested against the north line of piling of the wharf, though the raft was fastened to a wharf immediately east of the one mentioned. The latter wharf and a warehouse thereon were also built by the corporation in front of and abutting upon lot 1 in block 3 of Woodland addition to Bandon, which real property was owned by Mr. Kronenberg. From the raft to the west wharf the defendant placed an incline, or gangplank, over which passengers went and freight was carried to and from Willard's steamboat, and such means was used by him for that purpose eight months, and until the decree appealed from in the suit referred to was affirmed. *Rasmussen v. Walker Warehouse Co.*, 68 Or. 316, 136 Pac. 661. Thereupon the defendant herein was notified by the corporation to surrender possession of the leased premises. For seven months he never paid any rent and refused to make any remuneration on account thereof, whereupon the corporation assigned the claim to the plaintiff herein, who instituted this action to recover the remainder alleged to be due.

G. T. Treadgold testified that on May 6, 1913, when the lease was made, the Walker Warehouse Company was, and ever since the year 1911 had been, in possession of the wharf and the wharfage right in front of lots 1 and 2 in block 3 in the addition specified; that in the eight months during which the defendant occupied the demised premises pursuant to the terms of the written agreement he never denied his liability to the corporation or offered to surrender to it the possession of the property.

Chris Rasmussen, the party who secured the decree against the Walker Warehouse Company, testified that about May 6, 1913, the defendant herein applied to him for permission to use the wharfage right in front of lot 2, and was informed by the witness that the property was in litigation, and until a final decree was rendered nothing could be done by him in the matter. On cross-examination Mr. Rasmussen stated he did not tell the defendant he could not use the property, nor did the witness object to the steamboat being tied by Willard at that place.

The defendant testified that after making the agreement with the corporation he learned an injunction had been issued, whereupon he notified the agent of the Walker Warehouse Company of what he had been inform-

ed, and thereupon obtained from the agent of Mr. Kronenberg permission to tie his log raft to the east wharf, that the witness never took possession of any property under the terms of the written lease, and that he had never been evicted by Rasmussen.

[4-8] Notwithstanding the sworn statements of this witness, which declarations seem to voice his opinion of the law governing his rights, the physical fact remains that for eight months he occupied the demised premises. By accepting the written agreement he is estopped from controverting his landlord's title while he retained possession of the wharfage rights which he secured by the lease. *L. O. L. § 798*, subd. 5; *Jones v. Dove*, 7 Or. 467; *Rouse v. Riverton Coal Co.*, 71 Or. 154, 142 Pac. 343. The estoppel ceases, however, when the tenant surrenders to the landlord possession of the demised premises. *Bertram v. Cook*, 44 Mich. 396, 6 N. W. 868. Such relinquishment must be complete, open, and made in good faith, nothing short of which will suffice. *Hagar v. Wikoff*, 2 Okl. 580, 39 Pac. 281; *Shy v. Brockhause*, 7 Okl. 35, 54 Pac. 306. The west wharf leased by the corporation in this instance rested upon piles driven into the mud flats, and hence the structure was a part of the realty which could be held in subordination to some superior. If, therefore, the defendant took possession under the terms of the agreement of any part of the west wharf, the relation of landlord and tenant was created between the parties. *Beck v. Grain Co.*, 131 Iowa, 62, 64, 107 N. W. 1032, 1033 (7 L. R. A. [N. S.] 930). In deciding that case Mr. Justice Ladd says:

"The landlord may not have any interest in the title to the demised premises, but whether he has or not cannot be questioned by the tenant before the expiration of his lease, and whilst in possession under it, unless based upon some distinct and independent claim to the land."

A tenant who enters into possession of demised premises pursuant to the terms of a lease can escape liability for rent thereunder only by being evicted by the holder of the paramount title or by compulsory attornment to him, or, when notified of the assertion of such superior right, by surrendering possession to his landlord. *Jones, Land. & Ten. § 701*. This author in that section of his work remarks:

"For a tenant who admits the execution of a lease to defend an action for rent, it is necessary for him to allege either that he had not entered under the lease, or that he had been evicted by a paramount title or that possession had been surrendered."

In *George v. Putney*, 4 Cnsh. (Mass.) 351, 354 (50 Am. Dec. 788), Mr. Justice Wilde, speaking for the court, says:

"In an action for the recovery of rent reserved in a lease by the lessor against the lessee, the defendant is not allowed to plead *nil habuit in tenementis*; for he is estopped to deny the lessor's title, by whose permission he has entered upon and occupied the premises. And this is not a mere technical rule, but is conformable to the contract between the parties; for so long as

the lessee is not disturbed in his occupation he is bound by the contract to pay the rent, whether the lessor's title be defective or not. But it is equally well settled that, if the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor, without rendering himself liable as a trespasser to the other party, he may yield the possession, and take a new lease under him, or he may abandon the possession; and in either case he will thereafter not be liable to pay rent to the original lessor. Such an entry and disturbance are equivalent to an ouster."

See, also, the notes to the case of *Hodges v. Waters*, 4 Ann. Cas. 106.

[9, 10] The plaintiff's testimony shows that the Walker Warehouse Company was in the actual possession of the wharf in front of and abutting upon lot 2 in block 3 of Woodland addition to Bandon, Or., on May 6, 1913, when the lease was executed, notwithstanding the corporation had been perpetually enjoined from intermeddling with the property. The taking of an appeal from that decree and the giving of a supersedeas bond did not render the corporation immune, while the appeal was pending, from prosecution for contempt for a violation of the injunction. 1 Joyce, Inj. § 283. No testimony was offered tending to substantiate or to deny the averment in the reply that the Walker Warehouse Company by agreement with Rasmussen was permitted to retain possession of the property leased to the defendant until final determination of the cause on appeal. In the absence of such proof, however, it is certain that Willard was never evicted, nor did he attorn to Rasmussen; neither did the latter object to the defendant's possession. Willard testified that he did not take possession of the wharfage rights so attempted to be leased, but fastened his log raft to the east wharf in front of and abutting upon Mr. Kronenberg's lot. This raft constantly lodged against the outer row of piling in the west wharf; such float evidently being kept in that position by the current in the Coquille river. It will be remembered that from the raft an inclined plank gangway extended to the west wharf whereby passengers were permitted to pass, and freight was conducted to and from the defendant's steamboat to and over such wharf for the entire eight months during which Willard occupied the premises. Notwithstanding the defendant's testimony that he did not take possession of the wharfage rights under the terms of the lease, his sworn statement in this particular was evidently nothing more than a conclusion of law based upon the assumption that because the raft was fastened to the east wharf, and not to the west wharf, he did not occupy the latter. The physical fact that the raft constantly rested against the west wharf to which it was attached by the gangplank overcomes his testimony, and conclusively

shows he took possession of and occupied the wharfage rights so leased to him during the entire time specified.

[11] When a cause is finally submitted, if it appears from the evidence received that one of the parties is entitled, as a matter of law, to a particular finding of fact, it is incumbent upon the court when so requested to direct a verdict to that effect. *Merrill v. Missouri Bridge Co.*, 69 Or. 588, 592, 140 Pac. 439, 441. In deciding that case Mr. Justice Ramsey says:

"When there is no conflict in the evidence, and no dispute as to the material facts of the case, the question for decision is for the court, and under such a state of facts the court should direct the jury as to the particular verdict that they should find in accordance with the undisputed evidence."

See, also, the cases there cited in support of the language used.

A request having been made at the proper time for a directed verdict for the plaintiff, to which command the evidence shows he was unquestionably entitled, as a matter of law, an error was committed in denying such solicitation.

The judgment is therefore reversed, and the plaintiff will be awarded a recovery of the sum demanded in the complaint.

BENSON, BURNETT, and McBRIDE, JJ., concur.

NORRIS SAFE & LOCK CO. v. WEAVER et al.

(Supreme Court of Oregon. Nov. 14, 1916.)

1. BANKS AND BANKING §44—STOCKHOLDERS—LIABILITY FOR DEBTS—CONSTITUTIONAL PROVISION.

The amendment to Const. art. 11, § 3 (Laws 1913, p. 8), adding thereto the provision that the stockholders of corporations and joint-stock companies conducting the business of banking shall be individually liable for the benefit of depositors to the amount of their stock at par, in addition to the par value of such shares, cannot be extended to include creditors of a bank for merchandise sold to it.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 63; Dec. Dig. §44.]

2. CONSTITUTIONAL LAW §154(2)—OBLIGATION OF CONTRACTS.

An amendment to Const. art. 11, § 8, adding to it the provisions that the stockholders of corporations and joint-stock companies conducting the business of banking shall be individually liable for the benefit of depositors to the amount of their stock at par in addition to the par value of such shares, cannot impair the obligations of a subscription contract made before its adoption and while section 3 limited the liability of stockholders to the amount of their stock subscribed and unpaid.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 461-473; Dec. Dig. §154(2).]

3. BANKS AND BANKING §49(7)—ACTIONS AGAINST STOCKHOLDERS—PLEADING.

In an action to enforce, against alleged stockholders of a bank, payment of balance due on a judgment recovered by plaintiff against the

bank, the complaint which did not show how many shares each defendant subscribed, and how much remained unpaid upon his subscription, so that the court might know the extent of the award to be made against him, did not state a cause of action.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 77; Dec. Dig. ¶49(7).]

In Banc. Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by the Norris Safe & Lock Company against J. R. Weaver and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action to enforce against alleged stockholders the payment of a balance due upon a judgment recovered by the plaintiff against their corporation. After stating the sale of a safe to the concern, the rendition of judgment for its price, the return of an execution but partially satisfied, the want of any other property of the debtor, and demand upon the defendants that they liquidate the remainder of the adjudicated claim, the complaint contains this averment, it being the only one charging the defendants:

"That on the said 23d day of November, 1911, and at and during the time when the said debts and liabilities of the Citizens' State Bank of Ontario were contracted, accrued, and incurred by the said corporation, and the safe sold to said corporation and accepted by the same, the defendants and each of the defendants was a stockholder in the said corporation to the amount of — shares of the capital stock of the said corporation, the Citizens' State Bank of Ontario."

The answer tendered the general issue as the sole defense. At the close of the case, the trial court directed a verdict for the defendants, and from the consequent judgment the plaintiff appeals.

Geo. W. Hayes, of Vale, for appellant. C. McGonagill, of Ontario, for respondents.

BURNETT, J. (after stating the facts as above). [1, 2] When the obligation was incurred, if at all, it was only to the extent of unpaid balances on their several subscriptions to its capital stock that stockholders could be made liable for the debts of their corporation. This is the principle enunciated in section 3 of article 11 of the original state Constitution, reading as follows:

"The stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

A different rule would make their association nothing more than a mere partnership, wherein each member is responsible for all just claims against it.

By the plebiscite of November 5, 1912 (see Laws 1913, p. 8), this part of the organic act was amended by adding to it this language:

"Excepting that the stockholders of corporations or joint-stock companies conducting the business of banking shall be individually liable equally and ratably and not one for another, for

the benefit of the depositors of said bank, to the amount of their stock, at the par value thereof, in addition to the par value of such shares."

Whatever may be the meaning of this provision it certainly cannot be extended to include those who are not depositors, but only creditors of the institution for merchandise sold to it. Neither can it be made to impair the obligation of a subscription contract made before its adoption so as to double the original liability. So far as the increased responsibility is concerned, the utmost effect it can have is to operate in favor of the depositors in a bank incorporated since the Constitution was so amended. Even then the only change is in the amount and not in the basic principle of the claim against the stockholders.

[3] In an action of this sort, therefore, it is necessary to show, among other things, not only for how many shares each defendant subscribed, but also how much remains unpaid upon his subscription, whether measured by the original or the amended constitutional rule, so that the court may be made aware of the extent of the award to be made against him. The complaint is utterly wanting in these particulars, and hence does not state a cause of action. For aught that appears, each defendant, if a stockholder, may have paid to the corporation the full par value of his subscription and an equal amount besides. Moreover, the testimony reported as part of the bill of exceptions reveals no more than that two of the defendants signed some kind of paper, which is not in evidence and the absence of which is not legally explained. No showing whatever is made of the organization of a corporation or the issuance of stock to any one, so as to give rise to the accountability of a delinquent stockholder.

The judgment of the circuit court must therefore be affirmed.

LEVY v. NEVADA-CALIFORNIA-OREGON RY.

(Supreme Court of Oregon. Nov. 14, 1916.)

1. PRINCIPAL AND AGENT ¶189(4)—ACTIONS—ISSUES, PROOF AND VARIANCE.

Under an averment that plaintiff himself made a contract with defendant railway, he could show that it was made through his agent, though the agent did not disclose that plaintiff was the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 716, 717; Dec. Dig. ¶189(4).]

2. PRINCIPAL AND AGENT ¶143(2)—UNDISCLOSED PRINCIPAL—ACTIONS—PARTIES.

Though a contract was made by an agent who did not disclose his principal, the principal is the proper party in interest, and may maintain action for breach of the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 508, 506, 507, 511, 512; Dec. Dig. ¶143(2).]

3. CARRIERS ~~§~~69(4)—CONTRACTS—BREACH—DAMAGES—MEASURE.

As a general rule, damages for breach of a carrier's contract to supply cars may be predicated with reference to all that was in the reasonable contemplation of the parties in performance of the agreement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 218, 239; Dec. Dig. ~~§~~69(4).]

4. CARRIERS ~~§~~229(2)—CONTRACTS—BREACH—DAMAGES—MEASURE OF.

Under a contract to supply cars for shipment of live stock, which the carrier broke by delay in supplying cars, knowing that the stock was intended for sale on the market in a distant city, the measure of damages is not the amount of depreciation at the point of shipment, but the depreciation in market value at the destination; that being within the reasonable contemplation of the parties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 964; Dec. Dig. ~~§~~229(2).]

Department 1. Appeal from Circuit Court, Lake County; Bernard Daly, Judge.

Action by Henry Levy against the Nevada-California-Oregon Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

The amended complaint contains four separate causes of action, the gravamen of each of which is that the plaintiff in one instance and his assignors in the others contracted with the defendant for the latter to furnish cars at a station on its railroad in which to ship live stock to the San Francisco market; but that in violation of the agreement the defendant failed to supply the cars until a later date, in consequence of which delay the stock to be transported depreciated in weight and quality to the damage of the shipper. The defense against each count of the amended complaint consists in general denials, and the affirmative charge, in substance, that if the animals declined in condition, it was on account of the negligence of the person in charge failing to give them sufficient food and proper care while in the stockyards of the defendant awaiting shipment. The new matter of the answer is denied by the reply. The jury rendered a verdict favorable to the plaintiff, and from the consequent judgment the defendant appeals.

James Glynn, of Reno, Nev. (L. F. Conn, of Lakeview, on the brief), for appellant. W. Lair Thompson, of Lakeview (Arthur D. Hay, of Lakeview, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1,2] Several assignments of error are predicated upon the fact that the court allowed testimony to the effect that the agreement with the defendant was made in each instance by an agent of the plaintiff who did not disclose his principal, the contention being that under the averment that the plaintiff entered into the contract it is not admissible to show that the compact was really made between the defendant and an agent of the plaintiff. The defendant's argument is that, in order for the undisclosed principal

to recover on such a stipulation, it would be necessary to aver that the contract was made through an agent. This court has held to the contrary in *Kitchen v. Holmes*, 42 Or. 252, 70 Pac. 830, and *Smith Meat Co. v. O. R. & N. Co.*, 59 Or. 206, 117 Pac. 303. In other words, if the plaintiff alleges that he himself made the contract, it is permissible to prove that he did this by an agent. Cases like *Baker v. Eglin*, 11 Or. 333, 8 Pac. 280, to the effect that where A. makes a contract with B. for the benefit of C. the latter may bring an action upon it, are not applicable in this instance. There the real party in interest was avowedly C., and he was entitled to litigate in his own name. In the present juncture if in fact the agreement was made by the agent acting for his principal, the latter is the real party in interest, and the proper one to conduct the litigation.

[3,4] Another class of errors assigned relates to the measure of damages. The defendant contends that it is the difference between the value of the stock at the point of shipment when offered for transportation and the reasonable worth of the same when the cars were actually furnished at the same place, while the plaintiff urges that it is the difference between what would have been the market value at the place of destination and the real worth of the stock at the time they arrived there. In brief, the defendant contends that the damages should be measured by conditions at the point of shipment, while the plaintiff maintains that they should be governed by the circumstances at the place of destination.

We note that the only cause of complaint is the delay in furnishing the cars where the stock was to be loaded as the parties had previously agreed upon. No charge is made that the animals were neglected or ill treated en route to San Francisco. We observe, also, that it is alleged, and the evidence tended to show, that the cars were ordered for the transportation of the stock to the San Francisco market. The general rule is that damages may be predicated with reference to all that was in the reasonable contemplation of the parties in the performance of the agreement. It may be conceded that if the defendant had no knowledge or notice of the purpose for which the cars were to be used, or the place to which the animals were to be forwarded, or of the purpose for which they were to be sent there, the damages ought to be computed by the rule which the defendant suggests.

But here it is alleged and the evidence shows that it was within the contemplation of both parties that the cars were to be used to transport the stock to the San Francisco market; that is to say, they were to be taken there for sale. What injury, then, naturally flows from the neglect of the defendant to carry out its agreement? The delay, where

the shipment originated caused a depreciation in the marketable condition of the animals, had its effect on their condition at their destination, and rendered them less valuable there. As stated in *Chattanooga So. Ry. Co. v. Thompson*, 133 Ga. 127, 131, 65 S. E. 285, 287, cited by the defendant:

"Ordinarily, in a suit by a shipper against a carrier, in case of injury to or loss of the property by the carrier's fault, the carrier is required to make compensation on the basis of the value at the place of destination."

In that case the court refused to apply that rule because in the agreement to furnish the cars there was no stipulation about any destination for the goods to be shipped in them. The court there properly decided that the damages should be computed as at the place of shipment, because there was no destination or particular market within the contemplation of the parties. In *St. Louis S. W. Ry. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673, noted in the defendant's brief, the trial court charged the jury thus:

"If you find for plaintiff, the measure of damages will be the difference, if any, between the market value of the cattle when they should have arrived at their destination and when they did arrive, and also such damages, if any, as said cattle may have sustained by the unreasonable and negligent delay on the part of defendant in furnishing cars and shipping said cattle after said cattle had been received by defendant for shipment."

The Court of Civil Appeals of Texas held this erroneous because it authorized double damages. In other words the two clauses of the charge were in legal effect duplicates, as the precedent is applied to the instant contention. Where there is a market value of property intended for sale, that is the standard by which depreciation of it must be measured, and that was the ultimate question to be determined in that case, no matter what was the cause of the decline. So here, the parties had in view the accomplishment of a certain plan by the plaintiff, namely, the delivery of sheep and lambs in San Francisco for market purposes. That which rendered them less valuable for that purpose is what would cause damage, and hence it was proper to instruct the jury to consider how much less they were worth than the market value by reason of the damage caused by the defendant's delay. The instruction of the court on that subject here follows:

"The damage in each cause of action in this case will be determined without any regard to rise or fall in the sheep or lamb market in San Francisco during the delay in furnishing cars alleged in each cause of action in the complaint, if you find there was any such delay, and without regard to any delay en route between the place where each shipment originated and its destination. The measure of damages, if any you find, will therefore be the difference between the reasonable market value of the live stock described in each cause of action set forth in the complaint at the time and in the condition such stock would have arrived in San Francisco if the Nevada-California-Oregon Railway had furnished cars according to the contract alleged in

each cause of action, if you find such contract to have been made, and the decreased reasonable market value, if you find there was any decrease, at the time and in the condition said live stock did arrive in San Francisco, taking into consideration only loss in weight and quality, if any, of the lambs or sheep, directly due to the delay, if any, of the defendant railroad in furnishing cars in which to move said stock, and without regard to any fluctuation in the price of lambs or sheep in the San Francisco market, or delay, if there was any, after the live stock was loaded on the cars. In other words, the damage, if any, is the loss in reasonable market value due solely to loss in weight or deterioration in quality of the lambs and sheep because of delay, if any, on the part of the defendant in furnishing cars, if you find defendant agreed to furnish cars as alleged. If you find plaintiff is entitled to recover damages from defendant, you will include in your verdict the reasonable value of any hay or feed necessarily fed to said live stock, and the reasonable value, if any, of necessary care and attention bestowed upon said live stock during the delay, if any you find, in providing cars for shipment, but in no event can you find for plaintiff damages in excess of the sum prayed for."

The trial judge very carefully excluded from the consideration of the jury anything about fluctuations in the price of the stock and limited the jurors solely to the consideration of loss in weight or deterioration in quality of the stock caused by the delay of the defendant in furnishing the cars as agreed. Other cases applicable are *McManus v. Chicago & Great Western Ry. Co.*, 156 Iowa, 359, 136 N. W. 769; *Texas & Pac. Ry. Co. v. Nicholson*, 61 Tex. 491; *Newport News, etc., Co. v. Mercer*, 96 Ky. 475, 29 S. W. 301; *N. Y., etc., R. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292.

The following precedents cited by the defendant are distinguishable: *Richey v. No. Pac. Ry.*, 110 Minn. 347, 125 N. W. 897, was where no place of destination was mentioned, and it was held that the damages must be governed by conditions at the place of shipment. In *Gulf, C. & S. F. Ry. v. Hume*, 57 Tex. 211, 27 S. W. 110, it was held that if the shipment of stock is not made for a certain market, but for pasturage only at the point of destination, the damage is referable to the decline in intrinsic rather than market value of the chattels caused by the delay. In other words, the element of market conditions was not within the contemplation of the parties. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Tex. Civ. App.) 44 S. W. 8, was also a case where stock was shipped to pasture and not to market. *Dawson v. Quincy, etc., R. Co.*, 138 Mo. App. 365, 122 S. W. 335, was an instance where the plaintiff shipped two carloads of cattle from Trindle, Mo., to Chicago. The train was delayed in arrival. The trial court instructed the jury that the defendant was liable: (1) For any loss to plaintiff occasioned by decline in the market at Chicago between the time plaintiff's cattle should have arrived and the time they did arrive; (2) for any shrinkage in the weight of the cattle over and above what was ordinary and usual in such cases; (3)

for any loss to plaintiff occasioned by the stale appearance of the cattle caused by the delay. The Kansas City Court of Appeals held that this was a correct statement of the law, but that as to the first and third elements there was no proof, and consequently reversed the case, but it will be observed that it expressly recognized as an element of damages the shrinkage in the weight of the cattle caused by the delay of the carrier. *So. Kansas Ry. Co. v. O'Loughlin Land & Cattle Co.*, 60 Tex. Civ. App. 91, 127 S. W. 568, was a case where the transportation company refused to deliver the cars for so long a time that the owner was compelled to sell the goods at the place of shipment. Under those circumstances, there being no transportation whatever, the court held that the measure of damages was the difference between the market value at the destination and the same value at the shipping point less freight. There the feature of the stock arriving at the market was not open for consideration, because it was utterly absent.

In the present juncture, if nothing else were shown, we might well say that the failure to furnish cars at the appointed time worked out its full hurt at the point of shipment; that it accomplished there all it could in depreciation of the intrinsic worth of the animals; that it could have no subsequent effect upon them; and that, hence, the damage must be assessed according to their lessened value where they were delivered to the carrier. This, however, leaves out of view the feature that cars were to be furnished to carry the sheep to a specified market, not, indeed, to meet a certain price prevalent there on a particular day, but still to be sold there. That was the end to be attained, and it was known to the defendant. It contracted accordingly. Any shortcoming of the carrier, therefore, alleged and established, which operated to impair the plaintiff's fruition of the purpose taken into account by both parties to the agreement, constitutes ground for damage. The remedy ought to correspond in scope with the previously known plan which the defendant disarranged by its failure to co-operate as it promised.

Here we have within the contemplation of the parties the purpose of making the shipment to the San Francisco market. We have not only the delay of the defendant to supply the cars for that purpose, but we also have present the fact that later on the stock was actually transported to the destination. The measure of damage naturally flowing from these circumstances is the difference between the value of such stock in the condition in which they would have arrived at San Francisco if the cars had been furnished promptly as agreed and their actual value in the condition in which they did arrive. The other errors complained of either were

not assigned, or were not presented in the brief; hence they must be considered as waived.

The judgment is affirmed.

MOORE, C. J., and BEAN and HARRIS, JJ., concur.

BERNARD v. METROPOLIS LAND CO. (No. 2228.)

(Supreme Court of Nevada. Nov. 9, 1916.)

1. PLEADING \Leftrightarrow 177 — FAILURE TO DENY AFFIRMATIVE ANSWER—ADMISSION—STATUTE.

Under St. 1915, c. 158, providing that each material allegation of new matter in the answer, uncontroverted by the reply, must be taken as true, an allegation of the answer, undenied by the replication, must be taken as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 354, 355; Dec. Dig. \Leftrightarrow 177.]

2. WATERS AND WATER COURSES \Leftrightarrow 152(10)—FAILURE TO ESTABLISH ALLEGATIONS OF COMPLAINT.

In an action to determine water rights, where defendant's answer set up at least one allegation, which, uncontroverted and to be taken as true, established priority of appropriation in favor of defendant, plaintiff failing to establish the allegations of his complaint, the court properly dismissed the action on defendant's motion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156; Dec. Dig. \Leftrightarrow 152(10).]

3. PLEADING \Leftrightarrow 204(1)—DEMURRER.

A demurrer may be made to a whole pleading, or to the statement of any of the grounds embodied therein.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 489; Dec. Dig. \Leftrightarrow 204(1).]

4. PLEADING \Leftrightarrow 204(5) — DEMURRER — DEMURRER TO WHOLE PLEADING PARTIALLY GOOD.

Where a demurrer is filed to the whole pleading, it may be overruled if any of the statements are held to be good in furtherance of the purpose of the pleading, whether establishing a cause of action or interposing a defense; the rule applying not only as to a complaint, but equally to an answer and its affirmative allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 488; Dec. Dig. \Leftrightarrow 204(5).]

5. PLEADING \Leftrightarrow 204(5)—DEMURRER TO ENTIRE PLEA OR ANSWER—GOOD SEPARABLE PART.

A demurrer directed to an entire plea or entire answer, which plea or answer contains several separable parts, must be overruled if any one of the parts is in itself good.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 488; Dec. Dig. \Leftrightarrow 204(5).]

6. JUDGMENT \Leftrightarrow 949(2)—PLEADING—RES ADJUDICATA.

In an action to restrain the diversion of water, allegations of defendant's affirmative answer setting forth the court, the jurisdiction, the subject-matter, and the scope and effect of a former action, plaintiff's connection with the subject-matter, the final judgment bearing upon and having to do with that matter, the common and general interest of plaintiff in that subject-matter, and his connection with the force and effect of the former judgment, was sufficient to constitute a proper pleading of former judgment affecting the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1796, 1803; Dec. Dig. \Leftrightarrow 949(2).]

7. JUDGMENT \S 713(1)—RES ADJUDICATA.

Where plaintiff was a party to a former action, and the matter adjudicated therein was the same as that sought to be presently adjudicated, plaintiff is bound by the judgment in the former action, and cannot seek relief, against the successors to the beneficiaries of the former judgment, inconsistent with it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1234–1237, 1239; Dec. Dig. \S 713(1).]

8. JUDGMENT \S 958(2)—JUDGMENT AS BAR—QUESTION OF FACT.

The truth of a sufficiently alleged plea of former judgment affecting the same parties and the same subject-matter as involved in the present case was for the trial court, if the plea was denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1827; Dec. Dig. \S 958(2).]

Appeal from District Court, Humboldt County; Edward A. Ducker, Judge.

Action by Alphonse Bernard against the Metropolis Land Company, a corporation. From an order overruling his demurrer to an affirmative answer, and from a judgment entered on the pleadings, plaintiff appeals. Order and judgment affirmed.

J. A. Langwith, of Golconda, for appellant. Cheney, Downer, Price & Hawkins, of Reno, for respondent.

MCCARRAN, J. This is an appeal from an order overruling a demurrer to an affirmative answer, and from a judgment entered on the pleadings.

The record before us presents a complaint in which certain allegations essential to plaintiff's recovery were set forth. First, that he is an appropriator of water from the Humboldt river; that such appropriation was during the continuous period of 30 years; that Bishop creek is and constitutes the headwaters of Humboldt river; that Bishop creek and Humboldt river constitute one continuous natural water course; that the waters of Humboldt river as appropriated by plaintiff were essential to the successful cultivation of the lands of plaintiff and necessary for plaintiff's domestic uses; that the defendant had by artificial means diverted the waters from Bishop creek; that this diversion was accomplished by the construction by defendant of a reservoir built across the bed of Bishop creek above the point on the Humboldt river where plaintiff was accustomed to divert water from the river; that defendant by means of its reservoirs, dams, and other water devices had diverted the water from the natural water course, and moreover had impounded by means of its reservoir all the water flowing or to flow in Bishop creek; that defendant, by means of its reservoir, dams, ditches, canals, and other water devices in so diverting the waters from Bishop creek, had thereby prevented the water from flowing through said creek and through the Humboldt river, and had thereby prevented the water flowing through said stream system

from flowing into the ditches of plaintiff, and hence had deprived plaintiff of the use of said water for the irrigation and cultivation of his lands on the Humboldt river.

The prayer of the complaint was for an injunction to prevent defendant from so diverting the water or impounding the same, and for the establishment by judicial decree of the right of plaintiff to use the waters of Bishop creek, and to have the same enter his ditches for the uses and purposes to which they had been applied.

The record before us presents a complaint in which certain allegations essential to plaintiff's recovery were set forth. An answer to this complaint was filed, in which, as we view it, each of the allegations of plaintiff's complaint essential to his recovery was specifically denied.

By way of affirmative and separate defense, defendant alleged:

"That for more than 35 years last past defendant and its predecessors have continuously during each year appropriated, diverted, used, and consumed all of the waters flowing in said Bishop creek, and have at all of said times claimed the right so to do, and that said claim of right and said diversion, appropriation, use, and consumption for the irrigation of said lands, of all the waters of said Bishop creek have been by said defendants and the grantors and predecessors in interest of said defendants actual, visible, open, notorious, exclusive, and uninterrupted for a period of more than 35 years prior to the institution of this action, and adverse to all the world, including plaintiff herein, during all of said time, and that any claim by the plaintiff to said or any of the waters of said Bishop creek, as an individual stream or as a part or tributary of the Humboldt river, as against the defendant, is wrongful and without right, and constitutes a cloud upon the title of defendant herein."

As a further and second affirmative and separate defense, defendant alleged:

"That all the water flowing in said Bishop creek has for many years past been appropriated and used for beneficial purposes by defendant and by the grantors and predecessors in interest of defendant, as hereinbefore set forth and alleged, in the irrigation of the lands hereinabove described and for watering stock and for domestic purposes, that all of said waters are necessary, and that there is no other source of supply from which water may be obtained by defendant for said purposes."

These allegations, together with other affirmative allegations, such as that pertaining to the open, notorious construction of reservoirs, diverting dams, canals, ditches, and works for storing, impounding and diverting, conveying and distributing the waters of Bishop creek, the acquiring of lands under the Carey Act, the incurring of obligations, the laying out and construction on the lands of defendant of the town of Metropolis, the construction in said town and on said lands of expensive buildings, waterworks, and lighting plant, the purchase and acquisition of other lands under the irrigation system of defendant and the settlement thereof by a number of persons, the improvement of such lands, the cultivation and irrigation

of the same by the waters of Bishop creek when the same had been stored by the reservoirs constructed, appear in respondent's answer filed by way of affirmative defense. Together with these affirmative allegations, respondent's affirmative answer sets forth the following:

"That on the 13th day of April, 1912, in the above-entitled court, Union Canal Ditch Company, a corporation, and a number of other corporations and individuals, as plaintiffs, instituted their certain action against said Pacific Reclamation Company and others, said action in said court being numbered 1899. That the scope and purpose of said action above mentioned, was the same in character as the present action, in that the plaintiffs in said action mentioned sought to enjoin and restrain said Pacific Reclamation Company from storing and impounding in said reservoir the waters flowing in said Bishop creek, and to restrain and enjoin said Pacific Reclamation Company from diverting and using the waters of said Bishop creek so stored and impounded, and also to enjoin said Pacific Reclamation Company from diverting by means of its canals and other devices the waters flowing in Burnt and Trout creeks, which were alleged to be, and which are, tributaries of said Bishop creek, the point of junction between said Burnt and Trout creeks with said Bishop creek being below the place or location of said reservoir and said diverting dam constructed in the bed and across the channel of said Bishop creek. That the action, above mentioned, wherein Union Canal Ditch Company, a corporation, and others, were plaintiffs, and said Pacific Reclamation Company, a corporation, and others, were defendants, was, as alleged in said complaint, instituted for and on behalf of plaintiffs therein named and also for and on behalf of all other corporations, persons, and associations similarly situated to plaintiffs therein named and having a common and general interest in the subject-matter of the action with the plaintiffs. That plaintiff herein was, at the time of the institution of said action, above mentioned, similarly situated as the plaintiffs therein named, and had a common and general interest in the subject-matter of the action with the plaintiffs therein named. That the plaintiff herein was named in the answer filed in said action as one of the parties who should be specifically designated and brought in as a party to said action; that the institution of said action, above mentioned, and the hearing upon the order to show cause why injunction should not issue pendente lite, said hearing continuing from May 20 to June 1, 1912, and the issuance of said injunction pendente lite, are well known and advertised throughout the state of Nevada. That, upon information and belief, said action, so brought by Union Canal Ditch Company and others, was brought for and on behalf of plaintiff herein, and that plaintiff herein knew of the pendency of said action. That said action was pending in said court from the 13th day of April, 1912, to the 19th day of June, 1915."

It was to this affirmative answer that plaintiff demurred, the overruling of which demurrer occasioned the appeal.

The principal contention of appellant here is that in the case of Union Canal Ditch Co. et al. v. Pacific Reclamation Co. et al., the appellant herein was not a party plaintiff or defendant, inasmuch as his name did not appear in connection with that suit. Appellant contends in this respect that not being a party to that action, he cannot be bound by the judgment, and no judgment of the court

granting the Pacific Reclamation Company the water of Bishop creek could affect his right.

We are cited to the case of Ahlers v. Thomas, 24 Nev. 407, 56 Pac. 98, 77 Am. St. Rep. 820, to the effect that the former action must have been between the same parties before they can be bound by the judgment. Assuming that all of appellant's contention was correct, we are at a loss to know how it can avail anything in his behalf under the record before us. First and foremost, issues as to matters essential to the success of plaintiff were, by the complaint and the specific denials in the answer, squarely joined.

Section 295 of our Civil Practice Act (section 5237, Rev. Laws 1912) provides:

"An action may be dismissed, or a judgment of nonsuit entered in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the court or jury. * * *"

In the case of Clune v. Quitzow, 125 Cal. 213, 57 Pac. 886, the Supreme Court of California held, under an identical Code provision, that upon failure of the plaintiff to appear at the trial where defendant had filed a cross-complaint, the defendant is not bound to take a dismissal of the action, though he might do so, but has the right under the section to proceed with the case in the absence of the plaintiff and have judgment entered upon the merits finally disposing of the case.

[1] As we view the record before us, the trial court might have sustained the demurrer as to respondent's affirmative matter relative to the judgment in the case of Union Canal Ditch Co. v. Pacific Reclamation Co. Indeed, if on a motion to strike, this allegation had been stricken from respondent's affirmative answer, there was at least one other issue raised in the affirmative answer, to wit, the priority of appropriation of the respondent, which, if undenied by replication, must, under the statute (Stat. 1915, pp. 192, 193), be taken as true.

By the amendment to our Civil Practice Act (Stat. 1915, pp. 192, 193), it is provided that:

"Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply, and each material allegation in the counterclaim not controverted by the reply, must for the purposes of the action, be taken as true. * * *"

[2] As we have already stated, the issue was squarely joined by the answer of respondent. This put the plaintiff, appellant herein, upon his proof to establish the allegations of his complaint. Failing to do this, we are referred to no rule, and are aware of none, that would preclude the court from dismissing the action on motion of the defendant. The affirmative defense, as we have said, set up at least one allegation which, if undenied, must, under the statute, be taken as true, and which, if uncontroverted

ed and taken as true, established the priority of appropriation in favor of defendant, respondent here. This, being the pivotal point in the controversy, warranted judgment in favor of respondents.

[3, 4] A demurrer may be made to a whole pleading or to the statement of any of the grounds embodied therein. If, however, a demurrer is filed to the whole pleading, it may be overruled if any of the statements are held to be good in furtherance of the purpose of the pleading, whether it be in establishing an action in complaint or in interposition of a defense. *Griffiths v. Henderson*, 49 Cal. 566; *Holbert v. St. Louis, K. C. & N. Ry. Co.*, 38 Iowa, 315; *Hale v. Omaha National Bank*, 49 N. Y. 626; *Bondurant v. Bladen*, 19 Ind. 160; *Carter v. Wann*, 6 Idaho, 556, 57 Pac. 314; *Knapp v. Ross*, 181 Ill. 392, 55 N. E. 127; *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135; *Palmer v. Breed*, 5 Ariz. 16, 43 Pac. 219; *Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553; *A. O. P. v. Dixon*, 45 Colo. 96, 100 Pac. 427; *Johnson v. Ry. Co.*, 243 Mo. 278, 147 S. W. 1077; *Baker v. Water Co.*, 40 Mont. 583, 107 Pac. 819, 135 Am. St. Rep. 642.

In this respect, the rule applies not only as to a complaint, but with equal force to an answer and to the affirmative allegations therein. *Farmers' Ins. Co. v. Menz*, 63 Ill. 116; *Johnson Co. v. White*, 78 Minn. 48, 80 N. W. 838.

[5] A demurrer which is directed to an entire plea or an entire answer, which plea or answer contains several separable parts, must be overruled if any one of the parts is in itself good. *Elch v. Greeley*, 112 Cal. 171, 44 Pac. 483; *Holbert v. St. L., K. C. & N. Ry. Co.*, supra; *Van Housen v. Broehl*, 59 Neb. 48, 80 N. W. 260; *Bergstrom v. Advertiser Ass'n*, 147 App. Div. 774, 131 N. Y. Supp. 1025; *Harrill v. Weer*, 26 Okl. 313, 109 Pac. 539; *Williams v. Black*, 24 S. D. 501, 124 N. W. 728.

[6] But aside from our views as here expressed, let us consider the question most relied upon by appellant, that the former judgment in the case of Union Canal Ditch Co. v. Pacific Reclamation Co. was not binding upon him, inasmuch as he was not a party specifically named in that action. What shall be said as to the sufficiency of the allegations in respondent's answer as to the former action, parties, and final judgment? The vital point as against appellant's demurrer is not the ultimate fact itself, but rather is it the allegation of the existence of a former judgment in a cause alleged to have been duly instituted and tried in a court of competent jurisdiction, involving the identical subject-matter, and the further allegation properly connecting the parties in the present action with the force and effect of that former judgment. Here the allegations as to the former judgment set forth the institution of the former action and the date thereof, the name of the principal party

plaintiff, and that there were other parties plaintiff, corporations as well as individuals. It recites that the Pacific Reclamation Company (predecessor in interest to defendant here) was the party defendant. It asserts that the scope and purpose of the former action were the same in character as those of the present action in which appellant is plaintiff and proceeds to specify the scope and purpose in particular. The answer further alleges:

"That the action in the former proceedings was, 'as alleged in said complaint, instituted for and on behalf of all other corporations, persons, and associations similarly situated to plaintiffs therein named, and having a common and general interest in the subject-matter of the action with the plaintiffs.'"

Further the answer avers:

"That plaintiff in this action was, at the time of the institution of the former action, a party similarly situated as the other plaintiffs therein named, and that he had a common and general interest in the subject-matter of that action with the plaintiffs therein named."

Further it alleges:

"That the plaintiff herein was named in the answer filed in said action as one of the parties who should be specifically designated and brought in as a party to said action," and "that said action [referring to the former action] so brought by Union Canal Ditch Company and others was brought for and on behalf of plaintiff herein."

Here were allegations setting forth the court, the jurisdiction, the subject-matter, the scope and effect of the action, the connection of the plaintiff with that subject-matter, the final judgment bearing upon and having to do with the subject-matter, the common and general interest of the appellant herein in that subject-matter, and the connection of the plaintiff here with the force and effect of the former judgment. The averments here made were sufficient, in our judgment, to constitute a proper pleading of former judgment affecting the parties.

[7] The question here, being one on demurrer, is not as to whether the appellant was in fact a party to the former action and bound by the judgment. The fact in that respect was for the court to determine if the same was denied. To express the matter concretely, we may put it thus: If the appellant here was in fact a party to the former action, and if the matter adjudicated in that action was the same as that sought to be adjudicated here, then the appellant would be bound by the judgment in the former action. If the former action was brought "for and on behalf of plaintiff, appellant here," and with reference to the identical subject-matter as that involved in the present action, and the defendants here were in fact successors to beneficiaries of that judgment, then such judgment would constitute a defense here. The proper averment of these elements, as we think they were properly averred in this instance, would stand against demurrer; and would require denial.

[8] The plea of a former judgment affecting the same parties and the same subject-matter as involved in this case being sufficiently alleged, the question as to the fact asserted by the averment was one which, like all other matters of fact, was for the trial court if the same was denied; if not denied, it was deemed admitted. The matters alleged were susceptible of proof, and if proven, as alleged, would have constituted a defense that might have been available to defendant, respondent here. *Behrensmeyer v. Kreitz*, 185 Ill. 591, 28 N. E. 704. To the same effect is the case of *McSweeney v. Carney*, 72 Ind. 430; *Walker v. Ogden*, 192 Ill. 314, 61 N. E. 403. No issue having been taken to the averment of former judgment, the same must be taken as true. *Walker v. Ogden*, *supra*; *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905.

The order and judgment appealed from must be affirmed. It is so ordered.

NORCROSS, C. J., concurs.

COLEMAN, J. I concur in the order, for the reason that I think the matter pleaded in the second affirmative defense states a cause of action under section 5001, Revised Laws of Nevada 1912, wherein it is provided that:

"When the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

In view of this statute, I think the allegation in the defense mentioned, wherein it is alleged that appellant knew of the pendency of the action pleaded in that defense, and that it was brought for and on behalf of the plaintiff, states a good defense. If that action was brought for and on his behalf, it seems clear that he should be bound by the judgment. Had the plaintiff filed a reply alleging that the plaintiffs in that action controlled the prosecution of that suit, and that it was so managed as to jeopardize the interest of the plaintiffs, or alleging a conspiracy between plaintiffs and defendants in that action to so control the proceedings as to prejudice the plaintiff in this action, or other fraudulent conduct, a different rule would no doubt apply, notwithstanding the fact that a question of common interest was involved, or that the parties were so numerous that they could not all be brought before the court.

In view of the fact that the judgment must be affirmed for the reason that the second affirmative defense is good, I do not deem it necessary for the court to pass upon the question as to whether the judgment should be affirmed for the reason that no reply was filed denying the matter pleaded in the first affirmative defense. I am inclined to the view that no reply was neces-

sary to that defense, on the theory that it was not new matter. "New Matter" is matter in confession and avoidance." *Ferguson v. Rutherford*, 7 Nev. 390. It seems that it would have been necessary for defendant to have confessed the appropriation of water by plaintiff and sought to have avoided the effect of such appropriation. This was not done. On the other hand, if the allegations of this defense were true, plaintiff never appropriated the water at all. Hence there could have been no confession and avoidance. I am disposed to take the view that this defense comes within the rule that the mere statement of facts in an answer by way of defense, which is inconsistent with the facts alleged in the complaint, is, in effect, nothing more than a denial of the allegations of the complaint. *Bliss*, Code PL (2d Ed.) 333; *Goddard v. Fulton*, 21 Cal. 430; *Alden v. Carpenter*, 7 Colo. 93, 1 Pac. 904; *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912; *McDonald v. People*, 29 Colo. 503, 69 Pac. 703; *Cuenin v. Halbouer*, 32 Colo. 51, 74 Pac. 885.

BEAUREGAARD v. GUNNISON CITY et al.
(No. 2897.)

(Supreme Court of Utah. Oct. 16, 1916.)

1. WITNESSES — § 304(4) — STATUTORY IMMUNITY — SCOPE.

Under Comp. Laws 1907, § 912, providing that any person offending against the election laws may be compelled to testify in any trial, etc., in the same manner as any other person, with immunity from indictment, prosecution, or punishment for the offense as to which testimony was given, such immunity is complete, and is not limited to cases where one is called as witness in prosecution of a third person for violating election laws, and the one called may have been himself concerned in the offense charged against accused, and the privilege against self-incrimination cannot be invoked by such an offender in an election contest.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1051; Dec. Dig. § 804(4).]

2. ELECTIONS — § 73 — QUALIFICATION OF VOTERS — CHANGE OF RESIDENCE.

Under Laws 1911, c. 106, § 53, qualifying any person to vote at a city or town election who was qualified to vote at the last city or town election in the voting district in which he offers to vote, section 60 of said chapter, providing that the state laws relating to elections in cities, towns, and general elections shall apply in all matters not specified, where applicable, and the election laws, Comp. Laws 1907, §§ 812-846, making it a necessary qualification of a voter that he reside in and also be registered in or transferred to the election district in which he votes, and making it a ground for challenge "that he does not live in the election district," if a person was a qualified voter in a particular election district by having complied with registration laws of the state, he may rely upon that registration in voting therein at any election held under said chapter 106, if he still resides therein, but if he has ceased to be a resident thereof, he is no longer eligible to vote there, but may have his registration transferred to the

district in which he resides, as provided by Comp. Laws 1907, § 812.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. ¶73.]

3. ELECTIONS ¶291 — PRESUMPTION — RESIDENCE OF MARRIED MAN.

The residence of a married man is presumed to be in the voting district where his wife lives.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. ¶291.]

4. ELECTIONS ¶291 — PRESUMPTION — RESIDENCE OF VOTER.

The presumption is that one voting at a previous election in a certain voting precinct, in the absence of proof of change of residence, is still a resident of that voting precinct.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 286; Dec. Dig. ¶291.]

5. INTOXICATING LIQUORS ¶37—LOCAL OPTION — CONTESTS — PRESUMPTION — VOTING WITH PARTY.

In an election contest on the sole issue of allowing sale of intoxicating liquors, the presumption was that a voter who had previously affiliated and acted with the "drys" voted such ticket at the election.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. ¶37.]

6. ELECTIONS ¶293(3)—CONTEST—EVIDENCE—ADMISSIBILITY—DECLARATIONS.

A voter's declarations and conduct about the time of and recently before casting his ballot may not be proved, in an election contest in which he is not interested as a party, as tending to establish how he voted, unless such declarations are part of the *res gestæ* as determined from all the evidence as in other cases of *res gestæ*.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 291, 292; Dec. Dig. ¶293(3).]

7. INTOXICATING LIQUORS ¶37—CONTEST—PARTIES—DEFENDANT.

In a city election contest on the issue of allowing sale of intoxicating liquors, where the city authorities refused to defend the election, an elector and resident of the city was allowed to do so on his own behalf, in view of the statute providing that an elector may file a contest, and that "any proposition submitted to the vote of the people may be contested."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. ¶37.]

Appeal from District Court, Sanpete County; Jos. H. Erickson, Presiding Judge.

Election contest by Marenus Beauregard against Gunnison City, in which E. L. Swalberg filed answer on his own behalf. From judgment affirming the election, plaintiff appeals. Reversed and remanded.

Lewis Larson, of Manti, and R. A. McBroom, of Salt Lake City, for appellant. J. W. Cherry, of Mt. Pleasant, and Dilworth Woolley, of Manti, for respondents.

FRICK, J. This is an election contest which was instituted by plaintiff as an elector of Gunnison City pursuant to Comp. Laws 1907, § 914. The election was held pursuant to Laws Utah 1911, c. 106, §§ 57 to 63, inclusive, wherein it is provided that elections may be called and held in the cities, towns, and county voting units of this state for the purpose of determining whether intoxicating liquors shall or shall not be sold

therein. Such elections may be called and held not oftener than once in every two years. An election was called and duly held in Gunnison City, a city of the third class in Sanpete county, this state, on the 29th day of June, 1915, to determine the question of whether intoxicating liquors should or should not be sold in said city for the ensuing two years. After the election the votes were duly canvassed as provided by law. Such canvass disclosed that the number of votes for and against sale were tied; that is, there was an equal number of votes cast both for sale and against sale. Plaintiff, within the time required by section 914, *supra*, instituted this contest, making the city, the mayor, and the city councilmen, as the board of canvassers of the city, and the city recorder parties to the action. As a ground of contest the plaintiff alleged that illegal votes were cast at said election, and if such votes were excluded from the count as they should have been, the result of the election would be in favor of sale. Neither the city nor any of its officers appeared in the action, except E. L. Swalberg, who, however, did not appear for the city nor the other defendants, but did so on his own behalf. By leave of court first had and obtained he filed an answer and defended against the contest. A trial to the district court of Sanpete county resulted in findings and judgment affirming the election held as aforesaid, and the plaintiff appeals.

The principal assignments of error relate to the rulings of the district court in the exclusion of certain evidence proffered by the plaintiff. The plaintiff attempted to prove that certain persons had voted illegally because they were not qualified electors of the voting district in which they had cast their ballots. He called such persons as witnesses, and offered to prove by them that they did not reside within the voting district in which they had cast their ballots at the election in question. The witnesses all refused to answer the questions propounded to them respecting their residence, upon the alleged ground that in answering them they might incriminate themselves, in that by doing so they might disclose the fact that they had voted illegally, and thus would be subject to prosecution and punishment under our election statutes. Plaintiffs' counsel insisted that the claim made by such witnesses was without merit, since, under our statute, even though the witnesses had voted illegally, they, nevertheless, would be immune from prosecution and punishment, and therefore could not legally claim the privilege and refuse to answer the questions. The district court, however, sustained the witnesses' claims, and ruled that they need not answer the questions propounded to them. Counsel excepted to the rulings, and they now insist that the court erred in that regard. In this state it is an offense punishable by fine or by

imprisonment in the state prison, or both, for any person to vote who is not legally entitled to do so. Comp. Laws 1907, §§ 894, 895. In section 912 it, among other things, is provided:

"Any person so offending against any provision of this title is a competent witness against any other person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such indictment or prosecution."

[1] Counsel for the defendants, however, contend that the immunity applies only in cases where a certain person stands charged with having violated the election laws and another person is called as a witness who himself may have been concerned in the offense charged against the accused. We think the contention is without merit. We are of the opinion that the statute affords complete immunity from all prosecutions and punishment for every offense denounced by our election laws, where the witness is not on trial, and that it was so intended by the Legislature in adopting the immunity clause. The immunity clause which we have quoted above was first enacted in 1896. Laws 1896, p. 157. It was there, however, limited to the offenses denounced in three particular sections. In 1898, the immunity was enlarged so as to cover all the offenses denounced by our election and registration laws. That is, the immunity was enlarged so as to cover all persons "offending against any provision of this title," which is title 18 of the Revised Statutes of Utah of 1898. That title is composed of nine chapters, and includes all the sections numbered from 780 to 928, inclusive, of said Revised Statutes, and covers all laws relating to elections and registration. The immunity has therefore been in effect in its present form only since January 1, 1898, when the Revised Statutes aforesaid went into effect. The immunity clause of section 912, supra, is a transcript of the Purity of Election Law of California of 1893, except that in California the provisions of the section, like our law of 1896, was limited to certain sections. See *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127. In that case it was directly held that, by reason of the immunity, questions similar to those propounded to the witnesses in this case were not subject to the constitutional privilege. It is not possible to distinguish that case from the case at bar. It was there held that the statute afforded a complete immunity from prosecution and punishment in all cases where the witness is not himself on trial, but is called in a proceeding prosecuted against another

or others. It is obvious that the nature or character of the proceeding, or who the parties are, so long as it is an election contest in some form, is not material, and the witness must testify in such a proceeding although his testimony might incriminate him if he were on trial himself. As a matter of course if he stood charged personally, and were on trial, then the privilege would apply with full force. The statute, however, affords the witness a full and complete immunity for all of his acts or conduct in violation of the election laws. When such is the case there is no longer any reason why the privilege should prevail, and hence it cannot be invoked by the witness. This seems to be the holding of all the courts. The question, on several occasions, came before the Supreme Court of the United States. In the case of *Brown v. Walker*, 161 U. S. 595, 16 Sup. Ct. 646, 40 L. Ed. 819, Mr. Justice Brown, after discussing the privilege clause of the federal Constitution, and in applying the immunity granted by certain laws to certain witnesses, says:

"The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments, then as he must necessarily to a large extent determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency (citing cases), the practical result would be that no one could be compelled to testify to a material fact in a criminal case unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible—in other words, if his testimony operate as a complete pardon for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question."

In 40 Cyc. 2548, it is said:

"There is no constitutional objection to a statute which deprives a witness of the right to refuse to give testimony showing that he has committed a crime, where the statute also grants to him, as a consequence of such testimony, complete immunity from prosecution or punishment for the crime so disclosed, and under such a statute the witness may be compelled to testify."

The immunity granted by section 912, supra, could not well be made more sweeping than it is in protecting a witness from prosecution and punishment. Moreover, as we have seen, it was first adopted in its present form in 1898. It seems it was first enacted in California in 1893. The case of *Ex parte Cohen*, supra, was decided in November, 1894. There are strong grounds for holding, therefore, that in adopting the statute the Legislature also adopted the construction placed upon it by the Supreme Court of California. The same result would follow were it to be held that it was adopted first in 1896, as before stated. We are of the opinion, therefore, that the court commit-

ted manifest error in ruling that the witnesses could claim the privilege, and in not requiring them to answer the questions propounded to them respecting their residence, etc. We remark that we have treated the questions propounded to the witnesses concerning their place of residence as though the answers thereto might, in and of themselves, incriminate them. Whether such would or would not be the case under the circumstances is not now material, and is not decided.

[2] Counsel for the defendants, however, insist that the witnesses in question were qualified electors at the election in question, although at the time of the election they may not have resided within the election districts in which they cast their ballots. This contention is based upon section 53, c. 106, Laws 1911, *supra*, which, so far as material here, provides:

"Any person shall be qualified to vote at any election held in any city or town hereunder who was qualified to vote at the last city or town election in the voting district in which he offers to vote; * * * such qualification shall be shown by the official register used at such last city, town or general election."

In section 60 of the same chapter it is also provided that "the provisions of the election laws of the state, relating to elections in cities, towns and general elections * * * shall apply" in "all matters and proceedings not herein specified," so far as the same are applicable.

Counsel contend that under the provisions of section 53, *supra*, although the voter may have lost his residence in a voting district at the time of holding an election under chapter 106, yet, if he was a qualified voter in such district at the preceding city election, he is still a qualified voter. We cannot so construe the section. Under our election laws a part of the necessary qualifications of the voter is that he reside in the voting district at the time of the election, and that he be registered therein, or that his registry be transferred thereto some time before the day of election, and it is made a ground of challenge "that he does not live in the election district." Comp. Laws 1907, §§ 812-846. All those provisions apply to all elections, general or special, and all must be given effect if possible. As we view it, therefore, the proper construction of section 53, *supra*, is that if a person was a qualified voter in a particular election district by having complied with the registration laws of this state, he may rely upon that registration at any election held under chapter 106, provided he still resides within the district in which he offers to vote, but if he has ceased to be a resident of such district, he may have his registry transferred to the district in which he resides, as provided in section 812, and may vote upon such transfer as in other cases. The voter, however, may not, after he has lost his residence in a certain voting district, return thereto and cast his ballot

therein merely because he was qualified to do so at the last preceding city election. All that the statute means is that the voter need not re-register for any election held under chapter 106, and that the preceding registry for the city election is sufficient qualification in that regard. If a voter has removed from the district, however, he may not return thereto to vote at such an election any more than he could do so at any other election. From the foregoing it necessarily follows that if there were any votes cast at the election in question by those who did not live within the voting district as required by our statute, at the time of the election, in which they cast their ballots, such ballots were illegal, and should not have been counted.

[3] It is next contended that the court erred in holding that the vote of one Henry Knighton was legal. On the day of the election, and for more than 60 days prior thereto, Knighton, who is a married man, lived with his wife, Emily Knighton, in voting district No. 1. He voted in district No. 2. Now, in view that the court ruled that Mr. Knighton need not testify concerning his place of residence, counsel rely upon the presumption that a husband's residence is that of his family. In 14 Cyc. 861, it is said:

"The domicile of a married man is presumed to be at the place where his wife or family resides."

If Mrs. Knighton lived, that is, was domiciled, in voting district No. 1, the presumption is that her husband also lived there, and the presumption would prevail until the contrary was shown. 14 Cyc. 558; *State v. Savre*, 129 Iowa, 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452; *Gugenheim v. City of Long Branch*, 80 N. J. Law, 246, 76 Atl. 338. In *State v. Savre*, *supra*, the Supreme Court of Iowa, in referring to the question of residence, says:

"There is no absolute criterion by which to determine one's place of residence. Each case must depend on its particular facts or circumstances. Three rules, however, are well established: (1) That a man must have a residence or domicile somewhere; (2) when once established, it remains until a new one is acquired; and (3) a man can have but one domicile at a time."

We are of the opinion that Henry Knighton's residence presumptively was in voting district No. 1, where his wife lived, and that the presumption should prevail until the contrary is shown by proper evidence.

[4] What we have said about Knighton also applies to one Sylvester Pierce. With regard to the latter it was shown that in 1914, at the general election, Pierce lived in Fayette, and that in that year he was registered and voted there. Fayette is some miles north of Gunnison City, and constitutes a separate and distinct political organization and voting precinct. Mr. Pierce, however, voted at the election in question in Gunnison City upon a registry he had there in

1913. There was no proof that Mr. Pierce had changed his residence after voting in Fayette in 1914. We think that, in view that Mr. Pierce had established a voting residence in Fayette in 1914, and not having been thereafter registered in Gunnison City as a voter therein, the presumption should prevail that he was still a resident of Fayette until that presumption is overcome by proper evidence.

But merely to show that Mr. Knighton and Mr. Pierce voted illegally would not necessarily change the result of the election. Counsel for plaintiff, therefore, called Mr. Pierce as a witness on behalf of the plaintiff, and attempted to show by him that he had acted and affiliated with what, in the record, is called the "drys"; that is, those who voted against the sale of intoxicating liquors in Gunnison City. The witness, however, claimed his privilege, and, while the court required him to answer certain questions, it thereafter struck out all the evidence as privileged. If Mr. Pierce at the time of the election was a legal voter in Gunnison City, he could not be questioned with regard to how he voted, since that claim would be within his privilege. In other words, he could claim the privilege or he could waive it as he saw fit. If he was not a legal voter in Gunnison City at the time of the election, and therefore had cast an illegal ballot, then he could not claim the privilege unless he might do so upon the ground of self-incrimination. We have, however, already held that he, the same as other voters, would be immune from prosecution and punishment, and therefore the court erred in sustaining the claimed privilege and in striking out his testimony.

[5] We are also of the opinion that the evidence was sufficient to raise a presumption that Mr. Pierce had voted against the sale of intoxicating liquors. It was clearly shown that he was affiliated and acted with the "drys"; and it was shown that he was quite active in that regard. This is not a case where it is necessary to hold that because a certain voter has affiliated with a certain political party, from that fact alone it may be inferred that he voted for a particular candidate of his party. There may be many good and sufficient personal reasons why a voter did not vote for a particular candidate who was upon his party ticket, although he may have voted that ticket. In this case, however, all there was to vote for was the party ticket. That is, there was but one proposition, and that is whether the voter was for or against sale. We think therefore, there is no other reasonable inference under the circumstances than that Mr. Pierce did vote the ticket of the party with which he affiliated and acted on the day, and prior to the day, of election. That such an inference arises under the circumstances of this case is, we think, generally

held by the courts. In *Tunks v. Vincent*, 108 Ky. 829, 51 S. W. 622, the evidence respecting the voter's political affiliation and conduct was much weaker than in the case at bar, yet the Supreme Court of Kentucky held that the evidence was sufficient to justify an inference that the voter, not only had voted his party ticket, but that he had also voted for the particular candidate whose election was in question. In *Rexroth v. Schein*, 206 Ill. at page 97, 69 N. E. at page 247, the Supreme Court of Illinois, in passing upon this question, said:

"The party affiliations of the voter have been uniformly held sufficient to raise the presumption that he cast his ballot for the nominees of the political party of which he was a member, and this proposition, in the absence of any countervailing proof or circumstances, is, it seems, to be accepted as determining for whom the voter cast his ballot" (citing a number of cases).

It is, however, not necessary to go to that extent in this case. It is sufficient to hold, and that is all we do now hold, that the evidence as it now stands is sufficient to justify a finding that Mr. Pierce voted the ticket of the political organization he affiliated and acted with on the day of, and prior to, the election in question. That is all that, under the circumstances of this case, it is necessary to find in order to determine how Mr. Pierce voted upon the question of sale or no sale.

[6] Counsel for plaintiff, however, also attempted to show for what party some of the voters cast their ballots by seeking to prove their declarations in that regard. Counsel for the defendants objected to the evidence respecting the declarations upon the ground that the same was incompetent and hearsay. The court excluded the evidence, and counsel for plaintiff insist that the ruling constituted error. The authorities are in hopeless conflict upon the question. No doubt the present state of the authorities is largely due to the fact that the English courts have always held such declarations competent, and many of the legislative bodies of this country have followed the English rule. Many of the American courts, however, have always regarded the English rule with disfavor, and have refused to follow it. Mr. McCrary, in his excellent work on Elections (4th Ed.) §§ 483, 484, insists that the "better considered cases" are all against the English rule, and that those cases exclude such declarations as hearsay unless they constitute a part of the *res gestæ*. Mr. McCrary's statement is supported by the following cases: *Gilleland v. Schuyler*, 9 Kan. 569-583; *Sharp v. McIntire*, 23 Colo. 99, 46 Pac. 115; *Dean v. State*, 56 Neb. 301, 76 N. W. 555; *Berry v. Hull*, 6 N. M. 643, 30 Pac. 936; *Black v. Pate*, 130 Ala. 514, 30 South. 434; *Lauer v. Estes*, 120 Cal. 652, 53 Pac. 262; *Hill v. Howell*, 70 Wash. 603, 127 Pac. 211. The question is learnedly discussed in the case from Nebraska, and it is there held that if the dec-

larations are part of the *res gestæ*, they should be admitted, and that whether they are or are not should be determined by the same rules as that question is determined in other cases where declarations are sought to be introduced as evidence. In *Black v. Pate*, *supra*, the Supreme Court of Alabama, in speaking of the competency of a certain voter's declarations, said:

"His declarations and conduct about the time of and recently before casting his ballot may be proved as tending to establish the facts."

That is, the fact of how he voted. As a matter of course whether certain declarations are or are not a part of the *res gestæ*, and admissible as evidence, must be determined, as in other cases, by considering all the evidence relating to the voter's acts and conduct and the time when and the circumstances under which the declarations were made. We feel constrained to hold, therefore, that unless the declarations of the voter are a part of the *res gestæ* they are not admissible in evidence in an election contest in which he is not interested as a party. While plaintiff's counsel contend that some of the declarations in this case were part of the *res gestæ*, yet in view of the incompleteness of the record, we cannot determine that question. Counsel could not agree at the hearing just what evidence was stricken from the record by the district court and what remained, and we are unable to do so. In view of all the circumstances, therefore, we shall not pass upon the question of whether any declarations that may have been made by any of the voters constituted a part of the *res gestæ*, but we leave that question to be determined by the district court in accordance with the principles herein announced. That must be done when all the facts and circumstances are before the court.

[7] Finally, it is contended that the court erred in permitting E. L. Swalberg to file an answer to the contest upon his own behalf, and not as an officer of Gunnison City. Under our statute an elector may file a contest and "any proposition submitted to the vote of the people may be contested." We cannot see why an elector may not also defend in a contest proceeding where, as here, the contest relates to a question submitted to the people for determination, and where such an elector is a resident and elector of the city or town where such election was held. In this case the city authorities refused to defend, and we cannot see why an elector of the city could not do so on his own behalf. Although he may not be made a party, yet we think that a contest like the one in question is not of that private nature where an elector may not be given leave by the court to file an answer and defend. Counsel have not cited any authorities that such may not be done, and we have found

none. We are of the opinion that the court committed no error in permitting Swalberg to defend the proceeding on his own behalf.

In conclusion we desire to state that we have not been unmindful of the contention of defendants' counsel that courts should not, except for good reasons, set aside popular elections, and that the voter's right to refuse to disclose how he voted and to make other disclosures should be carefully guarded and fully protected. A voter whose acts may be called in question is, however, not the only person to be considered; nor is he the only one who should be protected. It is quite enough that a voter who may have been guilty of some infraction of our election law is fully absolved from prosecution and punishment. When that is the case there is absolutely no reason why he should not be required to disclose all matters concerning any acts or conduct, either on his part or on the part of another, that may affect the result of the election. A result that is obtained by criminal misconduct or fraud should not be upheld by any court of justice. Neither can it be assumed that the people either approve of or desire a result thus obtained. In the long run our free institutions and popular governments will suffer much less by granting complete immunity to an offender against our election laws, and by requiring him to make full disclosure of all he knows concerning any criminal misconduct, fraud, or collusion by which a fair and honest result of an election is attempted to be frustrated, where he is not being prosecuted for such offense, than can be gained by shielding the wrongdoer upon the ground that no one may be required to give self-incriminating evidence. The evidence no longer can be said to be incriminating, since it has lost all its force and effect for that purpose. As a mere prophylactic effect, the former course has many advantages over the latter.

From what has been said it follows that the judgment of the district court of Sanpete county should be, and it accordingly is, reversed, and the cause is remanded to that court, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed. Costs to appellant.

STRAUP, C. J., and McCARTY, J., concur.

HUFFINE v. LINCOLN et al. (No. 8684.)

(Supreme Court of Montana. Oct. 28, 1916.)

1. WILLS ~~§ 66~~ — CONTRACT TO DEVISE — REVOKING WILL.

The promise of the husband, on which a woman designing to convey her property to her daughter is induced to convey it to him, that he will devise it and his own property to the daughter and a son contemplates a will to remain ef-

fective, and is not satisfied by the mere making of one; it being subsequently revoked.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. ¶ 66.]

2. TRUSTS ¶ 96—CONSTRUCTIVE TRUST—REVOCATION OF WILL.

For one, to whom his wife, designing to convey her property to her daughter, conveyed it, induced by his promise that he would devise it and his own property to the daughter and a son, to afterwards revoke his will is a fraud, from which a trust arises.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148; Dec. Dig. ¶ 96.]

3. TRUSTS ¶ 103(3)—CONSTRUCTIVE TRUST—BENEFICIARY.

Under Rev. Codes, § 5373, declaring one who gains a thing by fraud to be an involuntary trustee of it for the benefit of the person who would otherwise have had it, the husband of one who designed to convey her property to her daughter having induced her to convey it to him, on his promise that he would devise it and his property to the daughter and a son, the trust arising on breaking of his promise, is in favor of the daughter, so that she is the real party in interest, privileged to bring action to have the trust declared and enforced.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. ¶ 103(3).]

4. DOWER ¶ 79(1)—TRUST PROPERTY—NOTICE—BURDEN OF PROOF.

Even if a wife's right of dower is an interest acquired by purchase, so that, under Rev. Codes, § 4539, she cannot be prejudiced by a trust of which she had no notice at the time of her marriage, a trust being established in property standing in the husband's name, she prima facie has no dower, and must show want of notice.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 294-298; Dec. Dig. ¶ 79(1).]

5. APPEAL AND ERROR ¶ 934(2)—PRESUMPTION IN AID OF JUDGMENT.

In aid of a judgment against right of dower of a wife, it may be inferred that she had notice of the trust on which her husband held property, no finding of want of notice, or complaint of its absence, appearing, and no showing that it would have been justified by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. ¶ 934(2).]

6. TRUSTS ¶ 103(3)—CONSTRUCTIVE TRUST—BENEFICIARY.

The trust arising from the broken promise of a man, on which he induced his wife, designing to convey her property to her daughter, to convey it to him, that he would devise it and his property to the daughter and a son, exists for the daughter alone, under Rev. Codes, § 5373, as the person who but for the promise made and broken, would have had the property, though the son, thus prevented from sharing therein, was not responsible for his father's wrong.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. ¶ 103(3).]

Appeal from District Court, Fergus County; J. B. Poindexter, Presiding Judge.

Action by Leonie Huffine against Alvin R. Lincoln and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. K. Cheadle, of Lewistown, and Gunn, Rasch & Hall, of Helena, for appellants. J. C. Huntoon and E. W. Mettler, both of Lewistown, and Walsh, Nolan & Scallon, of Helena, for respondent.

SANNER, J. Stripped of legal verbiage, the findings of fact in this case are: That on September 18, 1903, Alvin R. Lincoln and Mary E. Lincoln were husband and wife, living together as such; that Mary E. Lincoln was the owner in her own right of certain real estate which she then intended, and for a long time had intended, to convey to their only daughter, Leonie Huffine; that she was then dangerously ill and, resolving to carry out such intention, advised her husband accordingly; that he, possessing influence over her by reason of their confidential relations as husband and wife, exerted that influence to induce, and did induce, her to convey the property to him; that no consideration passed for such conveyance except his promise and agreement to devise all said property and all his own real estate to their daughter and their son, George R. Lincoln, in equal shares, upon which promise and agreement Mary E. Lincoln completely relied and but for which she would not have conveyed the property to him; that he then and there, as a part performance of said agreement and as a further inducement, executed such will and delivered the same to Leonie; that thereafter, and on October 6, 1903, Mary E. Lincoln died, leaving as heirs at law her husband, the defendant Alvin R. Lincoln, her daughter, the plaintiff Leonie Huffine, her son, the defendant George R. Lincoln, and two children of a deceased daughter; that in 1910 Alvin R. Lincoln married the defendant Anna D. Lincoln, and these two are now husband and wife; that in November, 1910, Alvin R. Lincoln repossessed himself of said will, and thereafter repudiated the same and his agreement with Mary E. Lincoln, declaring that Leonie Huffine should have nothing from him, and has threatened to dispose of the property conveyed to him by Mary E. Lincoln, in order to deprive and defraud Leonie of the same, or any portion thereof; that he has formally revoked said will and made another, which is now in force, bequeathing to Leonie a nominal sum, only for the purpose of preventing her from breaking the same; that George has made common cause with his father in resisting Leonie's complaint, and denying the agreement between Alvin R. Lincoln and Mary E. Lincoln as alleged therein. Upon these facts the court concluded as a matter of law that Alvin R. Lincoln became and is an involuntary trustee of the property conveyed to him by Mary E. Lincoln; that neither Anna D. Lincoln nor George R. Lincoln has any title, claim, or interest in the premises, that Leonie Huffine is entitled to a conveyance thereof from Alvin R. Lincoln, free of all claims through or under him, and that a decree should be entered directing such conveyance. This appeal challenges the correctness of the judgment entered in so far as it accords with said findings and conclusions.

The first contention is that the agreement between Mary E. Lincoln and Alvin R. Lincoln is not enforceable at all because of the subsequent marriage of the latter, and is not enforceable at the instance of the plaintiff because "she is not a third party for whose benefit the contract was made, within the provisions of the statute authorizing an action by a third party to a contract." If, as the argument and cases cited seem to indicate, it is meant by this to urge that the contract between Alvin R. Lincoln and Mary E. Lincoln cannot be specifically enforced by this plaintiff, the answer is that she does not ask, nor has the court adjudged, a specific performance. If, however, the contention is that the transaction is not cognizable by a court of equity at the suit of the plaintiff, then we say the defendants themselves have answered it by praying this court to reverse the judgment as entered and to direct a decree canceling the conveyance from Mary E. Lincoln to Alvin R. Lincoln, allowing the property to pass in accordance with the law of descent.

[1, 2] The real question at issue is this: Do the facts found warrant the declaration of a trust of the property in Alvin R. Lincoln for the benefit of Leonie Huffine, and can such trust be now declared and enforced as against Anna D. Lincoln, George R. Lincoln, or the children of the deceased daughter? In moving towards the answer it is to be noted that arguments based upon the statutory restriction of a wife's power to devise her property to others than her husband (Rev. Codes, § 3735) are wholly irrelevant. The determination of Mary E. Lincoln was not to devise, but to convey, and her right to convey cannot be open to doubt. Rev. Codes, § 3700. What her reasons were for this determination we may not definitely know, but it is a pure gratuity to assert that such conveyance was intended as a testamentary disposition rather than a conveyance *inter vivos* for the very best of considerations. Suffice it to know that her settled design was to convey to the daughter, and had it been carried out, title to the property would have vested in the daughter free of all claims by or under her father, her brother, or any one else. That design was frustrated, as the court has found, by the influence and inducements of the father to his own advantage and, as it ultimately proved, to his daughter's disadvantage. These inducements were that if the mother would convey to him instead of to her daughter, he would make a will, devising all the mother's property and all his own real estate to the daughter and son in equal shares. He made the will, and she the conveyance. It is argued that, inasmuch as he made the will, and inasmuch as his later revocation of it was perfectly legal, if not actually commanded by his subsequent marriage, no trust can be said to exist, because there was no fraud. This is too narrow a view of the transaction. The thing contem-

plated was a will which should be and remain effective; only on the understanding that the daughter and son alike should come into all the property, would the mother forego her design to convey her property to the daughter. The transaction was between parties who stood in the highest of confidential relations, and it is to be judged accordingly. Rev. Codes, § 3684. It called for a continued performance on the part of the husband, viz. the maintenance of such a will, and of his intention to do this; the mere making of the will is not conclusive. He may have actually intended to repudiate his promise, or he may have mentally reserved to do as he saw fit, once the property was safely in his hands; if he did either, there was actual fraud in the inception. Rev. Codes, § 4978, subdiv. 4. The trial court, however, did not expressly find that he did either, but rested its conclusions upon his subsequent repudiation. The case is thus made analogous to those wherein an intended testamentary disposition has been changed or thwarted by the promise or engagement of one in confidential relationship with the intended donor and to the advantage of the promisor. In such cases, as well as in those where the disposition is not testamentary, but is the fruit of confidence, the overwhelming weight of authority is that the promisor takes his advantage subject to the performance of his promise, and that subsequent repudiation is a fraud which operates to warrant the declaration of a trust without regard to the promisor's intention when the promise was made, or the presumption will be indulged, if necessary, that the promise was made without intention to fulfill it, and was therefore fraudulent. In our opinion, the existence of a trust in this case cannot be gainsaid. See *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Larmon et al. v. Knight et al.*, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229; *Fisk's Appeal*, 81 Conn. 433, 71 Atl. 559; *Schneideringer v. Schneideringer*, 81 Neb. 661, 116 N. W. 491; *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, 90 Cal. 329, 27 Pac. 186; *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430; *Young v. Peachy*, 2 Atk. 254; *Thompson's Lessee v. White*, 1 Dall. (Pa.) 424, 1 L. Ed. 206, 1 Am. Dec. 252; *Stahl v. Stahl*, 214 Ill. 131, 73 N. E. 319, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774; *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245; note, 106 Am. St. Rep. 95 et seq.; note, 8 L. R. A. (N. S.) 698 et seq.; note, 31 L. R. A. (N. S.) 176 et seq.; note, 39 L. R. A. (N. S.) 906 et seq.; note, 21 Ann. Cas. 1384 et seq.

[3] There is just as little doubt of plaintiff's right to have the trust declared and enforced. "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who

would otherwise have had it." Rev. Codes, § 5373. The thing prevented by the promise made and broken was a conveyance of the mother's property to the daughter alone; she, but for that promise, would have had the property which the defendant Alvin R. Lincoln now has. The trust, therefore, which exists here is a trust in her favor, and she is the real party in interest upon whom is devolved the privilege of maintaining appropriate action.

[4, 5] The judgment is assailed as depriving Anna D. Lincoln of any dower right in the property. If she has such right, the judgment should undoubtedly be modified to recognize it; but this is all that could be required, supposing such right to exist, since it is a mere inchoate interest which may never vest. Generally speaking, however, a wife has no dower in trust property or in estates lost by breach of condition. 2 Scribner on Dower, pp. 392 et seq.; 14 Cyc. 911; note, 22 L. R. A. (N. S.) 691 et seq. To avoid this rule, the defendants assert that the right of dower which comes to the wife in virtue of marriage is an interest acquired by purchase, and therefore cannot, under Code, § 4539, be prejudiced by a trust of which the wife had no notice at the time of the marriage. We think the premise may be doubted, and we question whether the section invoked has any application. Assuming, however, that the premise is sound, the section applicable and the conclusion correct as a proposition of logic, the defendants are in no wise advanced. The trust being established, Anna D. Lincoln had *prima facie* no dower; she could have it only by showing a want of notice (Lewis v. Lindley, 19 Mont. 422, 442, et seq., 48 Pac. 765; Weber v. Rothchild, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162), and, so far as this court is concerned, presenting a finding or the improper refusal of a finding to that effect. No such finding appears, no complaint of its absence, no showing that it would have been justified by the evidence. In this situation we are authorized to infer in aid of the judgment that she did have notice, particularly in view of the undisputed fact that the property came to her husband by conveyance from his former wife, for which conveyance there was no consideration save marital confidence.

[6] Finally the judgment cannot stand, it is said, because the defendant George is not responsible for the situation now presented, and neither he nor the grandchildren should be cut off from their share of Mary E. Lincoln's property. This ignores the fact that Mary E. Lincoln never did intend this property to pass by the law of succession. She intended to convey it; and she did convey it, not, as she desired, to the daughter who alone would have been entitled to it, but to Alvin R. Lincoln because of his promise and engagement to devise it and his property to that daughter and the son. The son became

entitled to share it only if the father kept his promise. If the father broke his promise, the son was free to feel aggrieved thereby, but if he is entitled to recompense, it is not at the expense of the plaintiff, who has done him no wrong. The wrong, if any done to him, was by the father, and that wrong the son, on the face of this record, waives, denies, and defends. In so doing he exhibits an accurate perception of his situation, for the trust here presented exists for the benefit of the person who, but for the engagement made and broken, would have come into the property.

The conclusions of law are justified by the findings of fact, and the judgment follows both. It is therefore affirmed.

Affirmed.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

JONES v. CALIFORNIA DEVELOPMENT CO. et al. (L. A. 8796.)

(Supreme Court of California. Oct. 21, 1916.
Rehearing Denied Nov. 20, 1916.)

1. WATERS AND WATER COURSES §171(1) — UNUSUAL FLOW—RIGHTS OF PARTIES.

Rights of owners in the Imperial Valley, during the Salton Sea overflow by diversion of the Colorado river, cannot be measured by the principles governing surface waters, or recurrent flood waters, or attempted changes of natural conditions which impose a greater servitude or positively injure lower lands bound to receive such waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. §171(1).]

2. WATERS AND WATER COURSES §171(1) — UNUSUAL FLOW—RIGHTS OF PARTIES.

Under extraordinary water conditions, as in the Salton Sea district at time of diversion of the Colorado river, the landowner may use every reasonable precaution to prevent injury to the land, and whether his conduct is reasonable is determinable by existing conditions and not subsequent consequences.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. §171(1).]

3. WATERS AND WATER COURSES §171(1) — UNUSUAL FLOW—RIGHTS OF PARTIES.

When, at the time of the diversion of the Colorado river to the Salton Sea, hundreds of square miles of land were inundated, and the flood was constantly increasing, so that outlet had to be provided in some way, the acts of a landowner, near the New River channel, in dynamiting the channel wider and deeper, were reasonable, and no recovery could be had, though the consequent off-flow damaged lands of another, and though the explosives tore out hardpan in the channel and increased erosion, especially where the damaged land was unimproved, and defendant's land, which was only threatened, was highly cultivated.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. §171(1).]

In Bank. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by A. N. Jones against the California Development Company, the Imperial Water Company No. 1, and another. From a judgment for plaintiff, and order denying new trial, the Imperial Water Company No. 1 appeals. Reversed.

W. N. Goodwin, Hunsaker & Britt, and Joseph L. Lewinsohn, all of Los Angeles, for appellant. Luce & Luce, of San Diego, and W. B. Mathews and S. B. Robinson, both of Los Angeles, for respondents.

HENSHAW, J. Plaintiff on his own behalf and on behalf of his assignors, one and all owners of land in Imperial Valley, brought this action to recover damages for injuries sustained by their lands because of the asserted negligent and unlawful acts of the defendants. Plaintiff recovered judgment, and from that judgment and from the order denying its motion for a new trial the defendant Imperial Water Company No. 1, a corporation, has appealed. The controversy cannot be understood without a presentation of facts in most respects remarkable, in some respects unique.

The great Colorado river, draining a large portion of the southwestern United States, and corresponding in this respect to the Mississippi, leaving the United States on its southerly course passes through northern Mexico and empties its waters into the head of the Gulf of California. In the past ages it has deposited enormous quantities of silt in what was then the upper waters of the Gulf of California, until it finally reclaimed a vast territory from the waters of that gulf. But it did this, not in the usual way of depositing detritus, until new land rose above the level of the ocean, but rather by forming a barrier of high land to the southward, this barrier being erected by the collision between the tidal, sand-carrying waters of the gulf and the silt-carrying waters of the river. The result was the formation of what was long known as the Colorado desert. With that portion of the Colorado desert to the west of the river, now bearing the name Imperial Valley, and now erected into a county of this state known as "Imperial," we are here concerned. The effect of this curious action of the elements was to leave Imperial Valley a waterless waste below the level of the ocean. While the general course of the Colorado river was south into the head of the Gulf of California, the land gradient of Imperial Valley was in an opposite direction northward, so that from the Mexican line Imperial Valley slopes down toward the north at a gradient of 4 to 6 feet to the mile. At the northern end of the valley is Salton Sink, which was and for some years had been a dry depression, from 250 to 275 feet below the level of the sea. The Colorado river from the neighborhood of the Mexican border southward carries its waters some-

what sluggishly through this higher land to which reference has been made. Late spring or early summer is the period of normal high water in the Colorado river, and at such seasons it is not unusual for it to overflow its westerly bank, where the waters, gathering in natural depressions locally known as lakes, flowed from these depressions in a northerly direction by two natural channels toward and, upon occasion, into the Salton Sink. The nearest to the river of these natural waterways leading from Mexico northward was known as the Alamo river, and the channel farther to the west was called New river. The distance between these two waterways at the international line is about 8 miles. The distance from the boundary to Salton Sink along the course of New river is approximately 40 miles. In its natural state, and before the occurrences hereinafter narrated, the channel of New river was from 2 to 8 feet deep, with an average width of 40 feet. The Alamo river channel was similar to it in size and characteristics, saving that the course of the Alamo was a little more direct, its channel consequently somewhat shorter, and its gradient a little steeper. The soil of Imperial Valley is a soft, friable silt, the climate extremely warm, the atmosphere very dry, the rainfall negligible. Under these conditions of course enormous quantities proportionately of the waters that found their way into the Alamo and New rivers seeped into the soil or were taken into the air by evaporation. So that, as has been said, while the terminal flow of these waters was Salton Sink, for some 7 or 8 years before the happening of the events to be recorded, Salton Sink was dry.

Upon an examination of the soil it was found that Imperial Valley, though without vegetation, was a desert only for lack of water. Further it was found to be a practicable engineering feat to tap the Colorado river near the international boundary line and through canals carry and put the water by gravity upon the lands of Imperial Valley both in Mexico and in the United States, the general course of these canals following the land gradient northerly and their surplus water flowing into the Salton Sink. This engineering feat was performed by the defendant the California Development Company, and the application of the water to these lands, taken with the climatic conditions, showed an amazing fertility and productivity of the soil. Irrigated farms were laid out and sold, towns sprung up, a railroad was constructed, and in verity this desert was made to blossom like the rose. The defendant Imperial Water Company No. 1, which will for convenience be called the Water Company, is a mutual company organized for the purpose of acquiring water for distribution to its stockholders upon the land owned by them within the territory lying north of the Mexican line and between the channels of the Alamo and

the New rivers. It was the purveyor of water to approximately 100,000 acres, taking this water by purchase from the canals of the California Development Company. It had 738 individual stockholders. It was supplying water to these stockholders upon their tracts of land varying in acreage from 6 to 320. It had its own checkerboard system of canals and irrigating ditches, aggregating more than 300 miles in length. The towns of Calexico, Heber, El Centro, Imperial, and Brawley, extending from Calexico upon the border northerly, were all within the territory of the Water Company. The lands were protected from the invasion of waters from New river by levees.

In the spring of 1904 the defendant California Development Company cut a new headgate to divert water from the Colorado river a few miles below the international boundary line. This cut through the silt formation was inadequately protected. The result was that the Colorado river, eating through and around the protecting headgates, soon was beyond control. It eroded the canals, spread over the country, and, finding a steeper gradient in Imperial Valley to the northward than its normal course southward to the Gulf of California, left its old channel and proceeded to make a new one ending in Salton Sink, which by the inflow of these waters rapidly became a lake, and is now known as Salton Sea, a lake of more than 400 square miles in area. The Development Company was using the Alamo waterway as part of its canal system, and to relieve the pressure of these waters upon a dam on the Alamo, dug a channel from the Alamo to the New river waterway. The construction of this is charged upon the appealing defendant jointly with its codefendants, but it is unquestioned that it had nothing to do with this act, and the construction of this ditch is therefore out of the case, saving so far as that it aided in turning the waters to the New river channel and in relieving the Alamo channel from the tremendous erosion which subsequently took place in the channel of New river. Nevertheless, while the flow in the Alamo channel was controlled and never exceeded 3,000 second feet, this channel was eroded southerly from Salton Sea until it was 85 feet deeper and 200 feet wider than formerly under normal conditions. From June, 1905, the waters of the Colorado river stood over the Imperial Valley and flowed down New river in ever increasing volume, so that notwithstanding the enormous loss by seepage and evaporation Salton Sink upon July 1, 1905, had received 400,000 acre feet of water (an acre foot being that quantity of water which will cover an acre to a uniform depth of one foot), while upon July 1, 1906, the Sink was filled to a depth of 58 feet and held 7,380,000 acre feet. The Colorado river, which in October, 1905, was discharging into Imperial Valley vagrant waters to the amount of 483,118

acre feet, steadily increased the quantity of this discharge so that in March, 1906, the flow was 1,561,771 acre feet; in April, 1,884,119 acre feet; in May, 3,824,896 acre feet; and in June, 5,008,498 acre feet.

The situation existing in the spring of 1906 was that for the first time in history the Colorado river had completely left its natural channel and was pouring all of its waters uncontrolled in and over the lands of Imperial Valley. Those lands upon the Mexican side were submerged and upon the California side, saving where protected by levees, were in like condition. More than 60 square miles of the valley north of the international line were inundated. The calamity was of more than local consequence. It was considered of national importance. The attention of the President and of Congress was directed to it, and, under assurances of repayment, the Southern Pacific Company was requested to use its best efforts to stem the torrent and return the river to its old channel. For more than 6 months the Southern Pacific Company had been endeavoring to do this thing, but without success. There was no certainty that the river could ever be controlled, and, if not, it meant the eventual filling, first, of the Salton Sink, and gradually of all the lands in the Imperial Valley, until the whole became a lake. Besides the private properties already inundated and thus threatened with destruction, the existence of the towns in the valley was equally imperiled. The quantity of water as the season of high water in the river approached was enormously increased. It was certain that the volume would steadily grow, and there was every reason to believe that within a short time the flow into Imperial Valley would be twice the existing flow. The lands of plaintiff and his assignors were all submerged and had been for a year. The lands of defendant and the towns temporarily protected by levees were in danger of like inundation. The water was finding its outlet into the Salton Sink principally by the channel of New river, and had already enlarged, deepened, and cut back that channel from Salton Sink southward 25 miles. Where cut, instead of the former insignificant water course, it was a gorge 1,000 feet and more in width, and from 70 to 100 feet deep. Thus it was manifest that these vagrant waters of the Colorado river were actively engaged in making for themselves an adequate channel for the carrying of their enormous volume. Moreover, it was apparent (in the event of the failure to divert the Colorado river back to its original channel) that the only relief from the actual and threatened inundation of these lands was by means of this new and adequate channel. About the middle of April, 1906, and for some weeks thereafter, the defendants Development Company and Water Company employed men who threw sticks of dynamite into the stream to clear away ob-

structions in the channel and to aid the force of the water in eroding a deeper channel.

The complaint charged and the court found (and this is the gravamen of appellant's offense) that there existed at various points along the course of New river certain reefs or riffles of hardpan which rose nearly to the bottom of the bed of the original channel of Old river; that these riffles and reefs of hardpan acted as natural dams and prevented and would have prevented the further deepening and widening of the channel to the southward by erosion; that if this natural condition had been allowed to remain, the water, standing in a vast lake over these inundated lands, would have drained off slowly and without appreciable injury to them; that the effect of this dynamiting was to shatter this hardpan and thus to subject it to ready erosion; and that in turn the effect of this rapid erosion and widening of the stream was to cause the water standing upon plaintiff's lands to be drained off more rapidly than it would have been in the course of nature, and that the effect of this rapid withdrawal was to cause a gulying and erosion of the lands of plaintiff and his assignors. These acts of dynamiting are admitted. Concerning them the court found as charged in the complaint and as above indicated, and the judgment which it rendered in favor of plaintiff was based upon its findings to that effect—that the dynamiting was wrongful and was the proximate and efficient cause in producing the damage to the lands.

For reasons which will hereinafter appear we will do no more than refer to many of the attacks which appellant makes upon this judgment, as that the amended complaint, upon which trial was had, if it stated a cause of action at all charged upon an entirely different cause of action from that pleaded in the original complaint, and that the cause of action charged upon was barred by the statute of limitations. Nor will we pause to consider the asserted insufficiency of the evidence to justify the findings, as that the reefs of hardpan did not exist, or that if they did exist they were not of such character as in any way seriously to retard the erosive force of the water. Nor yet will we discuss the question of the insufficiency of the evidence to support the finding that the dynamiting of the channel was an efficient cause of the erosion, herein appellant asserting that as compared with the devastating power of the water itself the acts of its men in throwing sticks of dynamite into the stream contributed no more to the inevitable result than these men would have contributed to it if they had tossed their hats into the mighty torrent. We pass over these matters to come to one consideration which is both determinative and fundamental. Herein assuming the truth and sufficiency of the findings in all other respects, the vital question is: Did the admitted acts of the defendant, the conse-

quences being what they were, subject it to the legal liability here declared?

For the purposes of the consideration of this question the appellant may be regarded as a private landowner who by artificial means has aided in deepening the natural channel which the waters were making. Moreover, since the facts of this case are unique, it would be a waste of time to seek for adjudications where those facts are in any essential way paralleled. Equally useless would it be to review the innumerable decisions dealing with the drainage and flow of surface waters and of flood waters, the right of defense against the sea or vagrant waters as a common enemy, and the asserted conflict between the common law and the civil law upon all these and kindred questions. The case here presented, we repeat, is unique in its facts. If the waters were surface waters, they were something essentially more. If the waters were storm waters or flood waters they differed radically from the ordinary storm or flood waters which in the course of nature would cease to flow. Here presented is the case of a mighty river leaving its channel and pouring and continuing to pour all its volume over the lands of a great and fertile valley. At first, and because of the lack of an adequate channel, these waters spread out and formed a vast shallow lake. In time the waters themselves selected and proceeded to form an adequate channel. Unless the art and ingenuity of man could arrest this flow and restore the river once more to its natural channel, the outcome was inevitable. It meant the submergence and destruction of all property in Imperial Valley. Thus, as surface water, these waters had stood upon the unleveled lands for more than a year. They were pressing upon the levees of the protected lands of appellant. Their volume, it was certain, would be enormously increased within a very short time, and unless an adequate channel was ready to receive these waters their devastating effect upon the protected lands and towns was a matter of grave and serious apprehension. Temporary security could be assured only if the channel were made adequate southward to the Mexican boundary. Nature was doing her best to accomplish this and the appellant aided her in the work. The result of their combined efforts was success. But this success worked injury to the lands long submerged, by causing the waters to withdraw from them with such rapidity as to eat away and gully the freehold.

[1] Manifestly the acts of this appellant, and its right to do those acts, are not to be measured by the familiar, indeed the commonplace, principles touching the right to relieve oneself from or protect oneself against ordinary surface waters, or the ordinary recurrent flood waters, nor with attempted changes in natural conditions which impose either a greater servitude upon or work a

positive injury to the lower lands bound to receive such waters, principles declared in such cases as *Los Angeles C. Ass'n v. Los Angeles*, 103 Cal. 461, 87 Pac. 375, *Rudel v. Los Angeles Co.*, 118 Cal. 281, 50 Pac. 400, *Sanguinetti v. Pock*, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169, *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92, and *Heier v. Krull*, 160 Cal. 441, 117 Pac. 530. The fact that in our decisions we have departed from what was conceived to be the rules of the common law, in favor of the more equitable principles of the civil law, does not mean that we are upon this or any other question irrevocably committed to the doctrines of either system of jurisprudence. This court has said that while the rules of common law are the basis of our jurisprudence where our own laws are silent, this means and can only mean that those rules will be recognized and adopted where they meet the conditions existing in the state, and will not be allowed to control where the conditions were those never contemplated by the common law. The same declaration applies to the principles of the civil law. Indeed, upon these general questions, it has been well said by the learned author of "Water and Water Rights":

"Therefore no arbitrary rule can be laid down which will govern all cases, but each case must be dealt with upon its facts, applying the rule which will be reasonable under the circumstances, under the general rule that the water should be allowed, as far as possible, to seek its natural outlet." 3 Farnham, § 839.

And this is precisely what this court declared in *Lamb v. Reclamation Dis.*, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775, when it said:

"The real question in such cases is: Had the party sued the right to do the thing complained of?"

[2] The underlying principle governing the decision of all these cases which deal with extraordinary water conditions, whether created by the ocean or by unexpected and unprecedented floods, is that in such stress the landowner may use every reasonable precaution to avert injury from his land, and whether or not his conduct be reasonable will be determined by existing conditions and not by after consequences; so that if the acts of the landowner be, in the light of the existing circumstances, not unreasonable, he will not be held liable for consequent damage which by these reasonable acts may be inflicted upon another landowner. It follows herefrom that the acts of protection themselves may differ in kind and character, but however they may differ, the test of the doer's legal liability is: Was the particular act which he did reasonable in view of the existing circumstances? Even in the civil law, upon which respondent here places great reliance, such was the principle governing the landowner's responsibility for his conduct, and the Supreme Court of the United States, pointing out that while in the Roman law the free flow of waters was

secured from undue interruption and the landowners were protected from undue interference or burden created by obstructions to the flow, or by deflections in its course, etc., says:

"While this was universally true, a limitation to the rule was also universally recognized by which individuals, in case of accidental or extraordinary floods, were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby, because all, as the result of the accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection." *Cubbins, Appellant, v. Mississippi River Commission*, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041.

In our own state the same principle has been invoked and declared whenever the occasion demanded it. Thus in *Lamb v. Reclamation District*, supra, where the action was to abate and remove as a public nuisance a levee erected by the defendant against the flood waters of the river, the effect of which levee was to force an excess of these waters upon plaintiff's land to his injury, and where the contention was that the defendant had by its levee dammed the natural water course carrying water in times of flood, it was held: "Considering all the facts and circumstances of this case," and conceding that the construction of the levee did impose an additional burden upon and work an injury to the lands of plaintiff, that the defendant, for the protection of its own lands, was, under the circumstances, doing what it had a right to do, and the resultant damage to plaintiff's land was *damnum absque injuria*. In this case, it is to be noted is quoted with approval *Rex v. Commissioners*, 8 Barn. and C. 355, and Lord Tenterden's language:

"But the sea is a common enemy to all proprietors on that part of the coast. * * * I am therefore of opinion that the only safe rule to lay down is this: That each landowner for himself, or the commissioners acting for several landowners, may direct such defenses for the land under their care as the necessity of the case requires, leaving the others in like manner to protect themselves against the common enemy."

To the same effect is *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575, where it is declared that the principle governing the decision in *Rex v. Commissioners*, declared in *Lamb v. Reclamation District*, "is the true principle to apply to the case" of the "flood waters of our large rivers." The principle is again announced and affirmed in *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163, where it is said:

"In the case of flood waters escaping from natural streams, we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but after all, this declaration is used in view of the means of defense resorted to rather than in the abstract. We build the banks of the river higher for our protection, it is true, but in so doing we aid nature in her effort to carry the water to

its ultimate destination, and he who to protect himself from a flood should erect a barrier across the channel of one of our important rivers, would probably be met with the declaration that it was not the proper mode of warfare, even against a 'common enemy.'"

And once more is the same principle declared in *Sanguinetti v. Pock*, 136 Cal. 466, 37 Pac. 375.

[3] In these cases, alike in their vital characteristics, the defendants had protected their lands against flood waters by artificially raising the banks of the stream. The damage to plaintiffs' lands followed in direct consequence. There was no question but that plaintiffs' lands were injured, but the governing principle under the application of which these plaintiffs were denied relief, is that the steps which the defendants took to protect their own lands were reasonable under the circumstances, and the consequent damage to plaintiffs' lands cast upon defendants no legal liability. In each case it was *damnum absque injuria*. Applying this principle to the case at bar, what defendant did, instead of raising the bank of the stream, was to lower its bed. The effect of this lowering, instead of precipitating more water upon the lands of plaintiff was to cause a too rapid withdrawal of waters standing upon those lands. Under all the circumstances of the case was defendant's conduct reasonable? Unhesitatingly we answer that it was, even in view of the finding of the court that the defendant "was not justified on the ground of public interest or on the ground of public good or greater public right, or on the ground of impending necessity, and no such right or no such necessity existed." The conditions have been outlined with sufficient elaboration. It is to be remembered that so far as these plaintiffs themselves are concerned, their lands had been submerged for more than a year. It cannot be doubted that in common with the owner of every other acre of submerged land they would have welcomed the assurance that the flood waters would be drained from their soil and the land once more made to appear. These lands, if not wholly, were for the most part unimproved. The threatened lands were improved and productive. The apprehension of injury to these lands and to the towns which had grown up in their midst is abundantly shown by the evidence. The controlling consideration is not whether there was an absolute necessity for the doing of the act, but whether the doing of it was reasonable under all the circumstances, and we repeat that we entertain no doubt that it was.

This conclusion renders unnecessary, as has been intimated, the consideration of any of the other propositions advanced in this case. The fact that under the evidence here presented plaintiff has not established against this appealing defendant any legal wrong is determinative of the controversy, and the

judgment and order appealed from are therefore reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

ATCHISON, T. & S. F. RY. CO. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA et al. (L. A. 4587.)

(Supreme Court of California. Oct. 23, 1916)

1. RAILROADS \S 9(1)—CONTROL BY RAILROAD COMMISSION.

The function of the Railroad Commission, like that of the Interstate Commerce Commission, is to regulate public utilities and to compel the enforcement of their duty to the public, and not to compel them to carry out their contract obligations to individuals.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-16; Dec. Dig. \S 9(1).]

2. RAILROADS \S 214 — OPERATION — DUTY — ABANDONMENT.

Where a railway line had been destroyed and service discontinued for about 20 years, there was no duty to operate the line, such duty being dependent upon the right to maintain the line, which right was lost by abandonment; it being immaterial whether or not it was forfeited under the provision of Civ. Code, § 468, as to forfeiture of right to operate.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 711, 712; Dec. Dig. \S 214.]

3. RAILROADS \S 83 — CONSTRUCTION — JURISDICTION OF RAILROAD COMMISSION.

Under section 36, Public Utilities Act (St. 1911 [Ex. Sess.] p. 36), authorizing the Railroad Commission to order, after hearing, "additions, extensions, repairs or improvements to" the existing plant, equipment, apparatus, facilities, etc., of a public utility, the Railroad Commission has no power to require a railroad company to extend its line of railroad or to build a new line to connect with its existing line points which have not theretofore been connected, and which the company has not undertaken so to connect, since a railroad company, constructing a line between given points, does not undertake to supply the transportation needs of any territory not reached by its lines.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 220, 221; Dec. Dig. \S 83.]

4. RAILROADS \S 223 — OPERATION — PUBLIC REGULATION.

The supervision of service rendered by a railroad company is a proper matter for public regulation and control.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 725-729, 738; Dec. Dig. \S 223.]

5. CONSTITUTIONAL LAW \S 297—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—RAILROADS.

To compel a railroad company to apply its property to the construction and operation of a line of railroad, which it does not desire to construct or operate, is to take its property.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 832-834; Dec. Dig. \S 297.]

In Bank. Proceeding in certiorari by the Atchison, Topeka & Santa Fé Railway Company against the Railroad Commission of the State of California and others. Order of the Railroad Commission annulled.

E. W. Camp, U. T. Clotfelter (Pillsbury, Madison & Sutro, of counsel), for petitioner. Douglas Brookman, of San Francisco, for respondents. Allan Brant and W. C. Wilde, both of San Diego, amici curiae.

SLOSS, J. This is a proceeding in certiorari to test the validity of an order of the Railroad Commission, requiring the Atchison, Topeka & Santa Fé Railway Company to construct and put into operation a line of railroad between Oceanside, in San Diego county, and Temecula, in Riverside county. The Atchison, Topeka & Santa Fé Railway Company (which we shall herein term the "Santa Fé Company") operates a transcontinental line of railroad, connecting with a number of lines in this state. It has succeeded to the property and railroad lines of the Southern California Railway Company, which was in turn the successor in interest of the California Southern Railroad Company. The last-named corporation was organized about the year 1880, to build and operate a railroad from the bay of San Diego to a point of connection with the line of the Atlantic & Pacific Railroad, running easterly from Barstow in San Bernardino county, and now forming a part of the main line of the Santa Fé system. The line of the California Southern Railroad Company was constructed from San Diego to Oceanside, thence northeasterly to Fallbrook Station, thence through the Temecula canyon to Temecula, and thence northeasterly through Riverside and San Bernardino counties to Barstow. The distance from Fallbrook Station to Temecula through the Temecula canyon is about 12 miles. In the year 1891 this portion of the road was washed out by a flood, and it has never been rebuilt. Theretofore, in 1888, another line had been built connecting San Diego and Oceanside with San Bernardino via Santa Ana. This road, while longer than the one through the Temecula canyon, could be operated to better advantage because it avoided unfavorable grades and curves. It has also passed into the ownership and possession of the Santa Fé Company.

The proceeding now under review was instituted before the Railroad Commission by the complaint of various civic and commercial organizations in San Diego, joined by citizens of the vicinity, who sought an order requiring the Santa Fé Company to re-establish railroad operations between Fallbrook and Temecula in order to give direct service over this line to persons residing in the territory beyond Temecula. Prior to the construction of the original line, the California Southern Railroad Company had received donations of money and land, aggregating several millions of dollars in value, as an inducement to the construction of a railroad from the bay of San Diego to a connection with the Atlantic & Pacific Railroad. An agreement to that end had been made between a representative of the intending donors

and a group of men who undertook to form a corporation for the proposed construction. Pursuant to this agreement the California Southern Railroad Company was formed, and its line built.

The commission filed an elaborate opinion, in which it recited the foregoing facts and many others. It went carefully into the question of the cost of reconstructing the road through the Temecula canyon, and made estimates of the extent of territory which would furnish traffic in consequence of the proposed connection. Suggestion having been made that an alternative route could be constructed from Oceanside to Temecula without going through the Temecula canyon, the commission also found the cost of constructing this line. The findings of the commission included the following:

"Eighth. That the re-establishment of a direct connection between San Diego and Temecula, either by way of the Temecula canyon or by way of the so-called alternative line, both of which said lines are described in the preceding opinion, is a public necessity and will greatly benefit all of the country affected by this railroad.

"Ninth. That it is reasonable to order the defendant to make such connection, and that the present and prospective traffic justify the expenditure of the sum of money necessary to establish this connection."

On these findings an order was made requiring the Santa Fé Company to present to the commission for its approval plans and estimates for a line connecting Oceanside and Temecula, either through the canyon or by the alternative route, and requiring it within 12 months after the approval by the commission of such plans and estimates to construct, complete, and put into operation such line of railroad and operate thereover regular passenger and freight service. This is the order which is attacked in the present proceeding.

The Railroad Commission seeks to find authority for its order in section 36 of the Public Utilities Act. So much of the section as is material here reads as follows:

"Sec. 36. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order." St. 1911 [Ex. Sess.] p. 36.

In assailing the validity of the order, the petitioner makes a number of contentions. These, generally speaking, divide themselves into two branches. One challenges the authority of the Railroad Commission to order the construction of a line of railroad, under the circumstances here shown, regardless of

the consideration that the operation of the new line might, in a financial view, be beneficial to the company, while the other turns more specifically on the inquiry whether, under the evidence in this particular case, the construction directed to be made would be justified by the showing of probable earnings to accrue to the company. The first of these questions is the more fundamental, and in view of the conclusion we have reached on it we do not find it necessary to go into an analysis of the evidence that would have to be considered in passing on the second.

The issue to be determined is this: Has the Railroad Commission authority to require a railroad company to extend its line of railroad, or to build a new line, so as to connect with its existing line points that have not theretofore been connected and which the company has not undertaken to so connect? In thus stating the question, we eliminate from consideration the contract found to have been made between citizens of San Diego and the incorporators of the California Southern Railroad Company, as well as the fact that a line had once been run from Fallbrook to Temecula.

While the commission, in its opinion, dwelt at some length upon the moral obligations arising from this contract, its conclusion was not, perhaps, in a legal sense, based upon it. The first finding of the learned commissioner who heard the testimony, after referring to the grants made under the contract, concludes as follows:

"I do not, however, find that the moral or legal obligations resulting from this contract are of necessity a deciding factor in this case."

[1] But whether or not the existence of the contract may, in some degree, have influenced the commission in reaching its conclusion, it is clear that grounds must be sought elsewhere for supporting the order here under review. We may pass, without expressing an opinion of its validity, the petitioner's suggestion that the Santa Fé Company was not a party to the contract, but was a purchaser under foreclosure of the properties of the corporation in whose behalf the agreement had been made, and therefore not bound by the contractual duties of its predecessor. See *Hoard v. C. & O. Ry. Co.*, 123 U. S. 222, 8 Sup. Ct. 74, 31 L. Ed. 130. For, even if it be granted that the burdens of the agreement rest on the petitioner, the railroad commission is not a body charged with the enforcement of private contracts. See *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656. Its function, like that of the Interstate Commerce Commission, is to regulate public utilities, and to compel the enforcement of their duties to the public (*Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283); not to compel them to carry out their contract obligations to individuals. This is conceded by the respondents themselves, and we need not, there-

fore, go into a review of the various provisions of the act (among others, section 36 itself), which demonstrate the soundness of the conclusion just stated.

[2] Nor is the fact that a railroad line had once existed between Fallbrook and Temecula a factor of any moment in the present inquiry. No question is made of the authority of the Railroad Commission to compel a railroad company or other public utility to restore a service which it has been furnishing. Here, however, the line between Fallbrook and Temecula had been destroyed for about 20 years before the action of the commission was invoked, and, indeed, before the enactment of the law upon which the commission relies for its authority to act. It is expressly found that "that portion of the line was left abandoned and service discontinued. It has remained abandoned ever since." In view of this fact, it cannot be doubted that any obligation of the predecessor of the Santa Fé Company to maintain and operate the line from Fallbrook to Temecula had long since ceased (*Pub. Ser. Com. v. P. B. & W. R. R. Co.*, 122 Md. 438, 89 Atl. 726), and that no such obligation ever rested upon the Santa Fé Company itself. The duty to maintain the line was dependent upon the right to maintain it, and this right was lost by abandonment (*Home R. E. Co. v. L. A. Pac. Co.*, 163 Cal. 710, 126 Pac. 972), without regard to the question whether it had been forfeited under the provisions of section 468 of the Civil Code. The case must, therefore, stand precisely as it would if there had never been any connection between these two points.

The solution of the problem thus presented must be found in a definition of the character of the order complained of. Is the Railroad Commission, in ordering the construction of a railroad line, regulating the service which the petitioner has undertaken to give to the public, or is it compelling the railroad company to dedicate its property to a new service? If the former, the commission is acting within its jurisdiction; if the latter, it is attempting to exercise an authority which the statute either has not attempted or is unable to confer upon it. Section 36 of the Public Utilities Act authorizes the commission to make an order directing that "additions, extensions," etc., be made in the plant or facilities of any public utility. It might be argued that this language is broad enough to include additions to the plant, even though such additions may involve a service never contemplated nor undertaken by the owner of the utility. But if this be taken to be the true meaning, the section expresses an intent which cannot, under the restrictions of the federal Constitution, be given effect. As was said by Henshaw, J., in *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 665, 137 Pac. 1119, 1128 (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 882):

"It may not be amiss to point out that the devotion to a public use by a person or corpo-

ration of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty."

And the following quotation from my opinion in the same case is also in point:

"I think it cannot be doubted that an order, compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property. * * * Where the particular property has been dedicated to a public use; where the property, in other words, is employed in a public service, the owner has consented that the public may use his property within the limits to which the dedication extends. Within those limits, the use by the public does not constitute a taking, or, if it be a taking, it is one which has been invited by the owner. But the fact that the property has been offered for one public use does not authorize the public to use it for other and different purposes."

Again, in *Del Mar Water, etc., Co. v. Eshleman*, 167 Cal. 666, 680, 140 Pac. 591, 596, Mr. Justice Shaw, in referring to section 36 and other provisions of the Public Utilities Act, said:

"These sections, taken literally, seem to empower the commission to direct any public utility to extend its plant and enlarge the territory supplied by it in such manner as the commission shall judge advisable. But a proper interpretation of these provisions must be that they are limited in their application to such public service corporations as may have devoted their entire property to the use of the entire public, or to those which may have undertaken to supply a certain district, such as a city, and dedicated their property to that service and which afterward may have failed or refused to give to such district an adequate service, or failed or refused to extend the system and supply to parts of the district, when it was within its means to have done so and such extension would not be unreasonable. In such cases it would be entirely proper to give such a commission power to compel adequate service within the territory which the corporation has undertaken to serve and to compel any reasonable extension of the service to other parts of such territory. But even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility and thus take property for public use without condemnation and payment. The provisions of this act could not authorize the commission to compel such corporation to dedicate additional property to public use without additional compensation. When a corporation voluntarily devotes a part of its property to public use, it is to be presumed that it makes the dedication because it is satisfied with the return which it expects to receive, and in that way it is deemed to have been compensated for such dedication. But when it is forced to devote to public use additional property which it has not dedicated to public use, or is compelled to extend its service to supply uses or territory not embraced in the original dedication, it must, under our constitutional provisions, as a condition precedent, be compensated for the value of the new property taken or new use exacted. This may be done under the power of eminent domain."

[3] The views thus announced, when applied to the facts of the case before us, lead inevitably to the conclusion that the commis-

sion exceeded its power in ordering the construction of a new line of road to connect Oceanside and Temecula. A public utility, undertaking to supply a given public need, submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken. Thus, a water company having a franchise to supply water to the inhabitants of a given city assumes the public duty of supplying that community with water. It may be compelled to extend its mains in order to furnish the service to such inhabitants. *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 146 Pac. 640. So of companies furnishing gas, electric current, or telephone service. 1 *Wyman on Pub. Ser. Corp.* § 797. But to require a public utility to devote its property to a service which it has never professed to render is to take that property, pro tanto, and such taking cannot be justified except under the power of eminent domain—i. e., upon just compensation. A railroad company, in constructing a line between given points, does not undertake to supply the transportation needs of any territory not reached by its lines. 1 *Wyman, Pub. Ser. Corp.* § 272. As is pointed out by petitioner, there is a very real difference between the nature of the service rendered by a railroad and that furnished by a water or gas company or a telephone system. Gas, water, electric light, or (as a rule) telephone service must, in the nature of things, be brought to the consumer. The obligation to supply a given district carries with it the duty, under reasonable limitations, to extend the mains or lines of the public utility to a point on the consumer's premises where use can be made of the service. Not so with a railroad company. Before freight or passengers can be transported they must be brought or must come to some point on the line of the railroad. True, the railroad company is bound to provide adequate facilities for the service of the public on its lines. It may be compelled to furnish proper stations for the reception and discharge of passengers and freight, to supply adequate motive power and cars, to install safety devices, to make needed repairs and additions to its roadbed and track, and other like improvements. All of these matters fall within the scope of the regulation of the service which the company has undertaken to give. But there is a vital distinction between regulation of this character and a requirement that the railroad company shall extend its operations by building a new line of road to tap or supply a territory which has not theretofore had the benefit of direct railroad service. Such a requirement cannot be justified by saying that the points to be thus reached are within the area already served by the railroad. The area served by any railroad may, in a certain sense, be said to include all of the territory, in any direction, from which freight or passengers may be brought to the railroad by any other mode of

conveyance. Such area may extend to a distance of many miles from the line of the road. Certainly the public duty of the company does not include the obligation of building lines to any or every portion of this indefinite expanse of territory.

Various decisions upholding orders of regulating bodies with respect to railroads are cited, but we think they do not, in any instance, meet the necessities of the case at bar. Much stress is laid upon *Wisconsin, etc., Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. There the Supreme Court of the United States had under consideration an order of the Railroad and Warehouse Commission of the state of Minnesota requiring two railroad companies whose tracks intersected at a certain point to provide connecting tracks so that the cars of each company could be run onto the tracks of the other. The ground of the decision sustaining the order was, in effect, that the requirement was simply a regulation of the operations of the two companies in furtherance of their obligation to properly serve the public needs and convenience. There was no attempt to compel a road to extend its service beyond the lines which it was already operating. The companies were merely required to furnish facilities for the more adequate performance of a service already supplied. The same is true of the other cases upon which reliance is placed. Thus, in *Atlantic Coast Line v. N. C. Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 396, the order in controversy directed a railroad to rearrange its schedules so as to make a convenient connection between its trains and those of another road passing a junction point. The order under review in *Missouri Pacific R. R. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472, required the railroad company to put into operation on one of its branches a passenger train in place of a mixed passenger and freight train. This order, said the court, did nothing more "than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers." So in *Minneapolis, etc., R. R. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614, the court sustained the validity of an order of the Railroad and Warehouse Commission of Minnesota directing the railroad company to build and maintain a station house at a certain point on its line. This ruling, like the others mentioned, was based upon the duty of the company to provide proper service upon its lines, the court saying that "to establish stations at proper places is the first duty of a railroad company. The state can certainly provide for the enforcement of that duty." The same grounds led to the decision in *Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988. The order there in question was one requiring the railroad

company to accept shipments of coal in carload lots when tendered in cars of other railroad companies. The requirement was justified "in order that reasonably adequate facilities for traffic may be provided." And similar considerations were made the ground of rulings upholding orders requiring various railroads to use their tracks within the city of Detroit for interchange of traffic (*Grand Trunk Ry. Co. v. Michigan*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310), and directing a street railroad company to double track its line for a distance of ten blocks (*Phoenix Railway Co. v. Geary*, 239 U. S. 277, 36 Sup. Ct. 45, 60 L. Ed. 287). In the case last cited the court, in its opinion, used this expression:

"Complainant is not required to open up new territory, but only to give better service upon a street already occupied by it under a public franchise."

These cases, one and all, have to do with regulations designed to improve the facilities for transacting the business already conducted upon the lines built by the company and devoted to the transaction of that business. They furnish no support for the claim that a railroad company may be compelled to build new lines in order to render a new service, however necessary or convenient such new service may be to the public.

[4, 5] "It must be remembered," said Mr. Justice Brewer in *Interstate Com. Com. v. Chicago G. W. Ry. Co.*, 209 U. S. 108, 118, 28 Sup. Ct. 493, 496 (52 L. Ed. 705), "that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager." To the like effect are the following expressions from recent decisions of the Supreme Court of the United States:

"A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs." *Great Northern Ry. v. Minnesota*, 238 U. S. 340, 35 Sup. Ct. 763, 59 L. Ed. 1837.

"The company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public." *C. M. & St. P. R. R. Co. v. Wisconsin*, 238 U. S. 491, 35 Sup. Ct. 869, 59 L. Ed. 1423, L. R. A. 1916A, 1133.

See, also, *People v. Wilber*, 198 N. Y. 1, 90 N. E. 1140, 27 L. R. A. (N. S.) 357, 19 Ann. Cas. 626; *People v. Stevens*, 203 N. Y. 7, 96 N. E. 114; *Bacon v. Boston & Maine R. R.*, 83 Vt. 421, 76 Atl. 128.

These quotations point to the essential ground of the invalidity of the order here in question. The supervision of service rendered by a railroad company is a proper matter for public regulation and control. The question whether a railroad company shall extend its lines to points not theretofore reached by it, whether, in other words, it

all engage in a new and additional enterprise, is one of policy to be determined by directors. To compel a railroad company apply its property to the construction and operation of a line of railroad which it does not desire to construct or operate is to take its property.

As we have already indicated, we are cited no authority which supports the power of the state, acting through its railroad commission, or otherwise, to compel the extension of a railroad line in the manner here attempted. On the contrary, such decisions have come to our attention tend, rather, to deny the existence of any such power. In *Public Service Commission v. P. B. & W. Ry. Co.*, 122 Md. 438, 89 Atl. 726, the court declared the invalidity of an order of the Maryland Public Service Commission requiring the railroad company to rebuild and operate a branch which had been abandoned (as had the line here in question) years before the making of the order and the acquisition of the line by its then owner. The Maryland statute authorized the commission to require a railroad company to make "repairs, improvements, changes * * * or additions" if in its judgment they "should reasonably be made"—a provision not unlike that found in section 36 of our Public Utilities Act. See, also, *Towers v. U. R. R.*, 126 Md. 478, 95 Atl. 170; *N. P. Ry. Co. v. Railroad Com.*, 58 Wash. 360, 108 Pac. 938, 28 L. R. A. (N. S.) 1021.

The order is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

CUMMINGS et al. v. LAUGHLIN et al.
(L. A. 3575.)

(Supreme Court of California. Oct. 21, 1916.
Rehearing Denied Nov. 20, 1916.)

1. BOUNDARIES \S 35(4)—EVIDENCE—ACQUISITION IN LOCATION.

In a boundary suit, testimony of common grantor as to marking by row of trees, the supposed dividing line, and that before sale he showed the grantee of the south tract the row as marking the boundary, and corroborating testimony of the grantee of the south tract, was admissible as part of the history of the agreement to treat this line as the true one.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. \S 163, 165; Dec. Dig. \S 35(4).]

2. ADVERSE POSSESSION \S 114(2)—EVIDENCE—SUFFICIENCY.

Evidence of occupancy of and dominion over disputed boundary strip by plaintiffs and predecessors, held sufficient to show title by prescription.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. \S 685, 686; Dec. Dig. \S 114(2).]

3. ADVERSE POSSESSION \S 92—PAYMENT OF TAXES—STATUTE.

Payment of taxes on a strip of land, as to which claims overlap, by claimant to title by adverse possession, is compliance with the law,

even though they have been paid by the holder of the record title also.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. \S 515, 520-524; Dec. Dig. \S 92.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by W. E. Cummings and another against Homer Laughlin and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Lynn Helm, of Los Angeles, for appellants. Trask, Norton & Brown, Trask & Brown, and Edgar K. Brown, all of Los Angeles (Everett L. Ball, of Los Angeles, of counsel), for respondents.

HENSHAW, J. The question here presented is over the title to a disputed strip of land lying between the holdings of plaintiffs and defendants. Plaintiffs asserted title by prescription and by agreement settling a disputed boundary. The court's findings were in favor of the plaintiffs upon both propositions, against the answer and cross-complaint of defendants. Defendants appeal.

The following facts sufficiently present the controversy: In 1888 one Rogers was the owner of a tract of land containing, he thought, 21 acres (herein disregarding fractional acreage). It was known as lot 13 of the Lick tract. He caused a survey to be made, dividing this lot into a southerly 10 acres and a northerly 11 acres. Surveyor's stakes indicated the boundary line, and Rogers planted a row of fig trees along this line. In 1889 one O'Dea became the purchaser of the southerly 10 acres by a deed calling for the southerly 10 acres of lot 13, "said 10 acres to extend back making the easterly and westerly lines equal distances from the center of Franklin avenue, and making it a rectangular piece." No controversy arises over the location of the center line of Franklin avenue, nor of the easterly or westerly line of lot 13. This southerly 10 acres, therefore, can be and has been accurately delimited upon the ground. So delimited upon the ground, the easterly and westerly lines extend 657.38 feet north of the center line of Franklin avenue. But the line of the survey caused to be made by Rogers, which line, as has been said, was marked upon the ground by stakes and by a row of fig trees, was 19.41 feet south of the true line, and only 637.97 feet northerly from the center line of Franklin avenue. Thereafter Rogers sold all of the rest of this lot 13, that is to say, all of the northerly portion of it, to one Stephens, by a deed of date October 4, 1892, which deed conveyed "the north 11 acres of lot 13, the south line thereof being parallel with the south line of lot 13 of the western subdivision of the Lick tract." The difficulty seemingly arises over a shortage in the acreage of lot 13. If the southerly proprietor is given 10 acres, the northerly proprietor

does not get his 11 acres, and, conversely, if the northerly proprietor is given his 11 acres, the southerly proprietor does not get his 10 acres, and hence this controversy over the strip 19 feet wide and 662.64 feet long.

Subsequently, touching title to the northern piece, Stephens, the husband, held title until January, 1898, when he conveyed to his wife the land as "the north 11 acres of lot 13," etc. Mrs. Stephens held title until 1902, when she conveyed the land to these plaintiffs by deed containing the same description. Touching title to the southerly 10 acres, O'Dea and his successors in interest owned the land from 1889 until 1900, when the land was conveyed to Homer Laughlin, against whom this action was brought, and the representatives of whom are the appellants herein. The transfers of title were by descriptions identical with that contained in O'Dea's deed. In 1902 Homer Laughlin caused a survey of his 10 acres to be made, which survey showed his northerly line to be 657.38 feet north of the center line of Franklin avenue. He asserted ownership to that line, and this action followed.

[1] The court admitted the evidence of Rogers, the common source of title, and of O'Dea, his grantee to the southerly 10 acres. Rogers testified to the survey which he had caused to be made, to the marking of the northerly boundary line of what he conceived to be the southerly 10 acres by stakes, his planting a row of fig trees along this line, and, further, that when he came to sell this southerly 10 acres, before the execution of his deed he took O'Dea upon the land and showed him these stakes and the line of fig trees as marking the northern boundary of the tract which O'Dea proposed to purchase. O'Dea's testimony corroborates this. He says that he paid no particular attention to the boundary line shown him, being more interested in other matters pertaining to the land, but that after he purchased it he did recognize the line as being his northern boundary line, and in turn pointed it out to his grantees as the northern boundary line. Objection is made to the introduction of this evidence, as being an effort to vary by parol the terms of the deed of grant. For such a purpose, of course, the evidence was inadmissible; there being no effort here made to reform the deed for fraud or mistake. But the evidence was admissible and was properly admitted as a part of the history of the agreement to treat this line as the true line of an uncertain boundary, and as well to show the initial claim of right from which originated plaintiff's asserted prescriptive title. The evidence further shows that continuously and uninterruptedly the Stephens and their successors—the Cummings—exercised all the necessary acts of dominion, ownership, and control over the land under open and notorious claim of right, and maintained

an adverse possession to this strip of land against O'Dea and his successors. This, from the nature of the case, was to be expected, since O'Dea and his successors unquestionably accepted this line as being their true northern boundary, and consequently made no opposition nor protest to the continuous acts of dominion which plaintiffs and their predecessors exercised over the now disputed strip.

[2, 3] Much of the briefs is devoted to an attack and defense of the finding of the court to the effect that the boundary line was uncertain and had been fixed by agreement, evidenced by long acquiescence. Into the consideration of this question we need not enter, because apart from it the judgment of the court is fully sustained upon its further finding of title by prescription. We have said that the occupancy and dominion of plaintiffs and their predecessors, as found by the court and as sustained by the evidence, were quite sufficient to fulfill the requirements of the law. There is left for consideration the one question peculiar to our law—the payment of taxes by the adverse claimant for the period required to perfect a prescriptive title. The difficulty as has been intimated arose over the fact, as found by the court, that lot 13 did not contain the requisite and supposed quantity of land to give to the holder of the southern 10 acres and of the northerly 11 acres each his full quantity. Giving to the deeds, therefore, the land that each called for resulted in an overlap. The taxes imposed upon the owners of the northern piece were taxes upon 11 acres. In like manner the taxes imposed upon the owners of the southern piece were taxes upon 10 acres. These taxes were duly and regularly paid by the owners. The result was a double taxation and a double payment of taxes upon the disputed strip. Under such circumstances the claimant to title by adverse possession has fully complied with the law when he has paid the taxes upon the land, even though they have also been paid by the holder of the record title thereto. *Cavanaugh v. Jackson*, 99 Cal. 672, 34 Pac. 509; *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983.

The judgment and order appealed from are therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.; MELVIN, J.

GARDNER v. STEADMAN. (Civ. 1841.)
(District Court of Appeal, First District, California. Sept. 15, 1916.)

1. VENUE ~~6-66~~—APPLICATION FOR CHANGE—AFFIDAVIT OF MERITS—SUFFICIENCY.

An affidavit of merits and residence, made by defendant's wife, who was familiar with the facts of the case, during his temporary absence

from the state, was a sufficient compliance with Code Civ. Proc. § 396, providing that the affidavit of merits upon motion for change of place of trial must be filed by the defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 110-118; Dec. Dig. ¶68.]

2. VENUE ¶67—CHANGE OF VENUE—AFFIDAVIT—AMENDMENT.

An affidavit of merits and residence, made by another than defendant himself, which is defective because merely stating a conclusion of affiant as to defendant's residence, may be amended in the discretion of the court.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 114-120; Dec. Dig. ¶67.]

3. VENUE ¶67—CHANGE OF VENUE—AFFIDAVIT—AMENDMENT.

Where an affidavit of merits and residence, upon motion for a change of venue made by defendant's wife, was defective in that it did not contain facts showing defendant's residence, but was a statement of a conclusion of affiant, a new affidavit, filed by defendant's attorney, was a sufficient compliance with an order of the court, permitting an amended affidavit to be filed.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 114-120; Dec. Dig. ¶67.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by N. L. Gardner against Willis E. Steadman. From an order granting defendant's motion for a change of place of trial of the action, plaintiff appeals. Order affirmed.

R. W. Gillogley and Algernon Crofton, both of San Francisco, for appellant. Newton J. Skinner, of Los Angeles, and R. P. Henshall, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order changing the place of trial of the action from the city and county of San Francisco to the county of Los Angeles upon defendant's motion.

The said defendant was sued in the city and county of San Francisco upon a personal obligation and was duly served with process. Within the time required by law he appeared by his attorney of record and demurred, and at the same time filed a demand for a change of the place of trial of the action to Los Angeles county. There was also filed at the same time an affidavit of residence and merits, which affidavit, however, was not sworn to by the defendant, but by his wife, who deposed therein that the defendant was temporarily absent from the state of California, and therefore for that reason the affidavit was made by her; that the residence of the defendant was some time prior to and at the time of the commencement of the action and thereafter in the county of Los Angeles; that the affiant was familiar with the facts of the case, and had fully and fairly stated the same to Newton J. Skinner, the defendant's attorney, and upon such statement had been advised by him, and verily believed that the defendant

had a good and substantial defense to the action on the merits. Upon the hearing of the motion plaintiff objected to this affidavit, but upon what grounds does not appear in the record. However, the defendant thereupon asked and obtained leave to file an amended affidavit of residence and merits, and thereafter presented and filed an affidavit of merits and of residence sworn to by Newton J. Skinner, his attorney of record. The plaintiff, in opposition to the motion, presented a counter affidavit as to the defendant's residence, and upon the hearing the court granted the defendant's motion for a change of the place of trial, whereupon plaintiff prosecutes this appeal.

[1] The first contention of the appellant is that the affidavit of merits made by the defendant's wife and presented on his behalf on said motion was fatally defective and void for the reason that it was not made by the defendant himself. Section 896 of the Code of Civil Procedure provides that the affidavit of merits upon motion for change of place of trial must be filed by the defendant. The Supreme Court, construing this section of the Code in an early case, decided that this did not mean that the affidavit of merits must be made by the defendant, but upheld the sufficiency of an affidavit of merits made by the attorney. *Nicholl v. Nicholl*, 66 Cal. 36, 4 Pac. 882. This being so, we see no reason for holding that an affidavit of merits may not be made by any person on behalf of the defendant who is sufficiently familiar with the facts of the case to make the same; and hence that the affidavit of merits on this case made by the defendant's wife was a sufficient compliance with the statute.

[2, 3] The appellant further contends, however, that the affidavit of the defendant's wife, in so far as it purported to be an affidavit of residence of the defendant, was insufficient in point of form, for the reason that it did not contain facts showing that the defendant's residence was in Los Angeles at the time of the commencement of the action, but only contained a mere statement of the affiant's conclusion in that regard, which the appellant insists is insufficient for any purpose, citing the cases of *Bernou v. Bernou*, 15 Cal. App. 341, 114 Pac. 1000, and *O'Brien v. O'Brien*, 16 Cal. App. 103, 116 Pac. 692. While it is true that these cases hold that an affidavit of residence, when made by another than the defendant himself, should contain more than the mere conclusion of the affiant, still we are of the opinion that an affidavit which merely states such conclusion may be made the subject of amendment in the discretion of the court; and in the case at bar the court, upon the application of the defendant, permitted the defendant to file an amended affidavit of residence and merits, whereupon he filed the affidavit of his

attorney of record which it is not contended by the appellant is insufficient in subject-matter. But the appellant urges that this affidavit cannot be considered as an amendment to the prior affidavit, and hence should not be received as such. It has been held, however, that the filing of a new affidavit of merits by another affiant is a sufficient compliance with an order of the court, permitting an amended affidavit to be filed upon motion for a change of the place of trial. *Palmer & Rey v. Barclay*, 92 Cal. 199, 28 Pac. 226. This being so, and the affidavit of the defendant's attorney being admittedly sufficient in form and substance to comply with the requirements of section 396 of the Code of Civil Procedure, we think the court committed no error in granting the motion for a change of the place of trial of the action.

The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

HAUB v. COUSTETTE et al. (Civ. 1860.)

(District Court of Appeal, First District, California. Sept. 14, 1916.)

WORK AND LABOR \S 14(2)—EXPRESS CONTRACT—PERFORMANCE PREVENTED.

Where plaintiff plumbing contractor was prevented from completing his contract by defendant's abandonment of the construction of the buildings, plaintiff is entitled to recover the reasonable value of the work performed and materials furnished.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. \S 29, 32; Dec. Dig. \S 14(2).]

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by George Haub against H. P. Coustette and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James F. Brennan, of San Francisco, for appellants. Fabius T. Finch, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff in an action to recover for certain plumbing materials and for work and labor done and performed by the plaintiff.

Just prior to the opening of the Panama-Pacific International Exposition the defendants, owners of a lot of land near one of its principal entrances, let contracts for the erection of three small stores on their lot. One of those contracts was with the plaintiff, under the terms of which he was to furnish and install the plumbing in said building for a specified sum. Shortly after the opening of the Exposition the defendants, having probably discovered that the improvement of their property no longer promised the

profitable investment they had anticipated, discontinued the construction of the stores. The plaintiff had proceeded with the performance of his contract, but certain parts of his work could not be performed until the building had progressed to a certain stage; for example, the toilets could not be installed until the floor had been laid on which they were to rest, and the sinks could not be placed in position until the wainscoting on which they were to hang was ready to receive them. The plaintiff on several occasions indicated to the defendants that he was ready and willing to proceed with and finish his work, and the latter on at least one occasion informed him that they were going to do nothing further with the building. It is plain, according to the testimony accepted by the court, that the defendants had abandoned the construction of the stores. Under these circumstances the court was warranted in finding and deciding, as it did, that plaintiff was entitled to recover the reasonable value of the materials furnished and the work performed. The court found that the reasonable value of the work unperformed called for by the contract was \$55, and directed that this amount be deducted from the contract price, and judgment for the balance was accordingly entered in plaintiff's favor.

Such judgment appears to us to be just and legal. The defendants having delayed and prevented the plaintiff from completing his contract, the latter was entitled to recover the reasonable value of the work done. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 Pac. 929, L. R. A. (N. S.) 1171. In *Carlson v. Sheehan*, 157 Cal. 692, 696, 109 Pac. 29, 30, the court said:

"Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been delayed, prevented or excused by the act of the other party, or by operation of law, or by the act of God or the public enemy, as specified in section 1511 of the Civil Code. If performance is prevented by the party who is to make such payment, the person doing the thing is entitled to payment as for full performance. Civ. Code, \S 1512. And if one party breaks an intermediate covenant of an executory agreement, the other party may treat the entire contract as rescinded and recover in quantum meruit for the value of the work he has done under it. *Cox v. McLaughlin*, 76 Cal. 60 [18 Pac. 100, 9 Am. St. Rep. 164]."

The defendants contend that there is a variance in the findings on the second and third counts, but no pains have been taken to point out the asserted inconsistency, and an examination of the record fails to reveal any merit in such contention.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

REESE v. G. B. AMIGO CO. (Civ. 1942.)

(District Court of Appeal, First District, California. Sept. 15, 1916. Rehearing Denied by Supreme Court Nov. 14, 1916.)

1. EVIDENCE — 445(2) — PAROL EVIDENCE — VARYING WRITTEN AGREEMENT — EVIDENCE OF WAIVER OF CONTRACT PROVISIONS.

Although a contract for sale of grapes designated a city as the place of delivery and acceptance, evidence that the person making the contract for the purchaser continued to act as the authorized agent of the purchaser and under such authority approved the quality of grapes and accepted them under the contract at the place of shipment, was admissible in action upon the contract, since it amounted simply to evidence of waiver by defendant of the contract provisions as to place of delivery and acceptance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2065-2067; Dec. Dig. 445(2).]

2. APPEAL AND ERROR — 1011(1) — REVIEW — QUESTIONS OF FACT — CONFLICTING EVIDENCE.

A finding of fact based upon conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. 1011(1).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. O. Reese against the G. B. Amigo Company. From judgment for plaintiff and order denying defendant's motion for new trial, defendant appeals. Affirmed.

Chas. A. Lee, of San Francisco, and Everts & Ewing, of Fresno, for appellant. Short & Sutherland, of Fresno, for respondent.

PER CURIAM. This is an appeal from the judgment and an order denying the defendant's motion for a new trial. The plaintiff, acting for himself and also for two other persons of whom he was the assignee, brought this action against the defendant to recover the contract price of certain Zinfandel grapes, alleged to have been sold and delivered to the defendant in September, 1913, pursuant to the terms of three contracts for the purchase of said grapes for that year, entered into between the plaintiff and his assignors, respectively, and the defendant herein, by the terms of which the plaintiff and his assignors agreed to sell and deliver to the defendant first crop Zinfandel grapes, which were to be raised in the county of Fresno and shipped from Kerman in said county to said defendant in the city and county of San Francisco, which was designated as the place of delivery and acceptance of said produce. These contracts were made with the plaintiff and his assignors on behalf of the defendant by one Carl A. Heijne, who was the duly authorized agent of the defendant for the purpose of making said contracts. When the first carloads of said grapes arrived in San Francisco they were rejected by the defendant, which refused to receive them as first crop grapes, or to take any pay for them under said contracts, and refused to receive any more grapes of a like quality, whereupon

the plaintiff and his assignors sold the remainder of their crop of grapes to other persons, and then brought this action for the price of the grapes shipped to the defendant as aforesaid. Upon the trial of the cause the court found that the carloads of grapes so shipped were first crop Zinfandel grapes of the quality required by the terms of said contracts, and also found that the defendant had accepted said grapes as such at Kerman at the time of their shipment from that point, and thereupon rendered judgment in favor of the plaintiff. From an order denying the defendant's motion for a new trial it has prosecuted this appeal.

[1, 2] The first contention of the appellant is that the court erred in the admission of evidence tending to show that Carl A. Heijne continued to act as the authorized agent of the defendant up to and including the time of the shipment of said grapes, and tending to show that prior to and at the time of said shipment said Heijne, purporting to act as the duly authorized agent of the defendant, had approved the quality of said grapes and accepted them as sufficient under the contract at the point of their shipment. It is the appellant's contention that this proof tended to vary the terms of the written contracts between the parties, which provided that the place of delivery and acceptance of said grapes should be the city and county of San Francisco. We are of the opinion, however, that such would not be the effect of the introduction of such evidence, but that the proofs thus adduced would simply amount to evidence of a waiver on the part of the defendant of the provisions of its contracts with regard to the place of delivery and acceptance of the grapes. We are of the opinion that the defendant might, through its duly authorized officers or agents, have accepted and received said produce at Kerman, instead of requiring that they be delivered at San Francisco, and that the place of acceptance should be there. The only question, therefore, presented on the record is as to whether said Carl A. Heijne was the duly authorized agent of the defendant for the purpose of acceptance of said produce at Kerman. Upon this subject the evidence is clearly conflicting, with the preponderance rather in favor of the view that Heijne acted as the agent of the defendant throughout the cropping season, and that his ostensible authority was such as would have entitled him to have bound the defendant by his approval and acceptance of the grapes at the place of their shipment. This being so, the finding of the court to the effect that the goods were delivered and accepted at Kerman will not be disturbed.

The appellant further contends that the evidence in the case is insufficient to show that the grapes were first crop and of the quality required by the contracts in question; but as to that matter also the evidence is in

conflict, and for that reason this further finding of the court will not be disturbed.

The final contention of the defendant is that there was a conspiracy between Heijne and the plaintiff and his associates, by which unmarketable grapes were to be shipped to the defendant and the contract thus violated, so as to enable the plaintiff and his associates to evade it and sell the remainder of their crop at a higher price upon a rising market. This defense does not appear to have been pleaded nor in fact presented upon the trial of the cause in the lower court; but, aside from this, we do not think the evidence is sufficient to sustain the appellant's contention.

The judgment and order are affirmed.

BELLINGER v. HUGHES et al. (Civ. 2007.)

(District Court of Appeal, Second District, California. Sept. 18, 1916.)

1. NEGLIGENCE §136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where the injured party's contributory negligence is pleaded and evidence thereon is introduced, it is a question for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 333; Dec. Dig. §136(26).]

2. MUNICIPAL CORPORATIONS §705(1) — STREETS — CROSSING ACCIDENTS — QUESTION FOR JURY.

Whether an automobile driver, in driving his car around the end of a standing street car, was negligent, and liable for damages when he struck a pedestrian, depends on the degree of care required, which in turn is dependent on the character of the machine as to size, weight, speed, and noise, and the condition of the streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. §705(1).]

3. MUNICIPAL CORPORATIONS §706(7) — STREETS — CROSSING ACCIDENTS — QUESTION FOR JURY.

In a pedestrian's action for injuries when struck by an automobile at a street crossing, whether she was warranted, after seeing the automobile a short distance away and knowing that it would cross her line of travel, in not further watching its approach, is a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. §706(7).]

4. TRIAL §253(4)—INSTRUCTIONS—IGNORING ISSUES.

In a pedestrian's action for injuries when struck by an automobile at a street crossing, an instruction that if the automobile driver, unable to see a street crossing which he approaches because of a passing street car, instead of stopping his machine, merely changes direction to pass around the car, and in so doing injures a pedestrian, he is guilty of gross negligence and liable for the damage proximately caused thereby, is erroneous as premitting contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 616; Dec. Dig. §253(4).]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Edna R. Bellinger against James

B. Hughes and others. Judgment for plaintiff and order denying motion for new trial, and defendants appeal. Reversed.

C. J. Willett, of Pasadena, for appellants. G. A. Gibbs and Elliot Gibbs, both of Pasadena, for respondent.

SHAW, J. Action to recover damages for personal injuries. Judgment was rendered for plaintiff, from which, and an order denying defendant's motion for a new trial, he prosecutes this appeal.

The injury, damages for which are sought, was the result of a collision between an automobile operated by defendant Hughes and plaintiff while she was crossing from the north side of Colorado street, in Pasadena, to the south side thereof, at a point along the east line of Los Robles avenue which at right angles intersects Colorado street. The record here presented is not only meager, but to a large extent unintelligible by reason of the fact that a map or plat, not brought up in the record, was used by witnesses who pointed out thereon positions and places of knowledge of which is necessary to a proper understanding of the relation of the parties to the location where the injury occurred. But to the court this evidence, without the map, is meaningless.

Numerous errors are assigned, only one of which, however, we deem necessary to consider, as upon this we are of the opinion that the judgment and order must be reversed. This error consists in giving to the jury, without qualification thereof, an instruction numbered 17, as follows:

"If an automobile driver not being able to see a street crossing which he is approaching because of a passing street car, instead of stopping his machine, merely changes its direction so as to go around the car, and in doing so comes suddenly upon and runs into and injures a person, he is guilty of gross negligence, and is liable for all damage proximately caused thereby."

It appears that a street car track was maintained along Colorado street west of Los Robles avenue, which at the intersection was extended in a southerly direction along the latter street. Immediately before the time of the injury a street car operated upon said line was on the track at a point just west of the line of Los Robles avenue and about to turn southerly into said avenue when plaintiff, who was crossing Colorado street and had reached a point therein about half or two-thirds of the way between the street car tracks and the curb, saw the automobile on the south side of Colorado street and near the west line of Los Robles avenue. She testifies that this automobile appeared to be held up by the street car, which was about to turn in front of it into Los Robles avenue, or for other reasons had slowed down. At all events, she says she was sure since the street in front of her over which she was crossing was clear, that she had time

to reach the south curb line thereof before the automobile would reach the line of her travel in effecting the crossing. When eight or ten feet from the south curb line of Colorado street she was struck by the motor car and knocked down. There is evidence, though contradicted, tending to show that plaintiff at the time she was struck by the automobile was facing east—that is, in the direction in which the automobile was going—and when “she got just beyond the tracks that are in the center of the street she got out of the way of a passing motorcycle.” Plaintiff testified that she “saw the automobile plain enough” when it was approaching just back of the street car. As to whether any signal was given by the operator of the automobile by horn or bell, and as to the speed at which it was operated—whether rather fast, as testified to by one witness, moderate speed, or slowly, as testified by others—the evidence is likewise conflicting.

[1] The answer alleged contributory negligence on the part of the plaintiff, and since there was evidence which, if believed by the jury, would establish such fact, the question as to whether or not plaintiff was guilty of contributory negligence, which constituted the proximate cause of her injury, should have been submitted to the jury for determination; and had it so found, this court could not have disturbed such verdict. The claim, as to which there was a conflict of evidence, that plaintiff had her eyes turned away from the automobile, the approach of which she had noticed, and that she stepped back to escape a collision with a passing motorcycle, if believed, might justify a conclusion of negligence on the part of plaintiff. And her own testimony to the effect that the distance between the line upon which she was crossing the street and the approaching automobile was little more than the intervening space of Los Robles avenue (width, however, not shown) might be deemed well calculated, if believed by the jury, to constitute a sufficient warning to her of danger from which by the exercise of ordinary care she could escape. Reasonable minds might have differed as to whether or not, under the circumstances, she was justified in concluding that the motor would not continue its progress, and as to whether she should not at least have looked in the direction of the approaching automobile, and this even though no sound of the horn or other signal was given. “The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find.” *Schlerhold v. North Beach & M. R. R. Co.*, 40 Cal. 453. In *Davis v. Pacific Power Co.*, 107 Cal. 575, 40 Pac. 952, 48 Am. St. Rep. 156, it is said:

“It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury.”

Where either negligence is set up as a cause of action or contributory negligence pleaded as a defense, it seldom happens that the question is so clear from doubt that the court can undertake to say as a matter of law how the jury should find upon such issues. It is apparent, we think, that plaintiff relied upon the course of the automobile being obstructed by the street car which she had reason to think was about to turn into Los Robles avenue ahead of the automobile. Whether an inference of negligence on the part of the plaintiff in not further watching the approach of the automobile was justified depended upon whether she was justified in this reasoning. As said in *Johnson v. Thomas* (Cal.) 43 Pac. 578:

“It was certainly an inference upon which minds might well differ, and hence proper to be submitted to a jury, under proper instructions.”

[2, 3] The evidence shows that the position of the street car was such as to partially at least obstruct the automobile driver's view of the street crossing, and that he did not see the plaintiff until after his automobile had passed the street car, when he came suddenly upon plaintiff, which facts bring the case directly within the instruction given. Nevertheless, if the jury were satisfied that plaintiff was guilty of contributory negligence, which was the proximate cause of her injury, she was not entitled to recover. In effect, the jury was told to disregard all evidence tending to prove contributory negligence on the part of plaintiff, and in effect took from it the consideration of all evidence tending to show negligence and carelessness on her part. Such we do not conceive to be the law. Whether such act on the part of the automobile driver would constitute negligence and render him liable for damages caused by a collision would depend upon the degree of care required in the operation of his machine, and this in turn would depend upon the dangerous character of the machine, its size, weight, the speed at which it was operated, the noise it made, condition of the streets, and other conditions which might be mentioned. *Simeone v. Lindsay*, 6 Pennewill, 224, 65 Atl. 778. Whether plaintiff was warranted, after she saw the approaching automobile a short distance away, knowing that it would cross the line of her travel, in not further watching the approach thereof, was a question upon which minds might well differ, and hence it should have been submitted to the jury. Respondent attempts to justify the giving of this instruction upon the authority of *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228, 124 Am. St. Rep. 402, the syllabus of which reads as follows:

“The driver of an automobile is guilty of gross negligence in driving his car at high speed across the intersection of two much-used streets and around the end of a street car, which obstructs his view of the crossing, so that, upon finding a pedestrian directly in the path of the car, he cannot avoid a collision with him.”

There is no evidence here, however, that the intersection of Colorado street and Los Robles avenue was a much-used street. On the contrary, it might be that it was seldom traveled or crossed. Nor does the evidence show that the defendant ran his automobile around the end of the street car, and the evidence cannot as a matter of law be said to justify the conclusion that the car was being driven at a high rate of speed, or at other than a moderate rate of speed.

[4] It is true that the court elsewhere in the instructions told the jury that even though it found defendant guilty of negligence in managing the automobile, its verdict must be in his favor if they found that plaintiff was guilty of negligence constituting the proximate cause of the injuries received; and also told them that if plaintiff in the exercise of ordinary care, by looking or listening, might have observed the automobile approaching, and did not exercise such care, she was guilty of negligence which would prevent her recovery. Instruction No. 17, however, was given without any qualifications whatever, and it is impossible to reconcile it with other instructions. The evidence tended clearly to show the facts upon which the jury were therein told that defendant was guilty of gross negligence and liable for damages, and was well calculated to mislead the jury in arriving at its verdict. Under these circumstances, our conclusion is that it constitutes prejudicial error.

The judgment and order appealed from are therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

PEOPLE v. AMBROSE. (Cr. 681.)

(District Court of Appeal, First District, California. Sept. 18, 1916.)

1. CONSPIRACY §43(11) — SUFFICIENCY OF INDICTMENT—OFFENSE.

An indictment under Pen. Code, § 182, subd. 5, declaring a conspiracy to commit any act for the obstruction of justice or the due administration of the law to be a criminal conspiracy, alleging that defendant unlawfully, willfully, and fraudulently conspired and agreed to obtain the release from custody of a party confined to the county jail awaiting trial upon an indictment for a felony by presenting to the superior court a fraudulent, worthless, and void bail bond, stated facts sufficient to constitute the offense charged.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 93; Dec. Dig. §43(11).]

2. CONSPIRACY §47—SUFFICIENCY OF EVIDENCE—FRAUDULENT AND WORTHLESS BAIL BOND.

Evidence on the trial upon such indictment, held insufficient to sustain a conviction, in that it did not show that the bond, as regards the party whom defendant was charged with advising to sign it, was worthless and void.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 106-107; Dec. Dig. §47.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Frank Ambrose was convicted of criminal conspiracy, and from the conviction and the denial of his motion for a new trial, he appeals. Judgment and order reversed.

John D. Harloe, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. In an indictment returned to the superior court of the city and county of San Francisco the defendant herein, jointly with three other persons, was charged with the crime of criminal conspiracy. The appeal is from the judgment of final conviction, and from an order denying a new trial.

Subdivision 5 of section 182 of the Penal Code, under which the indictment evidently was drawn, denounces as a criminal conspiracy the conduct of two or more persons who conspire "to commit any act * * * for the perversion or obstruction of justice or due administration of the laws." The charging part of the indictment alleges that the defendant, acting in concert with the three codefendants, "did unlawfully, willfully, and fraudulently conspire, combine, confederate, and agree to obtain the release and discharge from custody" of one Joseph Monahan (who was confined in the county jail pending trial upon an indictment which charged him with the commission of a felony), "by presenting to the superior court of the state of California in and for the city and county of San Francisco a fraudulent, worthless, and void bail bond." The indictment further alleged that two of the codefendants had agreed to falsely swear and did so swear, when qualifying as sureties upon the bail bond of Monahan, that they were each worth the sum of \$2,500, the amount fixed as bail, over and above their just debts and liabilities, and that they were respectively the owners of certain real estate situated in the county of Yolo and the city and county of San Francisco.

[1] Apparently the only connection which the defendant Ambrose had with the conspiracy charged, in so far as the allegations of the indictment are concerned, is to be found in the concluding paragraph of the indictment, which alleged that he advised and counseled Shaney, one of the codefendants who became a surety on the bond, "to execute said bond and to swear that he was the owner of said property." It will be noted that the indictment does not charge that it was the intent and purpose of the defendant and his alleged co-conspirators to do anything more by the preparation and presentation of the bail bond in question than to procure the release of Monahan upon bail pending his trial upon the felony charged against him. Neither expressly nor by necessary implication does the indictment allege that the

release of Monahan upon worthless bail was procured primarily for the purpose of permitting him to abscond and thereby evade the possible penalties of a trial and conviction. Nevertheless we are of the opinion that the indictment states facts sufficient to constitute the offense charged against the defendant, and that therefore his demurrer was properly overruled by the trial court. True it is that release from custody upon bail pending trial is ordinarily the constitutional and statutory right of every person charged with crime; but it is equally true that it is neither the constitutional nor statutory right of a person to be so released by means of a false and worthless bail bond; and it seems certain to us that the procurement of the release in that manner is a perversion of the due administration of the law, and therefore comes within the denunciation of subdivision 5 of section 182 of the Penal Code.

[2] We are not satisfied, however, upon a review of the evidence adduced upon the entire case that the judgment against this defendant cannot be sustained. The only evidence adduced upon behalf of the people tending in any way to connect the defendant with the alleged conspiracy may be stated in substance to be that the codefendant Shaughnessy qualified as a surety upon the bail bond in question under the name of Shaney; that the property, which at the time of qualifying he swore he owned, stood of record in the name of Shaney; that the property originally belonged to Ambrose; that the latter had placed it of record in the name of Shaney at a time when he was having trouble with his wife; that Shaughnessy, with the knowledge and consent of the defendant Ambrose, pretended to be the owner of the property, and on one or two occasions exercised acts of ownership over the property by borrowing money secured by mortgages upon it executed and acknowledged in the name of Shaney; that one Barkley, attorney for Monahan, called upon Ambrose for the purpose of having him procure Shaughnessy as a bondsman, giving as security the property in question; that the defendant Ambrose stated to Barkley that he had no objection to Shaughnessy going upon the bond; and that when Shaughnessy mentioned the subject of going upon the bond Ambrose replied: "If you desire it, go on the bond; it is all right; I think Monahan is all right." Incidentally it was shown in evidence that Shaughnessy was sometimes known as Shaney.

In the face of this evidence we do not think it can be said that the bond, as regards Shaughnessy's qualifications to serve thereon, was valueless. Even though the defendant Ambrose claimed to have been the real owner of the property, nevertheless inasmuch as the record title was in the name of Shaney, and that Shaughnessy under the name of Shaney (by which he was sometimes known) duly executed and acknowledged the

bond, there can be no doubt that the property standing in the name of Shaney could have been resorted to in satisfaction of a breach of the bond had one occurred. This being so, it cannot be held that the evidence sustains the allegation of the indictment to the effect that Ambrose counseled and advised his codefendant Shaughnessy to execute and qualify upon a false and worthless bond. It may be conceded that the evidence shows that the codefendant Gilfeather, who qualified as surety upon the bond, perjured himself when he swore upon qualifying that he was the owner of certain property situate in the city and county of San Francisco, and that therefore, in so far as Gilfeather was concerned, the bond was false and valueless; but aside from the fact that the indictment does not charge Ambrose with having counseled and advised Gilfeather to execute the bond and qualify as a surety thereon, we have been unable to find in the record any evidence showing or tending to show any connection of the defendant Ambrose with his codefendant Gilfeather in the preparation and presentation of the bond. In short, in so far as the evidence shows, whatever Ambrose may have done in the transaction was independent of anything done by Gilfeather. This being so, it cannot be said that the conspiracy charged in the indictment was sustained by the evidence adduced at the trial.

This conclusion makes it unnecessary to refer to and decide the other points presented upon the appeal.

For the reasons stated, the judgment and order appealed from are reversed.

CORY v. HOTCHKISS et al. (Civ. 1925.)

(District Court of Appeal, First District, California. Sept. 15, 1916.)

1. ADVERSE POSSESSION § 112—EVIDENCE—PRESUMPTION—STATUTE.

Under Code Civ. Proc. § 321, plaintiff, in an action to quiet title showing the record title in himself, was expressly presumed to have been seized of the possession within the time required by law; and hence the burden was upon the defendants to show that they, or either of them, having color of title to the land, had held and possessed it against the plaintiff for the full statutory period of five years preceding the commencement of the action.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. § 112.]

2. ADVERSE POSSESSION § 114(1)—POSSESSION FOR PASTURAGE—SUFFICIENCY OF EVIDENCE.

In an action to quiet title to uncultivated, uninclosed land, evidence held not to show that a defendant, having color of title, had continuously or at all occupied the land for pasturage within Code Civ. Proc. § 323, subd. 3, for the statutory period of five years necessary to establish his claim of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. § 114(1).]

3. ADVERSE POSSESSION \Leftrightarrow 112—BURDEN OF PROOF—CHARACTER OF POSSESSION—STATUTE.

In an action to quiet title to uncultivated land, a defendant, without color of title, in order to establish his claim of adverse possession, was required to show that the land had been protected by a substantial inclosure and had been cultivated and improved during his use and possession, as required by Code Civ. Proc. § 825.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. \Leftrightarrow 112.]

4. ADVERSE POSSESSION \Leftrightarrow 114(1)—CHARACTER OF POSSESSION—SUFFICIENCY OF EVIDENCE.

Evidence as to the use and occupation of it by one of defendants without color of title held not sufficient to show that such defendant, or another defendant, claiming under a tax deed, had exclusive use and occupation of the land for the statutory period within Code Civ. Proc. § 323, defining what constitutes adverse possession under written instruments or judgment.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. \Leftrightarrow 114(1).]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Albert J. Cory against W. J. Hotchkiss and D. J. Canty, with counterclaim by defendants. Judgment for plaintiff, motion for new trial denied, and defendants appeal. Judgment and order affirmed.

E. A. Williams, of Fresno, for appellants. Drew & Drew and Frank Kauke, all of Fresno, for respondent.

LENNON, P. J. The plaintiff in this action sought and recovered judgment against the defendants, quieting his title to 160 acres of land situate in the county of Fresno. The defendants' answer denied all of the material allegations of the plaintiff's complaint, and, cross-complaining, claimed title to the lands in dispute by adverse possession, and also under a purported tax sale and deed from the county tax collector to one R. M. Barthold, which was followed by a deed from the latter to the defendant Hotchkiss, alleged to have been made and executed for the benefit of Hotchkiss and the defendant Canty. The trial court found that the tax sale which was the basis of the tax collector's deed to Barthold was invalid for the reason that it was made for an amount in excess of that permitted by law. It is conceded that the evidence sustains this finding, and that as a consequence the tax deed did not, as further found by the trial court, convey any title to the land in dispute to Barthold or his purported successor in interest. It is claimed, however, that by reason of the purported deed from the tax collector to Barthold and the deed from him to the defendant Hotchkiss, the defendants had color of title sufficient to support their claim of title to the land by adverse possession under the provisions of section 323 of the Code of Civil Procedure.

[1] The record title to the land having been shown to be in the plaintiff, presumptively he was seised of the possession within the time required by law, and therefore the burden was upon the defendants to show that they, or either of them, having color of title to the land, had held and possessed the same as against the plaintiff for the full statutory period of five years preceding the commencement of the present action. Code Civ. Proc. § 321.

[2] In support of the burden thus placed upon the defendants they showed that yearly for seven or eight years prior to the commencement of the action the defendant Canty had, in writing, leased the land in suit to one Pucheu for the purpose of pasturing sheep thereon, and that during a portion of each of those several years Pucheu did run and pasture as many as three separate herds of sheep upon the land for a period of from two to six months in each year. Each band of sheep had a herder, and these herders, during the time that the sheep were pasturing, were in the habit of traveling back and forth over the land. Bands of sheep belonging to other persons at times traveled across the land to water at a well situated on the southeast corner of the land. Pucheu's sheep were upon the land only during the pasture season, and although during that season he was upon the land once a week, he did not know of his own knowledge whether his herders prevented the sheep of other persons pasturing upon the land leased by him; and, because of his lack of knowledge as to where the lines of the land actually ran, he was unable to say whether or not the sheep of other persons had roamed and pastured upon the land at the times his sheep were there. Supplementing the evidence of Pucheu, there was testimony of another witness for the defense, to the effect that he knew that Pucheu had pastured sheep upon the land in suit, and that, in so far as he knew, no other sheep were permitted to pasture there.

This is substantially a statement of the evidence introduced at the trial and relied upon by the defendants with reference to the actual use and occupation of the land. It was an admitted fact in the case—and the trial court found—that all taxes levied upon the land in suit subsequent to the date of the tax deed to Barthold were paid by the defendant Hotchkiss, and that the defendant Canty paid nothing for or on account of such taxes. While the evidence shows that the land was neither cultivated, improved, nor inclosed, it is conceded that inasmuch as Hotchkiss had color of title to the land, he might have supported his claim of adverse possession by proof of his possession and occupancy of the land for the purpose of pasturage, coupled with proof that he had employed herders to keep his own

stock on the land and other stock off. Subdivision 3, § 323, Code Civ. Proc.; Bullock v. Rouse, 81 Cal. 590, 22 Pac. 919. However, it does not appear from the record before us that the defendant Hotchkiss at any time, personally or otherwise, occupied and so used the land, or that he did anything with reference to the same after receiving the deed from Barthold save to pay the taxes thereon. Therefore it cannot be said that he had continuously or at all occupied the land for the purpose of pasturage for the statutory period of five years; and consequently it must be held that his claim of adverse possession was not made out. True, the defendants in their cross-complaint alleged that Barthold conveyed the land to the defendant Hotchkiss for the use and benefit of Hotchkiss and Canty. This allegation, however, was duly denied by the plaintiff's answer to the cross-complaint; and the record is absolutely barren of any evidence showing, or tending to show, any interest in common between them under the deed or otherwise, or that the defendant Canty was in privity or ever claimed any right, title, or interest in the land under or through the defendant Hotchkiss. In so far as the record shows, the source of Canty's right to lease the land to Pucheu does not appear and certainly there was no showing that in so leasing the lands he was acting for Hotchkiss, or jointly for himself and Hotchkiss.

[3] The defendant Canty, not having connected himself with the purported title of Hotchkiss, cannot be said to have had possession of the land in dispute under color of title, and therefore, in order to establish his claim of adverse possession, it was incumbent upon him to show compliance with the provisions of section 325 of the Code of Civil Procedure, viz.: (1) That the land had been protected by a substantial inclosure; or (2) that it had been cultivated and improved during his alleged use and occupation of the same. This the defendant Canty did not do, and therefore his defense of adverse possession necessarily failed when measured by the provisions of the Code section last cited.

[4] But, aside from this, we are of the opinion that the evidence adduced relative to the use and occupation of the land by Canty's lessee would not have sufficed to support a finding that the defendants, or either of them, had exclusive use and occupation of the land for the statutory period within the intent and meaning of the provisions of section 323 of the Code of Civil Procedure. The mere fact that Canty assumed the ownership of the land and leased the same to Pucheu may have been some evidence that it was the intent of Canty to claim the land; but if, as the evidence shows, he did no more, and that the land was not occupied by Pucheu under the lease in the manner and for the period prescribed

by the statute, then of course the mere intent of Canty would not afford any substantial support to the claim of adverse possession; and certain it is that the defendants did not affirmatively show, as they were required to do, that during the time that the land was not used for grazing purposes it was not otherwise used and occupied by the plaintiff, or other persons claiming under him or independent of him. The testimony that "this quarter section is used for nothing after the end of the pasture season" is the only evidence to be found in the record upon this phase of the case; and obviously the scope of that testimony must be confined to the use to which the land was usually put, and clearly cannot be construed as establishing the fact that the land was not occupied during and after the close of the pasturing season. In brief, the proof proffered in the present case, in support of the claim of adverse possession, as in the case of *Strauss v. Canty*, 169 Cal. 101, 145 Pac. 1012, "was entirely consistent with the view that the possession of those holding under Canty was casual and intermittent," and therefore, as was said in that case:

"The court was entirely justified in concluding that the defendant had not proven an exclusive and continuous possession sufficient to satisfy the statute."

For the reasons stated, the judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

COLTON v. ANDERSON et al. (Civ. 1999.)
(District Court of Appeal, Second District, California. Sept. 13, 1916.)

1. MORTGAGES ⇨401(2)—FORECLOSURE—DEFAULT—INTEREST.

Suit to foreclose a mortgage securing a note, providing that on default in interest payable semiannually the payee could declare the whole sum due and sue to foreclose the mortgage securing it, is not premature if brought more than six months after date of note; no interest having been paid.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1163; Dec. Dig. ⇨401(2).]

2. MORTGAGES ⇨415(1)—FORECLOSURE—DEFENSES.

Defense that purchaser from mortgagor inquired of mortgagee before purchasing, and was told that interest was not yet due, is of no avail where, at the time of purchase, the interest was actually in default.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1210-1218; Dec. Dig. ⇨415(1).]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Suit by H. C. Colton against Evan E. Anderson, J. H. Ryckman, and others. From a judgment for plaintiff and order denying motion for new trial, Ryckman appeals; the other defendants having been defaulted. Affirmed.

Harriman, Ryckman & Tuttle, of Los Angeles, for appellant. H. S. Rollins, of Los Angeles, for respondent.

CONREY, P. J. This is an action for the foreclosure of a mortgage. The mortgage was given to secure the payment of two notes which were dated February 13, 1912. The first note was for \$17,000, payable on or before three years after date—

"with interest from November 1, 1911, until paid, at the rate of 7 per cent. per annum, payable semiannually; should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note."

The other note was for \$500, due in six months from date, with interest from November 1, 1911, payable at maturity. No interest having been paid, the plaintiff on June 24, 1912, declared the whole sum of principal and interest of the first note to be then due and payable, and filed this action for foreclosure of the mortgage. By supplemental complaint filed August 21, 1912, the action was made to include the second note. Judgment by default was entered against the defendants Anderson, makers of the notes and mortgage, and the only defense presented is that of defendant Ryckman, who purchased a part of the property subject to the lien of this mortgage. Defendant Ryckman presents this appeal from the judgment and from the order denying his motion for a new trial.

[1] As stated in the brief of appellant, the only point involved in this case relates to his contention that the suit was prematurely brought. As to this we are of the opinion that the plaintiff was entitled to maintain his action by reason of nonpayment of the interest on the larger note on May 1, 1912. The statement in the note that interest was to be paid from November 1, 1911, at the specified rate, "payable semiannually," clearly made the first installment of interest due May 1, 1912. In view of defendant's claim that the note was uncertain in this respect, the plaintiff introduced evidence which shows beyond any doubt that the intention of the parties was in accord with this interpretation of their note. But we base our decision upon the note itself without reference to such extraneous evidence.

[2] Appellant set up in his answer the further defense that before purchasing the lots which were acquired by him early in May, 1912, he caused inquiry to be made of the plaintiff as to the time when the interest on the \$17,000 note would fall due, and was assured by the plaintiff that it would not be due until August 18th. In support of this defense we have the testimony of two witnesses. But they are contradicted as to the material parts thereof by the testimony of the plaintiff. Upon this evidence the court found

that appellant in buying the lots did not rely upon any statements of the plaintiff regarding said mortgage. At all events, under our construction of the note itself, the defense was not available to appellant.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

CENTRAL PAC. R. CO. v. RILEY. (Civ. 1929.)

(District Court of Appeal, First District, California. Sept. 13, 1916.)

STIPULATIONS ~~14~~(6) — INVOLUNTARY DISMISSAL.

Under Code Civ. Proc. § 583, providing that actions shall be dismissed on defendant's motion or by the court of its own motion unless brought to trial within five years after defendant has filed answer, except when the parties have stipulated in writing that the time may be extended, and making dismissal after five years mandatory, where an action was commenced in 1896, and defendant answered in 1897, and the parties stipulated in 1898 that the trial of the action should be "continued, to be dropped from the calendar, to be reset on notice, subject to the discretion of the court," the action was subject to dismissal on defendant's motion; there being nothing in the stipulation which, fairly construed, took the case out of the operation of the statute.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 30; Dec. Dig. ~~14~~(6).]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Central Pacific Railroad Company against Eugene Riley. Defendant having died, Daniel E. Riley was substituted. From an order dismissing for lack of prosecution, plaintiff appeals. Affirmed.

Reddy, Campbell & Metson, of San Francisco, and Tom M. Bradley and Harry E. Leach, both of Oakland, for appellant. Powell & Dow, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order dismissing an action for lack of prosecution.

The action was commenced in January, 1896, and in March, 1897, the answer of the defendant was filed. After the cause had thus been at issue for over 17 years, and not having been in the meantime brought to trial, the same on motion of the defendant was dismissed for failure to prosecute the same with due diligence. Section 583 of the Code of Civil Procedure provides that:

"Any action heretofore or hereafter commenced shall be dismissed * * * on motion of the defendant, after due notice to plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended"

—and the making of an order of dismissal, after the expiration of the 5-year period, is

mandatory upon the court. *Romero v. Snyder*, 187 Cal. 216, 138 Pac. 1002.

The defendant asserts that a stipulation entered into by the parties 16 years before the notice of motion to dismiss was served relieved it of the necessity of bringing the action to trial within the 5 years. The stipulation is as follows:

"It is hereby stipulated that the trial of the above-entitled action be, and the same is hereby continued, to be dropped from the calendar, to be reset on notice, subject to the discretion of the court, and a trial by jury is hereby waived." Dated April 13, A. D. 1898.

Under the terms of the stipulation the case was dropped from the calendar, to be reset upon notice, and it was in exactly the same position it occupied prior to the time when it was set, and subject, therefore, to the provisions of section 583, Code of Civil Procedure, above set out. There is nothing in the stipulation which can fairly be construed as taking the case out of the operation of the terms of that section. After the case was dropped from the calendar according to the stipulation, it was still the duty of the plaintiff to see that the case was brought to trial. *Kubli v. Hawckett*, 89 Cal. 638, 27 Pac. 57; *Mowry v. Welsenborn*, 137 Cal. 110, 69 Pac. 971.

The order is affirmed.

STIMSON CANAL & IRRIGATION CO. v. LEMOORE CANAL & IRRIGATION CO. et al. STIMSON CANAL & IRRIGATION CO. et al. v. PEOPLE'S DITCH CO. et al. CUTHBERT BURRELL CO. et al. v. SAME. (Civ. 1937-1939.)

(District Court of Appeal, First District, California. Sept. 13, 1916.)

COSTS \S 32(3)—**PREVAILING PARTY—STATUTE.**

Under Code Civ. Proc. \S 1022, subsec. 5, declaring that costs are allowed as of course to the plaintiff upon a judgment in his favor in an action involving the title or possession of real estate, the plaintiff, in an action involving water rights, conceded to be an action in the nature of a suit to quiet title to real property, which recovered a judgment for only part of its demand, and though the defendant recovered for part of its demand, was entitled to costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. \S 112; Dec. Dig. \S 32(3).]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Stimson Canal & Irrigation Company against the Lemoore Canal & Irrigation Company and others, and action by the same plaintiff and the Crescent Canal Company against the People's Ditch Company and the Last Chance Water Ditch Company, and action by Cuthbert Burrell Company and others against the People's Ditch Company and another. Judgment for plaintiffs, and the named defendants appeal, and from orders in each case, denying their motions to strike out plaintiffs' cost bill, the appellants appeal. Order affirmed.

E. C. Farnsworth, of Visalia, L. L. Cory, of Fresno, and H. Scott Jacobs, of Hanford, for appellants. Frank H. Short, W. A. Sutherland, and M. K. Harris, all of Fresno, for respondents.

PER CURIAM. The point involved in the three cases above entitled is identical, and they may be considered together.

The judgment in each case quieted the plaintiff's title to certain water rights subject to the title of the appellant, and the court awarded plaintiff its costs. The appellant moved to strike out the plaintiff's cost bill. From the order in each case denying the motion the appeal is prosecuted.

It is conceded that the action, concerning as it does the water rights of the parties in a certain river in Fresno county, is an action in the nature of a suit to quiet title to real property. It falls, therefore, so far as regards costs, within the provisions of section 1022, Code of Civil Procedure, which declares that:

"Costs are allowed, of course, to the plaintiff upon a judgment in his favor in the following cases: * * * 5. In an action which involves the title or possession of real estate. * * *"

While it is true that the plaintiff did not receive all that it asked for in its complaint, nevertheless it recovered a judgment for part of its demand, and is therefore entitled to costs. *Hoyt v. Hart*, 149 Cal. 722, 731, 87 Pac. 569; *F. A. Hihn Co. v. City of Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391. In each case the appellant in its answer also claimed the right to divert certain quantities of water from said river, and also alleged that its rights in that regard were prior to those of the plaintiff. It also recovered judgment for part of what it claimed, and perhaps it was entitled to its costs; but as to this it is sufficient to say that that question is not before us.

The order in each of the cases above entitled, denying appellant's motion to strike out plaintiff's cost bill, is therefore affirmed.

RIFFEL v. LETTS et al. (Civ. 1992.)

(District Court of Appeal, Second District, California. Sept. 14, 1916.)

1. ASSAULT AND BATTERY \S 15—**RIGHTS OF OWNER—FORCE.**

As much force as is necessary may be used to retain one's property, which a trespasser has taken into possession by force or fraud and is trying to carry away.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. $\S\S$ 13-15; Dec. Dig. \S 15.]

2. ASSAULT AND BATTERY \S 42—**RIGHTS OF OWNER—FORCE—QUESTION FOR JURY.**

Whether plaintiff took money from a defendant by force, or with fraudulent intent, and whether defendant used excessive force to retake it, is for the jury, in plaintiff's action in damages for assault.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. \S 56; Dec. Dig. \S 42.]

3. APPEAL AND ERROR ⇨1002—SCOPE—CONFLICTING EVIDENCE.

A verdict on conflicting evidence, sufficient on the one side to sustain it, is conclusive on the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇨1002.]

4. APPEAL AND ERROR ⇨932(1) — EXCESSIVE DAMAGES—DISCRETION OF JURY—PRESUMPTIONS.

The amount of damages for assault and unlawful imprisonment rests so largely in the discretion of the jury that, in considering an attack on a verdict as excessive, the appellate court must treat every conflict in testimony as resolved in plaintiff's favor and give him the benefit of every reasonable inference.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782; Dec. Dig. ⇨932(1).]

5. FALSE IMPRISONMENT ⇨36 — EXCESSIVE DAMAGES.

Verdict of \$2,500 to a woman in good health, who was assaulted and placed in a wagon, with cage inclosure, to force payment for C. O. D. package, and thereby humiliated, excited, and nervously shocked and seriously affected as to health for a long period, was not excessive.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113-115; Dec. Dig. ⇨36.]

6. TRIAL ⇨232(5) — INSTRUCTIONS—DEFINITION OF TERMS.

The court, having correctly stated the circumstances under which an arrest or imprisonment is legal and justifiable, was not in error in defining unlawful imprisonment as trespass rendering the trespasser liable in damages, without explanation of "unlawful imprisonment."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 545; Dec. Dig. ⇨232(5).]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Anna W. Riffel against Arthur Letts and others. From judgment for plaintiff and order denying motion for new trial, defendants appeal. Affirmed.

S. F. Macfarlane and Clair S. Tappan, both of Los Angeles, for appellants. T. C. Gould and Shaw & Stewart, all of Los Angeles, for respondent.

CONREY, P. J. The defendant Arthur Letts owns and operates a department store in the city of Los Angeles. The plaintiff purchased certain merchandise in his store and requested that it be delivered to her at her residence, the price to be paid on delivery. The goods were delivered by the defendant Withrow, an employé of Letts, to whom the plaintiff tendered a \$10 bill and received the change amounting to \$8.65. While this exchange of money was going on the plaintiff suddenly remembered that she had had in her possession two \$10 bills, and, acting under the belief that she had delivered one of them to Withrow, she attempted to withdraw the bill which she had tendered, but which still remained in her hand. According to Withrow's testimony this bill was in his possession, and she seized and took it out of his hand. But this is disputed by her; and, as the fact is material, it must be deem-

ed that the jury believed her testimony. Thereupon Withrow seized the plaintiff, violently pulled her from place to place in the yard near the door of her house, and finally lifted her up and carried her to the street and placed her in the wagon in a caged inclosure, the door of which he closed and fastened. After some delay and discussion, lasting for about an hour, Withrow and his assistant released the plaintiff from the wagon, and went with her into her house, where the missing bill was discovered lying between the pages of a notebook on a table. As a result of the acts of the defendant Withrow, plaintiff received certain bruises upon her shoulder and left leg and suffered serious nervous shock and injury, so that she was confined to her bed for about three weeks. The imprisonment of plaintiff in the wagon took place in the presence of a number of neighbors of Mrs. Riffel, the attention of these persons having been attracted by the noise and violence there occurring. The complaint in this action is in two counts, whereby she seeks to recover damages on account of the injuries received by her, seeking damages, first, for the assault and battery, and, second, as for a false and unlawful imprisonment. The case was tried to a jury, which returned a general verdict on which judgment has been entered in the sum of \$2,500 and costs. The defendants appeal from the judgment and from an order denying their motion for a new trial.

Appellants insist that the evidence was insufficient to justify the verdict of the jury for the reasons: (1) That it was not shown that Withrow acted in an unjustifiable manner in restraining the plaintiff; (2) that in view of the evidence the amount of damages allowed was excessive.

[1-3] Force may be used by the owner to retake property from a person who has obtained possession of it by force or fraud and is overtaken while carrying it away. As much force as is necessary may be used to retain one's property which a trespasser has taken into possession and is trying to carry away. *Hodden v. Hubbard*, 18 Vt. 506, 46 Am. Dec. 167; *Gyre v. Culver*, 47 Barb. (N. Y.) 592; *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826; *Hopkins v. Dickson*, 59 N. H. 235. The court gave to the jury instructions correctly stating the law as to these matters. It was for the jury to determine from the evidence whether or not the bill was taken by the plaintiff by force, or taken or withheld with fraudulent intent, and whether or not excessive and unnecessary force was used by Withrow upon the person of plaintiff. As there is evidence favorable to the plaintiff upon these issues, the verdict thereon is conclusive in this court. Therefore it must be taken as true that the plaintiff had not parted with possession of the bill, that she was acting in good faith, and that the

force used by Withrow was excessive even if it had been lawful.

[4] Next it is claimed that the verdict was excessive in amount. As a general rule, what will be a proper and reasonable compensation for the damages occasioned by injuries to the person is a question committed to the sound discretion of the jury. In considering an attack upon a verdict as excessive, the appellate court must treat every conflict of the evidence as resolved in favor of the respondent, and must give him the benefit of every inference that can reasonably be drawn in support of his claim. *Kimic v. San Jose-Los Gatos, etc., Ry. Co.*, 156 Cal. 273, 277, 104 Pac. 312.

[5] It is admitted by counsel for respondent that under the first cause of action as stated in the complaint the damages for injuries from the assault and battery were limited at the time of the trial to a period of three months following the date of the transaction. This being so, it may be that the amount of the verdict under the evidence in this case would be excessive if applied to the first cause of action alone. But the plaintiff's recovery also includes the second cause of action, namely, for an unlawful imprisonment. The jury was instructed that it must not allow damages by way of example or penalty, and that as to the first cause of action the recovery must be limited to facts or circumstances arising within three months from the date of the assault. The second cause of action was submitted under the general instruction, authorizing an assessment for actual damages only. There was evidence showing that the plaintiff was an unmarried woman about 45 years of age, and at that time in good health. She suffered much humiliation and distress of mind at the time and afterwards, caused by being arrested and imprisoned in a caged wagon in the public street and in the presence of her neighbors. That this caused great nervous excitement and shock, which seriously affected her health for a considerable time thereafter, is indicated by evidence sufficient legally to warrant the verdict, and we are not justified in setting it aside as excessive, or as having been rendered as the result of passion or prejudice, or anything other than a fair consideration of the evidence.

[8] Objection is made to the eighth instruction given to the jury. That instruction defines an arrest, and states that:

"For a private person to take another into custody, without legal justification, and restrain him of his liberty for a time and then turn him loose without taking him before a magistrate, or to a peace officer, is unlawful, and constitutes a trespass upon the liberty of the one so restrained for which he may be compensated in damages."

Appellants' criticism of this instruction is that the court failed to adequately explain the words "without legal justification," and it is contended that this omission was ex-

cessively prejudicial to the defendants, as implying that under the circumstances of the case the plaintiff was entitled to damages. A sufficient answer is that in other instructions, to which no objection is made, the court gave instructions showing the circumstances under which an arrest or imprisonment is legal or justifiable, and also the circumstances under which an arrest or imprisonment is not legal or justifiable.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

GRANT v. WARREN. (Civ. 1579.)

(District Court of Appeal, Third District, California. Sept. 15, 1916. Rehearing Denied by Supreme Court Nov. 14, 1916.)

SALES \Leftrightarrow 390—Breach—DAMAGES—CHARACTER OF ACTION.

Under a contract for sale of mortgage bonds of a quarry company, providing part cash payment and balance to be paid after foreclosure of the mortgage, by royalty on the stone quarried to be secured by giving the seller a first lien on the property, an action for a breach by the purchaser's giving a trust deed to another as a prior lien on the property, and by refusing to operate the quarry, was not in damages, so as to require finding of the amount of damages which might not be ascertainable, owing to the fact that payment was conditional, but the purchasers' breach renders him liable absolutely and unconditionally to pay the balance of the stipulated price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1109; Dec. Dig. \Leftrightarrow 390.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by William Grant against Charles A. Warren. From a judgment for plaintiff and order denying motion for new trial, defendant appeals. Affirmed.

Thomas B. Dozier and Reid & Dozier, all of San Francisco, for appellant. Harding & Monroe and Grant & Zimdars, all of San Francisco, for respondent.

BURNETT, J. The appeal is from the judgment and also the order denying a motion for a new trial. It is virtually conceded, however, by appellant that by reason of irregularities as to the statement on motion for a new trial we are, in effect, limited to the consideration of the appeal from the judgment and to the determination of whether the findings support said judgment. The findings necessary for an understanding of the situation are as follows:

"That heretofore and on the 28th day of March, 1912, the plaintiff was the owner of 595 per cent. first mortgage bonds of the par value of \$500 each, issued by the Columbia Marble Quarries, Inc., a corporation. That the payment of said bonds was secured by a first lien, mortgage, or deed of trust made by said Columbia Marble Quarries, Inc., on that certain property situated in the county of Tuolumne, state of California, which property is more par-

ticularly described in the complaint on file herein. That said property included a certain marble quarry hereinafter referred to as the Marble Quarry property. That at the time of the issuance of said bonds and continuously up to and until the time of the sale thereof, as hereinafter found, the said Columbia Marble Quarries, Inc., was the owner of said marble quarry property subject to said bonded indebtedness.

"That on or about the 26th day of March, 1912, this plaintiff sold and delivered to the defendant, Charles A. Warren, the said 590 bonds upon the following express terms and conditions, that is to say: First. That the said defendant should immediately pay to plaintiff the sum of \$15,000 as a part of the purchase price of said bonds. Second. That said defendant, upon receiving delivery and possession of said bonds, should immediately proceed to sell, or cause to be sold, the property described in the deed of trust made to secure the payment of said bonds, in accordance with the powers conferred upon the holder or holders of said bonds by such deed of trust, and at the sale thereof should purchase said property and hold the same upon certain trusts for the use and benefit of this plaintiff; that is to say: The said defendant agreed to cause a corporation to be organized for the acquiring, owning, and operating of said marble quarry property, and that he would cause and procure said corporation to enter into a proper written agreement with this plaintiff, whereby it should pay plaintiff beginning 18 months from the 26th day of March, 1912, the sum of 50 cents for each and every ton of marble taken out and shipped from said quarries until there should be paid to plaintiff the further sum of \$28,000 as the balance of the purchase price of said 590 bonds.

"That it was further agreed that such royalties should be paid on the 15th day of each and every month for all marble shipped during the previous month, and that all such royalty or royalties should be a first lien charge against said marble quarry property."

Then follows a finding to the effect: That Warren, on the delivery to him of said bonds, paid therefor the said sum of \$15,000, and proceeded to sell said property under the terms of said trust, and thereupon purchased the same; that he organized a corporation known as the Warren Marble Company. That he acquired control of its corporate stock and of said corporation and dominated its policy and business affairs; that said corporation "at the behest and instigation of said Charles A. Warren, and with full knowledge of the claims of this plaintiff against said property, and in violation of such claims, and without the knowledge or consent of this plaintiff, the said Warren Marble Company on or about the 1st day of July, 1912, made a certain mortgage or deed of trust, mortgaging and conveying said marble quarry property to the defendant, the Savings Union Bank & Trust Company, for the purpose of securing the payment of 100 bonds of the denomination of \$1,000 each." That said mortgage was duly acknowledged, and was recorded on July 29, 1912. That after said mortgage was recorded, the said corporation made and delivered to plaintiff the agreement attached to the complaint and marked "Exhibit B," providing "that this contract and all moneys payable thereunder shall be a first lien and charge against the

said marble quarry property and against the real property herein described." That at the time of the delivery of said "Exhibit B" plaintiff believed it constituted a first lien and charge against said property. That he had no knowledge nor notice of the creation of said bonded indebtedness of \$100,000, nor of the making or recording of said deed of trust, and that defendants Warren and the Warren Marble Company repeated to him that said agreement constituted a first lien and charge upon said property.

It is also found that plaintiff performed all the conditions of his agreement; that immediately after he discovered that "said bonded indebtedness had been created and had been made a lien and charge upon said marble quarry property prior to the lien or charge of said agreement 'Exhibit B,' this plaintiff demanded of said defendants Charles A. Warren and the Warren Marble Company that they cancel and annul said bonded indebtedness and said mortgage or deed of trust and make said agreement 'Exhibit B' a first lien or charge against said property, but that said defendants, and each of them, refused and have failed so to do," and that said defendants notified plaintiff that they did not intend engaging in the business of operating and carrying on said marble quarry enterprise and of quarrying and shipping marble from said quarry; and that they did not intend to perform the terms and provisions of said agreement "Exhibit B."

The findings disclose, as stated by respondent, that Warren broke his contract:

"First, by conveying the property to the corporation without reserving a first lien to plaintiff; and without which lien no one would have a right to extract marble from the quarry; second, by impressing the property so conveyed, with the first lien of \$100,000 in priority to plaintiff's security, thus putting it out of his power to perform his contract with plaintiff; third, by repudiation of plaintiff's right to have the first lien; fourth, by notice to plaintiff that neither Warren nor the company intended to operate the quarry or pay the royalty."

The groundwork is thus laid for a judgment in favor of plaintiff, unless there be merit in the contention of appellant that, the action being for damages, there should be a specific finding as to the actual pecuniary detriment suffered by plaintiff in consequence of the violation of the contract on the part of appellant. It is argued that for aught that appears to the contrary, there may have been no actual loss to plaintiff as a result of said dereliction. For instance, among other considerations, it is suggested that the quarry, if worked, might not have yielded sufficient to pay any portion of said royalty and reference is made to section 8358 of the Civil Code, providing that:

"Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and

penal damages, and in sections 3319, 3339 and 3340,"

—it being claimed that the present case does not fall within any of said exceptions.

But we do not regard this action as technically one for damages. It is rather a suit to recover the balance due on the purchase price of property that has been completely transferred to the vendee. There would, of course, be no question if the promise to pay the said \$28,000 had been absolute. In other words, if Warren had promised to pay the said amount on delivery of said property by the vendor and had failed or refused to do so, plaintiff could maintain his action immediately. Here the promise was to pay the balance out of the proceeds of the mine, it is true, and therefore was conditional, but in consequence of Warren's failure to give the promised security and his repudiation of his agreement to work the mine, the law treats his promise as an absolute and unconditional one and holds him to an obligation to pay said balance in cash. The authorities seem to take this view of the situation, and we may follow respondent in his quotations from some of the cases. In *Wolf v. Marsh*, 54 Cal. 228, the action was upon a note for a certain amount containing this provision:

"This note is made with the express understanding that if the coal mines in the Marsh ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void."

Defendant thereupon conveyed the property, making it impossible for him to operate the mine or derive any profit. In holding him liable on the note, the Supreme Court said:

"When he did that, he violated his contract, and the note at once became due and payable."

In *Love v. Mabury*, 59 Cal. 484, the contract for the payment for work done on a mine contained this clause:

"And the balance of \$900 to be paid out of the first proceeds of the mine, after deducting expenses."

The court declared:

"That the contract contemplated that the defendants were to work the mine 'out of the first proceeds of which, after deducting expenses,' the balance was to be paid, does not admit of doubt. And we are of opinion that their failure and refusal to commence to work it within a reasonable time after the completion and acceptance of the labor and materials bestowed on the property rendered them liable for the balance due therefor."

In *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962, the suit was upon a written promise to pay a stated sum containing this provision:

"The said sum to be so paid in installments in such amounts and at such times as I shall realize each month from such products after payment of all costs and expenses of the gathering or obtaining and selling such products. The said sum of money to be paid only and exclusively from such products of said land as I may be entitled to, and no other property of mine shall be subject to said debt or obligation."

The defendant conveyed the property and thereafter derived no profit. It was said by the court:

"This being so, the balance unpaid became immediately due and payable, and the plaintiff could maintain an action for the recovery thereof."

In *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117, the balance due was to be paid "out of the profits realized by me from my business of packing raisins at Malaga, during the present season." Defendant conveyed the property, and it was held that "his liability became thereupon fixed and absolute." In *Carter v. Rhodes*, 135 Cal. 48, 66 Pac. 985, the agreement provided:

"And \$1,000 balance to be paid only out of the net proceeds of the working of the one-half interest in said mineral claim conveyed; 'and that in no event shall the \$1,000 or any part thereof become a personal claim against the party of the second part'—that is, the appellant."

The court said:

"By the sale of his interest in the mine, the appellant put it out of the power of the respondent to receive the thousand dollars from the net proceeds of that interest, and appellant at once became personally responsible to pay the thousand dollars."

The cases where the defaulting party failed to give security as promised for the balance of the consideration are of the same tenor. Among the citations, we may refer to *Carnahan v. Hughes*, 108 Ind. 227, 9 N. E. 80, *Wheeler v. Harrah*, 14 Or. 325, 12 Pac. 500, and *Cook v. Stevenson*, 30 Mich. 243. In the first of these, it is said:

"It is abundantly settled that where goods are sold upon credit, the purchaser agreeing as part of the contract to execute notes payable at a future day for the purchase price, the refusal of the purchaser to execute the notes according to the contract entitles the seller to maintain an action for such refusal, and the measure of damages is the full price of the goods sold."

In the *Wheeler Case*, supra, the court says:

"The naked obligation of the defendant was not sufficient to obtain the credit; nor would it have been received and the property delivered, without the promise of security, as agreed. When credit is given for the price of goods sold, on the condition that the purchaser's note, with surety, be given therefor, and this condition is not complied with, but the property is taken by the purchaser, he is liable for the price at once, and before the expiration of the proposed term of credit."

In the *Michigan case*, supra, it was declared as to the defendant:

"By refusing or failing to keep that term in the agreement which was introduced to assure him delay, he entitled the other party to insist upon the resulting alternative of immediate payment."

Some of the cases refer to the amount recovered as "damages," and declare that the vendor will be entitled to recover as damages the whole value of the goods, it being suggested, though, that there may be "a rebate of interest during the stipulated credit." Such rebate—it may be stated—was allowed in the case at bar.

If we regard the amount recovered as damages, it is apparent that no other just rule could be applied in determining the amount. It is impossible, in other words, to say just how much would have been taken from the quarry and what the payments to plaintiff would therefore have been, but this difficulty was created by the refusal of appellant to perform his contract. He, therefore, is in no position to say that respondent must prove his actual damages, but the law holds him to the measure that he himself prescribed.

We think the foregoing consideration is decisive of the case, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. FINALI. (Cr. 347.)

(District Court of Appeal, Third District, California. Sept. 19, 1916.)

1. HOMICIDE \S 112(2)—SELF-DEFENSE.

Where accused, while trying, with revolver in hand, to force his way into a warehouse through a door, which was being held by deceased to prevent his entrance, shot deceased, he was clearly the aggressor, and not justified by self-defense, although deceased was trying to strike through the door as it opened with a beer bottle, and although after he and deceased had been separated from a prior encounter deceased had thrown a rock at him and hit him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 146; Dec. Dig. \S 112(2).]

2. HOMICIDE \S 112(1)—SELF-DEFENSE—INVITING ALTERCATION.

One may not by his own willful act create a situation giving rise to appearances which he may interpret as endangering his life, and thereupon kill the person he is in fact assailing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 145; Dec. Dig. \S 112(1).]

3. HOMICIDE \S 300(3)—SELF-DEFENSE—INSTRUCTION.

An instruction in murder trial, standing alone, that "there must have been a present ability on the part of the assailant to accomplish his criminal design in order to justify the person assailed in taking his life," was erroneous, as inconsistent with the doctrine of apparent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 617; Dec. Dig. \S 300(3).]

4. CRIMINAL LAW \S 1186(4)—APPEAL—REVERSAL.

Such instruction was not so misleading as to cause a miscarriage of justice and to call for reversal of judgment of conviction, where in no view of the evidence could it reasonably be said that deceased was the assailant, in view of Const. art. 6, \S 4 $\frac{1}{2}$, forbidding setting aside of a judgment or granting new trial for misdirection of the jury not apparently resulting in miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. \S 1186(4).]

5. HOMICIDE \S 300(7)—INSTRUCTIONS—SELF-DEFENSE.

An instruction that "self-defense is not available as a plea to a defendant who has sought a quarrel with a design to force a deadly issue, and thus, through his fraud, connivance, or fault, create a real or apparent necessity for the killing," held proper and applicable to the

facts, where the evidence showed that whatever real or apparent necessity defendant believed to exist for the killing was created by his fault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 622; Dec. Dig. \S 300(7).]

6. CRIMINAL LAW \S 863(2)—TRIAL—FURTHER INSTRUCTIONS TO JURY.

In a murder trial, where the jury after retiring returned to court and asked for further instructions on certain points, defendant was not entitled as matter of right to have instructions read which the jury had not called for, or to have all the instructions on a given subject read, when such as were read were satisfactory to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2067; Dec. Dig. \S 863(2).]

7. CRIMINAL LAW \S 1173(1)—APPEAL—HARMLESS ERROR.

Refusal of instructions as having been presented too late for consideration by the court was not prejudicial to accused, where they were not applicable to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3164, 3168; Dec. Dig. \S 1173(1).]

8. CRIMINAL LAW \S 1186(4)—APPEAL—REVERSAL—CONDUCT OF COUNSEL.

Although reference by a district attorney to accused's failure to deny his extrajudicial statement was violative of accused's right to remain silent without prejudice for so doing, this and other alleged prejudicial misconduct, which the court instructed the jury to disregard, held not such as to call for reversal in view of Const. art. 6, \S 4 $\frac{1}{2}$, forbidding setting aside of a judgment or granting new trial for any error not apparently resulting in miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. \S 1186(4).]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Amedeo Finali was convicted of manslaughter, and appeals. Affirmed.

Braynard & Kimball, of Redding, for appellant. U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of Shasta county for the crime of murder, and at his trial was convicted of manslaughter and sentenced to imprisonment for the term of seven years in the state prison. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

Defendant shot and killed Vincenzo Coudera on Sunday at about half past 4 o'clock in the afternoon of November 28, 1915, at the warehouse (sometimes called stable by witnesses) of Giaccosa & Bellone, near the Mammoth mine in Shasta county. Defendant justifies the killing on the plea of self-defense. Defendant and deceased met near this warehouse shortly before the homicide; they were but casually acquainted with each other; defendant had been told that deceased had said that defendant was watching for one Tony Claro every evening with intent to assault him; at the meeting of defendant and deceased above referred to, deceased was pointed out by one Peselli as the person who had made the statement, whereupon defend-

ant asked deceased why he had made such statement to Claro; deceased denied that he had made it and defendant replied that he (deceased) did make the statement because Tony so told defendant. Thereupon defendant extended his hand towards deceased, whether in a threatening manner or by way of assault or as an invitation for an encounter, does not clearly appear. However, the two men grappled, and a scuffle ensued, in the course of which they fell to the ground, defendant on top of deceased. Bystanders interfered and the two separated, defendant walking away a few steps. When deceased arose he picked up a stone and threw it at defendant, hitting him on the left shoulder, and immediately ran into the warehouse and closed the door.

The eyewitnesses were Italians, whose testimony was taken through interpreters. Several exhibits were introduced to assist the jury in understanding the facts and circumstances surrounding the homicide, among which was the bullet causing the death of deceased, taken from the body of the deceased, the latter's clothing worn at the time, defendant's revolver, the door through which, as was claimed by the prosecution, the fatal shot was fired and in which two bullet holes appeared, the door casing or 4x4 scantling to which the door was latched when closed, and which showed an indentation claimed by the prosecution to have been made by one of the bullets when the first shot was fired, sundry photographs, diagram of the warehouse premises, and two or three other exhibits, none of which was sent up with the record. Obviously, we are deprived to some extent of the aid which these exhibits afforded the jury. For example, defendant claims that the bullet found in the body of deceased was a fragment only, and that the first shot fired by defendant struck a beer bottle which the deceased threw at defendant, and that the bullet was split and a fragment of it caused the death of deceased, and not one of the bullets that went through the door of the warehouse. The scantling or door case was introduced, and the indentation found on it was shown to the jury in support of the theory of the prosecution that the bullet from the first shot struck the edge of this door casing and passed on into the building. The second shot was shown to have gone through the door, and the bullet hole was in line with a bullet hole through the opposite side of the building. The third shot concededly went through the door, and the position of the hole tended to show that it was where deceased was pushing at the door.

We think, however, that the evidence found in the record is quite sufficient to justify the verdict without having these exhibits before us to explain the testimony.

It appeared that when the first altercation occurred the parties were within two or three feet of the warehouse door; when defendant released the deceased and the latter got up

defendant moved away two or three steps and was standing sidewise to deceased when the latter threw the rock, hitting defendant on the left shoulder as above mentioned. Deceased immediately ran into the warehouse, the keeper, Fracchia, with him, and closed the door and both braced themselves against it on the inside, deceased next to the latch and Fracchia next to the hinges. When defendant was hit with the stone he ran after deceased and reached the door about the same time the two other men had closed it. He immediately endeavored to force it open, kicking and pushing it, and calling to deceased to "come out." It was testified by witnesses who were outside of the warehouse that defendant had his revolver in one hand while he was trying to force the door open. It was in evidence that during this struggle on the part of defendant to open the door and deceased and Fracchia to hold it fast, it was opened and closed a few inches at intervals, during one of which deceased threw or struck with a quart beer bottle which he had picked up with one hand while pushing with the other, and at about the same instant defendant fired the first shot. The bottle was broken into pieces, some of them falling within and some without the door. The evidence does not show how the bottle was broken. Defendant was not hit with it. He testified that he shot Coudera because he thought he was about to hit him with the bottle. Fracchia testified that he heard the bottle strike and break against the door casing just before the shot was fired. After the first shot the door was shut and Fracchia and deceased remained pushing against it. The second and third shots followed in quick succession, the last one, it is claimed by the prosecution, being the one that hit and killed the deceased. When deceased was hit he exclaimed, "I am shot in the stomach," and Fracchia cried out to stop shooting, that one of them was wounded. Deceased staggered back from the door to another part of the warehouse, and shortly afterwards expired. The door was opened, and, among others, defendant went in, looked at deceased, and immediately left; and was the next day arrested at the town of Tehama.

Fracchia testified:

"Q. Now, when Coudera came inside the warehouse, what did he do? A. He shut the door right away. Q. Was the door open or closed when Coudera came inside? A. Open. Q. When Coudera closed the door what did he do? A. He put himself right away against the door. Q. And how did he hold the door? A. With both hands. (Witness illustrates.) Q. What did you do? A. I put myself also against the door. (He explained the relative position of the two men, deceased on his right, next to the doorlatch.) Q. When you and Coudera placed yourselves against the door as you have illustrated, what next occurred? A. Finali was pushing at the door and we was pushing back. Q. Did Finali say anything as he was against the door on the outside? A. He was saying to open the door—'Open, open.' Q. While Finali was pushing against the door from the outside and you and Coudera were against the door on

the inside, what happened to the door, if anything? A. It happened that after he pushed the door several times, Coudera got ahold of a bottle. Q. When you say 'He pushed the door several times,' whom do you refer to? A. I think it was Finali; I couldn't see outside. (It elsewhere appeared that defendant was the only person pushing the door from the outside.) Q. Where did Coudera get the bottle? A. From the floor. Q. And what part of the floor? A. To the right side—north side. Q. And how far was the bottle from the door on the north? A. More or less, a foot and a half. (A photograph was shown witness on which he located the place where the bottle was. He also illustrated how Coudera reached out and got the bottle with his right hand while pushing against the door with his left hand.) And when Finali pushed the door he (Coudera) done like that (illustrating as if throwing an object with the right hand.) Q. Which hand, right or left, did Coudera reach for the bottle? A. With the right one. Q. At the time that Coudera reached with his right hand for the bottle, where was his left hand? A. At the door. Q. What did Coudera do with the bottle after he got it in his right hand? A. He held it there for a little while, and while the other was pushing at the door, he threw it at him—he threw it. He threw it. Q. And was the door open or closed at that time? A. When he threw the bottle, the door was open a little bit. Q. What happened when Coudera threw the bottle? A. When Coudera threw the bottle, I heard the report of the bottle, and the shot, 'Pom! Pom!' Q. What happened to the bottle? A. The bottle broke. Q. When did the bottle break with reference to the time that you heard the shot? A. First I heard the sound of the bottle, and then the shot of the pistol. Q. What do you mean by the sound of the bottle? A. The sound of the explosion of the bottle. Q. How did the bottle break, if you know? A. That I don't know. Q. Did the bottle break inside the door or outside the door? A. Inside the stable. Q. When the bottle broke what did Coudera do? A. He put himself against the door."

He was asked to illustrate:

"A. Like that. (Witness illustrates by arising and facing the wall, bending forward slightly and placing both hands flat against the wall.) Q. What occurred after Coudera placed himself in a leaning position with both hands against the door as you have illustrated? A. It occurred that the shots were fired. Q. How many shots were fired? A. Three shots. Q. How many shots were fired after Coudera placed both hands against the door in a leaning position immediately after the bottle was broken? A. Two shots. Q. After the two shots were fired, what happened? A. I heard Coudera say, 'Oh! I am wounded in the stomach.' Q. And what did Coudera do after he said that? A. He turned around and walked to the little room. Q. When you heard the bottle break did you hear another noise? A. When the bottle broke I heard the fire of the pistol—the shot of the pistol. Q. When Coudera said, 'I am wounded,' what did you do? A. Then I began to holler, 'Stop, stop, he is wounded.' * * * Q. From the time that Coudera came inside the warehouse, closed the door and leaned against the door, did he at any time let go of the door with both his hands? A. I never saw him move from the door."

He testified that the door opened two or three times, as he estimated it, before the first shot was fired, once he thought 8 or 10 inches.

Witness Benedetti went into the warehouse about the same time deceased entered it, and from a point 15 or 20 feet from the door saw

and heard what took place in there. He testified:

"Q. At the time the bottle broke, was the door open or closed? A. There was about that much open (showing). Q. State how many inches? A. About a foot or foot and a half. Q. Was Fracchia against the door or leaning against the door when the last two shots were fired? A. He was at the door pushing. Q. What happened after the last shot was fired? A. Mr. Coudera went backwards and he was wounded here (indicating in the breast). * * * Q. Did any one say anything after the last shot was fired? A. Mr. Fracchia told him not to fire any more—told Mr. Finali not to fire any more."

He testified that Coudera had the bottle in his right hand and was "pushing against the door this way (showing)."

The autopsy showed:

That the bullet entered the body of deceased "between the first and second cartilages on the right side—in front * * * the bullet entered near the apex of the lungs, passed down through the base, through the diaphragm, through the liver, and passed out between the eleventh and twelfth ribs, and entered and lodged in the back about 3 inches from the spine on the right side of the body about one inch from the skin—general course was down and back."

Dr. Sanhøldt, who made the autopsy, testified:

That the cause of death was "bleeding from the vena cava which was torn by the bullet"; that a man with such a wound would live but a short time—"it is only the matter of a moment. Q. As much as a minute? A. I don't think so. * * * He might utter a few words, but I doubt if he could make any coherent sentences."

He testified that the point where the bullet lodged was about 12 inches lower than the point of entrance, and that the bullet encountered no bone in its passage.

[1] We think the jury were warranted in finding that the fatal shot was fired through the door while deceased and Fracchia were holding it shut and endeavoring to keep defendant from entering. The position of deceased at the door—a position one would naturally assume in pushing with his hands against a door to hold it fast—would account for the entrance of the bullet as described and its course backward and downward. It is true this might possibly have happened had the bullet struck the bottle and had a fragment of it been deflected toward deceased. Bullets take eccentric courses sometimes after entering the body. But the evidence was that deceased did not exclaim that he was shot until the third shot was fired and while he and Fracchia were pushing at the door, and the evidence was also that had he received this wound from the first shot it would have immediately disabled him from making any further physical effort towards keeping defendant out of the building. But if it be conceded that the first shot was the fatal one, we cannot see that it was justified upon any view of the doctrine of self-defense. Defendant was clearly the aggressor. With revolver in hand he was trying to force his way through the door which was

; held to prevent his entrance. Having acted in pressing it partially open the deceased was the one then in danger, and had given defendant a fatal blow with the axe, the doctrine of self-defense and the right to act upon appearances might have been available to deceased.

[1] Defendant could not by his own willful conduct create a situation giving rise to appearances which he could interpret as endangering his life, and thereupon kill the person he was assailing. As was said in *People v. Barker*, 109 Cal. 451, 462, 42 Pac. 807, 311 L. R. A. 403):

"A man may not wickedly or willfully invite another to create the appearances of necessity or the legal necessity which, if present to one without blame, would justify the homicide."

Defendant lays much stress upon the fact that deceased hit him with a rock after they separated from the first encounter. Had defendant overtaken deceased in the heat of the moment and suitably punished him for assault, he might not have been blame-worthy. But he lost this opportunity by fleeing, having reached a harbor of safety where he was in no position to do defendant any harm. Thenceforth defendant was merely the aggressor. Under the circumstances disclosed, the plea of self-defense in favor of deceased was not open to him. It is to us that the jury exercised much wisdom in finding that the homicide was committed on a sudden quarrel or heat of passion" but manslaughter.

[2] The court instructed the jury quite correctly on the law of self-defense and the right of one being assailed to act upon appearances. It is not objected that these instructions are incorrect, but it is objected that the court in the same connection instructed the jury as follows:

"There must have been a present ability on the part of the assailant to accomplish his criminal design in order to justify the person assailed in taking his life."

It is contended that there was conflict in the evidence as to whether deceased struck defendant through the open space when the door was open, or whether deceased threw the bottle at defendant through the opening,

whether the bottle was broken by the defendant at the first shot or struck the door and was broken, and that there was no conflict in the evidence as to whether the door was fired before, at the time or after the bottle was thrown. In this state of the evidence it is claimed:

"That the jury may have believed, under this instruction of the court, that the bottle was thrown before the first shot was fired, and that the door was closed when the last two shots were fired, and that therefore as a matter of fact deceased at neither time had the present ability to inflict injury upon defendant, and defendant was in no real danger."

[3] We think the instruction was inconsistent with the doctrine of apparent danger to one who is assailed and was out of harmony with other instructions given upon the

subject, and, taken alone, was an incorrect statement of the law. It must not be forgotten, however, that in no view of the evidence could it be reasonably said that deceased was the assailant. And when the door was pushed open by defendant who was at that moment the real assailant, armed with a deadly weapon, which the sequel showed he intended to use, deceased had a right to defend himself against the threatened danger. By doing so, his relation toward defendant was not changed. Throughout their argument the learned counsel of defendant seem to hold that deceased became the assailant in having struck defendant with a rock after the latter had withdrawn from the first encounter, and that notwithstanding deceased had taken refuge in the warehouse, defendant had a right to pursue and punish him and still be within the protectingegis of the doctrine of self-defense, should deceased resist. This doctrine must not be confused with the *lex talionis*. The doctrine of self-defense presupposes that one who would avail himself of it has, without his fault, found himself in threatened danger of serious bodily injury to avert which the law gives him the right to resort to extreme measures. But, as we have already pointed out, the plea of self-defense is not available to him where he willfully, and without any necessity for his own protection, creates the danger with which he is threatened. The law of self-defense is a law of necessity and ceases with the disappearance of the necessity. Whatever may be said of the instruction, however, we are quite convinced that, error though it be, we cannot for a moment believe that the jury were so far misled by it as to have caused a miscarriage of justice, and unless we can so say we are forbidden to reverse the judgment. Section 4½, art. 6, Const.; *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Bartol*, 24 Cal. App. 659, 142 Pac. 510; *Vallejo R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

[5] 3. The court instructed the jury as follows:

"Self-defense is not available as a plea to a defendant who has sought a quarrel with a design to force a deadly issue, and thus, through his fraud, connivance, or fault, create a real or apparent necessity for the killing."

It is claimed that the instruction was not applicable to the facts because there was no evidence that either a real or apparent necessity for the killing was created by the fraud, connivance, or fault of defendant. The instruction was based upon the principle announced in *People v. Hecker*, supra. We think the evidence showed that whatever of real or apparent necessity defendant believed to exist for the killing was created by his fault. He had no right to break into the warehouse by force to assault deceased or to punish him for an assault previously made on defendant by deceased, and if, in doing so,

danger to defendant appeared, it was of his own creation.

[6] 4. After the jury had been considering the case some time, they came into court and asked for the instructions on justifiable homicide to be again read to them. The court read its instructions on the subject including the reading of section 195 of the Penal Code. On the suggestion of defendant's attorney, the court read still other instructions on the subject given at defendant's request. Defendant then asked to have a particular instruction read:

"That the defendant need not wait until the blow is struck before acting in his own protection." "The Court: No, I will only act on the request of the jury. The Court: Is that all you wish, gentlemen? A Juror: Are we entitled to know what the penalties are in each degree? The Court: No, that is entirely in the discretion of the court. The Juror: That is what I thought. The Court: The court has told you about that heretofore. I will read you this, gentlemen."

The court then read one of its instructions in connection with the rule of reasonable doubt, and stating the law as to the right of the jury to fix the punishment should the defendant be found guilty of murder in the first degree. The jury were then asked if they desired any further instructions, and all answered satisfied.

The jury, being still unable to agree, came into court again and requested "a little information on one little point, and that is, what creates a reasonable doubt." The court read its instructions on that subject and asked the jury if they desired anything further.

"The Foreman: That seems to be the only thing, your honor. The Court: Is that plain enough to you gentlemen? (An affirmation is given to the court.)"

The jury retired and later brought in their verdict. Defendant was not entitled as matter of right to have instructions read which the jury had not called for or to have all the instruction on a given subject read when such as were read were satisfactory to the jury.

[7] 5. The court refused certain instructions requested by defendant on the ground that they were presented too late for consideration by the court: (a) As to the right of self-defense having been revived, after defendant withdrew from the first conflict, by deceased having hit him with a rock; (b) defendant not bound to retreat in the face of danger; (c) reasonable doubt as to who opened the door and for what purpose it was opened, and that such doubt should have been resolved in favor of defendant. Whether or not the reason given by the court was sufficient need not be considered, for we do not think the defendant was prejudiced by the court's ruling. The hitting of defendant with a stone by deceased after defendant had withdrawn from the first conflict did not so far revive defendant's right to self-defense as to justify him in forcing a second conflict as appeared by the evidence and killing de-

ceased, because in doing so he believed himself to be in danger of great bodily injury. The doctrine of retreat in the face of apparent danger had no application, since defendant was the assailant. There was no evidence warranting the assumption that deceased opened the door for any purpose or raising any doubt on that question.

6. Two instructions were refused, for one of which rulings the court assigned no reason, and as to the other that it was covered elsewhere. The latter related to the doctrine of defendant's right to act upon appearances which was, as the court said, fully covered elsewhere in the instructions. The other instruction proceeded on the assumption that deceased was the assailant at the time he was killed, and that defendant acted upon the reasonable belief that he was in danger of receiving great bodily harm from deceased at that moment.

[8] 7. In the course of his argument to the jury, the district attorney referred to an instance, within his knowledge, of a bullet in passing through the front end of a wagon split in its course into two parts, hitting each horse and another part performing an equally freakish thing. Defendant objected, and the district attorney asked the court to instruct the jury to disregard the illustration and confine themselves to the evidence, which the court did.

The defendant at the time of his arrest made a somewhat self-incriminatory statement, which was introduced in evidence. The district attorney referred to the fact that defendant, when on the witness stand, did not deny the truth of the statement. Upon defendant's objection as misconduct prejudicial to defendant's rights and motion that the court instruct the jury to disregard the same, the district attorney said:

"While we do not feel that there is anything prejudicial, at the same time we have no objection to the court's giving the instruction."

And the court thereupon gave the requested instruction.

In his closing argument to the jury the district attorney stated that he did not believe Coudera (deceased) had ever made the statement to Tony Claro attributed to Coudera for the reason that defendant did not call Claro as a witness to prove it, though subpoenaed by defendant and excused.

Where misconduct of the district attorney is claimed as prejudicial, the more recent decisions of the Supreme Court hold that, if attention is called to it and the court instructs the jury to disregard it and not allow themselves to be influenced by it, the misconduct must be flagrant and obviously prejudicial to justify a reversal. Such was the misconduct of the district attorney in *People v. Tufts*, 167 Cal. 266, 139 Pac. 78, *People v. Derwae*, 155 Cal. 593, 102 Pac. 261, and other cases cited by defendant.

In the present case the record shows that the district attorney exhibited commendable carefulness in the conduct of the trial, not to

trench upon the rights of the defendant. No evidence was offered or admitted as to which defendant has assigned error. There was no attempt by the district attorney to repeat the objectionable statements. The reference to the eccentricities of a bullet was of no particular significance, and, in fact, had as much application to defendant's theory as to the people's.

As to the nonappearance of Claro as a witness, the reference could not have injured defendant, for whether it was true or not that he told defendant what deceased said had very little, if any, significance. Reference by the district attorney to defendant's failure to deny his extrajudicial statement, while violative of the defendant's right to remain silent without prejudice for so doing, the statements of defendant were as to circumstances connected with the homicide about which the jury had full knowledge through testimony of witnesses. We may safely adopt what was said in *People v. Kromphold*, 157 Pac. 599:

"While it was wrong for the district attorney to comment at all on the failure of defendant to testify upon this subject, it would be most unreasonable to assume, in the light of the attitude of the trial judge in the matter and the nature of the remarks, that the jury could have been influenced to the prejudice of the defendant by the statement complained of. See *People v. Sansome*, 98 Cal. 235 [33 Pac. 202]. Certainly we cannot hold that this statement 'has resulted in a miscarriage of justice.' Section 4½, art. 6, Const."

The defendant was ably defended and every opportunity given him to meet the evidence in support of the charge. We think the verdict was justified by the evidence, and that no prejudicial error occurred at the trial which would warrant a reversal.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

YOUTZ et al. v. FARMERS' & MERCHANTS' NAT. BANK OF LOS ANGELES.
(Civ. 2000.)

(District Court of Appeal, Second District, California. Sept. 11, 1916.)

1. PARTIES — § 59(2) — SUBSTITUTION — ACTION FOR DEPOSITS — REAL PARTY IN INTEREST — ATTACHING CREDITOR.

Under Code Civ. Proc. § 386, providing that another person may be substituted for the defendant, an order in an action by a wife joined by her husband to recover money deposited in her name in the defendant bank, substituting for the defendant bank the plaintiff in an action against the husband with attachment served upon the defendant bank claiming that the deposit in fact belonged to the husband, so as to place the real parties in interest in an adversary position, was properly made.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 91, 92; Dec. Dig. § 59(2).]

2. ATTACHMENT — § 304 — BANK DEPOSIT — ACTION BY DEPOSITOR.

Such order was properly made over the objection that the bank could not claim the

benefit of such provision and a discharge from its liability to its depositor unless a lien was created against the credit in its hands by the service of the attachment process, since, with notice as to the real ownership of the deposit and a claim thereto by a third person under attachment process, the bank would not be justified in honoring the check of the nominal depositor, and since, under Code Civ. Proc. § 544, if the money in fact belonged to another, it would be liable to such other's attaching creditor if it paid the money over to the nominal depositor.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1093-1095; Dec. Dig. § 804.]

8. CONSTITUTIONAL LAW — § 309(1) — "DUE PROCESS OF LAW" — ACTION FOR BANK DEPOSIT — SUBSTITUTION OF PARTY DEFENDANT.

In an action for a bank deposit, an order of substitution under Code Civ. Proc. § 386, authorizing a defendant in an action upon a contract or for specific personal property to show that a third person claims the proceeds or property to apply for an order to substitute such person as defendant, and for a discharge upon the deposit of the property in court, did not deprive the plaintiff of property without "due process of law," as leaving him without recourse to recover damages against the original defendant, where it required the full amount claimed, with interest, to be deposited, in view of Civ. Code, § 3302, under which there could be no further recovery of damages than the amount required to be deposited.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 929, 930; Dec. Dig. § 309(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Due Process of Law*.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by E. B. Youtz and Joshua E. Youtz, her husband, against the Farmers' & Merchants' National Bank of Los Angeles. From an order making Gara Williams, plaintiff in an action against Joshua E. Youtz, with attachment against a deposit in defendant Bank, a substituted party, defendant, the plaintiffs appeal. Affirmed.

Harriman, Ryckman & Tuttle, of Los Angeles, for appellants. J. H. Shankland, of Los Angeles, for respondent.

JAMES, J. Defendant bank in September, 1913, had on deposit in the name of E. B. Youtz, wife of Joshua E. Youtz, the sum of \$2,704.83. One Gara Williams commenced an action in the superior court against Joshua E. Youtz, in which action judgment was sought in the sum of \$11,000 on promissory notes. A writ of attachment was served upon the defendant bank with notice that all debts or credits owing by the bank to "J. E. Youtz, * * * E. B. Youtz, but belonging to Joshua E. Youtz, or either of them," were attached. The bank made answer to the writ stating the fact as to the name in which the deposit was held. E. B. Youtz thereupon drew her check against the bank for the full amount of the deposit, which demand the bank refused to honor. She then brought this action to recover the money. The defendant bank appeared before answering,

and by motion asked that the plaintiff in the attachment suit be substituted in its stead, upon the money being deposited in court. In the affidavit of its cashier the bank asserted that the plaintiff in the attachment suit claimed a lien upon the fund upon the ground that the money in fact was the property of Joshua E. Youtz, although deposited by his wife. Other facts showing the pendency of the attachment suit and the issuance and service of the writ of attachment or garnishment were set out in the affidavit. No counter showing of facts appears to have been made; E. B. Youtz resting her opposition to the motion on the claim that the case furnished no sufficient ground to support an order substituting Williams as defendant. The court, upon the full amount of the credit being deposited in its charge, and the further sum of \$17.87 interest, made an order substituting Williams in the place of the bank as defendant.

[1, 2] It may be here remarked that no point is made that the sheriff should have been made substituted defendant where the attachment suit had not gone to judgment. The court would have the power, nevertheless, to require the sheriff to be brought in, and if it was required to so do we must assume that such action would be taken in the progress of the case. The appeal taken by E. B. Youtz is from the order made as described.

The proceeding taken by respondent was in strict accord with the provisions of section 386, Code of Civil Procedure. The design of that statute is to enable a party who has been sued upon a contract as to which he admits full liability as to the amount thereof to show that a third party not named in the action claims some right to the proceeds of the contract either by way of complete ownership or that he possesses a lien against the same, and, so showing, to deposit the money due in court and have the third party made defendant in his stead, thus placing in positions of adversaries the real parties at interest. Appellants' counsel insist that the bank could not claim the benefit of section 386, Code of Civil Procedure, and secure a discharge from liability toward its depositor, unless a lien in fact was created against the credit in its hands by service of the garnishment process; that Joshua E. Youtz, the defendant in the attachment suit, must have been possessed of the right to maintain an action of indebitatus assumpsit against the bank on account of the deposit before any attachment lien could result. *Redondo Beach Co. v. Cal. L. & T. Co.*, 101 Cal. 322, 35 Pac. 896, is cited to this point. The principal conclusion announced in that case was that a mere equitable claim, or a credit not liquidated in the sense that it had become a demand of a fixed and certain amount, could not be reached by attachment process. *Hassle v. Congregation*, 35 Cal. 378,

is to the same effect. It must be kept in mind that in the cases cited the questions arose between the attachment plaintiff and the garnishee. There is room for distinction, we apprehend, between a case where a person served with garnishment disclaims liability because the debt is unliquidated or is attended by equities held in his favor and a case like this one. Can it be that a debtor, being possessed of money, may place that money to the credit of another in a bank, and that when so placed the credit becomes immune to attachment process issued against all except the nominal depositor? Surely the law will not spend its effort in furnishing to debtors such an easy and reliable means whereby creditors may be defrauded. With notice as to the real ownership of a deposit, and claim made by a third person under attachment process, a banking institution would hardly be justified in honoring the check of the nominal depositor. Section 544, Code of Civil Procedure, provides that every person having under his control credits belonging to the defendant, when served with attachment process, becomes liable to the attachment plaintiff for the amount of the credit. In this case Williams claimed that the money to the credit of E. B. Youtz belonged to Joshua E. Youtz, his debtor, and notified the bank of that claim and attached the credit. E. B. Youtz sued the bank for the money. If the money was Joshua E. Youtz's and the bank had full notice of this claim, it would, in our opinion, become liable to Williams in the event that it paid over the money to the wife and the fact was determined to be that Joshua E. Youtz owned the credit. It adopted the most convenient and reasonable course to free itself from liability for costs by asking that the real contending parties be compelled to try out the issue between them.

[3] The final point made in the brief of appellants is that the provisions of section 386, Code of Civil Procedure, are in derogation of a party's right not to be deprived of property without due process of law. Using this case as an illustration it is said in argument that the order substituting Williams as defendant in the place of the bank left the plaintiff without recourse in the recovery of damages in the sum of \$500 which she claimed against respondent. If it appeared that this result followed the action of the court then a case would be presented where the making of the order for substitution would amount to an abuse of discretion. The court is vested with discretion as to the matter of granting such a motion as that here considered. But there is nothing in the statement of plaintiff's cause of action which shows that plaintiff was entitled to recover special damages in any amount, and plaintiff showed no facts in opposition to the motion which would tend to establish her right to recover on the account last mentioned. The detriment caused by the breach

an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest thereon. Civ. Code, § 3302. The court did require respondent to pay into court the full amount of the deposit, with accrued interest to the date of the order.

We are of the opinion that the court was authorized to make the order complained of. The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

FORMAN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(Civ. 1959.)

District Court of Appeal, First District, California. Sept. 15, 1916.)

MASTER AND SERVANT §375(1)—WORKMEN'S COMPENSATION—"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

Workmen's Compensation Act (St. 1913, p. 3) § 12a, providing for compensation of employees for any personal injury arising out of and in the course of the employment, or where the time of the accident the employé is performing services incidental to his employment within its scope, does not govern injuries in hotel fire to a salesman whom his employer directed to go to the city of the accident and remain indefinitely for the purpose of selling goods; the fire having occurred while the salesman was asleep and not at work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §375(1).]

Proceeding for workmen's compensation. Richard F. James, opposed by James H. Forman, employer, and the Georgia Casualty Company, insurer. On application for writ of review directed to the award of the Industrial Accident Commission in favor of the employé. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. This is an application for writ of review directed at a proceeding before the Industrial Accident Commission, wherein the respondent Richard F. James sought to recover compensation from his employer, James H. Forman, and the insurer said employer, Georgia Casualty Company, for injuries alleged to have been sustained during and in the course of his employment. The stipulated facts are as follows: Richard F. James was employed by James H. Forman as a salesman for the purpose of selling real estate upon commission. The terms of his employment as such salesman did not call for regular working hours, but was understood that he should make sales of real estate at any or such times as it was possible for him to secure a customer and

complete the sale. Mr. James was directed by his employer to go to the town of Needles for the purpose of selling real estate there and to remain indefinitely. Mr. James went to said town for that purpose, and while there took a room in the White House Hotel, where, on the evening of February 28, 1916, he retired for the night. At or near the hour of 4:15 a. m. of February 29th a fire broke out in the White House Hotel, which destroyed the hotel and in which Mr. James lost his clothing and effects, and was also burned about the hands and arms and face in escaping from the fire. For the injuries thus suffered he made application for compensation from his employer before the Industrial Accident Commission, and upon a hearing was awarded the sum of \$365.90. A petition for rehearing was presented and denied by the Commission, whereupon the petitioners herein applied to this court for a writ of review.

We are of the opinion that this case is one which does not come within the scope of the Workmen's Compensation Act (Stats. 1913, p. 279). Section 12a of the act provides as follows:

"Liability for the compensation provided in this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against any employer for any personal injury sustained by his employé by accident arising out of and in the course of the employment. * * * (2) Where, at the time of the accident, the employé is performing service growing out of and incidental to his employment, and is acting within the course of his employment as such."

It seems clear to us that the injuries and losses which the respondent James suffered cannot be held to have been sustained by an accident arising out of and in the course of his employment, nor to have occurred at a time when the employé was performing service growing out of and incidental to his employment and acting within the course of his employment as such, and that this view is fully sustained by the following authorities: Gaskell v. Van Voorhies Co., 2 I. A. C. No. 14, p. 1020; Green v. Shaw, 5 Buttersworth Compensation Cases, 573; Kitchenam v. The Johannesburg, 4 Buttersworth Compensation Cases, 311; Rodger v. Paisley Schoolboard, 5 Buttersworth's Compensation Cases, 547; Milliken v. Towle Co., 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A, 337; Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458; and particularly the case of Ocean Accident & Guarantee Co. et al. v. Industrial Accident Commission of the State of California et al., 159 Pac. 1041, decided by the Supreme Court in bank September 8, 1916, and in which case the foregoing section of the Workmen's Compensation Act is given a very exhaustive review.

The award is therefore annulled.

TORMEY v. MILLER. (Civ. 1547.)

(District Court of Appeal, Third District, California. Sept. 19, 1916.)

1. BANKRUPTCY — 216—EFFECT OF ADJUDICATION.

After adjudication in bankruptcy, the bankrupt's property cannot be resorted to in execution or satisfaction of any judgment obtained upon an obligation created prior to the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 328-333; Dec. Dig. ¶ 216.]

2. BANKRUPTCY — 433(2)—EFFECT OF ADJUDICATION—RIGHT TO JUDGMENT NOTWITHSTANDING BANKRUPTCY.

Where plaintiff sued out attachment which was released on filing bond conditioned for payment of any judgment that might be rendered in such suit, and the debtor thereafter was adjudicated a bankrupt, the attachment creditor could have judgment against the debtor as a basis for pursuing his remedies against the surety, in view of federal Bankruptcy Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1913, § 9651), providing that liens given in good faith shall not be affected by the act and section 16 (U. S. Comp. St. 1913, § 9600), providing that the liability of a person who is surety for a bankrupt shall not be altered by the discharge of the bankrupt, and in spite of section 67c, invalidating a lien arising from attachment of property within four months before filing of bankruptcy petition if created while defendant was insolvent and in effect a preference or if it was created in fraud of the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 809; Dec. Dig. ¶ 433(2).]

3. BANKRUPTCY — 433(2)—EVIDENCE—ADMISSIBILITY.

In such case, the sole question being whether the creditor could have judgment at all against the debtor, the attachment and proceedings thereunder need not appear of record, but are mere evidentiary matters.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 809; Dec. Dig. ¶ 433(2).]

4. BANKRUPTCY — 433(2)—EFFECT OF ADJUDICATION—REMEDIES OF CREDITORS.

In such case the creditor's proper remedy was to move for judgment against the debtor after trial of the issues, with the perpetual stay of execution against the debtor's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 809; Dec. Dig. ¶ 433(2).]

5. APPEAL AND ERROR — 302(1) — SCOPE—PRESERVATION OF EXCEPTIONS.

An appeal after abrogation by St. 1915, p. 209, of right to appeal from order denying new trial, as granted by Code Civ. Proc. § 963, is properly before the court, regardless of whether the motion for new trial was based upon sufficient grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1746; Dec. Dig. ¶ 302(1).]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Ben E. Tormey against Frank N. Miller. Judgment for defendant and plaintiff appeals. Reversed and remanded.

Milton Newmark and Clarence A. Shuey, both of San Francisco, for appellant. Lon Bond, of Chico, for respondent.

HART, J. The defendant in this action was awarded judgment, from which this appeal, supported by a bill of exceptions and a stipulation admitting as true certain facts, is prosecuted by the plaintiff.

The facts as agreed upon by the stipulation of the parties are with accuracy synoptically stated in the opening brief of counsel for the plaintiff, and we, therefore, adopt said statement thereof, together with the statement of the legal propositions submitted here for decision by the appellant.

"Appellant brought an action in the superior court of this state for Butte county, against respondent, for goods sold and delivered. A writ of attachment was issued in said action, directed to the sheriff of Butte county, and placed in his hands for execution. A bond was thereafter made, executed, and delivered, and thereupon the attachment was released and discharged. By the obligation of said bond, the sureties undertook 'that if the said plaintiff shall recover judgment in said action we will pay to the said plaintiff upon demand the amount of said judgment together with the costs not exceeding in all the sum of \$1,200, gold coin of the United States.' Thereafter, and within four months of the commencement of the attachment suit, respondent filed a petition in the District Court of the United States for adjudication as a voluntary bankrupt, and thereafter was duly adjudged a bankrupt and discharged of his debts by order of said District Court. Respondent filed a supplemental answer in the attachment suit, setting up his discharge in bankruptcy as a defense. Upon these issues the case was tried, and at the trial counsel for plaintiff, in his opening statement, told the court that he proposed to ask for judgment against the defendant with a perpetual stay of execution against the property of said defendant for the purpose of maintaining his rights against the bondsmen. The allegations of the complaint in regard to the incurring of the indebtedness sued upon and non-payment were admitted by stipulation of counsel for respondent. The bankruptcy proceedings, culminating in the order of discharge, were also admitted by stipulation, and this constituted the sole defense interposed to the action. Plaintiff offered evidence establishing the facts in regard to the issuance of the writ of attachment, the execution and delivery of the undertaking, which evidence was excluded by the trial court upon defendant's objection that it was incompetent, irrelevant, and immaterial. The bond was also offered and similarly excluded. At the conclusion of the trial plaintiff again asked for judgment against defendant, with a perpetual stay of execution against the property of said defendant. Judgment went for defendant. The question of law thus presented and raised by the exclusion of the testimony in regard to the issuance of the attachment and the execution of the bond, and also by the absolute judgment in favor of the defendant, relates to the right of a plaintiff under such circumstances to a qualified judgment against the defendant sufficient to preserve his rights against the sureties arising out of the bond given to release the attachment. By the terms of the bond, recovery of a judgment is made a prerequisite to an action against the sureties."

[1] It is not questioned but, indeed, admitted by the stipulation of counsel for the defendant, that but for the special plea, setting up by way of supplemental answer the fact of the defendant's discharge from his debts under the federal bankruptcy law, the plaintiff would have been entitled to judg-

ment against the defendant for the amount of the debt sued for. By reason of the adjudication in bankruptcy, however, the defendant's property could not, obviously, be resorted to in execution or satisfaction of any judgment obtained against him by the plaintiff or, for that matter, by any other person suing upon an obligation created prior to and consequently affected by the adjudication. But, as seen, the plaintiff contends that the effect of the defendant's discharge in bankruptcy was not to destroy his rights originally created by the lien of the attachment, or, speaking with respect to the case as it appears, his rights against the sureties on the undertaking given to discharge the attachment levied upon the property of the defendant to secure his judgment. The contention so urged is clearly in harmony with the construction placed by the courts upon certain provisions of the bankruptcy law. Indeed, counsel for the defendant does not combat or dispute the soundness of the proposition, but, as we shall presently see, bases his resistance to this appeal solely upon grounds involving procedure.

Section 67d of the federal bankruptcy law provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, * * * shall * * * not be affected by this act."

Section 16 of said act reads:

"The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such bankrupt."

The courts have uniformly held, in cases like the present, that, under the foregoing sections, while the adjudication, when pleaded, will, of course, have the effect of granting immunity to the defendant from the execution of any judgment obtained against him from his property, such adjudication cannot operate to destroy the rights of the plaintiff under the undertaking given to release the attachment, or, in other words, will not itself relieve the sureties on the undertaking of their obligations thereunder. See *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417; *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, and cases therein cited; *Smith v. Lacey*, 86 Miss. 295, 38 South. 311, 109 Am. St. Rep. 707; *U. S. Wind Engine & Pump Co. v. North Penn. Iron Co.*, 227 Pa. 262, 75 Atl. 1094; *Rosenthal v. Nove*, 175 Mass. 599, 56 N. E. 884, 78 Am. St. Rep. 512. The principle is discussed and approved in *Harding v. Minear*, 54 Cal. 502, and *Holladay v. Hare*, 69 Cal. 515, 11 Pac. 28. As was said by the Supreme Court of Wisconsin, in *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417:

"The language of the bankrupt act, preserving a lien incident to a debt, by implication preserved the debt notwithstanding its discharge, so far as is necessary to make the lien effective."

The above cases further hold that where, under such circumstances as are present in

the case at bar, the defendant has pleaded and proved his discharge after the attachment had been levied upon his property and said attachment released upon the giving of the undertaking, the remedy of the plaintiff against the sureties on the undertaking must be made effectual, if at all, by the entry of a qualified judgment against the defendant for the amount found to be due on the account declared upon; that is to say, that, in order to enable the plaintiff to reap the benefit of his attachment, which can be obtained in this case only by proceeding against the sureties on the undertaking upon the giving of which said attachment was dissolved, he is entitled to have a judgment entered against the defendant, with a perpetual stay of execution, so as to prevent the plaintiff from enforcing the judgment against him, and leave him at liberty to proceed against the sureties. *Smith v. Lacey*, 86 Miss. 295, 38 South. 311, 109 Am. St. Rep. 707, supra, and the other cases above cited.

As has been shown, in the present case the undertaking given for the release of the attachment provided, as a condition precedent to the right of the plaintiff to a recovery against the sureties thereon or to maintain an action against them on the undertaking that a judgment shall have first been rendered and entered against the defendant. Indeed, it is obviously true that, if no judgment in the attachment suit were entered against the defendant, there would be no predicate for the support of an action against the sureties, the obligation of the latter being to pay the debt only when it should be established by a judgment.

Excerpts from the opinions in a few of the cases above referred to will be sufficient to disclose the reasons for or the theory of the rules above considered.

In *Danforth Mfg. Co. v. Barrett & Co.*, 138 Ill. App. 244, which was concerned with an action commenced in a justice's court, judgment was rendered against the defendant, who appealed, giving an appeal bond with surety conditioned for the payment of any judgment obtained against the defendant, if the latter defaulted in the satisfaction of the same, it is said:

"It is admitted in argument by appellant that it is proper for a trial court to enter a judgment against a defendant with a perpetual stay of execution in order that the plaintiff in said judgment may enforce the same against the sureties on a bond given upon an attachment levied more than four months prior to the bankruptcy of the defendant, as held in *Hill v. Harding*, 116 Ill. 92, 4 N. E. 861, and *Hill v. Harding*, 130 U. S. 699 [9 Sup. Ct. 725, 32 L. Ed. 1083]. But it is contended * * * that this rule should not be applied where the plaintiff or claimant has acquired no lien under his judgment, and that there should be no judgment against the appellant in this case because the sureties on the appeal bond are not liable. On this record the sureties on the appeal bond are not before the court, and we cannot determine their rights and liabilities. It will be time enough to determine the question of their liability when a proper case

is presented for our consideration involving that question. * * * In view of this question of the liability of the sureties on the appeal bond—a question not necessary for us to decide, and which we do not decide—the proper judgment in this case is a special judgment against appellant for the amount due to appellee with a perpetual stay of execution. Such a judgment against appellant can work no harm to it, and will not interfere with any rights or privileges acquired by its discharge in bankruptcy.”

In *U. S. Wind Engine & Pump Co. v. North Penn. Iron Co.*, supra, the Supreme Court reversed the judgment, with directions to enter a special judgment against the defendant, with a perpetual stay of execution, for the purpose of enabling the plaintiff to proceed against the surety upon a bond given to secure the release of an attachment levied upon the property of the defendant. The court there said:

“The appellee has secured its discharge in bankruptcy, and its personal liability is gone; but that does not constitute any reason why a judgment against it should not be entered for the special purpose of fixing and enforcing the liability of the surety. The surety took the risk of the appellee’s insolvency—a risk that the appellant was supposedly protected against by the very bond in question; so it would be most unfair to allow the substitution of the bond for the goods attached, and then to deny the formal relief necessary in order to enforce its terms against the surety. There is nothing in our law, or practice, or in the announced public policy of the state, to require such a ruling.”

Further quotation is not necessary, it being sufficient to say, as we have before declared, that all the other cases above cited are to the same effect.

It is true that section 67c of the Bankruptcy Act provides that a lien arising from the attachment of a debtor’s property and so created within four months before the filing of a bankruptcy petition by the litigant debtor shall be dissolved by the adjudication of such debtor to be a bankrupt, if:

“1. It appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or 2. The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or 3. That such lien was sought and permitted in fraud of the provisions of this act.”

It is asserted in the brief of appellant that the bankruptcy proceedings in the case at bar were instituted within four months after the levy of the attachment. We find nothing in the record justifying this statement; hence we do not know when, with respect to the time at which the attachment lien was created, the proceedings in bankruptcy were commenced by the defendant. But it is altogether immaterial whether the attachment lien in this case was created within four months prior to or within four months after the commencement of the bankruptcy proceedings, since the attachment had, by virtue of the undertaking, been dissolved before the proceedings in bankruptcy were begun. As seen, the bond or undertaking was

given for the express purpose of effecting a release of the attachment, the attachment was accordingly released, and such release operated as a sufficient consideration to support the obligation of the bondsmen. It has repeatedly been held that the bondsmen are, under such circumstances, liable. *Rosenthal v. Perkins*, 123 Cal. 240, 55 Pac. 804; *S. F. Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 695, 106 Pac. 111; *In re Maaget* (D. C.) 23 Am. Bankr. Rep. 14, 173 Fed. 232; *McCombs v. Allen*, 82 N. Y. 114; *King v. Will J. Block Amusement Co.*, 126 App. Div. 48, 111 N. Y. Supp. 102.

The *Rosenthal Case* involved an action against the sureties on an undertaking given to release an attachment. The defendant in the attachment suit, one Brusie, had the attachment released upon giving an undertaking for that purpose. Within a month after the levy of the writ of attachment, Brusie filed his voluntary petition in insolvency under the State Insolvency Act of 1880 (St. 1880, p. 82). That act contained a provision that the effect of the commencement of insolvency proceedings was to dissolve any attachment levied within one month next preceding the commencement thereof. The defendants (sureties on the bond) contended that:

“The effect of this provision was to dissolve the attachment in *Rosenthal et al. v. Brusie*, and render impossible the return of the released property to the attaching officer, and hence to destroy the obligation of their undertaking.”

After showing that the contract involving the undertaking embodied two alternative promises, viz., that the released property would be redelivered and applied towards the satisfaction of the judgment, or the sureties would pay the value thereof, not exceeding the amount of the judgment, and that if an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other, the court said:

“It is clear, for reasons which need not be enlarged upon, that if at the time the proceeding in bankruptcy is instituted there is no attachment in force on which the proceeding can operate, if the attachment lien has already been discharged by a bond for that purpose, then the liability of sureties on the bond is not affected by the subsequent bankruptcy of their principal. *McCombs v. Allen*, 82 N. Y. 114, and cases cited; *Easton v. Ormsby*, 18 R. I. 309 [27 Atl. 216]; *Insolvent Act*, § 45, last proviso. The mistake of defendants lies in supposing that the lien of the attachment in *Rosenthal v. Brusie* continued on the attached goods after they had been released to Brusie in consequence of the delivery bond. Our statute and the inferences which follow from the decisions of this court seem to put that question at rest. Upon the execution of the bond, such as was given by defendants, ‘an order may be made releasing from the operation of the attachment any or all of the property attached.’ *Code Civ. Proc.* § 554. It is impossible that property can be ‘released from the operation of the attachment’ if it yet remains subject to the attachment lien. * * * We are satisfied that no lien of the attachment persisted on the goods in this case after the release to the owner.”

[2] Our conclusion from all the authorities which we have examined and to many of which special attention has been directed in this opinion is that there is no provision in the federal Bankruptcy Act with which the judgment asked for by the plaintiff in this action would be in conflict. In other words, there is no language in said act which prevents the rendering or entering of such a judgment, and our opinion is that the court below should have entertained the motion of the plaintiff for a special or qualified judgment against the defendant, and that, in refusing to do so, and in disallowing the above indicated proof offered by the plaintiff in support of said motion, the court erred to the prejudice of the latter.

[3] As stated above, the defendant has not, in his brief or otherwise, assailed or challenged the legal propositions above considered, but, as we understand him, he denies the propriety of their application to the case in hand and further maintains that, even if this case in the abstract presented an appropriate instance for their application, the plaintiff did not properly proceed in the court to make them or to justify a review of the ruling of the court denying him the remedy sought. In support of this position it is declared:

"(1) There is absolutely no mention made in any of the pleadings of a writ of attachment having been issued or a bond to prevent its levy having been given. There was therefore no issue presented as to those matters; (2) the findings fully covered all the issues raised; (3) the specifications of particulars wherein plaintiff claims the evidence insufficient to support the decision is in fact addressed to the conclusions of law, and not to findings of fact; (4) the notice of intention to move for a new trial fails to specify as one of the grounds, 'errors in law, occurring at the trial, and excepted to,' etc., the only grounds of the motion being: Insufficiency of the evidence to justify the decision, and that the decision is against law."

The reply to the first of the above stated propositions is, in our opinion, that, since the ultimate question at issue was whether the plaintiff was entitled to any sort of judgment against the defendant under the issues as finally framed, the fact of the issuance of the writ of attachment, the fact of its levy upon the property of the defendant, the fact of the giving of the undertaking for the purpose of effecting a release of the attachment, and the fact of such release were purely evidentiary, or constituted mere evidence upon which the court might predicate its conclusion upon said question. It was therefore, even if proper, unnecessary to plead those facts.

[4] Nor can we conceive of a more appropriate procedure to which the plaintiff might have resorted for the protection and preservation of his rights against the sureties than that adopted. The trial of the case was, of course, necessary, notwithstanding the special plea set up by the supplemental answer

and its availability as a perfect defense to the action, if proved. If it transpired, as it did transpire, that the special plea could be established, then the plaintiff, still concerned with the ultimate decision, was entitled to a judgment in form which could do the defendant himself no possible harm, but which would preserve to him (the plaintiff) certain rights arising out of the controversy to which he was justly and legally entitled.

[5] As to the fourth proposition above stated, it is sufficient to say that whether the grounds upon which the plaintiff founded his motion for a new trial were or were not such as to warrant the trial court in legally considering and passing upon the alleged errors involved in the rulings of the court excluding proof of the attachment and the bond given to secure the release thereof is, so far as this appeal is concerned, wholly immaterial. Indeed, under the existing system for taking appeals in this state, it was not necessary for the plaintiff to move for a new trial to authorize this court to review the errors mentioned, and, so far as is concerned our right and authority to do so, it may be assumed that no motion for a new trial was in fact made. The appeal here was taken after the abrogation by the Legislature of 1915 of the right to appeal from an order denying a new trial (Stats. 1915, p. 209, amending section 963, Code Civ. Proc.), and the said errors may therefore be reviewed by this court on the appeal from the judgment, notwithstanding that the court below might have been justified in denying the motion for a new trial because of the insufficiency of the grounds upon which the motion was based, as designated in the notice of intention, to point the errors relied upon. Section 956, Code Civ. Proc. The last-named section provides:

"Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, * * * order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. * * *" (Italics ours.)

The motion for a new trial was made upon the minutes of the court, and the errors occurring at the trial were preserved by a bill of exceptions, duly settled, for use on the appeal from the judgment. Section 950, Code Civ. Proc. The errors are therefore legally before this court for review, and quite manifestly they "involve the merits," "necessarily affect the judgment," and most unquestionably "substantially affect the rights of" the plaintiff.

The judgment is therefore reversed, and the cause remanded, for further proceedings in accordance with the views herein expressed.

We concur: CHIPMAN, P. J.; BURNETT, J.

RICHMOND DREDGING CO. v. ATOHISON, T. & S. F. RY. CO.

(Civ. 1484.)

(District Court of Appeal, Third District, California. Sept. 13, 1916.)

1. DAMAGES ⇨124(1)—BREACH OF CONTRACT—PLEADING.

A dredging company's first cause of action against a railroad for breach of contract to pay for filling in land, which alleged that the work was to be done "strictly in accordance with the terms of said contract," and was "accepted by the defendant as having been done in accordance with the terms of said contract," did not authorize the jury to add to the total contract price of the quantity of earth deposited at so much a yard, as further damages, an amount based upon evidence that the hardest part of the work had been done when plaintiff quit on account of defendant's default.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-329; Dec. Dig. ⇨124(1).]

2. TRIAL ⇨355(1)—VERDICT SUPPORTED BY SPECIAL VERDICTS.

Where any one of the several answers to interrogatories or special verdicts was unsupported by the evidence, the general verdict, based on such special verdicts, could not stand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 846; Dec. Dig. ⇨355(1).]

3. RAILROADS ⇨159(4)—MECHANICS' LIENS—CONTRACT TO FILL IN LAND FOR RAILROAD—STATUTE—"CONSTRUCTION, ALTERATION, ADDITION TO, OR REPAIR OF"—"STRUCTURE."

A contract between a dredging company and two railroads, whereby the dredging company agreed to fill in a tract of land owned by one railroad, so that it might open an avenue across its land and provide a roadbed to which it might, at its own expense, remove the line of the other railroad at some time in the future, was not within the Mechanics' Lien Law (Code Civ. Proc. § 1183), giving a lien for labor or material used in the construction, alteration, addition to, or repair, in whole or in part, of any building, railroad, wagon road, or other structure, the moving of the second road's tracks to another location not being the "construction, alteration, addition to, or repair of" the first railroad, or a "structure" connected with it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 489, 490; Dec. Dig. ⇨159(4).]

For other definitions, see Words and Phrases, First and Second Series, Construction; Structure.]

4. ACCOUNT STATED ⇨4 — INSTALLMENT VOUCHERS.

Monthly vouchers, made out by a railroad, showing the estimated amount due a dredging company for work, in filling in the railroad's land at so much per cubic yard, done during the previous month, the installment of 75 per cent. of the contract price due, and the 25 per cent. retained by the road, as provided in the contract, carrying a receipt at the bottom of each, signed by the dredging company, for the amount of the voucher, but nothing else to show that they were new agreements containing the elements of an account stated, or were intended as a settlement of the number of cubic yards of filling deposited, were not accounts stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 14, 15; Dec. Dig. ⇨4.]

5. CONTRACTS ⇨305(3)—PERFORMANCE—PAYMENT—ESTOPPEL TO DENY TENDER OF PAYMENT.

Where a dredging company, filling in a railroad's land at so much per yard, the contract providing for payment in monthly installments,

received money on the railroad's monthly vouchers at dates later than the 15th of each month, the contract date for payments, without protest, it was not estopped to deny that payment for a subsequent month was not tendered in time, it having protested the road's late payments and demanded payment as per contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1463, 1464; Dec. Dig. ⇨305(3).]

6. CONTRACTS ⇨308(5)—BREACH—FAILURE TO PAY INSTALLMENT.

Where a dredging company, filling in a railroad's land at so much per cubic yard, payments to be made monthly, protested against previous late payments and demanded payment on the contract date, the road's failure to make a monthly payment on such date was a substantial breach of the contract justifying the dredging company in not proceeding farther.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1434-1439½; Dec. Dig. ⇨308(5).]

7. APPEAL AND ERROR ⇨1039(2)—HARMLESS ERROR—SPLITTING CAUSE OF ACTION.

In an action by a dredging company against a railroad for breach of its contract to pay for filling in its land, though the facts constituting the damages could have been set up in a single count, and probably should have been, stating them in two causes of action, the evidence being sufficient to support verdict for plaintiff on both the counts, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4075; Dec. Dig. ⇨1039(2).]

8. EVIDENCE ⇨878(1)—PRIVATE WRITINGS—PROOF—STATUTE.

Where not acknowledged, a private writing, such as a letter to be admissible in evidence must be proved in one of three ways provided by Code Civ. Proc. § 1940, by one who saw it executed, by evidence of the genuineness of the handwriting of the maker, or by a subscribing witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648, 1655; Dec. Dig. ⇨378(1).]

9. EVIDENCE ⇨471(16) — CONCLUSION OF WITNESS.

In action by a dredging company against a railroad for breach of its contract to pay for filling land, where plaintiff's president and defendant's engineer had been in frequent communication by conversations and letters, on which they acted, testimony of plaintiff's president that a certain letter was one he received from the engineer on a certain date through the mail, and that another letter was one received by him from the engineer, was not a mere conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2381; Dec. Dig. ⇨471(16); Witnesses, Cent. Dig. § 833.]

10. APPEAL AND ERROR ⇨1050(4) — HARMLESS ERROR—ADMISSION OF LETTERS WITHOUT AUTHENTICATION.

In an action by a dredging company against a railroad for breach of its contract to pay for filling in its land, where plaintiff's president and defendant's engineer, who had been in frequent communication, their differences having been made known sometimes in conversations and sometimes in letters, on which they acted, were both in court, error in permitting plaintiff to introduce the engineer's letters to the president without proof of their authenticity was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. ⇨1050(4).]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by the Richmond Dredging Company against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Modified and affirmed.

El. W. Camp, of Los Angeles, H. D. Pillsbury and Platt Kent, both of San Francisco, and C. E. McLaughlin, of Sacramento, for appellant. W. H. H. Hart, of San Francisco, for respondent.

CHIPMAN, P. J. The action is for damages arising out of a written contract of date January 31, 1910, between defendant as first party, plaintiff as second party, and East Shore & Suburban Railway Company, third party. This latter company is not made a party to the action.

Defendant is the owner of a tract of land situated in the city of Richmond, Contra Costa county, and was desirous of having "said land filled in as herein (by the contract) provided." The area to be filled is particularly described in the contract; the cubic measurement of said area as stated in the contract, was "estimated at approximately 220,000 yards" and "the second party agrees to fill, at the rate of 15 cents per cubic yard, within the area described." A map was attached to the contract as part thereof, showing the area to be filled, and other facts. Defendant was to pay plaintiff on—

"the 15th day of each month, for the work done during the preceding month, 75 per cent. of the amount estimated by the engineer of the first party to have been earned by the second party during such preceding month, and the first party will retain the remaining 25 per cent. of all monthly estimates of work done until 35 days after the completion and acceptance by the first party, of the work herein agreed to be performed. * * * The first party is to construct and maintain any and all levees north of Ohio street necessary or proper to impound the material deposited on the area hereinabove described as lying north of said Ohio street; also such levees as may be necessary to protect its main line between Ohio street and Richmond avenue."

Plaintiff's claim is presented in four causes of action.

By the first cause of action it is alleged that plaintiff entered upon the work pursuant to the contract and gave the bond specified therein and continued the work "up to on or about the 17th day of August, 1910"; that the work performed and material furnished "was accepted by the defendant as having been done and supplied in a workmanlike manner and in accordance with the terms of said contract"; that defendant refused to pay plaintiff for its said services and material furnished by plaintiff "during the month of July, 1910, or any part of said money, and in accordance with the terms of said contract, and by so refusing and neglecting to pay such money, defendant rendered, caused, and made it possible for the plaintiff to further continue performance under the contract; and on or about the 17th day of Au-

gust, 1910, the plaintiff, without fault on its part, did discontinue and suspend work under said contract, although plaintiff was fully equipped and prepared to continue such work and had expended a large amount of money for materials and supplies necessary to complete the same," whereupon on said last-mentioned day, "plaintiff notified the defendant that plaintiff would perform no further work under said contract because of defendant's neglect and refusal to pay to the plaintiff in accordance with the terms of said contract the amount due, owing, and coming to the plaintiff from the defendant for the work and services theretofore performed and labor and material theretofore supplied under said contract"; that plaintiff furnished material and performed work under said contract and in accordance with its terms of the value of \$46,575, no part of which has been paid to plaintiff except the sum of \$10,575, and there is now due and owing plaintiff from defendant the sum of \$36,000.

The second cause of action is for "work and labor and services heretofore performed and material furnished and supplied by plaintiff for the defendant at the special instance and request of defendant."

In the third cause of action the making of the contract is alleged; furthermore, that the defendant undertook to build the levees called for in said contract, but that it constructed said levees in such a negligent and imperfect manner as that they failed to hold or impound the material deposited on the said area by plaintiff to the great damage of plaintiff; that by reason thereof the defendant so delayed and embarrassed plaintiff as to cause plaintiff to suspend the entire work under said contract and large amounts of material deposited on said area by plaintiff were not held or impounded thereon; that by reason of defendant's said default, plaintiff was compelled to keep its working forces idle for long periods of time and to pay wages to its employés and rent for a dredger used by plaintiff, * * * all to the loss and damage of said plaintiff in the sum of \$6,818.81.

As a fourth cause of action the contract is pleaded, and it is alleged that plaintiff on February 12, 1910, notified defendant that plaintiff would be ready to commence operation under said contract as soon as the necessary levees were constructed to impound the material to be dredged, and defendant, on or about February 15, 1910, notified plaintiff that proper levees would be constructed on or before February 20, 1910; that on said last-named date plaintiff hired a dredger at large expense and placed it in position to enter upon said work, together with a full crew of men to operate the same, and was in readiness to commence work on February 25th; that defendant failed and neglected to construct the levees necessary to impound the material to be deposited until March 10,

1910, and thus prevented plaintiff from commencing operations under said contract until March 10, 1910, to its damage in the sum of \$3,000.

In the prayer plaintiff asks judgment for \$36,000, the amount claimed in the first and second causes of action, and interest from August 15, 1910; for the further sum of \$16,818, the amount claimed in the third cause of action; and for the further sum of \$3,000, the amount claimed in the fourth cause of action.

In its answer to the first cause of action defendant denies most of its averments; alleges that it mailed at Los Angeles vouchers for work done by plaintiff, to wit, for March, on April 21, 1910, for April, on May 21, for May, on June 21, and for June on July 20, 1910, amounting in all to \$10,596.53, and that plaintiff accepted the said payments, and that on or about August 17, 1910, defendant offered to pay plaintiff the amount found to be due for work performed and materials furnished for the month of July, but plaintiff refused and still refuses to accept the same; alleges that at the time of the abandonment of said contract by plaintiff the value of the work done and materials furnished by it was the sum of \$21,978.80, and not the sum of \$46,575, as set forth in the complaint; denies that there is any sum due and owing plaintiff save and except the sum of \$3,387.57; that there was due plaintiff for July the sum of \$4,080, which sum defendant tendered plaintiff and was refused, and that there is due plaintiff for work done and materials furnished from August 1 to August 17, 1910, the sum of \$1,837.57; that said contract was signed and delivered on March 3, 1910, and not on January 31, 1910, as alleged in the complaint.

Answering the second cause of action, defendant alleges that there is due plaintiff from defendant the sum of \$3,387.57, and no more.

Answering the third cause of action defendant denies that it has failed to perform the contract, and alleges failure of plaintiff to evenly distribute the material dredged, and that plaintiff so negligently filled said area that the embankments constructed by defendant were thereby caused to break and give way, and the progress of the work was thereby delayed.

For answer to the fourth cause of action, it denies the averments of the complaint, and avers that by the terms of the contract it was agreed that plaintiff should begin work thereunder not later than April 1, 1910, and alleges the construction of the levees by defendant as called for in the contract.

By way of counterclaim it alleges that plaintiff and defendant entered into a written contract on or about March 8, 1910, which provided that the work should be done and completed on or before October 1, 1910; that plaintiff failed to complete said work, and

it still remains uncompleted, to defendant's damage in the sum of \$30,000.

For further and distinct defense it alleges the contract attached to plaintiff's complaint; that defendant made payments monthly as therein provided for, and plaintiff received the same except the voucher for the month of July, 1910, which plaintiff "returned without cashing the same"; that by accepting said vouchers and payments for the months of March, April, May, and June, for said work plaintiff "is estopped from denying that said work was done and performed in accordance with said contract or from denying that said contract was at all said times and now is in full force and effect."

For a further defense it alleges that "the estimate of the engineer was a condition precedent to the making of such payment," and defendant was unable to obtain the estimates in time to furnish its voucher "until after the 15th day of the month, upon which the payment was to have been made," and that defendant was not in default in respect of March payments; that on September 1, 1910, and before payments could be made under said contract, defendant was served with an attachment in an action wherein plaintiff was defendant, and by reason thereof defendant has been prevented from making any further payments.

For further defense it alleges that under the terms of said contract the payment to be made thereunder is largely in excess of \$1,000, and said contract has never been recorded in the office of the county recorder of Contra Costa county, and by reason thereof is wholly void.

The cause was tried with the assistance of a jury, and defendant submitted certain interrogatories which, with their answers, follow:

"(1) How much do you find from the evidence the defendant has paid to the plaintiff for work done under the contract described in plaintiff's complaint? Answer: \$10,575.00.

"(2) How many cubic yards of earth do you find from the evidence was deposited upon the entire area described in the contract that remained there? Answer: 181,500 cu. yards.

"(3) How many cubic yards of earth do you find from the evidence was deposited by the plaintiff outside the area described in the contract resulting from overflow through breaks in the levees? Answer: 1,000 cu. yards.

"(4) When was the contract described in plaintiff's complaint signed and delivered by the East Shore & Suburban Railway Company? Answer: On or about the 3d of March, 1910.

"(6) If you find for the plaintiff, how much do you allow upon the first cause of action, described in plaintiff's complaint? Answer: \$19,773.00.

"(7) If you find for the plaintiff, how much do you allow upon the second cause of action in plaintiff's complaint? Answer: Nothing.

"(8) If you find for the plaintiff, how much do you allow upon the third cause of action in plaintiff's complaint? Answer: \$5,476.50.

"(9) If you find for the plaintiff, how much do you allow upon the fourth cause of action in plaintiff's complaint? Answer: \$675.00.

"(10) Do you allow the defendant any sum for damages, as set forth in the answer, and

interclaim, and, if so, how much? Answer: "none."

Judgment was accordingly entered in favor of plaintiff for the sum of \$25,925, from which, and from the order denying its motion for a new trial, defendant appeals.

Appellant contends first that the amount awarded by the special verdict under the first cause of action, to wit, \$19,773 (interrogatory 2) was excessive to the extent of \$3,123. The conclusion is thus reached:

500 cu. yards found by the jury to have been deposited on the ground (interrogatory 2) at the contract price of 15c per cu. yard, equals...	\$27,225.00
Amount paid plaintiff as found by the jury	10,575.00

Bal. due	\$16,650.00
----------------	-------------

Respondent replies that the interrogatory asked for the cubic yards "deposited upon entire area described in the contract that remained there," and that appellant has overlooked the latter part of the interrogatory; that the jury in reply to it had the right to take into consideration all the materials deposited upon the described area, including that which escaped because of incipient levees. To meet this reply appellant calls attention to interrogatory 3, which asks the finding of the jury that the quantity of earth deposited outside of the area "resulting from overflow through breaks in the levees," was 1,000 cubic yards. If this can be held to be the amount of earth which escaped from the designated area, and should be considered as earth that did not "remain there," it would add but \$150, and the excess would still be \$2,973. It is not claimed by plaintiff that it deposited, or had the right to deposit, earth outside the area. Its claim is that where earth deposited in the described area escaped for lack of sufficient levees, it should be compensated therefor. Appellant's answer is that the jury having found the extent of this overflow, the damages are measured by the contract price of 15 cents per cubic yard.

Respondent, however, makes the further contention, as borne out by the evidence, that the work done previous to its suspension was the hardest and most expensive of the dredging work, and "the jury had the right to take this fact into consideration in arriving at the amount which respondent earned under the contract mentioned in the first cause of action."

No special damages are alleged in the first cause of action. The averments are that plaintiff entered upon the work "pursuant to terms of said contract, and continued on work provided for in and by said contract up to on or about the 17th day of August, 1910." It is further alleged "that all said work and labor and service done and performed and all material supplied by plaintiff was done and performed and supplied strictly in accordance with the terms of said contract, and was accepted by

the defendant as having been done in a workmanlike manner and in accordance with the terms of said contract." The second count was on quantum meruit, but the jury found that there was nothing due on the second cause of action. (Interrogatory 7.)

Special damages were alleged in the third count for defendant's failure to construct necessary levees and the consequent damages for which the jury allowed \$5,476.50, and in the fourth count special damages were alleged for defendant's neglect in not having levees constructed at the time promised, and hence the additional cost to plaintiff by reason of expenses incurred while thus delayed in the work. For this the jury allowed plaintiff \$675.50. These three items make up the exact sum found by the general verdict.

[1, 2] It seems to us that there is no allegation in the first cause of action which can be made the basis for damages other than as provided for by the contract, and the agreement there is to pay 15 cents per cubic yard for earth deposited under the contract. The number of cubic yards was found by the jury, and the contract fixed the price to be paid. We can discover no averment in the first cause of action which would authorize the jury to add as further damages an amount based upon evidence "that the hardest part of the work had been done" when plaintiff quit the job. It was expressly alleged that the work was done "strictly in accordance with the terms of said contract," and was "accepted by the defendant as having been done in accordance with the terms of said contract." It was held in *California Wine Ass'n v. Commercial Union Fire Ins. Co.*, 159 Cal. 49, 52, 112 Pac. 853, 860, that "the special verdicts absolutely control the general verdict." *Napa Valley Packing Co. v. S. F. Relief and Red Cross Funds*, 16 Cal. App. 461, 118 Pac. 469. It seems to us quite clear that the special verdicts were addressed directly to the issues in the case and responded specifically to each of the causes of action. These several answers to interrogatories or special verdicts constituted the basis of the general verdict, and if any one of these answers or special verdicts was unsupported by the evidence, the general verdict cannot stand. The special verdict upon the first cause of action is not supported by the evidence. The contract provided that plaintiff was to be paid 15 cents per cubic yard for earth deposited by it, and the jury found the number of cubic yards deposited both within and without the area. The exact damage, therefore, under the first cause of action, may be ascertained by a simple example in multiplication, and we see no reason why this may not be resorted to as showing the amount of plaintiff's damage under the first cause of action. The contract price for depositing 181,500+1,000 cubic yards of earth at 15 cents per cubic yard will give

the amount of plaintiff's damages—\$27,375. Deducting payments made of \$10,575 leaves \$16,800, the amount due upon the first cause of action. This amount added to the findings under the third and fourth causes of action, to wit, \$5,476.50 and \$675.50 makes in all the sum of \$22,952, instead of \$25,925.

2. Appellant claims that the work was of such character as to bring the contract within the provisions of section 1183 of the Mechanics' Lien Law, and, as the contract was not recorded, it was void, and plaintiff's only remedy was in an action on quantum meruit for the value of the labor and material furnished, and the contract price will be taken as the basis for recovering damages, which brings the same result as above shown. *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391; *Condon v. Donahue*, 160 Cal. 749, 115 Pac. 113.

It is claimed further, however, that plaintiff's recovery being limited to the contract price as above claimed, the verdict was against law because the jury awarded recovery on counts under which plaintiff was entitled to nothing (counts 3 and 4), and was denied recovery on count 2, the only one under which plaintiff had any legal ground for a verdict in its favor.

[3] We cannot accept appellant's claim that the mechanics' lien law is applicable. The area to be filled was part of a tract of 50 or more acres, the property of defendant. As near as we can determine from the provisions of the contract and from the map made part thereof, defendant's principal object was to locate and open an avenue, called Ashland avenue, across defendant's land, and provide a roadbed to which the line of the East Shore & Suburban Railroad Company might some time be removed from its present location between the defendant's track and the proposed Ashland avenue. Just why this was deemed necessary or advisable does not appear. The contract reads:

"The third party (Suburban Railway) agrees that upon the filling in of said Ashland avenue to grade, as hereinabove provided, the first party shall have the right to remove the tracks of the third party now situated in part on the area to be filled in under this contract in the following manner: [Describing the route or new location of the suburban track.] * * * The cost of the removal and the relocation of said line is to be borne wholly by first party," etc.

We do not think that this work can reasonably be held to fall within the provisions of section 1183 of the Code of Civil Procedure which gives a lien to "all persons * * * performing labor upon or furnishing material to be used in the construction, alteration, addition to, or repair, in whole or in part, of any building, * * * railroad, wagon road, or other structure," etc. There is no evidence tending to show that defendant intended to make any present use of this filled-in ground for the extension or relocation of its tracks. The moving of the Suburban Railway Company's track to another loca-

tion cannot be said to be the "construction, alteration, addition to, or repair of" defendant's railroad, or to be a "structure" connected with said railroad. It did not appear that the fill was necessary to the operation of defendant's road, or for stations, roundhouses, shops, and the like which have been held to be included in the term "railway."

[4] 3. We do not think that the monthly vouchers made out by defendant showing the estimated amount due for work done during the previous month, the installment of 75 per cent. due, and the 25 per cent. retained as provided in the contract, can be regarded as accounts stated. Appellant claims that "the parties were bound thereby, and no recovery can be had except for the unpaid balance." There were four of these for the months of March, April, May, and June, respectively. The first one states the estimated number of cubic "yards dredger filling," but the others give only the estimated amount of money due, the result of former accounts being carried forward in successive accounts. At the bottom of each is a receipt signed by plaintiff for the amount of the voucher. Beyond this there is nothing to show that they were in effect new agreements or contained the elements constituting an account stated, or that they were intended as a settlement of the number of cubic yards actually deposited.

[5, 6] 4. Nor do we think that because plaintiff received money on these vouchers at dates later than the 15th of each month without protest, it is estopped to deny that payment for July was not tendered in time. There might be force in this contention had plaintiff failed to notify defendant that prompt payment must be made in the future. On August 10, 1910, plaintiff wrote defendant as follows:

"Because of the fact that our contract with you allows you to retain 25 per cent. of the money we have earned and because of the fact that your engineer persists in underestimating the amount of material delivered it is absolutely necessary that we should receive your check for the material delivered during the preceding month on the 15th as our contract specifies. Heretofore your check has arrived anywhere from the 23d to the 30th of the month instead of on the 15th. Our contract with the power company compels us to pay for the current used on the 15th. Unless we pay our bill the current will be shut off and we will be caused both damage and delay; therefore we must demand that we be paid as per contract on the 15th."

Notwithstanding this demand, defendant did not offer to pay for the July work as demanded, and on August 17, 1910, plaintiff notified defendant in writing that plaintiff considered itself released from "further performance under said agreement," and demanded payment for the work and services performed. The failure to make the payment demanded in compliance with the terms of the contract was a substantial breach thereof, and justified the plaintiff in not proceeding further. *S. F. Bridge Co. v. Dumbarton L. & I. Co.*, 119 Cal. 272, 51 Pac. 333; *Woodruff Co. v. Exchange Realty Co.*, 21 Cal.

App. 607, 132 Pac. 598; American-Hawaiian Eng. & Con. Co. v. Butler, 165 Cal. 497, 133 Pac. 280; Ann. Cas. 1916C, 44.

[7] 5. It is urged that the third cause of action included every element of damage which could accrue from the breach of the contract, and that the damages were duplicated by reason of damages also being awarded under the fourth cause of action; that a party cannot split up a single cause of action and maintain separate actions thereon; that damages arising from a single wrong, though at different times, make but one cause of action. Hall v. Susskind, 109 Cal. 209, 41 Pac. 1012.

This rule of pleading was not invoked by demurrer, nor was it raised at the trial. Doubtless the facts constituting the damages could have been set up in a single count and probably should have been, but we cannot see that defendant suffered prejudice by plaintiff's failure to do so. The third cause of action was grounded on defendant's failure to maintain the levees necessary to impound the material deposited, thus causing suspension of work by plaintiff. The fourth cause of action was grounded on defendant's failure to have the levees in readiness at the time defendant promised. There was evidence sufficient to support the verdict on both of these counts.

[8-10] 6. The only remaining error assigned as prejudicial relates to the admission in evidence of certain letters purporting to have been written by Mr. Ball, defendant's engineer in charge of the work. The testimony was conflicting as to the failure of defendant to construct the levees to impound the material. There were two of these letters dated respectively May 2d (Exhibit 4), and May 13, 1910 (Exhibit 8), each purporting to be signed "R. B. Ball, Division Engineer." The letter of May 2d refers to a conversation previously had with plaintiff, and plaintiff answered this letter on May 3d (Exhibit 5); the letter of May 13th (Exhibit 8) refers to defendant's letter of May 12th, and all of them dealing with the matter of these levees, and defendant's letters to some extent conceding defendant's default. The letters were produced in court by witness Cutting, president of plaintiff company, who testified that he received these letters in due course through the United States mail. It appeared that on Saturday, Mr. Cutting had a conversation with Mr. Ball, and that the letter of May 2d (Exhibit 4) was in response to this conversation and to which plaintiff replied on May 3d. Defendant's letter of May 12th was answered by plaintiff by letter the next day. Witness Cutting did not testify to the handwriting of Mr. Ball nor that he knew his signature, nor that he saw either of the Ball letters written, nor that he was a subscribing witness thereto. On these grounds defendant objected, and it is now urged that

the letters were not properly identified. Appellant relies upon the rule as stated in People v. Le Doux, 155 Cal. 535, 550, 102 Pac. 517, 523:

"Where not acknowledged, a private writing must be proved in one of three ways: By any one who saw the writing executed, or by evidence of the genuineness of the handwriting of the maker, or by a subscribing witness. Code Civ. Proc. § 1940. Such execution must be shown before it is entitled to admission. Sinclair v. Wood, 3 Cal. 98."

Mr. Jones states the rule thus:

"Before letters are received in evidence there must be, as in the case of other documents, some proof of their genuineness. This is not proved by the mere fact that the letter is received by mail, when the signature is not proved." Jones on Evidence (2d Ed.) § 583.

The evidence shows that Mr. Ball and Mr. Cutting were in frequent, almost daily communication in connection with the very matters the subject of the letters; sometimes their differences were made known in conversations and sometimes in letters. The evidence showed that the parties acted upon the suggestions in exchanged letters. The genuineness of Mr. Ball's letters was not challenged. He was a witness and in court and could have disclaimed writing them. Cutting no doubt was familiar with Ball's handwriting and his testimony:

"That is a letter I received from Mr. Ball on Monday, the 2d day of May, 1910, through the mail" (referring to Exhibit 4); again, "that is a letter received by me, received from Mr. Ball, Division Engineer, Santa Fé Railroad" (Exhibit 8)

—we think, under the circumstances, was more than a mere conclusion of the witness. It was stated in Verzan v. McGregor, 23 Cal. 339, 343:

"It is often the case that the main question in controversy is the execution and authenticity of the instrument. And the rule is, that if there be no evidence of authenticity, the instrument cannot be read to the jury; but if there be any fact or circumstances tending to prove the authenticity from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision."

The rule contended for is sound and is not to be disregarded. It would have been a very simple thing to prove the authenticity of these letters not only by Cutting, but by their writer who was in court, and it should have been done. We cannot, however, under all the circumstances, say that the error was so prejudicial as to cause a miscarriage of justice or to justify a reversal.

The judgment is modified by reducing the same from \$25,925 and costs to the sum of \$22,952 and costs, with direction to compute interest from the date of the original judgment, and, as thus modified, the judgment and order are affirmed, appellant to recover costs on appeal.

We concur: HART, J.; ELLISON, Judge pro tem.

PEOPLE v. MARTINEZ. (Cr. 358.)

(District Court of Appeal, Third District, California. Sept. 18, 1916.)

1. JURY \S 97(4) — COMPETENCY — BIAS — DISCRETION OF COURT.

In a prosecution for burglary, where three jurors stated that accused would be required to produce evidence in his favor to create a reasonable doubt as to his guilt, and another juror said that if there was a reasonable doubt as to defendant's guilt he would presume the possibility of his guilt to overcome such doubt, but where all of them declared that if accepted as jurors they would determine the defendant's guilt according to the evidence and the law, and give him the benefit of the presumption of innocence, the denial of defendant's challenges for implied bias, and their acceptance as jurors, was not an abuse of discretion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 437; Dec. Dig. \S 97(4).]

2. BURGLARY \S 35, 38 — CIRCUMSTANTIAL EVIDENCE — FOOTPRINTS — FINDING ARTICLES STOLEN.

In a prosecution for burglary, where there was no direct evidence of defendant's guilt, evidence that defendant and another were seen together at the place of the burglary and had obtained work together, that defendant wore a particular kind of a cap, and his companion a particular kind and size of shoes, that there was snow on the ground, and that footprints therein had the precise measurement of the shoes of defendant and his companion, that part of a leather case of one of the watches taken was found at a place at which defendant and his companion had been seen together, was admissible.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 83, 91; Dec. Dig. \S 35, 38.]

3. CRIMINAL LAW \S 531(1) — EVIDENCE — POSSESSION OF STOLEN GOODS — VOLUNTARY STATEMENT.

In a prosecution for burglary, it was not necessary to make the preliminary showing that the statements of defendant, and those of his companion made in his presence after their arrest, were voluntarily made, where the statements involved no confessions of guilt, but were merely inconsistent explanations of the possession of a stolen watch by defendant's companion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1212, 1213; Dec. Dig. \S 531(1).]

4. CRIMINAL LAW \S 412(2) — EVIDENCE — DECLARATIONS — FOREIGN LANGUAGE.

In a prosecution for burglary, testimony of the owner of the stolen goods as to a conversation he overheard between defendant and his companion while they were in jail, carried on in Spanish, was admissible, where witness understood Spanish to some extent and related only the part of the conversation which he clearly understood.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 896-910, 920-927; Dec. Dig. \S 412(2).]

5. CRIMINAL LAW \S 448(7) — EVIDENCE — CONCLUSION.

In a prosecution for burglary, a question to the owner of the stolen property as to whether he had the same powers of observation as any one that was with him had, following an unsuccessful attempt to secure a statement from him as to the relative distance between two houses located back of his store and between one

of such houses and the store, called for a conclusion of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1036, 1048; Dec. Dig. \S 448(7).]

6. CRIMINAL LAW \S 386 — EVIDENCE — OBSERVATION OF WITNESS.

In such prosecution, an objection to question on cross-examination of owner of stolen goods as to his powers of observation as to distances between his store and a house was properly sustained, where the witness could have given no more information than he did, whatever his powers of observation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 768, 875; Dec. Dig. \S 386.]

7. CRIMINAL LAW \S 1170½(5) — HARMLESS ERROR — CROSS-EXAMINATION — EXPLANATION — REMARK OF COURT.

In a prosecution for burglary, where the owner of the stolen goods after an exhaustive cross-examination as to the number of houses situated on the street back of that on which his store was, stated that there was more than one house, the refusal to permit the defendant's attorney to explain the object of such examination over the district attorney's objection, and the court's remark that the evidence was not material enough to take any time, was not prejudicial to defendant, where either an affirmative or negative answer would not have affected the witness' credibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3138; Dec. Dig. \S 1170½(5).]

8. WITNESSES \S 330(1) — EVIDENCE — CREDIBILITY OF WITNESS.

In a prosecution for burglary, a question to the owner of the stolen property who had been examined as to the number of houses situated on the street back of the street on which his store was located, "You are as sure of this as you are of any other part of your testimony," was meaningless, as either an affirmative or a negative answer would not add to or detract from his credibility, or the weight of his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1106; Dec. Dig. \S 330(1).]

9. CRIMINAL LAW \S 762(5) — INSTRUCTION — OPINION OF COURT.

In such prosecution, an instruction that under the information the jury might, if the evidence warranted, find the defendant guilty of burglary in the first or second degree, and that if there was a reasonable doubt, defendant should have the benefit of the doubt and be acquitted of the higher offense within Pen. Code, \S 460, was not objectionable as intimating that defendant was guilty of burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1731, 1758, 1759; Dec. Dig. \S 762(5).]

10. CRIMINAL LAW \S 784(4) — ARGUMENTATIVE INSTRUCTION.

In such prosecution, an instruction that where circumstantial evidence is wholly relied upon to prove defendant's connection with the commission of the crime, any fact essential to sustain the hypothesis of guilt and exclude that of innocence and any single fact from which the inference of guilt is to be drawn, must be proved by evidence satisfying the jury to the same extent as they are required to be satisfied of facts where the evidence is direct, was not objectionable as being argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1884, 1960; Dec. Dig. \S 784(4).]

11. CRIMINAL LAW **§118(3)—APPEAL—INVITED ERROR.**

Such instruction, if objectionable as argumentative, could not be complained of by defendant where it was given and read to the jury at his request.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. **§1137(3).**]

12. BURGLARY **§41(1) — BURGLARY IN THE FIRST DEGREE—SUFFICIENCY OF EVIDENCE.**

Evidence held to sustain a conviction of burglary in the first degree.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. **§ 94**; Dec. Dig. **§41(1).**]

13. CRIMINAL LAW **§1171(3)—TRIAL—CONDUCT OF DISTRICT ATTORNEY.**

In a prosecution for burglary, alleged misconduct on the part of the district attorney in stating that if defendant knew where the shoes of defendant and his companion were, the prosecution would attempt to get them, in reply to defendant's intimation that the prosecution which had once had possession of them had lost possession, through no fault of the defendant made in the presence of the jury was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. **§ 8127**; Dec. Dig. **§1171(3).**]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Frank Martinez was convicted of burglary in the first degree, and from the judgment and from an order denying a new trial, he appeals. Judgment and order affirmed.

J. D. McLaughlin, of Quincy, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant claims: That his rights were prejudiced by alleged errors of the court, in disallowing challenges of certain veniremen for implied bias, in allowing certain testimony to be received into the record, and in the giving of certain instructions. It is charged that he was prejudiced by alleged misconduct of the district attorney, and insisted that the evidence does not support the verdict.

The alleged crime was committed at the town of Portola, in Plumas county, between the hours of 8 and 10 o'clock of the evening of February 13, 1916. The building entered was the property of one Arkin. Therein he carried on the retail drug business, and also had living rooms, where he and his family resided. A portion of the store was occupied by one Johnson as a jewelry store and repair shop. On the evening named, Arkin and his family attended a moving picture show located on the opposite side of the street from the said store. He left the store at about half past 7 o'clock in the evening. Johnson had previously left the store and also attended the picture show mentioned. Arkin returned to the store at about 15 minutes after 9 o'clock on that evening, and discovered that a window to one of his living rooms in the rear of the building had been broken so as to admit of the easy entrance of a person into the building. An in-

vestigation following this discovery disclosed that the jewelry case belonging to Johnson had been broken into and a large quantity of watches, lockets, and other like articles had been abstracted therefrom, aggregating in value the sum of \$500 approximately.

The defendant and another man, known as Ed. Martinez and also as Ed. Leal, were, within a few days after the burglary was committed, arrested at Gerlach, Nev., and on the person of Ed. Martinez was found one of the stolen watches. Other facts developed at the trial will be stated as we consider some of the points, particularly the contention that the verdict is not sufficiently supported.

[1] 1. Objections by way of challenges for implied bias were interposed to the legal competency of four of the talesmen to serve as jurors in the case. These were jurors McKenzie, Grother, Guidici, and Ohlsen.

In reply to a question upon voir dire by the attorney for the defendant, McKenzie stated that the accused would be required to "produce evidence in his favor to create a reasonable doubt" in his mind as to the defendant's guilt. Grother and Ohlsen, also replying to questions by defendant's counsel, made similar replies. Guidici affirmatively answered the following question propounded by defendant's attorney:

"If there was a reasonable doubt in your mind as to the guilt of the defendant would you presume, or indulge in any possibilities that he would be guilty, to overcome that doubt?"

Each of the jurors, however, on being questioned by the district attorney, declared that, if accepted as a juror in the case, he would, in determining the question of the guilt or innocence of the defendant, be governed entirely by the evidence and the law as the court stated it to them; that he would, at all times, give the defendant the benefit of the presumption of innocence until his guilt was satisfactorily proved and acquit him if, after a full and fair consideration of the evidence by the light of the court's instructions upon the law, he entertained a reasonable doubt of his guilt. "Under this state of the record upon the question whether such jurors possessed such bias as would prevent them from trying the case fairly and impartially, it was for the court to determine that preliminary issue, and in all such cases the court's discretion will not be disturbed on appeal unless it appears that it has been abused." *People v. Conte*, 17 Cal. App. 771, 777, 122 Pac. 450, 457. As was well said in *People v. Ryan*, 152 Cal. 371, 92 Pac. 856, where the precise proposition under consideration was discussed:

"Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradic-

tions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. * * * Where there are such contradictions its decision is binding upon this court"—citing a large number of cases.

As is readily to be noted, the challenged veniremen in this case each made conflicting and directly contradictory statements as to the course he would pursue in the discharge of his duty as a jurymen—one statement which would disqualify him and another which would make him legally competent to serve—and, under these circumstances, it was, of course, with the trial court to decide, upon his examination as a whole, whether he was in all respects qualified to try the issue fairly and impartially. There is nothing upon the face of the record here indicating that in its decision in any of the instances referred to the trial court abused its discretion, and therefore the conclusion of that court upon the question is conclusive upon this court.

[2] 2. The next assignments involve objections which were made to the reception into the record of certain testimony. The case made against the accused was by evidence of circumstances, no direct proof of his guilt having been presented. The defendant, with Ed. Martinez or Leal, together applied for and secured work as section hands for the Western Pacific Company at Portola, a few days prior to the date of the burglary. They worked for the company for a few days only. They were subsequently seen together on the streets of Portola. The people, over objection by the defendant, were permitted to prove that the two men applied for and obtained work together; that the defendant wore a particular kind of cap while in Portola; that his companion wore a particular kind and size of shoes; that there was considerable quantity of snow on the ground in Portola at the time of the burglary, this testimony being allowed in connection with testimony that there were observed on the surface of the snow the impressions of human feet, and that measurements were made of the footprints so observed, which precisely compared in measurement with the shoes of the defendant and his companion; that the remnants of a leather case in which one of the watches taken from the store was kept were found a few days after the burglary at a place called Hawley, a short distance from Portola, and toward which place the defendant and his companion were seen hastily going by foot in the neighborhood of 10 o'clock of the night the building was entered, and other like circumstances tending in a greater or less degree to place upon the accused and Ed. Martinez or Leal responsibility for the crime. All this testimony, it is here claimed, was improperly received. Not so. The two men were shown to have been companions, and at all times in the company of each other from the time

they procured work with the railroad company until they were placed under arrest at Gerlach, Nev. The people, therefore, were entitled to the benefit of any testimony bearing upon the description of the two men and their wearing apparel, or which disclosed their joint movements and flight or their actions and declarations in the presence of each other having any tendency to show or point to their guilt of the crime charged.

[3] 3. It was not necessary to make a preliminary showing that the statements made by the defendant when placed under arrest, and those made by Ed. Martinez at the same time in the defendant's presence, were voluntarily made. The statements did not involve a confession of guilt. They merely involved conflicting or inconsistent explanations of the possession of the stolen watch found in the possession of Ed. Martinez. In their conversations with the officers, both denied that they were connected in any manner with the crime, or that they had any knowledge of it.

[4] 4. The ruling allowing the witness Johnson to state a conversation which he testified he overheard between the defendant and Ed. Martinez while they were confined in the county jail at Quincy, awaiting trial, was not erroneous. The conversation was carried on between the two men in the Spanish language, and the special ground of the objection to the testimony was that Johnson did not fully understand that language. But the witness testified that he could understand Spanish when spoken to some extent, and related only that part of the conversation which he testified that he clearly understood.

[5, 6] 5. It was not error to sustain the objection to the following cross-question to the witness Johnson:

"You had the same powers of observation as any one that was with you had, or didn't you?"

The question followed an unsuccessful effort to secure a statement from the witness as to the relative distances between two houses located back of the Arkin store and between one of those houses and said store. The question was argumentative in character and, as framed, called for a conclusion of the witness. But it is probable that what counsel intended to ask was whether the witness' opportunity for observation was equal to that of any other person with him at the time they were inspecting and following the footprints in the rear of the store. But, even so viewing it and if in that view a proper question, it is very clear that, inasmuch as the witness, after considerable questioning on that line, showed that he had formed no judgment as to the distances so sought to be shown, he could have given no more information upon the subject than he did, whatever his powers of observation might be or his opportunity for observation on that occasion might have been.

There are some other rulings similar to the above considered animadverted upon in briefs of the defendant, but even if not entirely correct, they were obviously harmless in their effect.

[7, 8] 6. There was nothing detrimental to the rights of the defendant either in the action of the court in refusing to permit his attorney to explain the object of a certain part of the cross-examination of the witness Johnson, and to which the district attorney objected, or in the language used by the court ruling upon the proposition. The witness Johnson had been exhaustively cross-examined upon the question as to the number of houses situated on a street back of the street which Arkin's store is situated. The witness declared that he was able to remember and say that there was more than one house on a certain part of the back street, whereupon counsel asked him, "you are as sure of this as you are of any other part of your testimony?" to which question an objection by the district attorney was sustained. Counsel then attempted to explain to the witness as to the number of houses, and upon objection by the district attorney, the court ruled and said, "I don't think that particular testimony is material enough to take any time with it." The question is of an argumentative character, and one which, though frequently asked of a witness on cross-examination, is really meaningless. Either an affirmative or negative answer to the question would not have the effect of adding to or detracting from his credibility or the weight of his testimony.

[9] 7. It is insisted that the court, in instruction No. 6, as given, told the jury that the defendant was guilty of one or the other of the two degrees of burglary. Said instruction reads:

Under the information in this case you may, the evidence warrant it, find the defendant guilty of burglary of the first degree or burglary of the second degree. Should you entertain a reasonable doubt as to which of the two degrees is guilty, if any, you will give the defendant the benefit of the doubt and acquit him of the lesser offense."

It seems to us that the language of said instruction is so plain and clear as to put beyond meaning thereof beyond all doubt or even possibility. It obviously means that, if the jury is satisfied by the proper degree of proof that the defendant committed the crime charged, but could entertain a reasonable doubt as to which of the degrees of that crime (Pen. Code, § 460), if any, he was, under the evidence, guilty of, then he would be entitled the benefit of such doubt, and in that case could be convicted only of the lower degree of the crime. It would seem to be hardly necessary to say that nowhere in said instruction does the court intimate that the defendant is guilty of the crime of burglary. [10, 11] 8. Instruction No. 16 is challenged on the ground that it is argumentative. It

explained that, where circumstantial evidence is solely relied upon for the proof of an accused's connection with the commission of a crime, "any fact essential to sustain the hypothesis of guilt and exclude the hypothesis of innocence," and any single fact from which the inference of guilt is to be drawn, "must be proved by evidence which satisfies the minds and conscience of the jury to the same extent that they are required to be satisfied of the facts in an issue in cases where the evidence is direct." We see nothing legally objectionable in the instruction; but, if it were amenable to just criticism, the defendant cannot complain of it, since the record shows that it was given and read to the jury at his request.

9. The general instructions preferred by the defendant and disallowed by the court we have carefully examined and find that they involved the statement of principles fully and clearly submitted to the jury in the court's charge. It is therefore unnecessary to give them special consideration.

[12] 10. We cannot say that the verdict was not justified. It at the least appears to be sufficiently supported by the proofs, and this is all that is required to put it beyond the power of a reviewing court to set aside a verdict, so far as the evidence is concerned. We have already stated that the evidence was not direct, but consisted wholly of circumstances. Some of the most important of these have been adverted to. It is not necessary to further rehearse them herein. There are, however, several other circumstances of no inconsiderable significance, when considered with the other circumstances, and they are: (1) That on the evening of the burglary and after Arkin and family and Johnson had left the burglarized building and gone to the picture show, a man answering the description of the defendant as to stature, build, and headgear was seen standing in a sort of hallway leading into the Arkin drug store and peering through the window of said store; (2) that when the defendant and Ed. Martinez were first searched at Gerlach, the watch was not found on the person of either. An Ingersoll watch of the value of \$1 was found on the person of Ed. Martinez, who declared to the officers that that was the only watch they had. In this connection, it was shown that, after Ed. Martinez was searched, he stepped up to and near the defendant, and that the two men were thereafter again searched and a gold watch positively identified by Johnson as one of the watches stolen from his store, was found on the person of Ed. Martinez; (3) that the defendant was heard to ask Ed. Martinez, while the two were confined in jail, if the latter had "told anything" to the officers, the natural inference from which question was whether Ed. had made any statement to the officers of an incriminatory character concerning the case or their possession of a part of the stolen property.

There is, then, this situation presented here, so far as the proof is concerned: The presence of the defendant and his companion in Portola just before the burglary was committed and thus opportunity to commit the crime available to them; the correspondence in size of the footprints on the surface of the snow leading to and from the building with the shoes worn by the defendant and his companion; the finding at Hawley, in which direction the accused were seen traveling, of a part of the leather case in which one of the stolen watches was encased when taken from the store, a short time after the burglary; the possession by one of the parties of one of the stolen watches, and the contradictory statements made by the defendant and his companion in attempting to explain such possession. These, with the other circumstances mentioned, make out what may well be deemed a strong circumstantial case. At all events, if, as appears to be so, the jury believed the circumstances and the evidence by which they were shown, we cannot say, as a matter of law, that they thus arrived at an erroneous conclusion.

[13] 11. The last point calling for consideration involves the charge of misconduct on the part of the district attorney during the progress of the trial. The most serious of the several objections under this head may be shown by the following colloquy:

Mr. McLaughlin: "While Mr. Myers (a witness for defendant) is coming, we will ask to strike out all the testimony in this case in regard to those shoes. The prosecution had those in their possession at one time, and could produce them here as an exhibit, if they had used due diligence; and we object to the shoes being used."

Mr. Kerr (district attorney): "We object to the statement of counsel that we had the shoes that got away from us before this trial was started through no fault of the prosecution."

Mr. McLaughlin: "Or defendant."

Mr. Kerr: "You tell us where they are and we will attempt to get them in here."

Mr. McLaughlin: "You probably know as much about their whereabouts as I do, Mr. Kerr, and we resent the insinuation in the remark."

Mr. Kerr: " * * * I certainly apologize if he (attorney for defendant) takes it as a personal proposition, for it wasn't meant that way."

It is, of course, always improper for an attorney in the trial of a case before a jury to make any remark pregnant with an insinuation that either party to the action, or any party acting on the suggestion or in the interest of one of the parties to the action, has suppressed testimony or disposed of physical objects so that they may not be available for use as testimony at the trial and which, upon inspection by the jury, might tend to weaken the case of one of the parties.

In the present case, both the district attorney and the attorney for the defendant, during the course of the discussion, made statements which should not have been made in the presence and hearing of the jury. While such conduct on the part of lawyers during the trial of a warmly contested case

is generally the result of their zeal for the interests of their clients and not intended as means for bringing some fact before the jury which it is not legally proper for them to know, it often results seriously to the rights of the parties, and may lead to gross injustice. In this case, however, it is reasonably probable that the remarks of the attorneys made no impression upon the jury. They involved a charge and countercharge by two persons, in theory at least hostile to each other, upon a matter not of overruling importance, since, as we have shown, there were many other inculpatory circumstances of a convincing character brought out against the accused than the circumstance of the footprints in the snow answering to the description of the shoes worn by the defendant and Ed. Martinez at the time of their arrest. The putting of the shoes themselves in evidence could have accomplished no more than to confirm or confute the testimony showing that, in size, they corresponded with the footprints; and if said testimony had been so confirmed or corroborated, nothing would have been added thereto, and if thus refuted, then the result would merely have been to destroy only one circumstance, important, it is true, but which still left many other circumstances the verity of which did not rest upon the production of the shoes and which, on their face, were sufficient to justify a verdict of guilty.

We have not succeeded in discovering the slightest semblance of misconduct by the district attorney in any of the several other assignments of misconduct on the part of that official. Those assignments, therefore, do not merit, and will not be given special notice.

We have now considered all the points to which we conceived special attention should be given, and, finding no prejudicial error in the record, the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

SWANSON v. DE VINE, Sheriff. (No. 2941.)

(Supreme Court of Utah. Nov. 16, 1916.)

1. APPEAL AND ERROR \S 854(1)—APPEAL ON JUDGMENT ROLL—EFFECT OF.

Where under the findings the court rendered judgment for plaintiff on two theories, the judgment must, on defendant's appeal on the judgment roll without a bill of exceptions, be upheld if either theory was correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 8410; Dec. Dig. \S 854(1).]

2. FRAUDULENT CONVEYANCES \S 47—"STOCK OF MERCHANDISE"—BULK SALES—STATUTES—APPLICABILITY.

Comp. Laws 1907, \S 2063x, entitled "An act to regulate the purchase, sale, transfer and incumbrance of a stock of goods, wares or merchandise in bulk, * * * otherwise than in the ordinary course of trade," provides that it shall be the duty of every purchaser of a stock of merchandise in bulk to secure from the seller a

verified statement as to his creditors to whom five days' notice shall be given by registered mail so that the purchase price may be paid to them, and that every sale not so made shall be fraudulent and void. Plaintiff purchased the business of one engaged in shoe repairing who sold to his customers small quantities of merchandise or materials which he carried for repair purposes consisting of shoe laces, polish, shoe brushes, and inner soles. These sales did not average more than \$5 monthly. Held that, though the laces, etc., were displayed by the seller in a small showcase, the appliances and goods for repairs did not constitute a stock of merchandise within Bulk Sales Act, and so compliance was unnecessary.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 84; Dec. Dig. § 47.

For other definitions, see *Words and Phrases*, First and Second Series, *Stock of Merchandise*.]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Erick P. Swanson against Thomas A. De Vine, Sheriff of Weber County, Utah. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. Horn, of Ogden, for appellant. A. M. Pratt, of Ogden, for respondent.

STRAUP, C. J. One Guernsey, in the name of the "Goodyear Shoe Repair Factory," at Ogden City, was, as is alleged and found, the owner and in the possession of repair machinery, tools of trade, leather, and other material and goods used in his business or trade of shoe repairing. As to the character of his business the court found that:

"Shoe repairing was his principal trade or business. He was not a merchant, in the sense that he was engaged in selling merchandise distinct from repairs that he made for his patrons or customers, but would and did on occasions, when requested by customers, sell, to the amount of \$5 or thereabouts monthly, small quantities of his stock of merchandise or materials which he carried for repair purposes, consisting of shoe laces, polish, shoe brushes, and inner soles, and sometimes pieces of leather, the same, with the exception of leather, being displayed in a showcase, in the window of his place of business."

He sold his business, tools, machinery, and goods to the plaintiff for a valuable and an adequate consideration. Both he and the plaintiff in the negotiations and sale, as found by the court, acted in good faith. But Guernsey at that time was indebted to a leather company of Colorado in the sum of nearly \$700 for "merchandise sold." The sale from Guernsey to the plaintiff was made without notice to creditors and was not in compliance with the statute (C. L. 1907, § 2063x) relating to a sale and purchase of "merchandise in bulk." Upon the theory that the sale was fraudulent and void and upon attachment proceedings in an action brought by the leather company, all the machinery, tools, and goods sold by Guernsey to the plaintiff were seized by the sheriff and taken into his possession as the property of Guernsey. The plaintiff thereupon brought this action to reclaim them or their value from the sheriff.

[1] Upon the findings the plaintiff was awarded a judgment on the stated conclusions: (1) That the act did not apply to the sale; and (2) that the act was unconstitutional. The defendant appeals on the judgment roll without a bill of exceptions. If either position taken by the court is correct then must the defendant fail. The determination of the one is not dependent upon the other.

[2] We thus look at the first. The title of the act is "An act to regulate the purchase, sale, transfer and incumbrance of a stock of goods, wares, or merchandise, in bulk, or of any portion of the stock, * * * wares and merchandise, otherwise than in the usual course of trade, and prescribing penalties for the violation thereof." The act itself provides:

"It shall be the duty of every person who shall bargain for or purchase any portion of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk"

—before paying the vendor, to demand and receive from him a verified statement as to his creditors to whom five days' notice shall be given by registered mail, and shall pay the purchase money to the creditors or see to it that it is paid to them; and that every sale within the provisions of the statute not so made is declared fraudulent and void. The findings are conclusive. They, in effect, are that Guernsey was not a merchant, but a shoe repairer operating a "shoe repair factory"; that his material or merchandise consisting of shoe laces, polish, brushes, inner soles, and leather carried by him were "for repair purposes," but occasionally sold small quantities of them "to his patrons or customers," when requested. We think it quite clear that the machinery, the motor, the tools, the cash register, and the showcase, etc., were not, within the meaning of the act, "any portion of a stock of merchandise," and were not articles or goods which the seller kept for sale. *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629; *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067; *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 85 N. E. 264, 126 Am. St. Rep. 184, 20 L. R. A. (N. S.) 167, 14 Ann. Cas. 434. It, however, is especially insisted that the heelplates and cushions, the laces, the spools of thread, the shoe soles and leather, the polish and brushes, etc., were a "portion of a stock of merchandise." But even as to these the finding is that they were "carried for repair purposes" and not for sale as commodities or merchandise. The act, we think, applies only to sales of commodities by persons who make it a business to buy commodities for sale, and who, in the ordinary course of trade, sell them at retail and in small quantities. The findings preclude the conclusion that these articles were purchased, carried, or sold as a stock of merchandise in the ordinary course of trade. That the

seller at the request of his customers occasionally sold some of the articles or material to them does not, within the meaning of the act, make them a "portion of a stock of merchandise." As well say that the horse-shoes and horseshoe nails carried by a blacksmith in his shop for shoeing horses are a portion of his stock of merchandise if, occasionally, he should sell a few nails or horseshoes to his customers; or that the laces and polish carried by "a bootblack," in the business of shining shoes, are a portion of his stock of merchandise if, occasionally, he should sell laces and polish to his patrons. The court, in the case of *Conn. Steam Brown Stone Co. v. Lewis*, 86 Conn. 386, 85 Atl. 534, 45 L. R. A. (N. S.) 495, said:

"And so, too, the extent to which retail sales are made by one, in connection with another business, should be considered in deciding whether the person making such retail sales can fairly be said to be one 'who makes it his business' to so sell commodities in small quantities for the purpose of making a profit. One who purchases metals and wood with which to manufacture and sell sewing machines at retail, can hardly be said to make it his business to buy such original materials and sell the 'same' for the purpose of making a profit upon the commodities which he has bought; nor can a wholesale dealer or manufacturer, because he has occasionally made a sale of goods at retail, properly be said to 'make it his business' to sell commodities in small quantities for the purpose of making a profit upon the goods thus sold."

We think that applies here. Though the Connecticut statute in phraseology is somewhat dissimilar to ours, yet it has the same central idea or aim to prevent the sale of goods in bulk until the creditors of the seller have been paid. It, however, is urged that section 2063x3 of the statute makes the act applicable to "a trade" or "a business" as well as to a stock of merchandise. It reads:

"Any sale or transfer of any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or whenever an interest in or to the business or trade of the vendor is sold or conveyed or attempted to be sold or conveyed, such shall be deemed a sale and transfer in contemplation of this title."

We think the words "trade" and "business" are there used in the sense of a trade in or business relating to merchandise or a stock of goods—carrying on a business or trade in merchandise—and not in the sense of an occupation, handicraft, or a business distinct from merchandise. It is clear such a subject, as is suggested, is not expressed nor implied in the title of the act. Thus, to give it effect, as is contended by the defendant, would render it invalid in such respect. We therefore are of the opinion that the court upon the findings properly held that the statute was not applicable. Reaching that conclusion it is unnecessary to consider the other question as to the invalidity of the statute on the alleged grounds that it is in restraint of trade, class legislation, and is discriminatory.

The judgment of the court below is therefore affirmed, with costs.

FRICK and McCARTY, JJ., concur.

BERRYHILL v. THRAILKILL (No. 7842.)
(Supreme Court of Oklahoma. Oct. 10, 1916.
Rehearing Denied Nov. 14, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 1001(1), 1010(1)—REVIEW—QUESTIONS OF FACT—VERDICT.

Where the evidence reasonably tends to support the verdict of a jury or the finding of the court, the judgment will not be reversed upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933, 3979-3981; Dec. Dig. \Leftrightarrow 1001(1), 1010(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Wagoner County; George C. Crump, Judge.

Action by Harvey K. Thrailkill against W. T. Berryhill. Judgment for plaintiff, and defendant brings error. Affirmed.

Blair & Brown, of Wagoner, for plaintiff in error. Robert C. Payne, of Wagoner, for defendant in error.

BLEAKMORE, C. This action originated in the justice court in Wagoner county. The plaintiff below, Harvey K. Thrailkill, filed his bill of particulars in two counts, alleging in the first that he had entered into an oral contract with the defendant, W. T. Berryhill, by the terms of which he undertook to construct for him a cistern of certain dimensions, and for which the defendant agreed to pay him the sum of \$90, and alleged his performance of such contract. On the second count he sought to recover upon a quantum meruit. Defendant answered, admitting the contract, but alleging nonperformance on the part of the plaintiff, in that he had not constructed the cistern according to the terms of the contract.

From the judgment of the justice an appeal was perfected to the district court of Wagoner county, wherein there was trial to the court resulting in judgment for the plaintiff in the sum of \$75, and a division of the costs. From this judgment, defendant appealed.

The sole ground upon which a reversal of the judgment is sought is that there was no evidence tending to support the second count in the bill of particulars, and that the evidence is insufficient to sustain the judgment on the first count.

As to whether plaintiff had performed the contract on his part by completing the cistern in accordance with the terms thereof the evidence is conflicting. Upon objection of defendant the trial court excluded evidence of the reasonable value of the services rendered by plaintiff. The evidence adduced dis-

closes that the plaintiff constructed a cistern of the dimensions specified in the contract; that shortly thereafter he approached the defendant for his compensation, and that defendant then informed him that the cistern had not been constructed in accordance with the terms of the contract, and declined to pay the full contract price therefor, but offered to pay him \$75, without disclosing in what respect he claimed plaintiff had failed to perform the contract on his part. It was shown upon the trial that the cistern leaked. Plaintiff testified that although he had not been requested so to do, he was willing and had offered to make the necessary repairs, and that the same could be done at an expense of \$10.

While the rule is well established, as contended by defendant, that in an action where the petition declares on an express contract and full performance thereof is pleaded, no recovery can be had upon a quantum meruit, yet where, as in the instant case, recovery is sought both upon an express contract and upon quantum meruit, and at the instance of defendant evidence as to the reasonable value of the services rendered is excluded, and the evidence as to full performance of the express contract is conflicting, a finding and judgment that the contract had been performed will not be set aside.

This court by an unbroken line of authorities is committed to the doctrine that where the evidence reasonably tends to support the verdict of a jury or the finding of the court, the judgment will not be reversed upon appeal.

It follows the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

MISSOURI, K. & T. RY. CO. v. SKINNER.
(No. 7121.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. CARRIERS §208 — CARRIAGE OF LIVE STOCK—NEGLIGENCE—DIPPING CATTLE.

"Dipping" cattle by a railway company in compliance with quarantine regulations established by law is a part of the service required by the shipping contract, and the question of negligence in the performance of this service must be measured by the terms of that contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 924-928; Dec. Dig. §208.]

2. CARRIERS §228(3) — CARRIAGE OF LIVE STOCK—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In an action for damages against a railway company for negligence in failing to water cattle before dipping them, in compliance with established quarantine regulations—although the plaintiff contends that the contract for dipping was an independent, oral contract—the exclusion of the shipping contract, when offered in

evidence in support of the allegation of the answer setting up such contract as a defense to the action, is prejudicial error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. §228(3).]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action by J. W. Skinner against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Clifford L. Jackson, W. R. Allen and M. D. Green, all of Muskogee, for plaintiff in error. Harve N. Langley, of Pryor, and Guy F. Nelson, of Muskogee, for defendant in error.

GALBRAITH, C. The defendant in error sued the plaintiff in error for damages to a shipment of cattle, on account of its negligent failure to water the cattle before dipping them. It is charged in the petition that the plaintiff shipped six carloads of cattle from Camden, Ark., to Adair, Okl.; that since they came from south of the quarantine line, established by the federal and state authorities, it was necessary to have them disinfected by dipping in arsenic dip before delivery to the shipper; that one of the railway company's dipping vats was located at Chouteau, in Mays county, Okl., and that these cattle were dipped at that place; "that in consideration of the sum of 25 cents per head, which said sum plaintiff paid defendant, the said defendant undertook to and did disinfect said cattle, as aforesaid, by dipping them in a solution containing arsenic, which said undertaking or contract to disinfect was oral," and further alleged "that on account of the failure of the defendant to water said cattle, and its failure and refusal to furnish plaintiff and plaintiff's caretaker with any facilities for watering said cattle, the said cattle were weakened and rendered extremely thirsty, and drank large quantities of the dipping solution aforesaid while they were being dipped by said defendant, as aforesaid, and were thereby made sick and injured." It is charged that 85 head of the cattle died from the effects of drinking this disinfectant, and that the company is liable for their value. The facts, in brief, are that J. W. Skinner is a resident of Mays county, living near Adair, and is engaged in farming and stock raising; that in the spring of 1913 he purchased some Arkansas cattle, brought them over to his place in Oklahoma for the purpose of feeding them; the cattle were shipped from Camden, Ark., to Adair, Okl. The Missouri, Kansas & Texas Railway Company received the shipment at Wagoner, on the morning of April 21, 1913, and about 1 o'clock of that day moved the cattle forward to Chouteau, where they were unloaded and disinfected in a dipping vat at

that place. They were not, however, dipped until the following day, April 22d. Late in the afternoon of that day they were reloaded in the cars and forwarded to Adair, and were delivered to the shipper. Some of these cattle were dead in the cars when they were unloaded at Chouteau. Nothing is claimed, however, for these, but after they were dipped 2 or 3 died in the pens at Chouteau, and 2 or 3 in the cars while being transported to Adair, and some 30 head died a week or 10 days after they were delivered at Adair. In the process of dipping the animals pass from the dipping vat to a platform or draining pen, where they are required to remain 10 or 15 minutes to allow the fluid to drip from their bodies, and this platform was so arranged that the fluid was supposed to drain back into the dipping vat. It is claimed that the drains in the draining pen were permitted to fill up so that the fluid did not run back into the vat as was intended, but that large quantities of it stood in pools in this pen, from which the cattle being very thirsty, drank and were thereby poisoned, and that if they had not been thirsty they would not have drank of the fluid, and, of course, would not have been poisoned; that the failure to water the cattle before dipping them was negligence, and the proximate cause of the damage sustained.

It is contended by the railway company that dipping these cattle was a service covered by the shipping contract, and that its duties and liabilities in connection with such service must be measured by the terms of that contract; that under this contract it was not its duty to water the cattle, but the shipper undertook to care for and water the cattle in consideration of a reduced freight rate conceded in said contract, and therefore it was not liable for failure to perform a duty which the shipper had undertaken and agreed to perform himself. On the other hand, the shipper contends that the shipping contract was merely a contract for the transportation of the cattle, and that he claims nothing on account of that contract, but that he made a separate and independent, oral contract with the agent of the railway company for the dipping of these cattle, and that it was this oral contract that was negligently performed, which gave rise to his injury, and on account of which this action was brought. The only evidence in the record as to the oral contract is found in the testimony of the shipper, and is as follows:

"Q. Did you have any facilities of your own for dipping or disinfecting these cattle? A. No, sir. Q. Did you make any arrangements with anybody for doing that? A. Not until after they got up there. Q. Who did you make it with? A. Mr. Horn got on the train— Q. Who is he? A. He was working for the railway company, stock loading and unloading, and I suppose he did the dipping; he said that that was his business. Q. Did you make any arrangements with him about the dipping? A.

Yes, sir; I asked what he would charge. He said 25 cents a head. I said, 'Isn't that pretty steep?' He says, 'No, we charge you 25 cents a head.' He says, 'Do you know they have to be dipped?' I said, 'Yes.' Q. What did you do; did you pay it? A. Yes, sir, couldn't help myself. Q. Did you pay it? A. Yes, sir."

It will be observed that there was nothing in this contract in reference to watering the cattle before dipping them, and it does not seem that any duty of the railway company to water the cattle before dipping them would arise under this oral contract, especially since the quarantine regulations controlling the dipping of cattle did not require that the cattle should be watered before being dipped.

[1] This court seems to be committed to the doctrine that it is the duty of the railway company, where the quarantine regulations require it, to furnish facilities for dipping cattle before delivering them to the consignee in compliance with the quarantine regulations, and that this service is a part of the public service called for and covered by the shipping contract. *Midland Valley R. Co. v. State et al.*, 35 Okl. 672, 130 Pac. 803; and *Midland Valley R. Co. v. Ezell*, 36 Okl. 517, 129 Pac. 734.

[2] It appears that the plaintiff in error had a tariff of charges, for dipping cattle, filed with the Interstate Commerce Commission, and also with the Corporation Commission of Oklahoma, and that the charge for this service set out in this tariff was the same as that claimed to have been made in the oral contract. The trial court took the view of the plaintiff below that the contract for the dipping was an independent, oral contract, and not covered by the shipping contract, and therefore excluded the shipping contract when offered in evidence. This ruling is assigned as error.

It does not seem to be important to a decision in this case to determine whether or not an independent oral contract for dipping the cattle was entered into. The negligence for which damages were claimed arose before the completion of the contract of carriage, and while the company was acting as a common carrier. The duty to water, if it existed, arose before the cattle were required to be dipped, and was no part of that service. The origin of this duty was prior in time to the commencement of the alleged oral contract, and was an obligation arising, if at all, under the shipping contract. The "dipping" being required by law before the cattle were delivered to the shipper, and this being a service required of the railway company under its shipping contract, and this contract having been excluded when offered in evidence, in support of the allegations of the answer denying liability, the court and jury were without the only proper evidence for determining the duties and liabilities of the railway company, and therefore could not properly determine the same.

On account of the error in excluding the shipping contract, the judgment is reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

COOK v. CARTER et al. (No. 1831.)
(Supreme Court of Oklahoma. Oct. 3, 1916.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES *§ 43(1) — TRANSACTIONS INVALID—PROPERTY TRANSFERRED.*

A debtor in the disposition of his property can commit a fraud upon his creditors only by disposing of such of his property as the creditor has a legal right to look to for his pay.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 95, 99, 100; Dec. Dig. *§ 43(1)*.]

2. EXEMPTIONS *§ 88—SALES — RIGHTS OF CREDITORS.*

The sale of personal property, "exempt from execution or liens," does not render such property subject to attachment in an action upon an unsecured claim against the vendor.

[Ed. Note.—For other cases, see *Exemptions*, Cent. Dig. § 111; Dec. Dig. *§ 88*.]

Commissioners' Opinion, Division No. 2. Error from County Court, Tillman County; T. E. Campbell, Judge.

Action by Wm. Cook against F. O. Carter and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

McGuire & Candill, of Frederick, and Louis P. Mosier, of Pawhuska, for plaintiff in error. Mounts & Davis, of Frederick, for defendants in error.

GALBRAITH, C. This was an action in replevin instituted in the justice of the peace court, involving the ownership and right to the possession of the following household goods, to wit:

"One extension table, one stand table, one iron bed, one cot, one steel cot, one set of bed springs, and four dining chairs, of the value of \$15."

There was judgment for the plaintiff. On appeal to the county court there was a trial de novo upon an agreed statement of facts.

It appears that the property involved was in the possession of and being used by one Rice, who was the tenant of the defendant in error Caldwell, and that Rice was indebted to Caldwell for rent in the sum of \$15; that Caldwell brought suit on this claim and caused an order of attachment to issue, and the goods in controversy to be seized thereunder. It is further agreed that prior to the seizure of these goods under the order of attachment Rice had sold them to the plaintiff in error, Cook, and had received the full purchase price, but had retained the possession of the property, and had paid rental thereon; that after the property was seized Cook commenced this action to recover possession of it from Caldwell, and the constable

who served the writ of attachment. It is also agreed:

"That said property was household furniture, and, while owned by said Rice, was exempt from execution or lien."

The county court found for the defendants, and rendered judgment in their favor for costs. From that judgment, an appeal has been prosecuted to this court.

Two errors are set out in the petition in error, and these involve the same question, namely, that the judgment is not sustained by the evidence, and is contrary to law.

It is contended on behalf of the plaintiff in error that the property involved was exempt property and not subject to execution or lien, and therefore the creditor, Caldwell, had no right to question the sale of the property made by Rice to Cook. On the other hand, it is contended that although the property was exempt while Rice owned it, when he sold it he committed a fraud against his creditors, and the property immediately became subject to attachment by his creditors.

[1, 2] The exemption statute in force at the time this action arose (section 3348, Snyder's Statutes) declares:

That exempt property "shall be reserved * * * from attachment or execution and every other species of forced sale for the payment of debts. * * *"

The Supreme Court of Oklahoma Territory held in *Irwin v. Walling*, 4 Okl. 123, 44 Pac. 219, that giving a mortgage on exempt property did not operate as a waiver of the exemption given by statute. That holding has not since been departed from in this jurisdiction. The creditors of Rice could have no interest in his exempt property. He might sell it or give it away if he chose to do so, and none of the creditors' rights were invaded or abridged.

In *Chandler v. Colcord*, 1 Okl. 260, 275, 32 Pac. 330, 335, the court said:

"The law is well settled, that a creditor, who has no lien on the property covered by a chattel mortgage, cannot be permitted to assail the validity of the mortgage on the ground that it was made with intent to hinder, delay, and defraud the creditors of the mortgagors. In order to do so, he must not only obtain a judgment, but must have a valid execution against the property of the mortgagor."

The Supreme Court of Kansas in *Rice v. Nolan*, 33 Kan. 28, 5 Pac. 437, in answer to the contention that giving a mortgage on exempt property waived the exemption, said:

"This claim is not tenable. Such a ruling would in effect be a diminution of the benefit given by the statute to the debtor. If the exemption could be thus limited, and the lien upon the property should be nearly or quite equal to its value, the beneficent purpose of the Legislature in giving the exemption would be defeated. Where he gives chattel mortgages upon exempt property, he only waives the right of exemption to the extent of the mortgages given, and they do not affect his rights against any one except the mortgagees."

In *Kershaw v. Willey*, 22 Okl. 677, 680, 98 Pac. 908, 909, the court said:

"The same rule does not apply to exempt property in relation to its disposal as to unexempt property, which is always subject to the payment of debts. It has been held that the husband can transfer exempt property without consideration, and his creditors cannot complain (*Hixon & Co. v. George et al.*, 18 Kan. 253); and that a debtor in the disposition of his property can commit a fraud upon his creditors only by disposing of such of his property as the creditor has a legal right to look to for his pay" (citing cases).

Since it is agreed that the property involved in this suit was "exempt from execution or liens," it follows that Rice's unsecured creditors had no interest in it and no right to question the sale of it, and that the property was not subject to Caldwell's attachment, and could not be made subject to the payment of his debt; therefore he had no interest in the sale of the property from Rice to Cook, and could not question the regularity of the same. It follows, therefore, that the judgment of the trial court was contrary to law, and was not supported by the evidence, and that the judgment appealed from should be reversed.

Since the amount involved in this action is so small, and it has been pending so long, and the facts were agreed to by the parties, it seems that every consideration should constrain us to end this litigation here and now.

The judgment appealed from is therefore reversed, and the cause remanded, with directions to the county court of Tillman county to vacate its judgment in favor of the defendants in error, and to enter judgment in favor of the plaintiff in error for the return of the property involved, or for its value and interest thereon from the date of the seizure, and for costs.

PER CURIAM. Adopted in whole.

CAREY, LOMBARD, YOUNG & CO. v.
HAMM et al. (No. 7418.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

COUNTIES ~~659~~ — COUNTY COMMISSIONERS —
PERSONAL LIABILITY.

The county commissioners of Garvin county contracted as such with the plaintiff for certain lumber and building material to be used in the work of eradicating the "Texas fever tick." At the time the contract was made it was within the estimate duly made and approved by the excise board of Garvin county. Thereafter such estimate and the levy made thereunder were held to be void. *Held*, that the persons constituting the board of county commissioners were not individually liable to the plaintiff for the value of the material so bought.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 83, 84; Dec. Dig. ~~659~~.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Garvin County; F. B. Swank, Judge.

Action by Carey, Lombard, Young & Co. against J. R. Hamm and others. From a

judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

J. B. Dudley, of Norman, for plaintiff in error. Blanton & Andrews, of Pauls Valley, for defendants in error.

BURFORD, C. It appears from the petition in this cause that the plaintiff in error in August, 1915, sold to the defendants, Gray, Harrison, and Hamm, acting as the board of county commissioners of Garvin county, certain lumber and material to use in the construction of a dipping vat necessary in the eradication of the "Texas fever tick." It appeared that the commissioners, supposedly acting under the authority of Session Laws of 1909, c. 2, as amended by chapter 115, Session Laws 1910-11, had attempted to create a quarantine district in Garvin county, and appropriated the sum of "\$2,500 for the eradication of the 'Texas fever tick'"; that they had included in their report to the excise board the amount of \$2,500 as necessary for that purpose, and that the excise board had made the estimate in that amount, and had levied a tax sufficient to produce the same. The board of county commissioners bought lumber aggregating \$290.17 from the plaintiff, and drew a warrant for \$173.99 as part payment. It appears from the face of this warrant that at the time it was drawn against the contingent fund in which the \$2,500 so appropriated had been included, it was within the estimate and funds provided by the excise board. Before the warrant had been paid, however, and prior to issuance of any warrant for the balance due, an action was brought to enjoin the allowance of any claims or the payment of any warrants against this fund, alleging that the levy had been illegally made, for the reason that it was not based upon a petition as required by law. It seems that the commissioners took the view that they had the discretionary power to create a fund, and the excise board that it had power to make the levy without petition. This view was concurred in by the district court, but upon appeal to this court the levy was held to be unlawful for the reason that the petition required by law had not been filed, and the issuance or payment of any claim against the fund was to be enjoined. *Adams v. Board of County Commissioners of Garvin County*, 35 Okl. 440, 130 Pac. 148. Thereupon the plaintiff brought this action against the individual members of the board of county commissioners and their official bondsmen to recover the amount of the lumber sold and delivered. To the petition alleging these facts a general demurrer was sustained, and from this judgment of the trial court the plaintiff brings the cause here for review. We find no error in the judgment of the trial court. Although there is some conflict in American authority in regard to the liability

ity of public officials for making contracts beyond their authority as such, the view adopted in this state is laid down in *Martin v. Schuermeyer*, 30 Okl. 735-738, 121 Pac. 248, 249, where it was said:

"The law is that an officer, contracting on behalf of a public corporation, and intending to so contract, is not personally liable on his contract, where he has been guilty of no fraud or misrepresentation, and where the person with whom he contracts has the same means of knowing the extent of his authority as he has, though he exceeds his authority, and for that reason does not bind the corporation (citing cases). The reason for this rule is that the powers of officers of municipal corporations are prescribed by law, and the public had equal means of knowing what the law is with the officers themselves."

This view is well sustained by both textbook writers and the courts. Mr. Dillon, in his work on *Municipal Corporations* (5th Ed.) vol. 1, p. 443, says:

"In the case of officers of municipalities, it has been sought to charge them with liability under contracts made by them in excess of their official powers in analogy to the principles under which the agent of a private individual becomes personally responsible for an ultra vires contract upon a representation, express or implied, that he has authority to make such contract on behalf of the principal. But the courts have refused to hold the officers of a municipality personally liable for contracts ultra vires, in the absence of actual fraud or deception. If a contract be made by an officer, acting officially, in excess of his authority, or unintentionally, under an innocent mistake of the law, without any intentional misrepresentation or deception, the officer is not in this case personally liable to persons with whom the contract is made. The authority and powers of the officers of a municipality are regulated by law, and all parties dealing with the officer must, at their peril, take notice of the nature and extent of his authority, and if the contract is invalid, because in excess of the powers of the officer, the persons contracting with him have no redress against him."

Many of the cases are collected in a monographic note to the case of *Lawrence v. Toothaker*, 75 N. H. 148, 71 Atl. 534, as reported in 23 L. R. A. (N. S.) 428. The annotator there says:

"Whatever may be the rule as to the individual liability of persons who, as agents for private parties, enter into a contract which is not within the scope of their authority, without doubt it is the general rule that, when public agents, in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable unless the intent to incur personal responsibility is clearly expressed, although it should be found that, through ignorance of the law, they have exceeded their authority."

Schloss & Kahn v. McIntyre, 147 Ala. 557, 41 South. 11, is very similar upon the facts. In that case the defendants, acting under the authority of an act of the Legislature establishing a liquor dispensary at Ashford, purchased liquor of the plaintiff for sale in the dispensary. Thereafter the act itself was declared unconstitutional, and the plaintiffs brought action against the defendants personally. A demurrer was sustained to their

petition, and on appeal, after reviewing the cases, the Supreme Court of Alabama said:

"In this case, both parties were mistaken in supposing that the dispensary had a legal existence. It had been established under color of a statute duly enacted according to constitutional forms, although invalid because of the nature of some of its provisions, and the plaintiff had all the opportunity to know this infirmity which the defendant possessed. The defendants made no promise to pay for the liquors. It is not averred that from them they derived any personal benefit, and they neither made misrepresentations to the plaintiffs nor perpetrated any fraud upon them. The demurrer was properly sustained."

In the case at bar the county commissioners undoubtedly acted under misapprehension of their legal powers. This misapprehension was concurred in by the district court, and it was only upon appeal that it was finally determined that they had no power to act. The statute, regulating their powers, was as open to the plaintiffs as to them, and also, if a petition had been filed, it would have been a matter of public record in the proceedings of the board that there was no such record, and could have as well been known to the plaintiff as to the defendants. Under the decision of this court in *Martin v. Schuermeyer*, supra, sustained by the authorities above quoted, it is apparent that there is no liability upon general principles upon the board of county commissioners for the lumber purchased from the plaintiffs.

It remains to be seen if liability is fixed upon the county commissioners by statute. Sections 7 and 9, c. 80, Sess. Laws 1910-11, provide as follows:

"Sec. 7. It shall be unlawful for any officer to issue, approve, sign, attest or register any warrant or certificate of indebtedness in any form in excess of the estimate of expenses made and approved for the current fiscal year or authorized for such a purpose by a bond issue, and any such warrant or certificate of indebtedness issued, approved, attested or registered in excess of the estimate made and approved or authorized by a bond issue, shall not be a charge against the municipality upon which it is issued, but may be collected by civil action from any officer issuing, drawing, approving, signing, attesting, registering or paying the same, or from either or all of them, or from their bondsmen."

"Sec. 9. It shall be unlawful for the board of county commissioners * * * to make any contract for, incur, acknowledge, approve, allow or authorize any indebtedness against their respective municipality or authorize it to be done by others, in excess of the estimate made and approved by the excise board for such purpose for such current fiscal year, or in excess of the specific amount authorized for such purpose by a bond issue. Any such indebtedness, contracts incurred, acknowledged, approved, allowed or authorized in excess of the estimate made and approved for such purposes for such current fiscal year or in excess of the specific * * * issue, shall not be a charge against the municipality whose officer or officers contracted, incurred, acknowledged, approved, allowed or authorized or attested the evidence of said indebtedness, but may be collected by civil action from any official contracting, incurring, acknowledging, approving or authorizing or attesting such indebtedness, or from his bondsmen."

It is insisted that under the sections a liability is fixed upon the commissioners. We are unable to agree with this contention. The statute is somewhat penal in its nature, and fixes a liability as above shown not imposed by the general law. It makes county commissioners liable whenever they exceed the estimate made and approved for the current year, or where they exceed the amount of an authorized bond issue. The estimate is made by the excise board. The county commissioner had nothing to do with it, except to recommend the amount they desired, which the excise board included in the estimate. When they bought the lumber in question they were acting within an estimate then provided for them by the excise board. We think they cannot be held liable for the contract so made, by reason of the fact that the excise board acted beyond its powers. As was said in the case of *Shannon v. State ex rel.*, 33 Okl. 293-299, 125 Pac. 1106, 1108:

"When the board of county commissioners is called upon to approve or allow any claim against any fund of the county, or any officer, whose duty it is to issue a warrant when such claim is allowed, is called upon to issue such warrant, they may look only to the estimate made and approved by the excise board, and to the amount of claims allowed or warrants already issued thereunder during such fiscal year, to determine whether they are authorized to approve the claim, or to issue a warrant therefor."

We are constrained to hold that, where county commissioners, acting innocently, under a mistaken idea of the law, and without any fraud or misrepresentation on their part, contracted a debt within an estimate made and approved by the excise board, they are not personally liable by reason of the fact that the estimate is thereafter held to be invalid and void, upon facts, and for reasons as open to the knowledge of the persons contracting with the board as they were to the board itself.

Judgment affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. DIZNEY.
(No. 7853.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

CARRIERS — 280(1), 321(1) — NEGLIGENCE — 138(2) — TRIAL — 194(18) — INJURIES TO PASSENGERS — ACTIONS — INSTRUCTIONS — INVADING PROVINCE OF JURY.

Instructions in this case examined and held to present the law of the case to the jury. *Oklahoma Railway Company v. Milam*, 45 Okl. 742, 147 Pac. 814, followed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085-1088, 1102, 1106, 1109, 1326, 1331; Dec. Dig. — 280(1), 321(1); *Negligence*, Cent. Dig. §§ 355, 370; Dec. Dig. — 138(2); *Trial*, Cent. Dig. § 466; Dec. Dig. — 194(18).]

Commissioners' Opinion, Division No. 3. Error from District Court, Garvin County; F. B. Swank, Judge.

Action by George M. Dizney against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Moore, C. O. Blake, and R. J. Roberts, all of El Reno, and K. W. Shartel, of Oklahoma City, for plaintiff in error. Parker & Simons, of Enid, and Blanton & Andrews, of Pauls Valley, for defendant in error.

HOOKER, C. This is an action for personal injuries alleged to have been received by the defendant in error while a passenger upon one of the trains of the plaintiff in error operating between Shawnee, Okl., and Oklahoma City, Okl., on the 14th day of March, 1913. In the petition it is alleged that the train upon which the plaintiff below was riding was a vestibule train, and consisted of an engine and three passenger coaches, and that the passageways between the three passenger coaches were wholly closed by vestibules; and that each of said vestibules had an outer opening upon the steps at the end of each of said cars, and within said vestibule doors, and over the steps at either end of said passenger coaches, were trapdoors, which when closed made a complete floor and inclosure within each of said vestibules, which said vestibules were designed for the protection of passengers, and to enable them to pass with safety from one car to another while the train was in motion; and that upon this train in which the plaintiff was traveling at the time of his injury there was maintained a free and uninterrupted access through said vestibules for the accommodation and convenience of the passengers on said train; and that while the plaintiff was a passenger on said train, operated by the company as aforesaid, he did proceed from the coach in which he was riding to the front door of the same, there stepped into the vestibule at the front end of said coach for the purpose of passing through said vestibule into the coach ahead of him; and that the vestibule had no light; and that the trapdoor on the front end of the coach on which plaintiff was riding had been by said defendant carelessly and negligently left open, leaving an open space in the floor of said vestibule directly over the steps leading down from said coach, which fact was wholly unknown to the plaintiff; and that in passing through said vestibule, and without notice or knowledge on his part that said trapdoor was open, and without any fault or negligence on his part; and that by reason of the jar which was given to the train, which caused him to lose his balance, he fell through said trapdoor and was precipitated from said train with great force and violence, and the

injuries complained of thereby caused to him. It is further alleged that it was the duty of the company in operating its train, and particularly in the nighttime, to keep the trapdoors in the vestibules of said cars closed, and to furnish sufficient light in said vestibules to enable passengers upon the train to pass through the same in safety, and that by reason of the carelessness and the negligence of the defendant in allowing and permitting said trapdoor to be and remain in an open and unguarded condition, the plaintiff was injured as aforesaid. The answer of the company was a general denial and a plea of contributory negligence. Upon these issues the case went to trial, and a verdict returned in favor of the plaintiff in error, from which an appeal is had to this court.

The plaintiff in error has assigned as reason why this verdict should be set aside the error of the court in giving instructions Nos. 3, 4, 10 and 11. Instruction No. 3 is as follows:

"You are further instructed that a carrier of persons for reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for the purpose, and must exercise to that end a reasonable degree of skill.

"In this connection you are further instructed that if you believe from the evidence in this case that the train on which the plaintiff was riding was a vestibule train, and that the trapdoor in the floor of the vestibule on the coach in which plaintiff was riding was permitted to be open while the train was in motion and by the use of the utmost diligence the defendant could have had such trapdoor closed, and that said plaintiff, in attempting to pass from one coach to another on said train, without negligence on his part, fell through such open trapdoor, thereby sustained the injuries complained of in his petition, and that the open trapdoor was the proximate cause of said injury, then a prima facie case has been made by plaintiff which raises a presumption of negligence on the part of the defendant company, which the defendant has the burden of overcoming to your satisfaction.

"(Excepted to by defendant and exception allowed.) F. B. Swank, Judge."

It is urged by the plaintiff in error that this instruction invades the province of the jury and determines as a matter of law a question of fact which should have been left for the determination of the jury. While it is admitted that the first part of the instruction is quoted verbatim from the Revised Laws of 1910, and is not objectionable, but it is asserted that in the second paragraph of this instruction the court undertakes to interpret and apply the statute, and thereby clearly invades the province of the jury. We have carefully considered this instruction, and we do not believe the same subject to the objections urged against it. In the trial of all cases where the evidence is admitted the court has the right to instruct the jury upon that theory consistent with the general admission of the parties. In this instruction the jury is told that, if it believes

from the evidence that the train on which the plaintiff was riding was a vestibule train (and this is admitted), and that the trapdoor in the floor of the vestibule on the coach in which plaintiff was riding was permitted to be open while the train was in motion (and that the door was open is not disputed), and by the use of the utmost diligence the defendant could have had such trapdoor closed, and that plaintiff, in attempting to pass from one coach to another without negligence on his part, fell through such trapdoor and suffered the injuries complained of, and that the open trapdoor was the proximate cause of such injury, then a prima facie case has been made by plaintiff which raises a presumption of negligence on the part of the company which the defendant has the burden of overcoming to your satisfaction.

It is the positive duty owing by the company to all passengers to provide a safe passage through a vestibule train. And our statute requires a carrier of persons for reward to use the utmost care and diligence for their safe carriage, and it must provide everything necessary for that purpose, and must exercise to this end a reasonable degree of skill. In fact the vestibules arranged in accordance with modern customs are but invitations to the passenger to travel from one coach to the other, and with this invitation extended, it is the positive duty of the company to keep the vestibule in a safe condition, so that the invitation may be accepted without injury to the patrons of the company.

This instruction as we view it presents the issues in this case to the jury, and, after telling the jury the degree of care which the law imposes upon a carrier of persons for reward, it then submits to the jury the questions whether this was a vestibule train; whether the trapdoor in the floor of the vestibule on the coach in which plaintiff was riding was permitted to be open while the train was in motion; whether by the use of the utmost diligence the company could have had such trapdoor closed; and whether the plaintiff in this action, in attempting to pass from one coach to the other without negligence upon his part, was injured. In fact this instruction recognizes the law of contributory negligence, and advises the jury that before a prima facie case of negligence can be established against the company by reason of these acts complained of by the plaintiff in his petition, and submitted to the jury by this instruction of the court, the jury must find from the evidence that the plaintiff was without negligence. And we think the law to be, where a passenger establishes that he is without negligence, and that injuries sustained by him arose in consequence of the failure in some way of the carrier's means of transportation or conduct of the carrier's servant, a presumption of negligence arises on the part of the carrier or his servants, which, unless rebutted by it, to the satisfac-

tion of the jury, will authorize a verdict and judgment against it for the damages sustained, or, to state the rule differently, it may be said that, that person entitled to sue for an injury makes out a prima facie case for damages against the carrier by proving the contract of carriage, that the accident happened in consequence of a defect in the vehicle of the carrier or an improper adjustment thereof, or by an omission or mistake of its servants, and that in consequence of the accident the plaintiff sustained damages. This instruction, as we view it, does not invade the province of the jury, but leaves to the jury the consideration of every issue involved in this case to be by it decided from the evidence in the case.

By instruction No. 9 the court instructed the jury in a separate instruction upon the law of contributory negligence, and we are of the opinion that the language used in instruction No. 3 was sufficient to inform the jury that the plaintiff below was not entitled to recover if he himself was guilty of contributory negligence. This court, in the case of *Oklahoma Ry. Co. v. Milam*, 45 Okl. 748, 147 Pac. 316, said:

"An instruction that, if defendant's car was running at a prohibited rate of speed, the jury would be justified in finding defendant guilty of negligence, and if such negligence caused the injury complained of, the verdict should be for plaintiff, unless he was guilty of contributory negligence, was not erroneous, as misleading the jury, when taken in connection with other instructions given that the verdict should be for defendant, though negligent, if plaintiff could have avoided the injury." And in which it was held there was no error, but in the instruction quoted the question of contributory negligence was plainly and expressly called to the attention of the jury which was not done in instruction No. 11 [in the *Milam Case*] given to the jury in the trial of the case at bar. If in this instruction the court, after stating the facts upon which the jury might find for the plaintiff, had added, as did the Washington instruction 'unless the deceased was guilty of contributory negligence,' and thereafter had followed with instruction No. 17, there would have been no ground for complaint by the defendant below."

The Washington case referred to by Mr. Justice Brown in the quotation above cited is that of *Traver v. Spokane Street Ry. Co.*, 25 Wash. 225, 65 Pac. 284; and, under the authority of these two cases, we are of the opinion that instruction No. 3 sufficiently calls to the attention of the jury the question of contributory negligence raised in this case. And it therefore follows that this instruction is not subject to the criticism mentioned in the case of *Okl. Ry. Co. v. Milam*, 45 Okl. 742, 147 Pac. 314. *C. R. I. & P. Ry. Co. v. Clark*, 148 Pac. 999. See *C. R. I. & P. Ry. Co. v. Pitchford*, 44 Okl. 197, 143 Pac. 1148.

Instruction No. 4 is as follows:

"In this case the negligent acts complained of are the gist of the action, and to entitle the plaintiff to recover, he must establish by a preponderance of the evidence that the alleged injuries resulted from the acts complained of. Negligence on the part of the defendant is the

failure of the defendant or its servants employed in the operation of the train upon which the plaintiff was a passenger to perform a duty owing to the passengers arising out of the relation of the parties at the time.

"And in this connection you are instructed that the defendant in this case is chargeable with any act of negligence on the part of any of its employees operating the car upon which the plaintiff was riding just as fully as if the defendant itself or its principal officers were in charge of or operating such car at that time, and that defendant company is liable for any act of negligence, if any there be, on the part of any of the employees of said defendant company on said train upon which said plaintiff was riding, providing said acts of negligence on the part of such employees resulted in causing the injuries received by the plaintiff.

"(Excepted to by defendant and exception allowed.) F. B. Swank, Judge."

This instruction does not attempt to cover the whole case; it does not purport to detail any of the facts established by the evidence. It is not a hypothetical instruction from any light you view it, but it only instructs the jury as to what constitutes negligence on the part of the company, and tells the jury that the company is charged with and liable for the negligent acts of its servants or employees to the same extent as if the defendant committed such acts itself. There can be no objection found to the law as stated in this instruction. Not being a hypothetical instruction, it is not necessary for this instruction to embrace the whole law of the case. In fact a rule of law which required every instruction to cover the entire case in all of its phases would not only be cumbersome, inconvenient, and misleading, but would doubtless occasion more confusion and be more incapable of a thorough understanding than by a short, concise statement of the law of the case to the jury. This court in a number of cases has held that it is not required that the entire law of a case shall be stated in a single instruction, and that it is proper to state the law as applicable to particular questions, or particular parts of the case in separate instructions. The numbering of instructions is merely for convenience, and it is to be presumed that the jury will consider the instructions as a whole, not one to the exclusion of the rest. This instruction No. 4 again informs the jury that under the law of this state contributory negligence is for the jury to determine from all the facts and circumstances admitted as evidence in the case.

Instruction No. 10 informs the jury that before the defendant company can relieve itself of liability on the ground of contributory negligence, it must prove such defense by a preponderance of the evidence. The plaintiff in error is not in a position to complain of this instruction, for the evidence here offered by the defendant in error cannot be said to establish, or by inference to show, contributory negligence upon the part of the defendant in error. It is true that a plea of contributory negligence is an affirmative defense, and to sustain it, it is the duty of the

party pleading the same to offer proof to support it, yet; if the plaintiff's evidence should establish that he was guilty of contributory negligence, the defendant would be entitled to rely thereon and avail itself thereof. The only objection urged by the plaintiff in error to this instruction No. 10 is that it curtails the right of the plaintiff in error to rely upon any contributory negligence that might be shown by the plaintiff's evidence. There being none apparent in this record, the objection to said instruction is not tenable.

Complaint is made to instruction No. 11, which is quite lengthy, and unnecessary for us to present here. Suffice it to say that, in the case of *Enid Ry. Co. v. Reynolds*, 34 Okl. 405, the Supreme Court of this state at page 410, 126 Pac. 193, therein approved an instruction similar to the one here complained of. The authorities cited there seem to support the instruction, and we see no reason why the rule should be disturbed.

The judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

GROUNDS et al. v. DINGMAN et al. (No. 6116.)

(Supreme Court of Oklahoma. July 6, 1915.
Rehearing Denied March 21, 1916. Order
Granting Rehearing Set Aside Nov. 29, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 336(1) — PARTIES — DISMISSAL.

All persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and a failure to join any of them, either as plaintiffs or defendants, is ground for the dismissal of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868-1874; Dec. Dig. — 336(1).]

2. APPEAL AND ERROR — 565 — RECORD — CASE-MADE—SERVICE.

If a joint judgment is sought to be reviewed on error, with case-made attached, the case-made must be served on all the parties against whom judgment is rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2507-2510, 2554; Dec. Dig. — 565.]

3. APPEAL AND ERROR — 568 — RECORD — CASE-MADE—SETTLEMENT.

Where no notice of the time of settlement of a case-made is given to, or waived by, all necessary parties to an appeal, and there is no appearance by all such necessary parties, either in person or by counsel, a case-made so settled is a nullity, and no jurisdiction is vested in this court to decide any question arising thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. — 568.]

4. APPEAL AND ERROR — 430(1) — PROCEEDINGS TO TRANSFER CAUSE — SUMMONS IN ERROR—SERVICE.

Where summons in error is not issued and served within the time allowed by statute upon

all necessary parties, and no præcipe therefor has been filed, and the time has expired in which a valid summons may issue, the appeal will be dismissed for want of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 3126; Dec. Dig. — 430(1).]

Commissioners' Opinion, Division No. 4. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by Jennetta Grounds and another against Ross B. Dingman and others. From a judgment for defendants, plaintiffs bring error. Petition in error dismissed.

See, also, 33 Okl. 760, 127 Pac. 1078.

J. A. Baker and T. S. Cobb, both of Wewoka, for plaintiffs in error. W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for defendant in error St. Louis & S. F. Ry. Co. Hughes & Miller, of Sapulpa, for other defendants in error.

WATTS, C. This case comes from the district court of Creek county, where Jennetta Grounds, Louanna Porter, by her guardian, and Andrew M. Grounds, administrator of the estate of Charles Stidham, deceased, were plaintiffs, and Ross B. Dingman, Fred Wilkering, Norman E. Chapman, Lafe Speer, Emory Jennings, Joe J. Jones, James K. Kepley, Charles W. Mandler, and the St. Louis & S. F. Ry. Co. were defendants.

The petition contains two causes of action: One in the nature of ejectment, the other an action to clear title. In addition to possession of the land damages were claimed in the first cause of action in the sum of \$15,000; in the second cause of action, possession of the land, etc., and damages in the sum of \$12,000 are claimed.

This case was tried to the court and jury beginning October 14, 1913, and on October 19, 1913, verdict was returned for defendants. October 20, 1913, judgment was entered upon the verdict. In due course, plaintiffs filed a motion for new trial, which was heard and denied November 12, 1913. Jennetta Grounds and Louanna Porter by her guardian appealed. Ninety days were given to make and serve a case-made, ten days to suggest amendments, and five days to settle and sign. Service of case-made was accepted January 29, 1914, by attorneys for Dingman, Jones, and the railroad company, also waivers of summons in error were signed by the same attorneys. The trial judge signed the case-made February 26, 1914. Petition in error and case-made were filed in this court March 6, 1914. This is the second time this case has found its way into this court. 33 Okl. 760, 127 Pac. 1078.

[1] Appellate, as well as nisi prius courts, should look to their jurisdiction and in this connection we find that, notwithstanding, the joint judgment against all the plaintiffs, Andrew M. Grounds, administrator of the estate

of Charles Stidham deceased, was not made plaintiff in error, or defendant in error, and under the well-established rule of this court the attempted appeal is a nullity.

"All persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and a failure to join any of them, either as plaintiffs or defendants, is ground for the dismissal of the case." *Vaught v. Miners' Bank of Joplin*, 27 Okl. 100, 111 Pac. 214; *Trugeon v. Gallamore*, 28 Okl. 73, 117 Pac. 797; *National Surety Co. v. Oklahoma Presbyterian College for Girls*, 38 Okl. 429, 132 Pac. 652; *Michael v. Isom et al.*, 43 Okl. 708, 143 Pac. 1053.

[2] We cannot entertain the appeal for other reasons. The record further discloses defendants Wilkering, Chapman, Speer, Jennings, Kepley, and Mandler were not served with the case-made.

"If a joint judgment is sought to be reviewed on error, with case-made attached, the case-made must be served on all the parties against whom judgment is rendered." *Cook v. State*, 35 Okl. 653, 130 Pac. 300; *Carr v. Thompson*, 27 Okl. 7, 110 Pac. 667; *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388; *Lathim v. Schlack*, 27 Okl. 522, 112 Pac. 968.

[3] Nor were the parties mentioned served with notice of signing and settling the case-made.

"Where no notice of the time of settlement of a case-made is given or waived, and there is no appearance of the opposite party either in person or by counsel, a case so settled is a nullity, and no jurisdiction is vested in this court to decide any question arising thereon." *Harrison v. Penny*, 28 Okl. 523, 114 Pac. 734; *Flathers v. Flathers*, 35 Okl. 342, 130 Pac. 124; *First Nat'l Bank of Collinsville v. Daniels*, 26 Okl. 383, 108 Pac. 748.

[4] Neither has summons in error been waived or served.

"Where summons in error is not issued and served within the time allowed by statute, and no praecipe therefor has been filed, * * * and the time has expired in which a valid summons may issue, the appeal will be dismissed for want of jurisdiction." *Springfield Fire & Marine Ins. Co. v. Belt*, 144 Pac. 606 (not yet officially reported in Okl. Rep.)

These defects are jurisdictional, and petition in error is therefore dismissed.

PER CURIAM. Adopted in whole.

SOUTHERN SURETY CO. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 8097.)

(Supreme Court of California. Nov. 20, 1916.)

CONSTITUTIONAL LAW §46(1) — JURISDICTION.

There being substantial evidence, aside from hearsay complained of, sufficient to establish the facts found by the Industrial Accident Commis-

sion, admission of incompetent evidence to prove such facts would be mere error, not ousting the commission of jurisdiction, nor justifying writ of review; so that the question of unconstitutionality of Workmen's Compensation Act (St. 1913, p. 279) § 77, as amended by St. 1915, p. 1102, § 28, providing that no award of said commission shall be invalidated by admission of hearsay evidence, cannot be considered.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43, 45; Dec. Dig. § 46(1).]

In Bank. Petition by the Southern Surety Company for writ of review against the Industrial Accident Commission of the State of California and another. Writ denied.

George F. Hatton and Hartley F. Peart, both of San Francisco, for petitioner.

SHAW, J. This is a petition to review an award of the Industrial Accident Commission to the widow of Giovanni Gaggero for the death of said Gaggero found to have been caused by an accident to him arising out of and in the course of his employment in the service of Macdonald and Kahn. The petitioner is the insurance carrier for Macdonald and Kahn.

The ground upon which the intervention of this court is asked is that there was no competent evidence given to prove that the decedent was injured while in the course of said employment; the claim being that the only evidence in proof thereof was hearsay. The petitioner attacks the validity of section 77 of the Workmen's Compensation Act, as amended in 1915 (Stats. 1915, p. 1102), providing that no award of said commission shall be invalidated because of the admission of hearsay evidence of declarations by a person who is dead or who cannot be found, and relating directly to the injury. The claim is that such section is unconstitutional.

Upon the showing made, we cannot consider the question sought to be presented. There is substantial evidence, aside from the hearsay evidence complained of, sufficient to establish the fact that the decedent received the injury in question while in the service aforesaid, and that it arose out of said employment. This being true, the admission of incompetent evidence to prove the same facts would be mere error. It would not oust the commission of jurisdiction, nor justify a writ of review.

The writ is denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; MELVIN, J.

WARNER v. WICKIZER et al. (No. 7841.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

*(Syllabus by the Court.)***1. CHAMPERTY AND MAINTENANCE § 7(3) — CONVEYANCE OF LANDS HELD ADVERSELY—STATUTORY PROVISION.**

Section 2260 of Rev. Laws 1910, which prohibits the buying or selling of pretended titles to land adversely held but not in suit, does not prohibit all conveyances as against an adverse possessor, but only such conveyances as are based upon the inhibited contracts. The law does not prohibit the exercise of an authority which it authorizes; and this section of the statute does not prohibit a conveyance which equity would compel, or which is made in compliance with statutory authority or duty.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 84-110; Dec. Dig. § 7(3).]

2. CHAMPERTY AND MAINTENANCE § 7(3) — CONVEYANCE OF LANDS HELD ADVERSELY—STATUTORY PROVISION.

Where a corporation was organized in the Indian Territory prior to statehood, having as the object of its existence the dealing and trading in real estate, and where a continuance of the exercise of the functions for which such corporation was created is in violation of the express provisions of the Constitution and statutes of the state, and the indefinitely continued ownership of real property by such corporation is contrary to the policy of the Constitution and laws of the state, it is in accord with the policy of the Constitution and law that such corporation seek voluntary dissolution and dispose of its lands; and where such a corporation, in bona fide compliance with such policies of law, in actual contemplation of such dissolution and as a step in the actual process of dissolution, which occurs within a reasonable time, divides its assets among its stockholders, and in effecting such division of its assets executes to one of its stockholders a conveyance of land owned by it, which land is adversely held by a third person, such conveyance, being necessary to effect such dissolution and division of assets, is authorized by law, and is not void as to such adverse possessor of the lands conveyed; it being clear that such dissolution is had in good faith, and that the conveyance is a mere incident to and not the object of it.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 84-110; Dec. Dig. § 7(3).]

3. CHAMPERTOUS DEED—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held, that deed is not void as being champertous.

Commissioners' Opinion, Division No. 8. Error from Superior Court, Tulsa County; Farrar L. McCain, Judge.

Action by E. S. Warner against Margaret C. Wickizer and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Haskell B. Talley, of Tulsa, for plaintiff in error. Davidson & Williams, of Tulsa, for defendants in error.

JOHNSON, C. This was an action in ejectment, filed in the superior court of Tulsa county by E. S. Warner, plaintiff in er-

ror, as plaintiff, against Margaret C. Wickizer, and others, defendants in error, as defendants, for the recovery of 160 acres of land, rents and profits.

The land was allotted to the heirs of Tecumseh Tiger, deceased Creek Indian citizen. It was admitted by the parties that Albert Tiger was the sole heir of Tecumseh Tiger, deceased, and was assumed by the parties that, at the time of the conveyance by Albert Tiger, hereinafter mentioned, the latter was not restricted in reference to the alienation of such lands. In the trial, by his evidence plaintiff deraigned his title through (1) a deed, executed on December 27, 1904, by Albert Tiger to the Iowa Land & Trust Company, a corporation organized and existing under the laws of the Indian Territory, and (2) a deed executed on January 10, 1911, by the Iowa Land & Trust Company to plaintiff. The evidence of plaintiff disclosed that, prior to statehood, the Iowa Land & Trust Company was engaged in the business of buying and selling lands; that after the induction of the laws of the state of Oklahoma prohibiting a corporation from engaging in the business of buying and selling of lands, and requiring that all corporations dispose of all lands owned by them not necessary and proper in carrying on the business for which they are licensed, the corporation, for the purpose of complying with the law, abandoned its former business of buying and selling lands, and proceeded to dispose of all lands held by it, including the lands in controversy, and then to seek a voluntary dissolution. The evidence further showed that, at the time of the conveyance by the Iowa Land & Trust Company to plaintiff, plaintiff was the owner of all of the corporate stock of the company, with the exception of two shares, which were held by two other persons for the purpose of keeping alive the official life and directorate of the corporation until its affairs could be liquidated and a dissolution accomplished; that this deed was made to plaintiff, without any present consideration, as one of the steps in accomplishing a division of the assets of the corporation, so as to comply with the state laws requiring a disposition of corporate realty, and in winding up the affairs of and dissolving the corporation. Within a short time after the execution of the deed, a petition for the voluntary dissolution of the corporation was filed in the superior court of Muskogee county; and, on May 23, 1911, that court entered a decree declaring the dissolution of the Iowa Land & Trust Company as a body corporate. This action was one in ejectment, and the evidence of plaintiff established that, at the time of the execution of the deed by the Iowa Land & Trust Company to plaintiff, and for a number of years prior thereto, the defendants had been in the adverse possession of the land involved in the action.

At the close of the testimony of plaintiff,

the defendants interposed a demurrer to the evidence, which was sustained by the court, upon the ground that the deed from the Iowa Land & Trust Company to plaintiff was void as to the defendants by reason of the adverse possession of the land by defendants at the time of its execution, and of the fact that the grantor had not been in possession of the land, or the reversion and remainder therein, or taken the rents and profits therefrom for the space of a year. After adverse action upon his motion for a new trial, plaintiff has brought the case to this court on appeal.

Plaintiff in error contends: (1) That at the time of the execution of the deed from the corporation to himself he was the sole owner of the stock of the corporate grantor, and thus the sole owner of its assets, and that therefore the conveyance to himself, in contemplation of dissolution of the corporation and to comply with the laws of the state, was the performance of a trust created by law, in that it was a delivery to him of the legal estate in reference to which he in reality was already the equitable owner in his capacity as the owner of the entire corporate stock, and was not in violation of the champerty act; and (2) that the deed was executed and delivered as an act of division among the stockholders of the corporate real assets, with no other consideration, as one of the necessary steps in the actual dissolution of the corporation, the disposal of the realty and the dissolution of the corporation both being a compliance with the inhibitions and requirements of the corporate land ownership laws of the state, and that the validity of the deed therefore was not affected by the adverse possession of defendants.

We cannot lend an ear to the argument of the first contention, for the reason that it is based upon an illegality. While plaintiff testified that he was the owner of the stock of the corporation, and on this statement based the conclusion that he was the owner of its assets, he qualified the testimony that he was the owner of the stock by the statement that two shares of the stock were held by two other persons for the purpose of preserving the legal official life of the corporation. We do not conceive that the law would permit plaintiff in error to claim ownership of the two outstanding shares of the stock, and thus of the entire corporate stock. Under the law, there were two other stockholders of the corporation, and plaintiff in error was not the owner of the entire assets of the corporation by reason of his ownership of all but two shares of the stock. He, therefore, was not the owner of the entire legal estate, as distinguished from the equitable estate, in this land, and therefore cannot claim immunity from champerty under his first contention.

The claim that the validity of the deed was not affected by the adverse possession of the defendants, by reason of the facts that the

deed was executed by the corporation as an act of division of the corporate assets among the stockholders, with no other consideration, as one of the necessary steps in the actual liquidation and dissolution of the corporation, in compliance with the corporate land ownership laws of the state, requires consideration of the various laws involved.

The section of our statutes, in force at the time of the origin of the subject-matter of this controversy, and involved here, is section 2260 of the Revised Laws of 1910, which reads as follows:

"Buying Pretended Titles. Any person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor." (Emphasis ours.)

This court has repeatedly held that a conveyance made in violation of, or as the consummation of a violation of, this section, though valid as between the grantor and grantee, is void as to the person in adverse possession of the land conveyed; and this general rule is so well settled, and so well known, that it is not necessary to cite or quote from such decisions. We now have under consideration an asserted exception to the general rule, viz. a theory that the section does not by letter or spirit prohibit all conveyances of title to land under the possessory conditions outlined in the statute. In other words, the theory here advanced is, that the statute, in both letter and intent, prohibits only the present actual buying or selling, procuring, making, or taking of any promise or covenant to convey; and does not prohibit the actual grant or conveyance, except if the grant or conveyance be, in the words of the statute, "such grant or conveyance," as may be based upon a transaction of present buying or selling, or procuring, making, or taking a promise or covenant to convey, which transaction itself actually occurs, at the time of the adverse possession. For analogy, it is argued in effect that, if the actual landowner, at a time when the adverse possessory circumstance does not exist, and at a time when it would be clear that such contract is not within the sphere of champertous influence, makes to another a sale and agreement to convey his land at a future time; and if, in the interim between the making of the sale and contract to convey and the actual conveyance, adverse possession in still another person should intervene against the owner, in such an event, being a condition under which equity would compel the execution of the deed, and the penalty of damages would attach to the owner for failure so to do, an inhibition of the execution of the deed would work an ex

post facto effect not contemplated by the statute.

As still further analogous to these contentions and the above illustration, it is contended, in effect, that, the champerty law, being for the very purpose, in both expression and intent, of prohibiting the willful acquisition of rights of action to the end of a promotion of litigation, it was neither the expression nor intention of the law to relieve or prohibit a compliance with an obligation or authority to convey, created by the law itself, and not the result of the willful or constructive intention of the conveyor to foment litigation.

Upon these premises, plaintiff in error bases his final argument that the Iowa Land & Trust Company was organized in territorial times, had as the purpose of its existence a business contrary to the policy of the Constitution and laws of the state, and was required to dispose of its real estate within a given statutory period; that at the time of the execution of the deed in controversy the corporation was in process of dissolution, in good faith, and in compliance with the policy of the law, which was inimical to the objects of the existence of the corporation; that, in executing the deed, the corporation was but performing the obligations imposed upon it by the law, in dividing its assets among the stockholders in the process of dissolution; and that, by the deed, the corporation also was but performing the strict requirement of the law that it dispose of its real estate within a given time.

[1] It is first necessary to determine whether the section of the statute under consideration was intended to prohibit any and all conveyances of land, as against an adverse possessor; and, if not, then whether the conveyance to plaintiff comes within any exception.

In this connection, it will be noted that section 2259, Rev. Laws, prohibiting the buying of lands already involved in pending litigation, *expressly* prohibits the taking of *any conveyance* of lands from persons not in possession, while such lands are in suit, by a person knowing of the pendency of the suit and such lack of possession in his grantor; while section 2260, brought into being at the same time by the same legislative power, as a part of the same legislative act, dealing with transfers of property adversely held without regard to pendency of suit, and corollary to the first section, does not embody the general inhibition against *any conveyance*, but only against "such grant, conveyance," etc., as are based upon the *buying or selling, procuring, or taking of promise or covenant to convey, transacted during the time of the existence of the prescribed adverse holding*. This difference in use of words is not meaningless, and evidently was deliberate.

The conditions which gave rise to both sections were the same. In almost every com-

munity are litigiously inclined persons, who thrive in contention, who, unrestrained, for personal gain, spite, or fondness for quarrel, would be prone, not alone to litigation of their own, but to purchase and engage in the dormant causes of action and disputes of others. Both of these sections came into existence to allay the social unrest consequent upon such activities, as a blow at litigiousness, and not for the purpose of striking down rights. The one section, prohibiting the buying of titles in suit, contemplated that the courts having already assumed jurisdiction, no conveyance should be made, for the reason that, if there were outstanding rights, either resulting from operation of law or otherwise, acquired at a time when they could be legally so acquired, all that was necessary was for the holder of such rights to come into the litigation pending and obtain an adjudication of his claims, and he would be compelled to this course. The other section evidently contemplated that, if a person may have already acquired rights, at a time when litigious intent in the acquisition was not imputed, or if he should acquire rights by operation of law, in such manner that no litigious intention might be imputed, without the inhibited intent he already would be involved in the possibility of the litigation, and that the full maturity of his rights not alone would not meet with disfavor in the law, but would be favored, both for the reason that the law favors a vested right, and the further reason that the elimination of his obligor restricts rather than broadens the limits of controversy. The evident intentions of the sections force the conclusion that the first section deliberately was intended to be so worded as not to tend to abrogate substantial non-champertous rights, and did not prohibit all conveyances.

Ruling Case Law lays down the rule as follows:

"The adverse possession must exist at the time of the conveyance, in order to avoid it, but there are cases in which lands may be held adversely and still the conveyance will be valid. It seems that a conveyance made in the performance of a duty or of an obligation is not within the statute. It is on this principle that a conveyance of land in pursuance of a person's contract of sale, or a previous bond for title, or parol gift, is not within the statute, if the contract, bond, or gift was made at a time when the lands were not held adversely." 5 Ruling Case Law, 280.

Cyc. treats the matter thus:

"Conveyances made at judicial and official sales or under decree of court of lands adversely held by third parties are not champertous either at common law or under the statutes. * * * A deed to land in the adverse possession of a third person is not invalid if executed in performance of a lawful contract entered into when the land was not so held. Similarly a deed is not invalid, if executed to correct mistakes in a conveyance made before the commencement of the adverse possession. * * * When a trust relation subsists between the parties, a conveyance by either that merges the legal and equitable estates is valid, though the land is in the ac-

tual adverse possession of a third person. * * * Devices are not within the rule against conveying pretended titles." 6 Cyc. 874, 876, 877, and 878.

Each of the above works cites an extensive list of authorities in support of the doctrine they announce. In the decisions cited there seems to be little or no conflict, except that the exception was not adhered to by some of the courts in cases of sales on execution, where the creation of the debt and the consequent judgment and execution sale might have been construed as willfully brought about or permitted by the debtor for the purpose of subverting the intent of the statute on champerty.

The Supreme Court of Vermont, in referring to a statute similar to ours, said:

"That statute was enacted to carry out a principle of the common law which forbids the traffic and speculation in matters of dispute and litigation; and this cut up by the roots the business of breeding lawsuits. And it has ever been held that the surrender of a trust, or a conveyance that merely merged the equitable and legal estates—what a court of equity would compel—was not within the mischief which that statute was intended to prevent." *Stacy v. Bostwick*, 48 Vt. 192.

The Supreme Court of Connecticut, in a similar case, said:

"A conveyance made by a trustee to the party holding the equitable title is not a sale of a pretended title. A release of the title by a mortgagee, * * * after the satisfaction of the mortgage, is not within the statute. * * * Here the bank held the legal title under the mortgage, while Alfred Todd, having as surety paid the mortgage debt, had been subrogated to the beneficial interest held by the bank, and was now the equitable owner. A conveyance to him by the bank of the bare legal title in these circumstances could not be affected by the adverse possession of the defendants. A full title therefore passed to Alfred Todd by the deed of the receivers." *Townsend Sav. Bank v. Todd*, 47 Conn. 190.

The Supreme Court of Kentucky, in treating of the validity of a sheriff's deed, the execution defendant being out of possession after the sale and at the time of the execution of the deed, said:

"The contention of the appellees that said parcels of land were held by them adversely to the appellants at the time they received the conveyances from the sheriff is not an available defense. There was no adverse holding of said parcels of land at the time the sheriff sold them, and it is well settled that the law of champerty does not apply to deeds made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was entered into, although the land be held adversely when the deed is made." *Greer v. Wintersmith*, 85 Ky. 516, 4 S. W. 232, 7 Am. St. Rep. 613.

Other cases supporting the rule that conveyances by grantors under legal or equitable obligations, or in pursuance of legal or equitable duty to execute the conveyance, are found in the authorities quoted from, and additional cases are as follows: *West v. Drawhorn*, 20 Ga. 170, 65 Am. Dec. 614; *Norton v. Sanders*, 31 Ky. (1 Dana) 14; *Harral v. Leverty*, 50 Conn. 46, 47 Am. Rep. 608; *Va-*

rick v. Jackson, 2 Wend. (N. Y.) 193, 19 Am. Dec. 571; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; *Mitchell v. Stevens*, 1 Aikens (Vt.) 16; *Appleton v. Edison*, 8 Vt. 239; *McCoy v. Williford*, 32 Tenn. (2 Swan) 642; *Sims v. Cross*, 18 Tenn. (10 Yerg.) 460; *Humes v. Bernstein*, 72 Ala. 546.

None of the cases found deals with a state of facts identical with the facts in this case; but the rule to be drawn from the cases is applicable. Running through the great body of judicial interpretation of similar statutes seems to be the rule that such statutes are not intended to bar conveyances by grantors under legal or equitable duty or obligation to convey, where such duty or obligation arises prior to the adverse possession of the third party, or where it arises afterwards from operation of law, and clearly not from the purpose of the parties to that end. It is clearly not the intent of the law to prohibit obedience to its own mandates.

We do not lose sight of, and the other courts in construing this law have not ignored, the principle of livery of seisin, but it is entitled only to its proper weight. This principle came into existence during the early period of feudalism in England, when some public method of alienating land was made imperative by the illiteracy of the people. A proposed grantor and grantee went with witnesses to the land to be sold, and in the presence of the witnesses the grantor handed to the grantee a clod of dirt from the land, or other token; and this completed the investiture of the title. The advance of education has modified this principle to coincide with other modern conditions, so that the legal making, delivery, and recording of a deed passes the seisin without any formal entry. In states which have no statute against the purchase of lands in adverse possession, this ancient principle does not vitiate a conveyance of lands adversely held. *Purcell v. Barnett*, 30 Okl. 605, 121 Pac. 231. The inhibitions of our statute, therefore, are not based on this principle, but upon its own provisions, withdrawing the implication of seisin. If the law requires a conveyance, the law, therefore, will imply seisin, if this be a necessary ingredient of the transaction.

[2] The question now presents itself: Was the conveyance in this case such as to bring it within the inhibitions of the statute? Sections 1242 and 1243 of the Revised Laws of 1910 read as follows:

"1242. *Land Companies.* No corporation shall be created, licensed, or chartered in this state for the purpose of buying, acquiring, selling, trading, or dealing in real estate other than real estate located in incorporated cities and towns, and as additions to such cities and towns; nor shall any corporation doing business in this state buy, acquire, sell, trade, or deal in real estate for any purpose, except such lands as may be located in incorporated cities and towns and as additions thereto, and except such as shall be necessary and proper for carrying on the business for which such corporation was licensed or chartered; nor shall any corporation be created, licensed, or chartered to do business in this state,

for the purpose of acting as agent in buying or selling real estate, except as herein provided: Provided, however, that corporations shall not be precluded from taking mortgages on real estate to secure loans or debts or from acquiring title thereto upon foreclosure of such mortgages or in the collection of debts, conditioned that such corporation or corporations shall not hold any real estate so acquired for a longer period than seven years, and conditioned that disposition or incumbrance of such land shall in no way be made to another corporation, or corporations: Provided, further, that this section shall not apply to trust companies taking only the naked title to real estate in this state, as trustee, to be held solely as security for indebtedness pursuant to such trust.

"1243. *Disposition of Surplus Realty.* Every corporation doing business in this state which owns real estate, other than real estate within the corporate limits of cities and towns, or as additions to cities and towns, or either of such, shall, unless the same shall be necessary and proper for carrying on the business for which such corporations are licensed or chartered, sell and dispose of said real estate within a period of seven years from the 26th day of May, 1908: Provided, that all corporations which may hereafter acquire title to real estate upon foreclosure of mortgage or in collection of debts shall dispose of said real estate within a period of seven years from the date said title was acquired: Provided, further, that if at the expiration of seven years from the date heretofore respectively mentioned, if such lands remain unsold, it shall be the duty of the county attorney of the county in which such real estate is situated to proceed by information in the name of the people of the state of Oklahoma against such corporation in the district court of such county, and such court shall hear and determine the facts and proceed against said property as in case of escheat."

Section 1242 is a re-enactment of the provisions of article 22, § 2, of the state Constitution. Both sections of the statute were enacted prior to the execution of the deed in controversy.

From a reading of these sections, the policy of our Constitution and laws with reference to corporate ownership of lands is clear, without comment. It is plain that it was absolutely required by law that the Iowa Land & Trust Company dispose of its interests in the real estate in this case within seven years from May 26, 1908. It would seem to be within the policy of the Constitution and laws of the state that such disposal should be had as quickly as possible. It would further seem to be within this policy, if not within the strict mandate, that the Iowa Land & Trust Company, having been organized for purposes inconsistent with these sections of the Constitution and statutes, should seek dissolution of its corporate existence at the earliest possible moment.

Article 5, c. 15, Revised Laws of 1910 (article 5, c. 20, Compiled Laws of 1909), expressly authorizes the voluntary dissolution of corporations, by action in the district court. The Iowa Land & Trust Company under the state laws could not continue to exercise the functions for which it was created. That it should take advantage of the provisions authorizing its dissolution was in strict accord with the law's policy.

Section 1279, Revised Laws 1910 (section 1809, Compiled Laws of 1909), reads as follows, viz.:

"Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, and to collect and pay debts and divide among the stockholders the property which remains after the payment of debts and necessary expenses; and for such purposes may maintain or defend actions in their own names by the style of the trustees of such corporation dissolved, naming it; and no action whereto any such corporation is a party shall abate by reason of such dissolution."

By the terms of this section of the statutes, the directors of a dissolving corporation are expressly designated as trustees of the stockholders for the purposes of winding up the affairs of the corporation, and dividing among the stockholders the property of the corporation; and a division of the property among the stockholders is specifically authorized.

Such a division is not alone authorized; but the implication is that it would be decreed by a court of equity, if not done voluntarily. We see no reason why this winding up of the affairs of the corporation, and division of its property among the stockholders, may not be accomplished prior to the decree of dissolution, and thus be in pursuance of the authority of this statute. The second paragraph of the second section of the chapter of the statutes on dissolution of corporations expressly provides that one of the allegations of the petition for dissolution shall be that all claims and demands against the corporation have been satisfied; and such was the finding of the decree of dissolution in this case. The affairs of the corporation being completely adjusted prior to the filing of the petition for dissolution, all stockholders consenting, it would seem a useless fiction to require the division to await the decree. At least it is sufficient to say that the decree having been entered, the division made prior thereto is but what would have been afterwards authorized and compelled, if not performed. A corporation is but an aggregation of persons, who are its members or stockholders, standing in the stead of the stockholders in the ownership and control of their property. When its ends have been accomplished and its other obligations discharged, and it is in bona fide process of dissolution, it seems to us not too much to say that, until the property of the dissolved corporation shall have been turned over to the directors as trustees, the corporation is in the nature of a trustee of the property for the stockholders, and that a division of this property, satisfactory to the stockholders, is but the performance of a trust.

If a dissolving corporation owns the title to real estate, such title is property which would be required to be divided among the

stockholders. It does not seem that adverse possession in another party should be allowed to defeat the trust in favor of the stockholders, nor that the existence of the corporation, which is not in accord with the policies of the fundamental law of the state, should be continued for the sole purpose of litigating the question of the possession of the adversely held land. If the corporation may properly be dissolved under such circumstances, the trust in favor of the stockholders as to this title would necessarily result. We see no reason why the directors of the deceased corporation, as trustees for the stockholders, should be required to bring the suit for possession; for we have seen that, under the authorities, the merger of the legal and equitable title in trust estates is not inhibited by the champerty statute on account of adverse holding. The title to the land is a unit of the trust property, and the statute specifically authorizes a division of this trust property by the directors as trustees. As we have said, we see no reason why the trust might not be performed by the corporation through its stockholders and directors, prior to the decree, as well as by the directors after the decree.

We conclude that, where a corporation was organized in the Indian Territory prior to statehood, having as the object of its existence dealing and trading in real estate, and where a continuance of the exercise of the functions for which such corporation was created is in violation of the express provisions of the Constitution and laws of the state, and the indefinitely continued ownership of real property by such corporation is contrary to the policy of such Constitution and laws, it is in accord with the policy of the Constitution and law of the state that such corporation seek voluntary dissolution and dispose of its lands; and where such a corporation, in bona fide compliance with such a policy of the law, in contemplation of such dissolution, which actually occurs within a reasonable time, as a step in the process of dissolution, divides its assets among its stockholders, and in making such division executes to one of such stockholders a conveyance of lands adversely held by a third person, such conveyance, being necessary to accomplish such dissolution and division of assets, is authorized by law and not in violation of the inhibitions of section 2260 of the Revised Laws of 1910, and it is not void as to such adverse holder, it being clear that such dissolution is had in good faith to comply with the policies of the law, and that the conveyance is a mere incident to and not the object of the dissolution.

[3] Under this holding, the deed from the Iowa Land & Trust Company to plaintiff in error was not void on account of the adverse possession of the defendants in error; and the lower court erred in sustaining the de-

murrer of defendants to the evidence of plaintiff upon the ground of champerty in such deed.

The judgment of the lower court, therefore, should be reversed, and the cause remanded for proceedings in accordance herewith.

PER CURIAM. Adopted in whole.

WHITAKER v. STATE ex rel. PIERCE
(No. 8660.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. QUO WARRANTO ⇨10—PRIMARY ELECTION—CONTEST.

Where plaintiff was shown by the canvass of the precinct returns to have been nominated for the office of county commissioner upon the Democratic ticket, and thereafter upon a recount under section 3038 of the Revised Laws of Oklahoma 1910, defendant was shown to have received the nomination, plaintiff has a remedy by an action in the nature of quo warranto to try the title to such nomination.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 10-12; Dec. Dig. ⇨10.]

2. ELECTIONS ⇨126(7)—PRIMARY ELECTIONS—RECOUNT—POWER OF COUNTY ELECTION BOARD.

The duties performed by the county election board when recounting the ballots cast at a primary election under section 3038, Revised Laws 1910, are ministerial in their nature, and said board in so doing is not vested with judicial power to inquire into and determine questions that are judicial in their nature, but is limited to a recount of the ballots upon their face.

[Ed. Note.—For other cases, see Elections, Dec. Dig. ⇨126(7).]

3. ELECTIONS ⇨126(7)—PRIMARY ELECTIONS—RECOUNT—POWER OF COUNTY ELECTION BOARD.

The returns made by the precinct officials to the county election board, until impeached, constitute prima facie evidence of the votes cast and of the result of said primary election, which will be overcome when a different result is made to appear upon a recount of the ballots.

[Ed. Note.—For other cases, see Elections, Dec. Dig. ⇨126(7).]

4. ELECTIONS ⇨154(10) — CONTESTS — EVIDENCE.

As between the ballots and the canvass thereof by the election officers, the ballots are the primary and controlling evidence where it is made to appear that they have been preserved in the manner and by the officers prescribed by statute, and that they were the identical ballots cast by the voters, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable opportunity for their having been changed or tampered with.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. ⇨154(10).]

5. ELECTIONS ⇨154(10)—PRIMARY ELECTIONS—CONTEST—EVIDENCE.

Where it is made to appear that after the ballot boxes and election returns have been delivered into the custody of the county election board and before a recount of the ballots the boxes containing the ballots cast at an election have been left in the custody of a person other than one of the election officials, and that a number of ballots cast by the voters have been ab-

strated and destroyed and other ballots forged and placed in said boxes, and a number of other ballots cast at said election are mutilated so as to change the result of said election as determined by the canvass of the returns, the ballots are discredited to such an extent as to destroy their controlling weight as evidence in a contest over a nomination at such election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154(10).]

6. ELECTIONS § 154(11)—PRIMARY ELECTIONS—CONTEST—QUESTIONS FOR JURY.

Whether the ballots introduced in evidence were the identical ballots cast by the voters, and whether they were in the same condition as when cast, and the weight to be given to the ballots as evidence, as well as to all other testimony in the case, are questions to be left to the jury.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 154(11).]

7. ELECTIONS § 149—PRIMARY ELECTIONS—CONTEST—RIGHT OF ACTION.

Where, because of the illegal and fraudulent acts of another in tampering with the ballots cast at a primary election, a person who was a successful candidate therein is deprived of his nomination upon a recount under section 3038, Revised Laws 1910, he may maintain an action to try the title to such nomination against the person wrongfully declared by the election officials entitled thereto, irrespective of the identity of the culprit, whether his opponent in said primary was connected with such unlawful conduct or not.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 132; Dec. Dig. § 149.]

8. ELECTIONS § 154(10)—PRIMARY ELECTION—CONTEST—ADMISSIBILITY OF EVIDENCE.

In the instant action it was not error to reject an offer by defendant to show how certain voters voted in said primary election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154(10).]

Error from District Court, Pittsburg County; R. W. Higgins, Judge.

Primary election contest by the State, on the relation of J. O. Pierce, against Ernest Whitaker. Judgment for relator, and defendant brings error. Affirmed.

Arnote & Anderson and Andrews & Leidtke, all of McAlester, for plaintiff in error. Wilkinson & Scott and Geo. M. Porter, all of McAlester, and W. C. Gilmore, of Kiowa, for defendant in error.

HARDY, J. This is a contest over the Democratic nomination for the office of county commissioner for the second commissioner's district of Pittsburg county, at the primary election therefor held in that county on August 1, 1916. The official returns of the precinct officials at said primary, as canvassed by the county election board, showed that defendant in error, Pierce, received 250 votes, and plaintiff in error, Whitaker, received 238 votes, for such nomination. The parties will be referred to as they appeared in the trial court.

The defendant, Whitaker, who lost on the face of the returns as made by the precinct officers, claimed a recount under section 3038, Revised Laws 1910, which recount showed

that plaintiff, Pierce, received 230 votes, and defendant, Whitaker, 244 votes. After the recount plaintiff, Pierce, brought this action to contest the right of defendant, Whitaker, to the nomination for said office.

[1] Defendant contends that the laws of this state do not permit the maintenance of an action of this kind. Section 3035, Revised Laws 1910, declares that all provisions of the laws governing general elections, not in conflict with chapter 28, entitled "Elections—Primary," are made applicable to primary elections, and section 3054 provides that all contests arising out of primary elections shall be settled and decided in the same manner as is now or may hereafter be by law provided for general elections, except as otherwise provided.

Roberts et al. v. Marshall et al., 83 Okl. 716, 127 Pac. 703, was an action for mandamus to the state election board in which Marshall sought to compel the state election board to meet and recanvass a second set of returns certified to it by a county election board after the original returns had been canvassed and the result declared and certificate of nomination issued. The writ was denied; the court holding that plaintiff had a remedy by an action in the nature of quo warranto against the holder of the nomination to try the title thereto, following *Newhouse v. Alexander*, 27 Okl. 48, 110 Pac. 1121, 30 L. R. A. (N. S.) 602, Ann. Cas. 1912B, 674.

[2] The duties performed by the county election board in a recount under this section of the statute are ministerial in their nature, and the board is not vested with judicial power to inquire into and determine questions that are judicial in their nature, but are limited merely to a recount of the ballots upon their face. *Stearns v. State*, 23 Okl. 462, 100 Pac. 909; *Shelton v. McMillan*, Judge, 43 Okl. 486, 143 Pac. 196.

This being true, if plaintiff was not entitled to maintain this action, he would be without a remedy; but such is not the condition of the law, for it is expressly enacted under section 3054, as already seen, that all contests arising out of primary elections shall be settled and determined in the same manner as similar controversies arising out of general elections, except where otherwise expressly provided. The plaintiff therefore had the right to maintain this action, and, upon proper showing, was entitled to a judgment in his favor.

There were five candidates for the nomination for the office of commissioner of district No. 2, and at Kiowa precinct plaintiff, Pierce, received 80 votes, and defendant, Whitaker, 15 votes, and one Allen, a candidate for the same office, received 1 vote. At Pittsburg precinct plaintiff, Pierce, received 58 votes, and defendant, Whitaker, 4 votes. The plaintiff alleged that after the election had been held and the ballots cast thereat counted by

the precinct officials and the returns properly certified to the county election board, that the ballot boxes containing the ballots cast at Kiowa and Pittsburg precincts were opened, and from the box containing the votes cast at Kiowa precinct 10 of the ballots cast by the voters in said election were removed, and 10 other ballots taken from the bundle of unused ballots, and were forged in favor of defendant, Whitaker, and placed on the string, and that such other ballots which had been cast by the electors were mutilated by stamping same opposite the name of some other candidate for commissioner in said district, thereby changing the result of the election at that precinct, so as to show that plaintiff only received 68 votes, instead of 80, and that defendant, Whitaker, received 21 votes, instead of 15, as shown by the official returns. That from the box containing the ballots cast in Pittsburg precinct 6 ballots were taken from the back of the pad or bundle of unused ballots, which had been returned by the precinct officials, and were forged in favor of defendant, Whitaker, and placed in the box, and 6 ballots that had been voted for plaintiff were taken out of the ballot box and destroyed, and at said time 6 other ballots legally cast for plaintiff were mutilated.

The evidence shows that 286 ballots were printed and sent to Kiowa precinct, which were numbered consecutively from 1 to 286. The name of plaintiff, Pierce, was printed at the bottom of the list of names of candidates for commissioner on all of said ballots up to and including No. 242, and upon the remainder the name of one Williamson, a candidate for said office, was printed at the bottom of the list of names of candidates for that office. It appears from the evidence that all of the ballots voted at the Kiowa precinct except 10 have plaintiff's name at the bottom, which 10 have the name of Williamson in that position. The number of ballots returned by the precinct officials, including the ballots voted, 2 that were mutilated, being Nos. 25 and 93, and those unused, amounted to 286, the exact number sent them prior to the election. Upon the recount only 276 ballots were found, and when the boxes were opened the envelopes containing the voted ballots had been torn open. Upon the original count the ballot voted for Allen was counted next to the last vote, and placed upon the string next to the last ballot. Upon the recount the Allen ballot was found to be the eleventh ballot from the last on the string. One hundred and forty-seven ballots in the Kiowa box are stamped in blue and black ink, while the 10 ballots alleged to have been forged are stamped in purple ink.

One hundred and forty-six ballots were sent to Pittsburg precinct, all of which were accounted for in the precinct returns, 80 ballots being cast, 66 unused, and none mutilated. The last number in the bundle of unused ballots now is No. 140, showing a

discrepancy of 6 ballots between the amount sent to the precinct officials and returned by them and those in the possession of the county election board. A number of ballots, upon the recount, in this box were mutilated, and the mutilation plainly appears to have been made by a defective stamp, and in purple ink, while the voters in the preparation of their ballots used a blue or black ink, and a different stamp. Upon the recount of the ballots cast in the Pittsburg precinct plaintiff, Pierce, is shown to have received 51 votes, and defendant, Whitaker, 8 votes. It is admitted that the official returns of all the other precincts are correct, and on the recount Pierce received a total of 230 votes, and Whitaker 244 votes.

[3, 4] Neither side makes any contention that any irregularities affecting the result occurred upon the part of the precinct officials, or that the ballots had been tampered with prior to their delivery into the hands of the county election board. Defendant, in his brief, states:

"We do not believe it is possible for the human mind to say that there is any evidence to show that these ballots were changed after leaving the hands of the election boards at Kiowa and Pittsburg or had been altered before the recount. Nor can we believe that it is possible for any one to read this record and say that they were changed at all."

The returns by the precinct officials, until impeached, constituted prima facie evidence of the votes cast and of the result of said primary election. *Moss v. Hunt*, 40 Okl. 20, 185 Pac. 282. The recount, showing a different result from that found upon a canvass of the returns by the precinct officials, overcame the prima facie effect of those returns, and to impeach the result of the recount plaintiff introduced evidence to show that during the canvass of the precinct returns by the county election board, which occupied the time of the board from the 1st day of August until the 5th of that month, the board while in session during the daytime had said ballot boxes and returns in its possession, but at night left them in charge of a man by the name of Ray, who was employed by the board to guard them, and after the canvass was completed they were left in a certain room, the doors and windows of which, with the exception of the front door, were nailed down, and the front door locked with two Yale locks. As between the ballots and the canvass thereof by the election officials, the ballots would ordinarily be the primary and controlling evidence, provided it be made to appear that they had been preserved in the manner and by the officers prescribed by the statute, and that they were the identical ballots cast by the voters, and that while in said custody they had not been so exposed to the reach of unauthorized persons as to afford a reasonable opportunity of their having been changed or tampered with. *Moss v. Hunt*, supra; *Moss v. Hunt*, 145 Pac. 761; *Thomas v. Marshall*, 160 Ky. 168, 109 S. W.

615; *Stafford v. Sheppard*, 57 W. Va. 84, 50 S. E. 1016; *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814.

[5, 6] The condition of these ballots when the boxes were opened by the county election board at the time of the recount shows beyond any question to our minds that they had been tampered with, and that a number of ballots cast by the voters had been destroyed and other ballots forged and substituted therefor, while others had been mutilated after reaching the custody of the county board. We have already seen that neither side contends that these matters happened until after the ballots and returns were in the hands of the county board, and the facts and circumstances in evidence are sufficient to thoroughly discredit the ballots as the best evidence of the result of said election. It was proper to admit them in evidence for consideration in order to determine their identity and condition at the time of the recount, as compared with the condition they were in when delivered to the county election officials. These were questions of fact for the jury to determine, whether they were the identical ballots cast by the voters, and whether they were in the identical condition as cast, and to determine whether the greater weight should be given to the ballots or to the other evidence as to the result of the election. *Moss v. Hunt*, 145 Pac. 761. These issues were properly submitted to the jury, who found in favor of the plaintiff upon the facts, and their verdict was abundantly sustained by the evidence.

[7] Defendant claims that because the evidence failed to show that he participated in the alleged fraudulent and illegal acts, plaintiff is not entitled to prevail, but cites no authorities in support of this position. This contention is without merit. If such were the law, no matter what wholesale frauds might be indulged in or how many crimes committed against the purity of the ballot, the successful candidate could not complain, unless his adversary participated in the wrongful acts which deprived him of the nomination or election. It matters not who commits the fraud effecting a change in the result of the election, the candidate who is successful therein, irrespective of the identity of the culprit, is entitled to have the correct result declared in a proper action brought for that purpose.

[8] It is further urged that the court committed error in not permitting the defendant to show by certain voters how they voted in the primary. There was no error in rejecting this evidence. The object of the law in providing for a secret ballot is to secure the independence of the elector by requiring the exercise of his right of franchise in absolute secrecy, and free from solicitation and annoyance, and to preserve that secrecy after his ballot is cast, and the provisions of the

statute upon this subject are mandatory in their character, and designed to prevent the corruption and abuses that were possible and sometimes prevailed in elections before the establishment of the present system. *Board v. Dill*, 28 Okl. 104, 110 Pac. 1107, 29 L. R. A. (N. S.) 1170, Ann. Cas. 1912B, 101.

That defendant could not compel them to testify is clear, to our minds, and the fact that they might have stated to other persons how they voted did not change the rule.

The judgment is affirmed. All the Justices concur, except THACKER, J., absent.

ENGLISH v. SEVERNS et al. (No. 7263.)
(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR—§1232—LIABILITIES ON BONDS—ACCRUAL.

A cause of action upon a bond given to supersede an order directing the delivery of personal property to a receiver, upon appeal to the Supreme Court, arises upon the affirmance of such order, and it is not necessary for the receiver to await the termination of the main cause before beginning action upon said bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4758-4757; Dec. Dig. § 1232.]

Commissioners' Opinion, Division No. 1.
Error from District Court, Comanche County; Cham Jones, Judge.

Action by F. M. English, receiver, against J. O. Severns and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded for new trial.

B. M. Parmenter, of Lawton, for plaintiff in error. Howard B. Hopps, of Oklahoma City, and W. O. Stevens, of Lawton, for defendants in error.

RUMMONS, C. This action was commenced in the district court of Comanche county, by the plaintiff in error, hereinafter designated as plaintiff, against defendants in error, hereinafter designated as defendants, to recover judgment on a supersedeas bond executed by the defendant J. O. Severns, as principal, and J. W. McNeal and T. H. Dunn, as sureties, to stay the execution of an interlocutory order entered by the judge of the district court of Comanche county, Oklahoma Territory, in an action wherein F. M. English, as receiver, was plaintiff, and J. O. Severns was defendant, pending an appeal from said order to the Supreme Court of Oklahoma Territory.

Upon said appeal the said interlocutory order was affirmed, and plaintiff brings this action to enforce said supersedeas bond. At the trial, it appearing that the main action of plaintiff against the defendant J. O. Severns had not yet been finally disposed of, the trial court sustained a demurrer to the evidence of plaintiff and dismissed plaintiff's

action without prejudice, upon the ground that said action was prematurely brought. Having moved for a new trial, and having excepted to the overruling thereof, plaintiff brings this proceeding in error to reverse the judgment of the trial court.

The sole question presented by this appeal is whether or not plaintiff was entitled to maintain this action upon the bond executed by defendant Severns to stay the execution of the order entered in the case of *F. M. English, receiver, against J. O. Severns*, before said cause was finally determined.

Plaintiff was appointed receiver in an action pending in the district court of Comanche county, Oklahoma Territory, wherein George W. Broe was plaintiff, and J. R. Hale was defendant, to take charge of and hold, keep, and preserve one Buckeye ditcher, the title to which was involved in said action. Plaintiff having qualified as such receiver, and having obtained leave of court, commenced this action against the defendant Severns into whose possession the said ditcher had been delivered by J. R. Hale, to recover the possession of said ditcher. At the commencement of said action plaintiff applied to the judge of the district court of Comanche county, Oklahoma Territory, at chambers, for an order directing said defendant Severns to surrender possession of said ditcher to him, and for an order restraining and enjoining said defendant Severns, his agents, servants, and employes, from interfering with the possession of said ditcher by plaintiff; the judge of said court made an order directing the defendant Severns to deliver said property to plaintiff and the defendant Severns being aggrieved thereat appealed to the Supreme Court of Oklahoma Territory, and executed the undertaking now sued on to stay the order of said court pending said appeal. The action of the trial judge was affirmed by the territorial Supreme Court. *Severns v. English*, 19 Okl. 587, 101 Pac. 750.

The undertaking upon which this action is based was given under the section of the Code of Civil Procedure, now found at section 5253, Revised Laws 1910. From the argument contained in the brief of counsel for defendant, we conclude that the trial court treated this case as an injunction action, and thereby fell into error.

The Supreme Court of Oklahoma Territory (*Severns v. English*, supra), says:

"It will be noticed that the first three assignments of error are based on the theory that there was a mandatory injunction improperly issued in the case. This contention we think is not well taken, as a reading of the order of the court will show that the only purpose of the injunction part of the order was in aid of and to give force and effect to the order compelling the turning over of the property to the receiver, that it might by him be preserved and accounted for in such a manner as the further order of the court might require. An examination of the record will show that all the court did or attempted to do was to make an order di-

recting that the property in litigation between the parties be turned over to the receiver pending the final disposition of the case."

From this it is apparent that the order appealed from, and to stay which the undertaking herein sued on was given, was an order for the delivery of the property in question to the receiver to be by him held and preserved pending the litigation between Broe and Hale, and that it was in no sense an injunction proceeding; the restraining orders being merely ancillary to and for the purpose of enforcing the order of delivery.

We cannot agree with the contention of counsel for defendants that no action could be maintained upon this undertaking until a final determination of the main action. Under the terms of the order appealed from and affirmed by the Supreme Court of the territory, the plaintiff was entitled to the immediate possession of the ditcher, and entitled to hold possession of the same until the final determination of his action against the defendant Severns. This right of the plaintiff was superseded and defeated by the giving of the undertaking upon which plaintiff seeks to recover. Upon the affirmance of the order by the Supreme Court, plaintiff was entitled to the immediate possession of the machine, and to recover of the defendants such damages as he might have sustained from the withholding of possession from him by virtue of said supersedeas bond. It appears from the evidence that the machine was never returned to plaintiff, and that it was of the market value of \$5,000 to \$6,000.

Defendants are bound by the terms of their undertaking, since an action upon a supersedeas bond is an action upon a contract. *Richardson v. Penny*, 9 Okl. 655, 60 Pac. 501; *Richardson v. Penny*, 10 Okl. 32, 61 Pac. 534; *Ryndak v. Seawell*, 23 Okl. 759, 102 Pac. 125.

It will not do to say that plaintiff cannot maintain this action, because he might ultimately fail in the main action, since he was entitled under the order of the court to the possession of the property and was responsible for it as receiver, under his receiver's bond, and he is entitled to recover from the defendants upon the failure of Severns to deliver the machine to him, the value thereof, to be held and accounted for by him as such receiver upon the conclusion of the litigation arising out of the contest over the title to said machine.

We therefore conclude that plaintiff's right of action upon this undertaking accrued upon the affirmance by the Supreme Court of the territory of the order of the district judge of Comanche county, and that the trial court erred in sustaining the demurrer of defendants to the evidence of plaintiff.

This cause should be reversed and remanded, with directions to the trial court to grant plaintiff a new trial.

PER CURIAM. Adopted in whole.

COX et al. v. STATE et al. (No. 8408.)
(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. EVIDENCE \Leftrightarrow 158(15)—PROCESS \Leftrightarrow 149 —
RETURN—EFFECT AS EVIDENCE—BEST EVIDENCE.

An official return is the best evidence of the doings of the officer under the mandate of the writ or process, and is sufficient as proof of the facts which the officer is authorized and required to certify.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 492, 497, 498, 504; Dec. Dig. \Leftrightarrow 158(15); Process, Cent. Dig. §§ 202, 203; Dec. Dig. \Leftrightarrow 149.]

2. INTOXICATING LIQUORS \Leftrightarrow 249—SEARCHES AND SEIZURES—RETURN.

By virtue of the provision of section 3617, R. L. 1910, the officer is required to make a return, "setting forth a particular description of the liquor and property seized, and of the place where the same was so seized."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 376-385; Dec. Dig. \Leftrightarrow 249.]

3. INTOXICATING LIQUORS \Leftrightarrow 249—SEARCHES AND SEIZURES—RETURN.

Where an automobile was seized by an officer without warrant as a thing used in violation of the prohibition laws, held, that such return is of itself incompetent as evidence to prove any unlawful characteristics thereof, or to establish facts which distinguish it or its use as illegal or prohibited at the time of its seizure.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 376-385; Dec. Dig. \Leftrightarrow 249.]

Commissioners' Opinion, Division No. 3.
Error from County Court, Cotton County;
J. C. Norman, Judge.

Action by the State against Charley Rice and others, defendants, and Mrs. Elbert J. Cox and another, interpleaders. Judgment for plaintiff, and interpleaders bring error. Reversed and remanded.

Sigler & Howard, of Ardmore, for plaintiffs in error.

BLEAKMORE, C. On April 10, 1916, the following return was filed in the county court of Cotton county:

"The State of Oklahoma, Plaintiff, v. Charles Rice, Ben Lane, Jim Brocket, and Oluf Fitzgerald, Defendants. Search and Seizure without a Warrant. Comes now Carl Keeter and Lee Lowe, sheriff, in and for Cotton county, Okl., and gives the court to understand and be informed that at and within the said Cotton county, Okl., on, to wit, the 10th day of April, 1916, the above-named defendant was then and there in the presence of relator in possession of certain spirituous, vinous, and malt and intoxicating liquors with the willful unlawful intent then and there on the part of the said defendant to barter, sell, convey, transport, give away, and furnish the said liquors in violation of the laws of Oklahoma, and was then and there unlawfully engaged in transporting and conveying the said liquors from one place in the state of Oklahoma to another place in Oklahoma. Whereupon the relator did, without any warrant, arrest the said defendant and search him and his premises, and did seize and take into my possession the said liquors and all the furniture, fixtures, tools, and implements then and there unlawfully used in the possession, conveyance, and transporting of said liquors, to wit, 264 pints of whis-

ky and Reo 4 automobile, motor number, 79146. And relator here now brings the said defendants and all of said property into this court, to be disposed of according to law in such cases made and provided.

C. E. Keeter.
"Lee Lowe.

"Fees: Arrest\$4.00
"Mileage, 44.. 4.40."

Thereafter Mrs. Elbert Cox filed in said court her written plea of intervention, setting forth that she was the owner of the automobile seized; that the same had been taken and was being used at the time of its seizure without her knowledge or consent, and was not then, and had never been, with her knowledge or consent, used in violation of law, etc. The First National Bank of Berwyn, Okl., also filed its interplea, asserting a lien on said automobile by virtue of a mortgage securing an unpaid indebtedness, and that such automobile was not used with its knowledge or consent in violation of law. Demurrer to the plea of the bank was sustained. Hearing was had before the court upon the plea of intervention of Mrs. Cox, upon which she introduced evidence establishing her ownership of the automobile in question, and the fact that it was taken and used on the occasion when it was seized without her knowledge. Whereupon the state, over the objection of intervenor, offered in evidence the return, supra, and the certificate of the clerk of the city of Ardmore, to the effect that the livery tag found upon the car was sold to E. L. Rice, who it appears is a brother of the Charles Rice named in the caption of the sheriff's return. Upon this evidence the court adjudged that the automobile be confiscated to the state, and delivered to the board of county commissioners of Cotton county for disposition; and intervenors have appealed.

[2] Section 3617, R. L. 1910, provides:

"3617. When a violation of any provision of this chapter shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels and appurtenances thereunto belonging so unlawfully used, and to take the same immediately before the court or judge having jurisdiction in the premises, and there make complaint, under oath, charging the offense so committed, and he shall also make return, setting forth a particular description of the liquor and property seized, and of the place where the same was so seized, whereupon the court or judge shall issue a warrant commanding and directing the officer to hold the property so seized in his possession until discharged by due process of law, and such property shall be held and a hearing and adjudication on said return had in like manner as if the seizure had been made under a warrant therefor."

By section 10, c. 70, Sess. Laws 1910-11, it is provided:

"Upon the return of such warrant, as provided in the next preceding section, the judge or magistrate shall fix a time, not less than ten days, nor more than thirty days thereafter, for hearing of said return, when he shall proceed to hear and determine whether or not the property

and things so seized or any part thereof, were used, or in any manner kept or possessed by any person within this state, with the intention of violating any of the provisions of this act. At such hearing any person claiming any interest in any of the property or things seized, may appear and be heard upon filing a written plea of intervention setting forth particularly the character and extent of his claim; but upon such hearing the sworn complaint or affidavit, upon which the search warrant was issued, shall constitute prima facie evidence of the contraband character of the property and things seized, and the burden shall rest upon the claimant to show, by competent evidence, his property right or interest in the thing claimed, and that the same was not used in violation of any of the provisions of this act, and was not in any manner kept or possessed with the intention of violating any of the provisions of this act. If, upon such hearing, no person shall appear as a claimant for any of the property and things seized, the judge or magistrate shall thereupon enter judgment of forfeiture in favor of the state without requiring or receiving any other evidence than that contained in the sworn complaint or affidavit upon which the search warrant was issued; if, upon such hearing, any person shall appear as claimant to the property or things seized, or any portion thereof, the issue of fact thus raised shall be tried in the manner provided by law and judgment shall thereupon be entered accordingly."

While the record before us is silent with regard thereto, it may be presumed (if the same is material) that the county judge, in the performance of his duty, issued a warrant, directing the sheriff to hold the property seized in his possession until discharged. By section 3617, supra, it is provided:

"Such property shall be held and a hearing and adjudication on said return had in like manner as if the seizure had been made under a warrant therefor"

—and by section 6 (Laws 1907-08, c. 69, art. 3, as amended by section 10, Laws 1910-11, c. 70), that:

"Upon such hearing the sworn complaint or affidavit, upon which the search warrant was issued, shall constitute prima facie evidence of the contraband character of the property and things seized."

In the instant case, as appears by the return of the sheriff, the property was seized upon violation of the law in his presence, without warrant issued upon affidavit or complaint. Obviously the return of the officer under such circumstances was sufficient to confer jurisdiction upon the court to proceed against the property seized, the statute specifically providing that a hearing and adjudication shall be had upon such return.

It is also provided that where a claimant of the property appears, the issue of fact raised by his plea of intervention must be tried in the manner provided by law. It is clearly contemplated by the law in every instance that evidence of the contraband character of the property seized must be adduced by the state to authorize a forfeiture thereof. In certain cases where things are seized upon warrant it is declared that the sworn complaint or affidavit upon which the same is issued shall constitute prima facie evi-

dence of such character; and where this evidence, designated as sufficient in the judgment of the Legislature for the purpose, is presented the burden rests upon the claimant to show his property right or interest in the thing claimed, and that it was not used in violation of law. But the return of the officer setting forth a description of the property, whether seized with or without warrant, does not, in any instance, by virtue of the statute, constitute evidence, prima facie or otherwise, of the character or use of the thing taken into his possession. The return of an officer ordinarily is an official statement of what he has done in obedience to the mandate of the law. By virtue of the special statutory provision, supra, where property is seized without warrant, as in the present case, the return of the officer is required to set forth a particular description of such property and the place where the same was seized, and nothing further.

[1] In *Driggers v. U. S.*, 21 Okl. 60, 95 Pac. 612, 129 Am. St. Rep. 823, 17 Ann. Cas. 66, the rule announced in 18 *Encyclopedia of Pleading & Practice*, 963, is quoted with approval, as follows:

"An official return is the best evidence of the doings of the officer under the mandates of the writ or process, and is sufficient as proof of the facts which the officer is authorized and required to certify."

But the return of an officer is not competent evidence as to facts which he is not required to certify in the proper execution of his powers. 3 *Jones on Evidence*, § 631.

[2] We therefore conclude that the return in the instant case, which alone forms the basis of the judgment, is of itself incompetent as evidence to prove any unlawful characteristic of the automobile in question, or to establish facts which distinguished it or its use as illegal or prohibited at the time of its seizure.

It is unnecessary to consider the other interesting questions involved in this proceeding.

There being no competent evidence upon which the judgment of forfeiture can be predicated, the same should be reversed, and the cause remanded for further proceedings.

PER CURIAM. Adopted in whole.

CHERRY et al. v. CITY NAT. BANK.
(No. 7780.)

(Supreme Court of Oklahoma. Oct. 17, 1916.
Rehearing Denied Nov. 14, 1916.)

(Syllabus by the Court.)

EXECUTION ~~ON~~ 222(2)—SALE—NOTICE—SUFFICIENCY.

A notice of sale under section 5166, Rev. Laws 1910, published once a week for six weeks in a daily edition, is insufficient, and an objec-

tion to the confirmation of sale based thereon should have been sustained.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 631, 633; Dec. Dig. ¶ 222(2).]

Commissioners' Opinion, Division No. 3. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by the City National Bank against E. A. Cherry and another. From a judgment confirming a sale under execution, defendants bring error. Reversed and remanded.

L. M. Gensman and W. T. Dixon, both of Lawton, for plaintiffs in error. H. A. Smith, of Lawton, for defendant in error.

HOOKER, C. A judgment was rendered in this case on the 12th day of August, 1914, to satisfy which a sale of real estate involved herein was directed to be made, and thereafter, on the 15th day of February, 1915, an order of sale was issued directing the sheriff to advertise and sell said real estate in the manner and form as provided by law; that the sheriff did advertise said property for sale by causing notice thereof to be published in the Lawton Constitution, a newspaper printed and of general circulation in Comanche county, Okl. And it appears from the affidavit of the publisher of said Lawton Constitution that said notice was published in said paper for six consecutive Thursdays (and omitted from the other daily issues). The sale was had and a return thereof made by the sheriff. Thereafter the plaintiff in said action filed a motion to confirm the sale, and H. A. Cherry and Martha M. Cherry filed objections to the confirmation for the following reasons:

"First. That the sum of \$800 is grossly inadequate; the value of said property being \$3,000. "Second. That no legal notice was published of said sale as required by law."

The court, after hearing the objections, overruled the same and confirmed said sale, and H. A. Cherry and Martha M. Cherry appealed therefrom. These reasons were the only ones presented to the trial court; hence they are the only ones we can consider here.

Inadequacy of price alone is insufficient to justify a court in setting aside a sale, but, when considered with other good reasons, the same appeals very strongly to the discretion of the court. The evidence here hardly justifies the assertion that the price bid for the property is disproportionate to its value.

The second ground relied upon by the plaintiffs in error presents a more formidable reason why this sale should be disturbed.

Section 5166 of the Revised Laws of 1910 is as follows:

"Lands and tenements taken on execution shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county. * * * All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable."

This statute comes to us from Kansas, and at the time of its adoption here the same had been construed by the courts of Kansas in the following cases:

Treptow v. Buse et al., 10 Kan. 170, where the Supreme Court of Kansas, through Mr. Justice Brewer, said:

"The next point is that the advertisement of the sale was not sufficient as to time. The first publication was on July 13th; the sale on August 14th. The publication was in the weekly paper, and was repeated each consecutive week from the time of the first publication to the day of sale. This, we think, satisfies the statute. It is not necessary that the notice be in a daily paper. A weekly is sufficient. Nor does the statute call for publication for a certain number of weeks. It says notice 'must be given by advertisement for at least thirty days before the day of sale.' Civil Code, § 457. Here the notice was published more than 30 days before the sale, and was continued through every successive issue of the paper until that time."

Likewise the same court in *McCurdy v. Baker*, 11 Kan. 111, said:

"The questions in this case arise upon the construction of section 457 of the Civil Code. Is notice by posting upon the courthouse door and in five other public places in the county required in all cases of sale, or only in those cases where there is no newspaper printed in the county? We think the section may fairly be construed to sustain either view, and it is difficult to suggest reasons why either should be preferred. We shall sustain the latter, and hold that notice by posting is necessary only where there is no newspaper printed in the county. We do this because the language of the section as clearly sustains this as the other, and because, this having been accepted in some parts of the state as correct, and sales made in accordance therewith, the opposite construction might cast a cloud upon many titles. Is one insertion of the notice in the paper sufficient, or must it be continued through the successive issues of the paper up to the day of the sale? The language is, 'public notice of the time and place of sale, for at least 30 days before the day of sale, by advertisement in some newspaper.' The preposition 'for,' as used in the language quoted, requires, as it seems to us, an insertion in each successive issue of the paper up to the day of sale, the first one being more than 30 days prior thereto. In the authority cited by counsel the language was 'at least 60 days'; the preposition 'for' being omitted. The difference is obvious."

In the case of *Whitaker v. Beach et al.*, 12 Kan. 492, the Supreme Court said:

"The statute requires public notice 'for at least thirty days before the sale' by advertisement, etc. The question turns upon the force of the word 'for' in the language quoted. It seems to us to be nearly equivalent to the word 'during.' Such is a common signification of the word, and unless it have that meaning * * * that a single insertion in the paper should be sufficient, they would have expressed this intention much more clearly by omitting 'for,' and saying only, 'at least thirty days.'"

And in the syllabus of this case it is said:

"(1) In sales of real estate upon execution or order of sale, the notice of sale published in the newspaper must be first published at least 30 days prior to the day of sale, and continued in each successive issue of the paper up to the day of sale. *Scott v. Paulen*, 15 Kan. 168; *Watkins v. Inge*, 24 Kan. 616.

"(2) In sales of real estate upon execution, an advertisement in a weekly newspaper is sufficient, provided the first publication is at least 30 days before the sale, and the advertisement is

continued in each successive issue up to that time.' *Treptow v. Buse*, 10 Kan. 170."

In the case of *Rounsaville v. Hazen*, 33 Kan. 76, 5 Pac. 426, it is said:

"It appears from the evidence that this notice was published in a weekly newspaper on March 30th, April 20th, and April 27th of the year 1882, for the sale which was to take place, and did take place, on April 29th of that year, and that the notice was not published in such newspaper on April 6th, or April 13th, but for some unexplained reason was omitted from the issues of the paper on those days and of those dates. Does this omission render the notice void? We think it renders the notice voidable, and for that reason the sale might have been vacated or set aside upon proper motion before its confirmation. *McCurdy v. Baker*, 11 Kan. 111; *Whitaker v. Beach*, 12 Kan. 492. But we do not think that the omission renders the sale void, or that it may be treated as void in any collateral proceeding, or upon any collateral attack like the present."

Likewise in *Watkins v. Williams*, 33 Kan. 149, 5 Pac. 771, it is said:

"In sales of real estate upon execution, a notice of the sale as published in the newspaper should be given for at least 30 days before the day of sale, and should be continued in each successive issue of the newspaper up to the time of the sale. * * * Where the notice is not so published the sale may be set aside upon motion, at any time before confirmation."

From the foregoing authorities we are of the opinion that the publication notice in this case was not good, and that, the objection thereto before confirmation being made by the plaintiffs in error, the same should have been sustained.

The judgment of the lower court is therefore reversed, and this cause is remanded for proceedings consistent with this opinion.

PER CURIAM. Adopted in whole.

ELY WALKER DRY GOODS CO. v. SMITH et al. (No. 7083.)

(Supreme Court of Oklahoma. Oct. 24, 1916.
Rehearing Denied Nov. 14, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT ⇨94—CREATION OF RELATION—EMPLOYMENT OF NOTARY.

The mere employment of a notary public solely to take an acknowledgment does not constitute such notary the agent of the person paying him to make the representations concerning the nature of the mortgage.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 248, 249; Dec. Dig. ⇨94.]

2. PRINCIPAL AND AGENT ⇨17—AUTHORITY OF AGENT—EMPLOYMENT OF SUBAGENTS.

The fourth paragraph of the syllabus in *Gaar, Scott & Co. v. Rogers*, 148 Pac. 161, is adopted and approved.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 35; Dec. Dig. ⇨17.]

3. MORTGAGES ⇨78—VALIDITY—FRAUD.

A person signing an instrument is presumed to know its contents, and one in possession of his faculties and able to read and understand, and having an opportunity to read a contract which he signs, if he neglects and fails to do so,

cannot escape its liability, for the reason that at the time false representations were made as to its contents. *Colonial Jewelry Co. v. Bridges*, 43 Okl. 813, 144 Pac. 577.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 177-181; Dec. Dig. ⇨78.]

4. FRAUD ⇨58(1)—DEGREE OF PROOF.

Fraud, though in equity it may be inferred from circumstances, must be shown and brought home to the opposite party by clear and convincing proof.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 55; Dec. Dig. ⇨58(1).]

5. JUDGMENT ⇨713(2) — CONCLUSIVENESS — MATTERS CONCLUDED.

A regular judgment while it remains in force is conclusive not only as to matters litigated, but as to every ground of recovery or defense which might have been presented and determined therein.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1063, 1066, 1099, 1241; Dec. Dig. ⇨713(2).]

6. JUDGMENT ⇨443(1)—EQUITABLE RELIEF— GROUNDS—FRAUD.

Ordinarily it is fraud which prevents a party from fairly exhibiting his case in court or fraud practiced upon the court, or its process, and not fraud in the cause of action, which will authorize a court to set aside a final judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 785, 836; Dec. Dig. ⇨443(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, McIntosh County; Preslie B. Cole, Judge.

Action by C. S. Smith and wife against the Ely Walker Dry Goods Company to modify a judgment and for an injunction. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

A. C. Markley, of McAlester, for plaintiff in error. Brook & Brook, of Muskogee, for defendants in error.

GALBRAITH, C. This action was brought by C. S. and Louisa B. Smith to modify a judgment rendered against them in favor of the Ely Walker Dry Goods Company in an action to foreclose a mortgage and to enjoin the sale of certain lands described in said judgment of foreclosure. As grounds therefor the petition alleges that plaintiffs executed a certain mortgage to the dry goods company; that it was executed without reading it, and by reason of the representation of one J. T. Primrose, who, in the language of the amended petition, was "then acting for and in behalf of the defendant, Ely Walker Dry Goods Company," that the tract of land on which stood their home, and also a tract known as the "wagon yard," in Enfaula, were not included in the mortgage; that thereafter suit was brought to foreclose the mortgage so given, which suit they did not investigate or defend, for the reason that they could not pay the debt, and had no knowledge that the home or wagon yard was included in the mortgage; that after judgment they discovered that the home and wagon yard was included, and thereupon

brought this suit to modify the judgment so as to exclude the home and wagon yard from its operation and to enjoin the threatened sale of said tracts.

Defendant answered, after a demurrer was overruled, denying under oath that Primrose was the agent of the dry goods company, or that any fraud was perpetrated by it. At the trial there was the usual conflict of testimony, but the following facts may, we think, be taken as undisputed: A son of the plaintiff's was indebted to the Ely Walker Dry Goods Company, and was being pressed for payment. As security for the debt and in consideration of the extension of time of payment thereof he offered to have executed a real estate mortgage by his father and mother. The son and A. C. Markley, an attorney at law, who represented the dry goods company, went to J. T. Primrose, a notary public and loan agent, to get a proper description of the land to be mortgaged; it appearing that Primrose had previously closed a loan upon the same land. Either the son or Markley asked Primrose for the description, which was taken from certain records and written by Markley in the mortgage. Primrose was then engaged to go to the Smith home and take the acknowledgment. Markley, Primrose, and the son then went together to the Smith home, and were met by plaintiff C. S. Smith. Mrs. Smith was in an adjoining room, and did not leave it. The mortgage was handed to C. S. Smith, and Markley asked him if he should go in and read or explain it to Mrs. Smith. He was answered in the negative. Thereupon Primrose and C. S. Smith went into Mrs. Smith's room. While in there one of them asked Primrose if the home was included, and he answered that it was not. Primrose then advised the Smiths not to sign the mortgage at all, but they did so, and he took the acknowledgment. Primrose and C. S. Smith then returned to the room where Markley was waiting and delivered the mortgage to him; nothing being said about the conversation had in Mrs. Smith's room. Markley paid Primrose \$1 for his services as notary and for walking out to the Smith home to take the acknowledgment. Neither of the Smiths read the mortgage, although C. S. Smith testified he "might have looked over it." The Smiths were mixed blood Creek Indians, each being able to read and speak English fluently, and having better than a common school education. Upon the note secured by the mortgage becoming due suit was brought and personal service had on the Smiths. They did not appear in the action, owing, as they said, to their lack of knowledge that the home and wagon yard were actually included in the mortgage. After judgment was rendered plaintiffs discovered that said tracts were so included, and brought the instant suit.

The trial court rendered judgment modi-

fying the judgment in the foreclosure suit so as to exclude the home and wagon yard and enjoined the sale thereof. From this judgment, the dry goods company appealed to this court.

[1, 2] Several assignments of error are urged. The cause being equitable in its nature, and it being assigned, among other errors, that the petition does not state a cause of action, and that the trial court erred in rendering judgment for the plaintiffs, we prefer to review the whole case. It may be said in the outset that, in our judgment, Primrose was no more the agent of the dry goods company than he was of the Smiths in so far as any authority to represent the terms of the instrument or bind his principal is concerned. He was employed solely to take the acknowledgment, and not to enter into any negotiations on behalf of the dry goods company. His own conduct in advising the Smiths not to execute the mortgage at all negatives the idea that he was acting solely for the dry goods company. Further, it is not shown that Markley had any authority to employ a subagent to perform the duties authorized by his principal for him to perform, or that any such employment was ratified by the principal. In *Gaar, Scott & Co. v. Rogers*, 148 Pac. 161, this court said:

"The general rule of law is that an agent has no implied authority to delegate his powers to a clerk or subagent; and persons employed by him as clerk or subagent do not become the agent of the principal, without the principal's consent; and only upon extreme and unusual exigencies can an agent delegate his authority to a clerk or subagent to transact business for his principal, which requires special judgment, discretion, and experience, without the consent of the principal."

The fact that Markley paid the notary fees does not change the situation. There is no evidence that he asked Primrose to solicit the execution of the mortgage; in fact, Primrose did just the opposite. The only suggestion in the record that Primrose might explain the mortgage came from the Smiths in response to Markley's suggestion that he (Markley) go to Mrs. Smith's room and read or explain it. Primrose's "positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true" (Rev. Laws 1910, § 903), might bring his statement within the definition of fraud were the other necessary elements thereof present. The fraud which will avoid a contract under our statute (Rev. Laws 1910, § 903) must be "committed by a party to a contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract." As fraud is the only ground of relief pleaded in this action, it is the only one considered herein. Under the statute fraud must be brought home, not to a third person, but to a party to the contract. We are not here concerned with any liability of the notary for failure to exercise his duties

as such or for misrepresentation, and are not to be taken as passing upon any such question. So far as the parties here are concerned, the notary, in the exercise of his quasi public functions, doubtless owed each of them the duty to see that the grantors understood the nature and contents of the mortgage (1 Cyc. 553), but when he misrepresented without the connivance of either party, we think it can no more be charged to the one than the other of the parties to the contract.

[3] Passing to the next phase of the case, it seems the Smiths did not read the mortgage, although having ample opportunity and ability so to do.

In *Guthrie & Western R. Co. v. Rhodes*, 19 Okl. 21, 91 Pac. 1119, 21 L. R. A. (N. S.) 490, this court said:

"We take it the rule is well established that, in the absence of any evidence of incapacity to read, or any trick or artifice resorted to prevent his reading it, a party signing a written instrument that is plain and unequivocal in its terms is bound by its express terms and conditions therein contained, and that he cannot set up his own carelessness and his own indolence as a defense, and, because he failed to make use of the faculties possessed by him for determining its conditions, be heard to say that its terms or conditions should be other or different from what they are."

The court in that case and in others hereinafter cited and approved the language of Chancellor Kent in volume 2 of his *Commentaries*, p. 485:

"The common law affords to every one a reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly or an indifference to the ordinary and accessible means of information."

In *McNinch v. Northwest Thresher Co.*, 23 Okl. 388, 100 Pac. 524, 188 Am. St. Rep. 803, this court, speaking through the Chief Justice, said:

"If a party is induced to sign a contract by fraud, he can, of course, avoid it for that reason. It is, however, clear that merely falsely representing to a man in possession of his faculties and able to read that a writing embodies their verbal understanding is not the fraud the law means."

This language is repeated almost verbatim by the court in the late cases. *Ames v. Milam*, 157 Pac. 941, and *Frizzell v. Milam*, 157 Pac. 944.

In *Herron v. M. Rumley Co.*, 29 Okl. 319, 116 Pac. 952, this court said:

"The burden was upon the plaintiff to prove fraud in the securing of the execution of said mortgage by positive and convincing evidence. As a rule, fraud is not presumed, and a person signing an instrument is presumed to know its contents, unless the contrary appears by clear, positive, and convincing evidence, and the party signing the instrument cannot escape its legal liability if such party has an opportunity to read the instrument and neglects and fails to do so, and this is so even if false representations may have been made to them as to the character and kind of instrument signed."

Again, in *Colonial Jewelry Co. v. Bridges*, 43 Okl. 813, 144 Pac. 577, this court said:

"A person signing an instrument is presumed to know its contents, and one in possession of his faculties * * * and having an opportunity to read a contract which he signs, if he neglects and fails to do so, cannot escape its legal liability, for the reason that at the time false representations were made to the effect that the writing contained the verbal understanding of the parties."

These expressions of principle seem to conclude the question of plaintiff's recovery against him. It must be conceded that there are expressions to be found in opinions of this court seeming to limit the broad application of the rules laid down in the case above quoted, but, in our judgment, a careful examination of such cases reveals no exception, if there may be said to be any, within which this instant case falls. Thus in *Smith v. Thesmann*, 20 Okl. 133, 93 Pac. 977, 15 Ann. Cas. 1161, it was said:

"In the absence of misrepresentation, fraud, or deceit, a party to a transaction is bound by the writing evidencing the agreement, though he was in fact ignorant of its contents; but, where the signature to the agreement is induced by the misrepresentations of the other party as to its contents, and the signer was ignorant thereof, he may introduce parol evidence of contemporaneous acts, declarations, and conversations to show the true nature of the agreement."

An examination of that case reveals, however, that defendant, Thesmann, was a German, unacquainted with the English language, and therefore no more capable of reading the instrument which he signed, written in English, than if he could not read at all.

In *Brown v. Trent*, 36 Okl. 239, 128 Pac. 895, it was said:

"Where a person signs an instrument without reading it, the law will not permit him to introduce evidence that he did not know what it contained. * * * But when the opposite party has been guilty of some positive fraud, has said or done something capable of proof which has prevented the maker from informing himself, the instrument can be set aside for the fraud."

In that case the plaintiff was a woman, who pleaded that she was so unacquainted with business affairs that she could not comprehend the nature of the transaction into which she entered; that by trust in some near relatives she was induced to sign an instrument represented to be a release of a dower right, but which was, in fact, a deed conveying title in fee simple. The circumstances were held to be such as to "prevent her from informing herself" as to what she signed. No such facts here appear. It is not shown that either party was incapable of appreciating the nature of the instrument signed or that either was unfamiliar with the boundaries and descriptions of the land they wished to mortgage. *Phipps v. Union Ins. Co.*, 150 Pac. 1083, is inapplicable here. In that case an insurance agent was to insert a certain provision in an application for insurance. He was intrusted by the insured with making out the application, and delivered to the insured a portion thereof which contained the provision, but did not insert

it in the part sent to the company. There is nothing in the case to show that the insured saw or ever had an opportunity to see the application sent the company; hence the decision in his favor in this court does not bear upon this case.

McDonald v. McKinney Nursery Co., 44 Okl. 62, 143 Pac. 191, comes nearer than any case in this court to supporting the position of defendant in error. That case was one of an alleged mistake, decided upon demurrer to the answer and based upon many facts not present here. If it may be said to be in any wise in conflict with the general rule announced by the court, the peculiar facts which justified the decisions do not here exist, nor can that case be taken as overruling the prior decisions, especially in view of the later cases of *Colonial Jewelry Co. v. Bridges*, *Ames v. Milam*, and *Frizzell v. Milam*, *supra*.

[4-6] It is to be further noted that, though personally summoned, the Smiths made no appearance in the foreclosure action. There is no evidence that any representation was made or action taken to prevent them appearing. Their only excuse is that they did not yet know the mortgage described the home and wagon yard. Ordinarily it is fraud which prevents a party from having a fair opportunity to present his case, and not fraud in the cause of action itself, which will afford ground for setting aside a judgment. *Brown v. Trent*, *supra*; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 98; *Alder v. Van Kirk, Land & Construction Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 123; *Graham v. Loh*, 32 Ind. App. 183, 69 N. E. 474; *Gardiner v. Van Alstyne*, 22 App. Div. 579, 48 N. Y. Supp. 114; *Id.*, 163 N. Y. 573, 57 N. E. 1110; *Ramseur v. Brownell* (Ark.) 12 S. W. 200; *Irvine v. Leyh*, 124 Mo. 361, 27 S. W. 512; *Shufeldt v. Gandy*, 34 Neb. 32, 51 N. W. 302; *Brownell v. Storm Lake Bank*, 63 Iowa, 754, 19 N. W. 788. The fraud here alleged, if sufficient to sustain the instant case, was a defense to the foreclosure action. The judgment in that action concluded not only what was actually litigated, but what might properly have been there put in issue. *Alfrey v. Colbert*, 44 Okl. 246, 144 Pac. 179; *Earl v. Earl*, 149 Pac. 1179; *Prince v. Gosnell*, 149 Pac. 1162, and cases cited. Although we are not prepared to say that defendant's reason for not defending the suit was altogether insufficient, yet, to say the least, it is but a slender reed upon which to lean. Fraud even in equity, though it may be inferred, must yet be brought home by clear and convincing proof. Upon the whole record and for the reasons above given we are of the opinion that the plaintiff was not entitled to judgment. We are led to overcome our hesitation in differing from the trial court, and to believe that his entire judgment may be wrong, from

the fact that he not only restored to plaintiffs their home place, which there was some evidence that Primrose represented was not in the deed, but also excepted from the judgment of foreclosure the wagon yard in Eufaula, as to which we have been able to find in the record no evidence at all of any misrepresentation.

The judgment of the trial court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

FORD MOTOR CO. v. LIVESAY. (No. 7448.)
(Supreme Court of Oklahoma. Sept. 12, 1916.
Rehearing Denied Nov. 14, 1916.)

(Syllabus by the Court.)

1. NEGLIGENCE — DANGEROUS INSTRUMENTALITIES—AUTOMOBILE.

An automobile is not an inherently dangerous machine, and the rules of law applicable to dangerous instrumentalities do not apply.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 31, 32; Dec. Dig. ¶ 22.]

2. EVIDENCE — OPINION EVIDENCE — EXISTENCE OF AGENCY.

Evidence that the party is or is not an agent is a mere conclusion. But the witness may state the facts and circumstances concerning the various transactions between him and the alleged principal, leaving the court and the jury to determine, under the facts disclosed, whether or not he was such agent.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2175; Dec. Dig. ¶ 471(30); *Witnesses*, Cent. Dig. § 833.]

3. EVIDENCE — BEST AND SECONDARY EVIDENCE—CONTRACT OF AGENCY.

If the contract of agency is reduced to writing, the written instrument is the best evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 514-522; Dec. Dig. ¶ 158(27).]

4. NEGLIGENCE — AUTOMOBILES — LIABILITIES OF SELLER.

The general rule, subject to certain exceptions not involved in this action, is that a manufacturer or vendor of an automobile is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of such machine.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 25; Dec. Dig. ¶ 27.]

Commissioners' Opinion, Division No. 8. Error from District Court, Texas County; W. C. Crow, Judge.

Action by J. M. Livesay against the Ford Motor Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

Phil D. Brewer, of Oklahoma City, L. B. Robertson, of Detroit, Mich., and R. E. Hartman and Douglas B. Crane, both of Oklahoma City, for plaintiff in error. John L. Gleason, of Guymon, for defendant in error.

RITTENHOUSE, C. The W. K. Prudden Company manufactured wheels for the Ford Motor Company, who used the same in as-

sembling their No. 174900 Model T. 1913 automobile. In March, 1913, the plaintiff purchased from A. D. Hopkins this machine, and in May following was injured while driving along a smooth road at the rate of 22 miles an hour by reason of the breaking of the spokes in the right wheel of said automobile. This action is brought against the Ford Motor Company, wherein it is alleged that it failed and neglected to put proper material in such wheel, and carelessly and negligently constructed the spokes out of unsound timber. The defendant answered by general denial, and further alleged that the wheel was not manufactured by it, but by W. K. Prudden Company, of Lansing, Mich., and denied that it sold the machine to the plaintiff through its agents and servants. At the trial the plaintiff established the injuries received, introducing in evidence a few of the spokes, one of which was defective, that he had purchased the automobile from A. D. Hopkins, and attempted to prove that Hopkins was acting as the agent of the Ford Motor Company.

The defendant demurred to the evidence, which was overruled, and by its evidence established the purchase of the wheel from W. K. Prudden Company, a reputable manufacturer of automobile wheels; that such company made seven tests of the wheel before delivery; that after delivery the defendant company made nine tests, which were all the tests known to the automobile industry. The expert testified that the one defective spoke was known as a case-hardened spoke, sometimes caused in kiln drying; that there is no known method of detecting a case-hardened spoke other than by breaking the same which would destroy its value.

[1] That an automobile is not an inherently dangerous machine has been held by the weight of authority. In *Vincent et al. v. Crandall & Godley Company*, 131 App. Div. 200, 115 N. Y. Supp. 600, it was held that motor vehicles cannot be placed in the same category, as locomotives, gunpowder, dynamite, and similar dangerous machines and agencies, and the rules of law applicable to dangerous instrumentalities do not apply. *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915.

[2, 3] In an attempt to show a privity of contract between the plaintiff and the Ford Motor Company the plaintiff offered the evidence of A. D. Hopkins, over the objection of the defendant, who testified that he was acting as a representative of such company in the sale of the machine. The only evidence on the subject is as follows:

"Mr. Gleason: Were you selling as their agent? * * * A. As subagent; yes, sir. Mr. Gleason: As subagent? A. Yes, sir. Q. When you sold this car to Mr. J. M. Livesay

did you sell it as the agent of the Ford Motor Company? * * *

"Mr. Robertson: Just one question; was that agreement in writing with the Ford Motor Company? A. It was in printing. Mr. Robertson: In printing, yes, and signed by you? A. Yes, sir. Mr. Robertson: We object to any further testimony by this witness.

"Mr. Gleason: The question I asked him was: Was he acting in the capacity of agent; did he perform any act for them? If so, it makes no difference.

"The Court: I understand that perfectly. He is not asking for the contents of the writing, or the extent of the authority at this time. (Objection overruled.)

"Mr. Robertson: Exception."

It will be observed that the witness testified to no facts or circumstances concerning the transaction between him and the principal from which the jury could or could not draw the conclusion as to whether or not an agency existed, but merely testified to the conclusion that he was a subagent. That statement alone is not sufficient to prove the agency. *Goddard & Sons v. Garner et al.*, 109 Ala. 98, 19 South. 513; *Young v. Newark Fire Ins. Co.*, 59 Conn. 41, 22 Atl. 32; *Maurer v. Miday*, 25 Neb. 575, 41 N. W. 395; *Encyclopedia of Evidence*, vol. 10, p. 28; 31 Cyc. 1652; *Southern Home B. & L. Ass'n v. Winans et al.*, 24 Tex. Civ. App. 544, 60 S. W. 825; *McCormick v. Queen of Sheba Gold Mining & Mill Co.*, 23 Utah, 71, 63 Pac. 820.

Independently of the insufficiency of this testimony to prove agency, there was evidence that the contract of agency, if any, was reduced to writing, and this would have been the best evidence of the existence of the agency.

In the admission of the evidence of A. D. Hopkins there was prejudicial error, as the question of the capacity in which A. D. Hopkins acted in the sale of the automobile was the main question in issue, and upon it rested the question of the liability of the Ford Motor Company. If Hopkins was not the agent of the defendant, then the plaintiff failed to make a case, and the demurrer to the evidence should have been sustained.

[4] It is a general rule that a manufacturer or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. In the leading case of *Winterbottom v. Wright*, 10 M. & W. 109, the rule is placed upon the ground of public policy. There would be no end of litigation if the manufacturers were to be held liable to the third persons for every act of negligence in the construction of the machines they make after the parties to whom they have sold them have received and accepted them. In the case of the *Cadillac Motor Company v. Johnson*, 221 Fed. 801, 137 C. C. A. 279, L. R. A. 1915E, 287, the court held:

"A manufacturer of automobiles, which purchased the wheels used on its automobiles, was not liable to an injured person, who purchased an automobile manufactured by it from a dealer, and who had no contractual relations with

it, for its negligent failure to discover that one of the wheels was defective, since, while one who manufactures articles inherently dangerous is liable to third parties injured by such articles, unless he exercises reasonable care, one who manufactures articles dangerous only if defectively made is not liable to third parties for injuries, except in case of willful injury or fraud."

Cooley on Torts, at page 1486, says:

"The general rule is that a contractor, manufacturer, vendor, or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of such articles. * * *

See *Huset v. J. I. Case Threshing Machine Company*, 120 Fed. 865, 57 O. C. A. 237, 61 L. R. A. 303; *Richmond & Danville Railroad Company v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728; *O'Neill v. James*, 138 Mich. 567, 101 N. W. 828, 69 L. R. A. 342, 111 Am. St. Rep. 321, 5 Ann. Cas. 177; *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 226; *Heizer v. Kingsland Douglass Mfg. Co.*, 110 Mo. 605, 19 S. W. 650, 15 L. R. A. 821, 33 Am. St. Rep. 482; *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; *McCaffrey v. Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822, 91 Am. St. Rep. 637.

To this rule there are three exceptions, as stated in *Huset v. J. I. Case T. M. Co.*, supra, but the instant case does not fall within any of these exceptions.

The judgment is reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

BROOK et al. v. WERTZ et al. (No. 5163.)
(Supreme Court of Oklahoma. Oct. 24, 1916.
Rehearing Denied Nov. 14, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD §105(1)—SALE OF WARD'S PROPERTY—SETTING ASIDE—PARTIES DEFENDANT.

Under section 4696, Rev. Laws 1910, it was not error for the court to make Brook & Brook parties defendant in this action.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 383-389; Dec. Dig. § 105(1).]

2. GUARDIAN AND WARD §109—LIABILITIES TO THIRD PERSONS—KNOWLEDGE OF CLAIM.

Where a purchaser in good faith at a void guardian's sale pays the purchase price thereof to the guardian, the said guardian holds the same as a trust fund for the use and benefit of the purchaser, and where the title to said property fails on account of the proceedings being void, it is the duty of the guardian to refund the money to the purchaser. And any party with knowledge of the trust receiving any part thereof acquires no title to said fund as against the true owner, and an action to recover the same in favor of the true owner will lie against the party to whom said fund was transferred contrary to the trust.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 400; Dec. Dig. § 109.]

Commissioners' Opinion, Division No. 8.
Error from District Court, Wagoner County;
R. C. Allen, Judge.

Action by Tooka Apueka against the Walton Trust Company and others, and Eck B. Brook and another, doing business under the firm name of Brook & Brook, were brought in as parties defendant. From an adverse judgment, defendants Brook & Brook bring error. Affirmed.

Brook & Brook, of Muskogee, for plaintiffs in error. Rittenhouse & Drake and Watts & Watts, all of Wagoner, and Furry & Motter and Jay P. Farnsworth, all of Muskogee, for defendants in error.

HOOKER, C. On the 23d day of March, 1912, Tooka Apeuka instituted a suit in the district court of Wagoner county against the Walton Trust Company, B. F. Wertz, and J. P. Farnsworth, and in her petition filed in said action she alleged that she was a full-blood Creek Indian, regularly enrolled upon the approved rolls of the Creek Tribe of Indians and that she was the owner of the real estate involved here, but that the same was in the unlawful possession of the defendants above named, and she further alleged that said defendants claim an interest in and to said lands which constitutes a cloud upon her title, and in said action she sought judgment for the price of the lands, and that the defendants be required to deraign their title and to make profert thereof, and that she be restored to the possession of said property, and that said defendants, and each of them, be barred from asserting any title, claim, right, or interest in said property adverse to plaintiff.

Said defendants filed an answer in which they denied that plaintiff was the owner of said property, and said that on the 23d day of April, 1906, the plaintiff was a minor of the age of 12 years, and that by a judgment of the proper court one Daniel B. Childers was appointed her guardian, and he thereupon executed a bond and qualified as required by law, and that on the 1st day of June, 1911, her guardian filed a petition in the county court of Wagoner county, Okl., said court having jurisdiction of the guardianship cause of the plaintiff, asking for a sale of the real estate involved here, and that thereafter, on the 3d day of July, 1911, the county court of Wagoner county made an order directing the guardian to sell said real estate, and that, in pursuance to said order of sale and the proper proceedings had thereunder, the said Daniel B. Childers, as guardian of the plaintiff, sold said real estate to one B. F. Wertz for the sum of \$7,700, which sale was afterwards confirmed, and a deed made by the guardian to the purchaser therefor, and that thereupon the said B. F. Wertz entered into possession of said property, and claimed the same adversely in fee simple from that time until the institution of said suit; that the said B. F. Wertz paid to the said guardian of the plaintiff the sum

of \$7,700 as the purchase price for said land, and that in order so to do he borrowed from the Walton Trust Company the sum of \$5,700, to secure which he executed a mortgage upon said property, and he likewise borrowed from J. P. Farnsworth the sum of \$2,000, and in order to secure the payment thereof he executed a mortgage upon this property; that no part of said mortgaged indebtedness had been repaid to said mortgagees, and it is further alleged that said money was in the possession of the guardian and under his control, and thereupon said defendants asked the court that said guardian and his bondsmen be made parties defendant to this action, and that said guardian be required to pay said money into court to await the decision of the court, and it further appears that the court did make said guardian and his bondsmen parties defendant, and that a receiver was appointed by the court to take charge of the real estate involved here, and also to take charge of the money in the hands of the guardian, in order to preserve the same pending a decision of this cause. It further appeared that \$770 of this money paid by B. F. Wertz to the guardian had under an order of the county court been paid to Brook & Brook, attorneys for the guardian in the proceeding for the sale of said property, and the aforesaid defendants requested the court that Brook & Brook be made parties to this action, and that they be required to pay the money in their hands into court, in order that the receiver might take charge of the same to await the final action of the court. And thereupon, said Brook & Brook were made parties to this case. Thereupon the plaintiff filed a reply in which she stated that at the time said application was filed in the county court of Wagoner county asking for a sale of her property she was of age, and that all of the proceedings had in said cause from that time on were void and of no force, for the reason that she was not a minor. Upon the trial of said cause the parties thereto entered into an agreed statement of facts, which were substantially as alleged above, together with the agreed stipulation that the plaintiff below nor no one for her ever received the portion of the purchase price for said land as above stipulated, and it was further stipulated that at the time the order was made in the county court of Wagoner county for a sale of plaintiff's property she was of age, and not a minor. Thereupon the court rendered a judgment in favor of the plaintiff, restoring to her the possession of all of said land free and clear from all incumbrances, and directed that the mortgagees be returned their money, and further rendered a judgment in favor of B. F. Wertz against Brook & Brook for the sum of \$770, being the money paid by Childers to Brook & Brook, for legal services in said action; they having declined to pay the money to the receiver herein. To reverse this judgment

Brook & Brook have appealed to this court.

It is contended by the plaintiffs in error that no contractual relation existed between them and B. F. Wertz, the purchaser of said property, that they, Brook & Brook, received this money as compensation for services rendered Childers as guardian of the plaintiff, and that, if the same was unlawfully paid to them, the purchaser, B. F. Wertz, is not entitled to recover or to maintain an action against them therefor, and that only the guardian, if any one, could maintain an action against them for matters arising therefrom; while the defendants in error contend that this \$7,700 was paid by B. F. Wertz, the purchaser at said guardian sale, into court for a specific purpose, and that purpose was the purchase price of the property of the supposed ward, the plaintiff here. The title to said property having failed, the purpose of the trust cannot be carried out, and therefore the purchaser is entitled to a return of said money, and is entitled to follow the same wherever it may be found, and any parties connected with the subject-matter who may have knowingly received any part thereof may properly be ordered to return said money to him.

There are two questions to be determined here: First, did the court err in making Brook & Brook a party on application of Wertz, the purchaser of said property? Second, did the court err in rendering a judgment in his favor against Brook & Brook for that part of the purchase money paid by him for the land which they received for services rendered the guardian in this proceeding to sell the land of the ward, all of which proceedings were void, for the reasons stated hereinbefore.

[1] Under the view that we take of this case the order of the court in making the plaintiffs in error a party was proper; for section 4696 of the Revised Laws of 1910 provides:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in."

The Supreme Court of Kansas, in *Martin v. Martin*, 44 Kan. 295, 24 Pac. 418, said:

"In an action to forfeit an estate in certain land, where the court has acquired jurisdiction to hear the case, it may adjudicate and pass upon all of the real and substantial rights of the parties connected with the subject-matter of the litigation, in order to avoid a multiplicity of suits."

And in *Selbert v. Thompson*, 8 Kan. 65, the same court said:

"Where a court of equity has all the parties before it, it will adjudicate upon all the rights of the parties connected with the subject-matter of the action, so as to avoid a multiplicity of suits."

And Mr. Pomeroy on Code Remedies (4th Ed.) § 229, says:

"If a person not thus immediately interested is nevertheless so related to the subject-matter and to the principal defendant that, upon the plaintiff's success, he will be liable to be proceeded against by such defendant, and to be compelled to make compensation in whole or in part for the loss, he is consequently interested in the subject of the action, and is also, in general, a necessary, or at least a proper, codefendant. Equity requires this class of persons to be joined as defendants, not because they will be directly affected by the decree when rendered, but because, if the plaintiff succeeds against the principal defendant, the latter will then have the right to call upon them to reimburse him, wholly or partially, or to do some other act which shall, according to the nature of the case, restore or tend to restore him to his former position before the recovery against him. To avoid a multiplicity of actions, such persons should, in general, be brought into the suit in the first instance, so that their secondary or consequential liabilities may be determined, and adjusted together with the main issues in the one decree."

Also the Supreme Court of Iowa in *Camp v. McGillicuddy et al.*, 10 Iowa, 202, said:

"A court of equity may require that a person whose rights may not be directly affected by a decree in accordance with the prayer of the bill be made a party where it is necessary to avoid a multiplicity of suits."

And in the body of the opinion it is said:

"There are cases in which it is proper and necessary to make a person defendant to a proceeding in equity, upon the ground of avoiding a multiplicity of suits. His rights may not be directly affected by the decree, but it may occur that, if the complainant succeeds, the respondent will thereby acquire a right to call upon the party omitted or not joined, either to reimburse him, or reinstate him in the position lost by the complainant's success. And, if so, the person consequentially liable to be thus affected, should be before the court that his liability may be adjudicated by one proceeding."

And in 16 Cyc. 188, it is said:

"In order to accomplish the object of completely adjudicating the controversy and of rendering the performance of the decree perfectly safe to those compelled to obey it, it is frequently necessary to bring in as a party one against whom or whose interest plaintiff seeks no relief, but against whom the principal defendant would have a demand in the event of plaintiff's success."

[2] The purchaser here at this guardian sale paid his money to the guardian for the specific purpose of purchasing the real estate of the ward. When it reached the hands of the guardian it became a trust fund in his hands for that specific purpose, and when the object and purpose of the trust failed, on account of the proceedings being void, it then became the duty of the guardian to refund the money to the purchaser, and any sums paid out by him to any party connected with this proceeding must be deemed to have been received by them subject to the lien or trust held by Wertz to said money.

The order of the court directing the guardian to pay to plaintiff in error an attorney's fee in that case did not justify the guardian in paying the same, nor justify the attorney in receiving the same from him. The claim of Wertz to this money is superior to the

claim of the plaintiff in error for services thus performed by them for the guardian. This money, under this state of case, did not belong to the ward, and the guardian had no right of ownership in it, nor lawful control over it, and that part which was paid by him to his attorneys does not lose its character as a trust fund, but may be followed by Wertz, the purchaser, and subject to his claim and lien.

The Court of Appeals of the District of Columbia, in *Willey v. Stormont*, 38 App. D. C. 411, said:

"This brings us to the consideration whether Stone & Fairfax is a necessary party to this proceeding in order that a complete disposition of the rights of all of the parties can be made in the final decree.

"If the necessity to make Stone & Fairfax a party depended upon any interest of it in the subject-matter of the suit, we would not hesitate to say that it would not, at least when not suggested at a reasonable stage of the proceedings. Passing without comment the question of its acting as agent of both buyer and seller, expecting to receive a commission from each for effecting a sale, it is sufficient to say that it did not become entitled thereto on a transaction not completed, under the contract therefor, whatever may be its right to recover for services actually performed, in an action against any of the parties on such a demand. The question, however, does not depend upon these considerations alone. Both parties sought relief in equity, which they were entitled to do; as the remedy at law for the situation presented would not be adequate. In addition, they consented to an interlocutory decree appointing receivers for the property, and empowering them to receive from Stone & Fairfax all of the funds in their hands derived from the transaction. In addition, they were empowered to receive rent of the property, and to renew mortgages. For this purpose, and to pay taxes, and for necessary repairs, they were empowered to use the fund, holding the balance subject to the final decree. This order was proper enough for the protection of all concerned. But it does not appear that Stone & Fairfax delivered any of the money claimed by them as commissions. It seems, though the record is not clear on the point, that they only delivered the balance after deducting their commissions and probably some other charges and expenses paid in arranging the transactions.

"Under these circumstances the final decree ordering payment of the funds to the parties entitled thereto could not dispose of such of the fund as may have been retained by Stone & Fairfax. To do this it must be made a party. When so made the final decree could be so molded as to settle every matter involved. In this view the court was right; but we are of the opinion that it should have suspended the hearing and directed that it be made a party defendant. This would have entailed delay, especially if the new party should demand, as it would have the right to do, time to take testimony on the issues in which it is involved.

"Ordinarily the matter of amendment of pleadings in equity, at the time of the hearing, is one of discretion, the exercise of which will not be disturbed without very strong reasons therefor. At the same time it is not unusual to permit an amendment after the cause shall have been taken to an appellate court. Owing to the principle of equity that a cause shall not be finally disposed of without having all parties whose interests might be affected before the court, leave to amend by making new parties is more liberally granted, especially where the necessity therefor has not been suggested, and does not become manifest, before the hearing. We are of

the opinion, therefore, that the leave to amend should have been granted in this case when applied for.

"The decree will be reversed, and the cause remanded, with direction to grant the leave to make Stone & Fairfax a party, and for further hearing and a final decree not inconsistent with this opinion, making a disposition of the fund in the possession of the receivers, as well as that which may have remained in the possession of Stone & Fairfax."

In the case of *Fidelity & Deposit Co. of Maryland v. Rankin*, 83 Okl. 7, 124 Pac. 71, the Supreme Court of this state said:

"(1) A depositor, having an account with a bank in which he deposited trust funds, drew his check as trustee thereon to pay his private debt to the banker. The banker, with knowledge of the trust, concurred with the depositor in the appropriation by the depositor of the trust in order to pay an individual claim held against him by the bank. Held, that the bank acquires no title to said funds as against the true owner. * * *

"(3) Where a person holding money in a fiduciary capacity pays or transfers it to a bank with notice of his relation to it, for a purpose foreign to the trust, the bank cannot hold the money as against the true owner.

"(a) An action to recover same will lie in favor of the true owner as against the party to whom the trust fund was transferred contrary to the trust."

The judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

J. W. WOLVERTON HARDWARE CO. v.
PORTER, Comanche County Treasurer.
(No. 7753.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. TAXATION ~~§~~362—ASSESSMENT—REASSESSMENT—STATUTORY PROVISION.

Under section 7449, Revised Laws of 1910, the board of county commissioners of any county in this state is authorized to contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed for taxation, and the authority conferred by this provision of the statute applies only to property omitted from assessment, and does not confer the power or authority to revalue or reassess property which has already been assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 601; Dec. Dig. ~~§~~362.]

2. TAXATION ~~§~~406—ASSESSMENT—OMITTED PROPERTY.

Where a corporation has disposed of all of its capital stock and invested the proceeds in property upon which the taxes have been paid, an attempt to assess the capital stock to the corporation as omitted property under the provision of the aforesaid statute is illegal and not warranted by law.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. ~~§~~406.]

3. TAXATION ~~§~~406 — ASSESSMENT — OMITTED PROPERTY.

The record in this case examined, and held, not to warrant the rendition of the judgment rendered herein.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. ~~§~~406.]

Commissioners' Opinion, Division No. 3. Error from County Court, Comanche County; R. J. Ray, Judge.

Proceedings by Joe L. Porter, County Treasurer of Comanche County, against the J. W. Wolverton Hardware Company for the collection of a tax. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Charles C. Black, of Lawton, for plaintiff in error. W. C. Stevens and B. M. Parmenter, both of Lawton, for defendant in error.

HOOKER, C. [1] Section 7449, Revised Laws of 1910, authorizes the board of county commissioners of any county in this state to contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed as required by law, and provides the compensation that may be paid therefor, and directs that before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same ten days' notice thereof by registered mail addressed to him at his last-known place of residence, fixing the time and place when objections in writing to such proposed listing and assessment may be made. And it further provides that an appeal may be taken to the county court from the action of the treasurer within ten days by giving notice and filing a bond as provided therein. From an examination of this statute it is clearly apparent that the purpose contemplated is to assess property that has been omitted from assessment and that has escaped taxation, and that it does not confer the power nor the authority to revalue or reassess for the purposes of taxation any property that may have been overvalued or previously assessed. The object of the statute is to discover omitted property, and this is the entire scope and purpose contemplated by the act.

The proceedings here began on the 10th of November, 1913, when a notice of personal property alleged to have been omitted from taxation for the years 1908 to 1913, inclusive, was served upon the plaintiff in error, and it was directed to appear before to the county treasurer of Comanche county on November 21, 1913, which it did and filed objections in writing as contemplated by the act. The county treasurer of Comanche county decided the contentions adverse to the plaintiff in error, whereupon it appealed to the county court of Comanche county, and upon the trial in the county court the plaintiff in error was successful in all of its contentions, save and except for the year 1910, and by the judgment of the county court of Comanche county it was adjudged to pay the tax on \$7,685 as omitted property for the year 1910. It appears from the record before us that the judgment of the county court was based upon the admissions of the plaintiff in error in

its pleadings filed in this action, and the question for us to review here is, whether the admissions in said pleadings justified the judgment rendered.

[2, 3] In the county court on the 30th day of July, 1915, the plaintiff in error filed an answer, wherein it said, with reference to property alleged to have been omitted from taxation in 1910, that it was a corporation having a capital stock of the par value of \$23,500, and real estate of the assessed value of \$17,000, and that in 1910 it failed to list with the assessor or other taxing officer its capital stock, less the assessed value of its real estate, for the reasons that it did not own any of its capital stock as the same had been sold to private individuals, and the proceeds invested in tangible, real, and personal property which had been duly assessed and taxes paid thereon for the year 1910; and that for the year 1910, that all of its personal property owned by it on March 1st of that year had been fairly assessed for taxation, and the taxes thereon as well as on the real estate owned by it. That in the year 1910, there was a mortgage placed by said company on certain real estate in Lawton for \$15,980, and that \$1,980 represented interest and commission, and that \$14,000 represented money borrowed by the company which it placed in the real estate in improving the buildings thereon, which real estate had been assessed for taxation for \$17,000, and thereafter the plaintiff in error filed a supplemental amendment to its answer, wherein it stated that said mortgage was executed on the 26th day of June, 1909, for \$15,980, and that only \$14,000 thereof was for borrowed money which was used by it in the construction of said building and reiterated the allegations of the answer above given. Without the introduction of any evidence and upon these admissions the county court rendered a judgment against the company as stated above.

Section 7318, Revised Laws of 1910, provides that all corporations organized, existing, or doing business in this state for profit other than public service corporations . . . shall be assessed upon the net value of their moneyed capital, surplus, and undivided profits as the same existed on the 1st day of March of each year in the county, town, district, or city where such corporation is located, less the assessed valuation of any real estate located in this state owned by such corporation and listed separately in the name of such corporation. Moneyed capital, as used in this section, shall include money actually invested in the business of such corporation whether represented by certificates of stock, debentures, or bonds.

The judgment of the county court appealed from is as follows:

"As to the year 1910 the court finds from all the pleadings as they appear in the record and particularly from the admissions and statements made in the answer of appellant to amend statement filed herein the 30th day of July, 1915,

and from the entire record, that the sum of \$23,500 mentioned in the appellant's answer as capital stock of the par value of \$23,500 and the sum of \$14,000 mentioned in appellant's answer as the amount of cash received from the mortgage for \$15,980, making a total of \$37,500, constituted the money actually invested in the business of the J. W. Wolverton Hardware Company for the year 1910.

"The appellant's real estate was assessed at \$17,000, which should be deducted from the total of \$37,500, making \$20,500, which was omitted from the tax rolls for that year. But the court further finds that appellants returned their personal property at \$12,815, which in good conscience should be deducted from the \$20,500, leaving \$7,685, which was omitted from the tax rolls for the year 1910."

The answer of plaintiff in error filed in the court below upon the admissions of which the trial court rendered a judgment against the plaintiff in error asserts that the plaintiff in error did not own the capital stock of the company in the year 1910. That raises a question of fact, and this court in the case of *Weatherford Milling Company v. Duncan*, 42 Okl. 243, 140 Pac. 1185, said:

"Where a milling corporation has disposed of all of its capital stock and invested the proceeds in tangible property, real and personal, and an attempt is made to assess its capital stock to the corporation, as omitted property, under the provisions of the tax ferret statute, such attempt is illegal, and not warranted by the statutes, and the action of the treasurer making such assessment or attempt to collect the taxes thereon may be restrained by injunction."

Then again this answer admits that the capital stock, etc., of the company was of the par value of \$23,500 in 1910, and that its real estate was of the value of \$17,000. We cannot say from this admission whether the real estate was included in the estimate made by the company of the par value of the stock. The statute contemplates that the assessment shall be based upon the net value of the capital stock, surplus, and undivided profit, less the assessed value of the real estate, etc. If the money borrowed had been placed in real estate and the par value of the company determined by taking into consideration this real estate, then the judgment of the lower court is wrong. We do not understand how these admissions justified the court in rendering this judgment, for the reason that if the company had disposed of its capital stock and invested the proceeds in other property upon which it had paid the taxes as it alleged in its answer, then this judgment rendered by the trial court is unquestionably incorrect. Then, again, if in determining the net value or par value of the capital stock, if the value of this real estate was included within the estimate so as to make the total \$23,500, the judgment is wrong.

It appears to us that this case should have been tried out upon its merits, and if, upon the trial thereof, in determining the net value required by the statute, any property had been omitted from a consideration when this assessment was made, that the same might be lawfully assessed under the provi-

sions of the statute quoted above. But if said property had not been omitted, but merely undervalued, that valuation could not be disturbed in this proceeding.

The judgment of the lower court is therefore reversed, and this cause remanded for proceedings consistent with this opinion.

PER CURIAM. Adopted in whole.

JANEWAY et al. v. NORTON. (No. 7644.)
(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. INSURANCE \S 815(2) — MUTUAL BENEFIT INSURANCE—ACTIONS—PLEADING.

A mutual benefit insurance company issued a certificate of insurance to W. H. N., naming therein E. N. as the beneficiary. On November 20th the assured executed and mailed to the insurance company an application for a change of the beneficiary to R. E. J. and N. N., which application did not reach the insurance company until about November 23d, and after the death of assured, which occurred November 21st. E. N. brought suit to recover the amount due upon the certificate. R. E. J. and N. N. were made parties defendant, and claimed the amount due under the certificate, their answer and cross-petition alleging the above facts, but failing to plead specifically the laws of the insurance company in reference to a change of beneficiary and a compliance therewith, but making the general allegation that the assured during his lifetime complied with all the requirements to effect a change of beneficiary to R. E. J. and N. N. Held, that the answer states a defense good as against a general demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1997; Dec. Dig. \S 815(2).]

2. INSURANCE \S 780—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY.

A member of a mutual benefit insurance company has a right to change his beneficiary by complying with the laws of the association governing such changes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1946; Dec. Dig. \S 780.]

3. INSURANCE \S 784(7) — MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY.

To the rule that the insured must comply with the law of the society in order to effect a change of beneficiary there are three exceptions:

(1) Where the society during the lifetime of the member has waived strict compliance with its own laws.

(2) Where it is beyond the power of the insured to comply literally with such laws.

(3) Where the member has done all the laws of the society require him to do, and only formal ministerial acts on the part of the society remain to be done to complete the change of beneficiary at the time of the death of assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1954; Dec. Dig. \S 784(7).]

Commissioners' Opinion, Division No. 4. Error from District Court, Love County; W. F. Freeman, Judge.

Action by Mrs. Etta Norton against the Supreme Lodge, Knights of Pythias, and Ruby E. Janeway and another intervene as defendants. Judgment for plaintiff, and in-

terveners bring error. Reversed and remanded, with instructions.

L. S. Dolman and F. C. Ryburn, both of Ardmore, for plaintiffs in error. R. A. Keller, of Marietta, for defendant in error.

EDWARDS, C. The defendant in error, Mrs. Etta Norton, hereinafter called plaintiff, as the widow of W. H. Norton, deceased, instituted this action in the district court of Love county against Supreme Lodge, Knights of Pythias, to recover upon a certificate of insurance issued by that organization to the said W. H. Norton, deceased. The plaintiffs in error, Ruby E. Janeway and Nova Norton, daughters of the deceased, hereinafter called defendants, intervened and were made parties defendant.

The Supreme Lodge, Knights of Pythias, hereinafter called the Insurance Company, admitted liability, paid the amount due on the certificate into court, and was discharged with costs. The petition of the plaintiff in error alleges, in substance, the issuing of the certificate or policy to W. H. Norton, and that plaintiff is named therein as beneficiary; that said assured died on the 21st day of November, 1914. Plaintiff prays for judgment for the amount of the policy. The defendant Insurance Company for its answer admitted the issuance of said policy, and further pleads a clause of the contract as follows:

"The beneficiary or beneficiaries named in this certificate have no vested interest in the same, and the beneficiaries may be changed at any time, and as often as the member may desire, upon the laws respecting the changing of beneficiaries being complied with."

And it then alleges that on November 13, 1914, pursuant to request of assured, the said company furnished the assured with a blank for a change of beneficiary; that on the 20th day of November, 1914, such change was made and executed by the said assured, and Ruby E. Janeway and Nova Norton were made beneficiaries; the said instruments referred to being attached as a part of the answer of said Insurance Company. It then further alleges that upon November 22, 1914, and before the execution of another certificate evidencing a change in said beneficiary, defendant was advised of the death of said assured. The said Insurance Company asks that Ruby E. Janeway and Nova Norton be made parties, and that it be permitted to pay the amount of the policy into court and be discharged.

The amended answer and cross-petition of Ruby E. Janeway and Nova Norton in substance alleges that they are the sole beneficiaries under the policy in controversy; that on the 9th day of November, 1914, the assured made application to the secretary of Marietta section of said Insurance Company for a change of beneficiary of said policy, and that said secretary forwarded said application to the board of control of said Insur-

ance Company, and upon the 13th day of November 1914, the president of the insurance department of said company forwarded the proper blank to the assured, and on the 20th day of November said assured filled out said blank, addressed to the board of control of said Insurance Company, acknowledged the same as required by said organization, and forwarded same to the said Insurance Company; that W. H. Norton, the assured, died on the 21st day of November, 1914; and that said change of beneficiaries reached said Insurance Company by due course of mail about November 23, 1914. Said defendants then allege that the deceased had complied with all the requirements to effect the change of said beneficiary to said defendants, and could have done nothing more to effect such change had he lived longer thereafter. They pray judgment against the plaintiff and their codefendant for the amount of said policy as tendered into court by said Insurance Company. To this amended answer a demurrer was interposed by the plaintiff, which was by the court sustained. The defendants elected to stand upon their answer, refused to plead further, and the court thereupon entered judgment in favor of the plaintiff for the full amount of the policy. From this judgment the defendants Ruby E. Janeway and Nova Norton appeal. The policy sued upon is made payable as follows:

"The Supreme Lodge Knights of Pythias promises to pay at the head office of its board of control unto Etta Norton, his wife, beneficiary of said member, subject to his right to change the beneficiary—as hereinafter provided. * * *

And it contains the following clause with reference to the rights of and the change of beneficiaries:

"The beneficiary or beneficiaries named in this certificate have no vested interest in same, and the beneficiary or beneficiaries may be changed at any time and as often as the member may desire, upon the laws respecting the changing of beneficiaries being complied with. If there is a failure of designation of beneficiary hereunder, the rule for such cases stated in the laws of the society shall govern."

And attention of the assured is called to the by-laws in a clause as follows:

"A true copy of the several charters of the society and of the laws of the society governing this certificate in force at this time is delivered to the member coincident with the delivery to him of this certificate, and the same is attached to this certificate. Additional copies will be furnished upon request."

The application for change of beneficiary made by the assured to the Insurance Company begins in this manner:

"Application for Change of Beneficiary. In the Insurance Department of the Supreme Lodge Knights of Pythias. To the Board of Control: The undersigned makes application for change of beneficiary, in accordance with the provisions of the laws governing the insurance department (chapter VI, Supreme Statutes, 490 and 492), and for that purpose respectfully submits the following."

And just preceding the acknowledgment thereon it contains the following:

"Note: Change of beneficiary can be made only in accordance with the provisions of the Supreme Statutes referred to, and no change will be valid until application therefor upon this form is accepted by the board of control. When signature of section secretary cannot be obtained, the member must acknowledge signature before an officer authorized to take acknowledgments, who will officially certify to his character and the date of expiration of his term of office."

[1-3] The facts alleged, then, briefly summarized, are that the assured held a policy of fraternal insurance in which his wife was named as beneficiary. He procured a blank for the purpose of making application to the Insurance Company for a change of beneficiary, executed such application on the 20th day of November, at Muskogee, Okla., and on said date mailed same to the company at Indianapolis, Ind., but died on the 21st day of November, before the application to change the beneficiary had reached the company. The question then for determination is: Did the court err in sustaining the demurrer to the amended answer alleging this state of facts?

The policy involved in this action attached to the pleadings as an exhibit, naming as it does the plaintiff as the beneficiary, and the liability thereon being admitted by the Insurance Company issuing same, the amount due thereunder should be paid to the beneficiary named, unless it appears that a change of beneficiary in favor of the defendants Ruby E. Janeway and Nova Norton had been effected by the assured, or unless the assured had fully complied with all the requirements of the laws of the Insurance Company to effect a change of beneficiary and only formal, ministerial acts on the part of the organization remained to be done in order to complete the change. 29 Cyc. 129, states the rule as follows:

"In order to divest the rights of the original beneficiary, the substitution of a new beneficiary must ordinarily be completed in the lifetime of the member, since on his death the beneficiary's rights become vested"—citing numerous authorities.

The following rule is also laid down, supported by a great many authorities:

"However, the society has power to prescribe the mode in which a change of beneficiary shall be made, and if a mode of change is prescribed either in its laws or in its certificate of membership, that mode must as a rule be followed by the members in order to effect a substitution of beneficiaries."

Thus it is frequently required, in order to effect a change, that:

"The member shall file a written petition for the change, * * * and the approval of the substitution by the society is sometimes made a condition precedent to the valid substitution." 29 Cyc. 130-132.

See, also, *Flowers v. Sovereign Camp Woodmen of the World*, 40 Tex. Civ. App. 593, 90 S. W. 526; *Stringham v. Dillon et al.*, 42 Or. 63, 69 Pac. 1020; *Knights of Macabees of the World v. Sackett et al.*, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532; *Shuman v. Ancient Order United Workmen et al.*,

110 Iowa, 642, 82 N. W. 331; McLaughlin v. McLaughlin et al., 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83; Kemper v. Modern Woodmen of America, 70 Kan. 119, 78 Pac. 452.

In the exhibits attached to the pleadings it is specifically provided that:

"The beneficiary may be changed * * * upon the law respecting change of beneficiaries being complied with."

The certificate or policy of insurance states that:

"A true copy of the several charters of the society and of the laws * * * is delivered to the member, * * * and the same is attached to this certificate."

The application for a change of beneficiary, addressed to the board of control applies " * * * for change of beneficiary in accordance with the provisions of the laws, * * * chapter VI, Supreme Statutes, 490 and 492."

Just preceding the acknowledgment to the application for change of beneficiary is a notice that the change of beneficiary can be effected only in accordance with the provisions of the Supreme Statutes, and not until the application therefor is accepted by the board of control. All these references to the laws of the Insurance Company were pleaded, but the laws themselves governing the change of beneficiaries are pleaded neither as exhibits nor by an allegation of their substance, and such laws nowhere appear in the record before us. Nor do the defendants allege a compliance with the requirements of such laws in respect to a change of beneficiary. The defendants do, however, allege that:

"Wm. H. Norton during his lifetime fully complied with all the requirements to effect a change of the beneficiary to these defendants, and could have done nothing more to effect such change had he lived longer thereafter."

In the absence of any motion to make the pleading more definite and certain, this statement should be considered as an allegation that the insured had pursued the course pointed out by the laws of the association, and had done all in his power to change the beneficiary. Such an allegation is sufficient to state a cause of action in favor of the defendants Ruby E. Janeway and Nova Norton. *Knights of Maccabees of the World v. Sackett et al.*, supra; *McLaughlin v. McLaughlin*, supra; 29 Cyc. 133, 134. The better pleading, of course, would have been to set out the laws of the Insurance Company providing for a change of beneficiary, and specifically to have alleged a compliance therewith instead of the general allegation in the nature of a conclusion just quoted.

It is evident from the reference made to the laws of the Insurance Company in regard to a change of beneficiary that some law upon that subject exists, since they are referred to as sections 490 and 492 of the Supreme Statutes, and are again referred to as providing that the application for change of bene-

ficiary is not to become effective until accepted by the board of control. But these laws not being before the court, this cause cannot be determined here, and is reversed and remanded, with instructions to the lower court to overrule the demurrer and proceed in accordance with this opinion.

PER CURIAM. Adopted in whole.

KANSAS CITY SOUTHERN RY. CO. v. HURLEY. (No. 8045.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES §171(1)—FLOWAGE—CARE REQUIRED.

Where a railway company attempts to alter the course of the natural drainage of a tract of land, it must provide sufficient means for the escape of the flow of such water, and where it attempts to gather up the water into ditches, it must care for it so that it will not do injury to an abutting landowner greater than would have resulted had it not interrupted the natural drainage.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. §171(1).]

2. EVIDENCE §472(2)—OPINION EVIDENCE—DAMAGES.

In an action for damages against a railway company, the court, over objections, permitted witnesses to testify as to the amount of damages the plaintiff had sustained. *Held*, error; that the witness should have been required to state the facts, and not conclusions as to the amount of such damage.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2187; Dec. Dig. §472(2).]

3. DAMAGES §105—MEASURE—DESTRUCTION OF PROPERTY—MARKET VALUE.

The measure of damages for the destruction of property is its reasonable market value at the time and place of its destruction, but if the property had no market value at the time and place, then its value in view of the use to which it was to be put may be recovered.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 266-271; Dec. Dig. §105.]

Commissioners' Opinion, Division No. 2. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by W. E. Hurley against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

Jas. B. McDonough, of Ft. Smith, Ark., for plaintiff in error. Jos. I. Pitchford, of Sallisaw, for defendant in error.

GALBRAITH, C. The defendant in error. W. E. Hurley, sued the Kansas City Southern Railway Company for damages charged to have been caused by the overflow of surface water. It was charged in the petition that the plaintiff owned lot 3 block 25 in the town of Gans, Sequoyah county, Okla., that he built his home there, made the improvements, and resided there for a number of years, and that the railway company changed the natur-

al drainage of the lot without making proper provision for the escape of the surface water, and thereby caused the same to overflow to the plaintiff's property, to his damage in the sum of \$878. The jury returned a verdict for \$800, and a judgment was rendered thereon.

[1] There are 52 assignments of error in the petition in error. It will not be necessary to consider these in detail. It is sufficient to say that, although the company denied responsibility for the damage, there was competent evidence tending to show that it was liable. But there was no competent evidence to show the amount of the injury sustained by reason of the overflow. The controlling rule of law has been announced as follows:

"If a railroad attempts to alter the course of a natural drainage of a tract of land, it must provide sufficient means for the escape of the overflow of such water. If the railroad company attempts to gather up the water in the ditches, it is bound to care for it so that it will not do an injury to the abutting owner." *Kelly et al. v. Kansas City Southern Railway Co.*, 92 Ark. 466, 123 S. W. 664.

This rule has been approved by this court in the following cases: *C., R. I. & P. R. Co. v. Groves*, 20 Okl. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802, 16 Ann. Cas. 56; *Town of Jefferson v. Hicks*, 23 Okl. 688, 102 Pac. 79, 24 L. R. A. (N. S.) 214; *C., R. I. & P. R. Co. v. Johnson*, 25 Okl. 762, 107 Pac. 662, 27 L. R. A. (N. S.) 879; *C., R. I. & P. R. Co. v. Davis*, 26 Okl. 434, 109 Pac. 214; *Gulf, Colorado & S. F. R. Co. v. Richardson*, 42 Okl. 457, 141 Pac. 1107; *Wichita Falls & N. W. R. Co. v. Stacey*, 147 Pac. 1194.

[2] The character of the evidence given in support of the claim for damages is illustrated by the following:

"Q. Well, Mr. Hurley, what was the amount of damage to your house? (Objected to as not the proper way to prove the measure of damages. Overruled.) A. (witness continuing.) Well, I figured close on the damages; it was \$250 the way I figured it out—to the house. Q. What do you consider the amount of damages which were sustained by reason of this overflow on your lot? (Objected to and overruled.) Q. Answer the question. A. Well, I hardly know without itemizing it. The Court: That is the way to reach it; itemize it. Witness: Well \$250 for the house, \$100 for the cellar, \$100 for the well, and the potatoes I had were ruined. Q. How much were you damaged by reason of the loss of your potatoes? A. I had a market price on that day of \$87.50 on the potatoes that were ruined. They were in the cellar, and they rotted. Then I had \$25 worth of canned fruit in there that was broken. Q. Were there any outhouses that were damaged? A. Yes, sir; I had a barn and outhouse. Q. What do you figure the damage was on the outhouse? A. Well, something like \$25 on the other place. * * * Q. Were you damaged in any other respect by reason of this overflow? A. Yes, sir. Q. What manner? A. Well, the inconvenience we have been out. We have had to carry water ever since this happened for one block. * * * Q. Mr. Hurley, outside of the cellar and well and outhouse, has your lot been damaged in any manner? A. Yes, sir; damaged for this year; we were unable to have a garden. Q. What do you consider the reasonable damage done to your lot, aside from the cellar and the well and the outhouse, because of

this overflow? * * * A. I would say \$50. Q. Of what does that consist? A. It consists of being without a garden and the stench that was left on my lot. Q. Were you compelled to do anything to keep down the stench? A. Yes, sir. Q. What did you do? A. I used lime there for two or three weeks; I used two barrels under the house and on the lot."

In *Tootle et al. v. Kent et al.*, 12 Okl. 674, 685, 73 Pac. 310, 313, the court, in considering this character of testimony, said:

"This method of proving damages was clearly erroneous. The witness should have been required to state the facts, and not his conclusions, as to the amount of damages he had sustained. He should have been permitted to state the condition, quality, and value of the goods. If any of the goods were destroyed or injured in any respect, that should have been shown. * * * The jury should have been allowed to draw the conclusion from these facts as to the amount of damages that the plaintiff had sustained in that respect."

In *C., R. I. & P. R. Co. v. Teese*, 42 Okl. 188, 140 Pac. 1166, 52 L. R. A. (N. S.) 167, the court said in regard to this character of testimony:

"It is apparent that this testimony was not as to a fact, but as to a conclusion. In an action of this character, the plaintiff would be allowed to state facts showing the extent of the damages and other pertinent matters, but it was error for the court to allow the plaintiff to measure his damages in dollars and cents. Such testimony could only be conclusions of the witness and an invasion of the duties belonging to the jury."

A large number of authorities to the same point are collated in this opinion.

[3] In *Wichita Falls & N. W. R. Co. v. Gant*, 156 Pac. 672, the third paragraph of the syllabus reads:

"The measure of damages for the destruction of property is the reasonable market value of the same at the time it was destroyed; but, if it has no market value, then its value in view of the use to which it was to be put may be recovered."

See, also, *Chicago, R. I. & P. R. Co. v. Quigley*, 156 Pac. 669.

It is apparent from the record that the plaintiff below sustained damages by reason of this overflow. It is equally apparent that no proper evidence was offered to the jury to enable them to estimate and determine the amount of such damages. They were given the conclusion of the witness whose testimony is set out above, and of one or two other witnesses who gave the same character of testimony. These witnesses were not qualified as experts, and did not pretend to give expert testimony. They simply gave their conclusions as to the amount of damages. This was a matter entirely within the province of the jury to determine. The witness should have testified as to the facts, the particular kind of property that the defendant owned, and how it was injured by this overflow. The fact that none of the injured property except the potatoes had a market value at Gans was no reason why each item of the property could not have been described and its use given, and how its usable value had been lessened by reason of the water.

If the witnesses had described the property and its use and had related in what way each item had been injuriously affected by reason of the water, the jury would have had some reasonable basis upon which to form a judgment as to the extent of the injury and proper means of estimating the amount of damage. Under the character of evidence given the jury was compelled to guess that the conclusion of the witnesses as to the amount of damage was correct. There is too much hazard and want of accuracy in this method of reaching a judgment to allow property to be taken from one and given to another by means of it.

On account of the character of the testimony admitted in support of the claim for damages, the judgment appealed from is reversed, and the cause remanded, with directions to the trial court to grant a new trial.

PER CURIAM. Adopted in whole.

CLIFT et al. v. HART. (No. 7739.)

(Supreme Court of Oklahoma. Oct. 10, 1916.
Rehearing Denied Nov. 14, 1916.)

(Syllabus by the Court.)

FRAUD §11(1) — ELEMENTS — REPRESENTATIONS—EXPRESSION OF OPINION.

An assignee of a leasehold interest in land cannot predicate fraud upon the representations of his assignor which, either by reason of their form or subject-matter, constitute mere expressions of opinion. The assignee is not justified in relying upon the accuracy of such statements, especially where he personally views the premises and makes independent inquiry relative thereto; and if he does so, and the opinion so expressed proves incorrect, he must suffer the consequences.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12; Dec. Dig. §11(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Canadian County; John W. Hayson, Judge.

Action by George W. Hart against H. S. Clift and another. Judgment for plaintiff, and defendants bring error. Affirmed.

R. B. Forrest, of El Reno, for plaintiffs in error. W. M. Wallace, of El Reno, for defendant in error.

BLEAKMORE, C. This action was commenced in the district court of Canadian county by George W. Hunt, plaintiff, against H. S. Clift and L. B. Clift, defendants, to recover on a promissory note in the sum of \$600.

Defendants answered:

"First. These defendants admit the execution and delivery of the said promissory note sued on herein.

"Second. Further answering, these defendants allege that said note was obtained by the plaintiff through means of fraud and misrepresentations, in this, to wit: The said plaintiff, being then and there the owner, or alleged owner, of a certain leasehold on a certain tract of land ly-

ing and being situate in the county of Lane, in the state of Oregon, and being then and there desirous of disposing of said leasehold to the defendant H. S. Clift, did then and there represent and state to the said H. S. Clift that he was well acquainted with the said land contained in said leasehold, and knew the productive quality thereof; that he had farmed and used the same and had realized large profits in gathering and disposing of the products therefrom; and defendants say that said leasehold was particularly adapted to fruit growing, and had located thereon a large number of bearing fruit trees, of which, and concerning which, the defendant H. S. Clift had no knowledge, and then and there informed the plaintiff that he was wholly in ignorance of the business of fruit growing, and had no experience whatever as to productiveness and incomes from such business, and stated to the plaintiff that he was willing to enter into said undertaking if he could be confident that ample remuneration would probably follow his efforts in that line; that the plaintiff thereupon stated and represented to the said defendant that said tract of land included in said leasehold had, when he was in possession of the same, profits from fruit grown and picked therefrom, \$900 a year, for the two last preceding years; that the apple trees on said land were very productive, and would produce large and easy profits to the said defendant, if he would take an assignment of plaintiff's said leasehold thereon; and defendant says he believed the said statements and representations of the plaintiff, and in all particulars relied thereupon as the truth, and by reason of such reliance and belief he was induced to and did enter into a contract with the plaintiff for the purchase of said leasehold of said land.

"Third. Defendants further say that the said representations of the plaintiff of and concerning the productive quality of said fruit trees on said land, and his having realized large profits therefrom, or any profits whatever, were false and known by the plaintiff to be false when he made the same; that said apple trees were not productive, but on the contrary were poor bearing trees, producing scarcely sufficient fruit to pay the expense of picking—all of which the plaintiff well knew when his aforesaid representations were made to the defendant.

"Fourth. Defendants further state that the said promissory note sued on in this case was given to the plaintiff by the defendant H. S. Clift, and so soon as the defendant discovered said fraudulent representations of the plaintiff, he renounced the same on the grounds of said fraud."

Demurrer was sustained to the evidence, and judgment rendered for plaintiff, from which judgment defendants have appealed.

The sole contention here is that the trial court erred in sustaining the demurrer, for the reason that there was some evidence tending to establish the allegations of fraud contained in the answer.

Defendants purchased from plaintiff the assignment of a four-year lease of certain lands in Oregon, a portion of which was planted to orchard, together with certain live stock, for the sum of \$900, the note in suit evidencing part of the purchase price. They took possession of the premises and occupied the same for a year, realizing a net profit therefrom of but \$6. They discovered that the trees were diseased, and the yield was small, the fruit of inferior quality, and the venture proved unprofitable. However,

there was no evidence that the trees were diseased or known to be defective by the plaintiff at the time the contract was entered into. At the expiration of the year defendants sold the lease for \$250, and a portion of the live stock for the additional sum of \$40, retaining the remainder, which was apparently of little value. There was no evidence offered to establish the falsity of the representation that plaintiff had realized an annual profit of \$900 from the leasehold during the years of his possession previous to the sale to defendants.

The defendant H. S. Clift testified:

"Q. You had been negotiating for this lease, this farm, for quite a while? A. Yes, sir. Q. And you was all over it two or three times, well, several times, were you not? A. I looked it over; yes, sir. Q. You looked it over two or three times? A. Yes, sir. Q. And you talked with the neighboring people there about it? A. I did not talk to very many. I have talked to a few; yes, sir."

Defendant L. B. Clift also testified:

"Q. Now, you may state to the jury what was said by Hart in relation to the productiveness, the quality of the orchard that was on that land, covered by that lease?

"By Mr. Wallace: Objected to for the reason that it was incompetent, irrelevant, and immaterial.

"By the Court: Overruled and exceptions allowed plaintiff.

"A. Well, he represented it to be a good bearing orchard to me and all of us. Q. Just state to the jury what he said? A. He said we could pay for the land with that orchard, the crop in about one year, and have the other three years, have that what we made on it during the other three years. Q. How? A. The other three years we would make money on it. Q. Did he tell your father anything about the quality of the trees? A. He said that they were good trees, and that he had a very good crop. Q. He said what? A. Said they were good trees and would make a good crop. Q. Did he say anything about the fruit produced, as to it being marketable? A. Yes. Q. What? A. He said— Q. Did he make any representations as to what you would get to make out of it? A. Yes, he said it would make money; that he had made money. Q. Just tell what he said to you. Did he say anything about the amount of money? A. He said the amount, but I do not know exactly what he did say, something like \$600 or \$900 a year. Q. State whether or not—state what he said to you in reference to the improvements as to the amount. A. Yes, sir. Q. Well, what was it? A. He said he thought I had a good thing. Q. Did you believe him? A. Yes, sir. Q. I will ask you whether or not it is a fact that you believed him, and if your believing him had anything to do with your buying this place? A. Yes, sir. * * * Q. You bought this land with your eyes open? A. I guess we did. Q. You looked at it? A. Looked it over. Q. You looked around? A. Yes, sir. Q. And you knew exactly what you was getting in the land? A. I thought I did. Q. You knew that you had 125 acres of land? A. No, 123. Q. And that it had a cherry orchard of about 8 acres? A. Yes, sir. Q. Was that bearing? A. Yes, sir. Q. And you saw that? A. Yes, sir. Q. And this apple orchard of about 8 acres? A. Something like 8 or 10. Q. And it had been bearing some time? A. Yes,

sir. Q. And you knew that you was buying these cattle, hogs, horses, and pasture and the improvements? A. Yes, sir. Q. And you knew what you was getting? A. Yes, sir. Q. And you believed that you had made a good deal? A. Yes, sir. Q. You had been talking to Mr. Hart about buying this for some time? A. It had been mentioned; yes, sir. Q. And he had asked you more money for it than you paid? A. I do not remember. Q. And you frequently saw this property and talked with him about it? A. I do not know as I did."

From the evidence it would seem that the condition of the fruit trees was in no manner concealed, but that the means of knowledge relative thereto was equally available to the parties. Defendant viewed premises at least two or three times and made independent investigation by inquiries of neighbors regarding the same before their purchase:

"As a general rule, an owner, in selling or exchanging his own property, may exalt its value, and where the buyer examines the property before the deal is closed, he has no right to rely upon the representations of the owner as to value, and if he does so he must take the consequences." *Reger v. Henry* (not yet officially reported), 150 Pac. 722; *Long v. Kendall*, 17 Okl. 70, 87 Pac. 870.

Clearly the alleged representations of plaintiff as to the quantity, quality and value of the future yield of the fruit trees was a mere expression of opinion.

"A purchaser of land cannot predicate fraud upon statements made by the vendor which, either by reason of their form or subject-matter, show to be mere expressions of opinion. A purchaser is not justified in relying upon the accuracy of such statements, and, if he does, and the opinion turns out wrong, the purchaser has no action because thereof." *Hazlett v. Wilkin*, 42 Okl. 20, 140 Pac. 410.

In *Wesley v. Diamond*, 26 Okl. 170, 109 Pac. 524, this court quotes with approval the doctrine announced in *Herrin v. Libbey*, 36 Me. 350, as follows:

"The rights of a party who has been defrauded in making a contract, are, on the discovery of the fraud, within a reasonable time to rescind the contract, and restore the parties to their former condition, or to affirm the contract, and claim compensation in damages for the injury he has sustained by reason of the fraud."

In the instant case, if it could be conceded that there was evidence of actionable fraud on the part of plaintiff inducing the contract, it is clear that after the discovery of such fraud defendants declined to rescind, and elected to affirm. In their brief they state, "Here the defendant is not relying upon a rescission of the contract." It cannot be claimed that there was an entire failure of consideration; and defendants do not attempt to recoup damages on account of a partial failure thereof. They neither allege nor offer proof of the measure of damages.

The demurrer was properly sustained, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

RELIABLE MUT. HAIL INS. CO. v. ROGERS. (No. 4977.)

(Supreme Court of Oklahoma. Jan. 4, 1916.
Rehearing Denied Nov. 14, 1916.)

(Syllabus by the Court.)

1. ATTACHMENT \S 373—WRONGFUL ATTACHMENT—ACTIONS—PLEADING.

In a petition to recover damages for the wrongful issue of an attachment, it is not necessary to aver the want of probable cause for the suing out of the attachment or a determination of the action in which the attachment was issued.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 1356-1362, 1395-1397; Dec. Dig. \S 373.]

2. ATTACHMENT \S 375(1)—WRONGFUL ATTACHMENT—ACTIONS—PLEADING.

Actual damages only for mere wrongful attachment may be recovered in an action against the plaintiff therein, independent of the undertaking required by section 4070, Laws 1893 (section 4814, Rev. Laws 1910), and without allegation or proof that the same was sued out maliciously or without probable cause.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 1378, 1379½, 1381, 1398, 1399; Dec. Dig. \S 375(1).]

3. ATTACHMENT \S 377—WRONGFUL ATTACHMENT—ACTIONS—PLEADING.

If exemplary or punitive damages are sought in an action for wrongful attachment against the party instituting the attachment proceedings, both malice and want of probable cause must be alleged and proved.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 1389-1392, 1397; Dec. Dig. \S 377.]

Commissioners' Opinion, Division No. 6. Error from District Court, Kingfisher County; James B. Cullison, Judge.

Action by Lizzie Rogers, individually and as special administratrix of the estate of John Rogers, deceased, against the Reliable Mutual Hail Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

Parker & Simons, of Enid, and F. L. Boynton, of Kingfisher, for plaintiff in error. Bradley & Bradley, of Kingfisher, for defendant in error.

BOWLES, C. This is an action commenced by defendants in error against the plaintiff in error to recover damages for wrongful attachment. A complete history of the case is as follows:

Plaintiff in error, defendant below, instituted proceedings against defendants in error, plaintiffs below, jointly as husband and wife, to recover judgment upon a promissory note signed by the husband alone. Attachment proceedings were caused to issue, and a crop of cotton growing upon the homestead of defendants in error was attached. Garnishment proceedings were also instituted against defendants in error jointly, and money was garnished in the name of the husband. The homestead was in the name of the wife. It seems that no proceedings were taken to dis-

solve the attachment. The main case, however, was determined after two trials in favor of defendants in error. Plaintiff in error appealed to the district court, where a trial was had, and again judgment was rendered for defendants in error. After the termination of the suit in the district court of Kingfisher county, the action before us was instituted in the district court of Kingfisher county for wrongful attachment, and defendants in error recovered a judgment, hence this appeal.

The errors complained of by plaintiff in error, and relied upon for a reversal of this case, will be considered in the order referred to in plaintiff in error's brief. Plaintiff in error complains of instruction No. 13, given by the court, wherein he instructs the jury in substance that if the attachment proceedings were wrongful, the defendants would be entitled to recover such damages as were the proximate result of such wrongful attachment, and also told the jury in the same instruction that the want of probable cause was not a necessary element in determining whether or not the attachment proceedings were wrongful.

From our investigation of plaintiff's amended petition, we find that they predicated their cause of action upon the wrongfulness of the attachment proceedings. It is true that an allegation appears in the amended petition that the affidavit for attachment was sworn to without any probable cause therefor. The attachment affidavit, however, was not the only basis of the suit. The suit is based upon the wrongful attachment, including all the proceedings which brought about and caused an unlawful and wrongful taking and converting of the property of defendants in error, and the petition, taken as a whole, states a cause of action for wrongful attachment. The court, however, gave instructions which would lead us to believe that he considered the case one for malicious prosecution; consequently the instruction complained of squarely contradicts the instruction given by the court upon the theory that the cause of action was one for malicious prosecution; in other words, he tells the jury in instruction No. 1:

"In order for the plaintiff to recover it is necessary for the plaintiff to prove each and every one of the following four things which are essential to sustaining their cause of action as set forth in the petition: First. That the attachment and garnishment process was sworn out and levied on the plaintiffs' property and money by the defendant. Second. That this was done with malice. Third. That it has been legally terminated in favor of the plaintiff. Fourth. That the institution of these proceedings was without probable cause."

This can be accounted for upon one hypothesis alone: The vigilant and determined effort on the part of the plaintiff in error to transform a case of wrongful attachment into one for malicious prosecution. In a suit for malicious prosecution, four elements

must combine: The termination of the main case, damages, malice, and want of probable cause. In a suit for wrongful attachment it was only necessary to allege that the attachment was wrongful and the resulting damages. In the event exemplary or punitive damages are sought, malice and want of probable cause are necessary allegations.

[1, 2] It is strenuously insisted by counsel for plaintiff in error, and not without authority, that when an attachment is sued out and levied upon the property of the defendant in an action, and the plaintiff therein has failed to maintain his action, two remedies, and only two, are open to the attachment defendant; he may sue upon the undertaking on attachment, or maintain an action for malicious prosecution. We cannot agree with this contention. The dissolution of the attachment proceedings gives the right of action, and it is not necessary to wait until the termination of the main action before instituting proceedings for redress. This being the law, upon the dissolution of the attachment, the aggrieved party may elect to sue upon the bond or waive the bond and sue the attaching plaintiff for wrongful attachment. If the proceedings were malicious and instituted without probable cause, the defendant can await the termination of the main action and sue for malicious prosecution.

Justice Brewer, in *McLaughlin v. Davis*, 14 Kan. 168, speaking of the defendant's right to sue for wrongful attachment and to sue attaching plaintiff, uses this language:

"It is insisted that 'the petition should have averred want of probable cause for the suing out of the order, and the termination of the attachment suit.' Neither of these is necessary. A party is entitled to an attachment only when certain facts exist. * * * If the facts do not exist, the attachment is wrongfully issued, and the party causing it to issue is liable for all the damages actually sustained. Nor is it necessary in such case to set out or sue on the undertaking. If the surety in the undertaking is liable, a fortiori the principal is, and that, not by reason of the undertaking, but of the act for which it was given. Nor need the determination of the attachment suit be averred. The attachment is but ancillary to the action in which it was issued. It stands or falls without affecting the progress or termination of" the main case. "A party may have a just cause of action, but no right to an attachment; nor can he justify a wrongful attachment by a valid action."

This court, in *Overton v. Sigmon Furn. Co.*, 151 Pac. 215 (not yet officially reported), has held:

"An action at common law may be maintained for wrongful attachment against the plaintiff therein when the attachment is sued out maliciously and without probable cause, in which case, if the pleadings and evidence warrant it, both actual and punitive or exemplary damages may be recovered."

"In such case, by reason of section 4070, Stat. 1893 (section 4814, Rev. L. 1910), actual damages only may be recovered for the mere wrongfulness of the attachment and without regard to either malice or probable cause."

"Actual damages only for mere wrongful attachment may be recovered in an action against the plaintiff therein independent of the under-

taking required by section 4070, Stat. 1893 (section 4814, Rev. L. 1910), and without allegation or proof that the same was sued out maliciously or without probable cause."

We therefore conclude that the instruction complained of stated the law correctly, and that the giving of the same was not error. In coming to this conclusion we have thoroughly considered the authorities cited by plaintiff in error sustaining the opposite view, but we see no reason why we should depart from the former holdings of this court.

The instructions of the court, however, predicated upon the theory that the action was one for malicious prosecution, were erroneous, but plaintiff in error is not in a position to complain of the giving of them, because they were given at the request of plaintiff in error, and, under our theory of the case, these instructions, if followed by the jury, had the effect to add an additional burden to the plaintiffs below, which could in no wise adversely affect plaintiff in error, but would militate in its favor.

Plaintiff in error next complains that the cause of action of defendant in error was barred by the statute of limitations, citing our statute that:

"Actions on a foreign judgment, libel, slander, assault, battery, malicious prosecution, and false imprisonment, must be instituted within one year after the cause of action accrues."

This being an action for wrongful attachment and not for malicious prosecution, the statute of limitations would not run in any event for a period of three years, and three years not having elapsed from the termination of the attachment until the suit for wrongful attachment was instituted in the district court, the statute has not run, and the contention of plaintiff in error in this regard is without avail. This being the law, a construction of section 5397, Harris-Day Code, pertaining to appeals from justice court, is unnecessary in determining whether or not, by virtue of the appeal, the attachment proceedings were taken to the district court. Under the evidence and facts adduced at the trial of the case at bar, plaintiff in error acts upon the assumption, when the appeal was taken in the main case, the attachment proceedings were also appealed. The constable, having charge of the property, continued to retain it until the case was disposed of in the district court, and no instructions were received by him from the justice of the peace or plaintiff in error here to release said property; the damages suffered and the expense incurred in defending the attachment were the same and the liability of plaintiff in error unchanged.

Plaintiff in error also urges that the court erred in permitting evidence to go to the jury relative to the damage to the cotton growing upon the homestead of defendants in error; said homestead being in the name of the wife. That plaintiffs below could not sue jointly for damages to the cotton, even

though the attachment was wrongful. Under our law, the homestead is for the benefit of the family, and the husband, in this instance, being a member of the family, and having possession of the cotton by reason of his homestead relation, and the fact that he had produced it, as shown by the evidence, inclines us to the opinion that he had such a special interest, along with his wife, as to permit him to be joined with her to recover for the damages complained of.

Instructions numbered 9, 10, 11, 12, 13, 14, and 16, given by the court, are claimed to be erroneous and prejudicial to the rights of the plaintiff in error. Instructions Nos. 9, 11, and 12 were given by the court, we imagine, to counteract the theory maintained by the defendant in the court below that the appeal from the justice of the peace having been erroneously taken to the district court, the district court having no jurisdiction of appeals from justices of the peace at the time, was void, and the plaintiff in error could not be held for damages accruing to the defendant in error after the matter had been appealed to the district court, and the contention of plaintiff in error that the suit for wrongful attachment must be predicated upon the bond given in the attachment proceedings in the first instance.

Plaintiff in error, having invoked the jurisdiction of the district court, and caused a trial to be had therein, is estopped from denying the liability for injuries done by reason of its wrongful attachment. Instructions of this character are often necessary, that the jury may be advised in such a way as to give them a correct understanding of the law of the case, and in order to prevent them from giving an improper effect to the evidence and argument of counsel. In the same connection, instruction No. 10 advises the jury of the admitted facts in the case. We fail to see how this instruction could operate to prejudice the rights of plaintiff in error.

[3] Plaintiff in error also complains of instruction No. 16, which reads as follows:

"You are instructed that attorneys' fees and expenses, incident to the trial of said former proceedings in attachment, the fair, reasonable value of the time expended by reason of the same and all property lost or destroyed by reason of the same, if wrongful, and while such property was under attachment, are elements of actual damages; in the event you find that the defendant company maliciously caused the issuance, levy, and maintenance of said attachment in said former proceedings, and that the plaintiffs herein suffered a loss of credit by reason of such malicious conduct on the part of the defendant company, you will allow the plaintiffs damages for such loss of credit."

In order, however, to discuss instruction No. 16, it will be necessary to understand instruction No. 15, which reads as follows:

"You are also instructed that if you find that the order of attachment and said attachment proceedings were sued out or maintained maliciously and without probable cause therefor, you may also award to the plaintiff such exem-

plary damages as may be just and reasonable, in addition to such actual damages as you may allow them under the instructions heretofore given you by the court. Exemplary damages, also called vindictive or punitive damages, are given by way of example and by way of punishing the defendant."

For wrongful attachment, plaintiffs below were entitled to have the jury instructed, as a measure of damages, that they were entitled to attorneys' fees, loss of time, loss of credit, and the reasonable value of the property destroyed or taken under the attachment and of which they were ultimately deprived. The instruction complained of tells the jury that before it could consider loss of credit, they must find that the prosecution was carried on maliciously. This instruction was wrong, as to the necessity of showing malice in order to recover for loss of credit and in not admonishing the jury that it could not consider remote, speculative, or conjectural damages; following *Tootle et al. v. Kent et al.*, 12 Okl. 674, 73 Pac. 310. But the instructions militated to the advantage of plaintiff in error, and it will not be heard to complain of the error here. Instruction No. 15 was a correct statement of the law, so far as exemplary or punitive damages are concerned; the better line of decisions holding that even in a suit for wrongful attachment, before punitive or exemplary damages can be claimed, both malice and want of probable cause must not only be proven, but pleaded.

The theory of instruction No. 16, so far as the item of loss of credit is concerned, is based upon malice. The jury was instructed that it must first find malice before the loss of credit can be taken into consideration. We have examined the evidence and fail to find where the defendant suffered any loss of credit other than in his own imagination, and we do not believe the instruction was proper, unless there had been some evidence upon which to base it. However, the instruction seems to have been given upon the theory that unless there was malice and lack of probable cause, loss of credit could not be taken into consideration; this being true, we are strongly inclined to the opinion that both the court and jury had in mind that loss of credit could only be considered in awarding punitive or exemplary damages.

The jury was directed to specify the amount of exemplary and punitive damages in its verdict. This they did, and returned a verdict in the sum of \$280 for punitive damages, and we believe the punitive damages, as returned by the jury, were based upon the item of damages for loss of credit. There being no evidence before the jury that would justify the court in submitting to them the item of loss of credit as an element of damages, the \$280 judgment for punitive damages should be remitted. Complaint is made on the part of counsel for plaintiff in error that counsel for defendant in error in the court below, throughout the entire trial and proceedings,

were insinuating, captious, and, by a series of questions, both in direct and cross examination, were endeavoring to prejudice the jury against the plaintiff in error because it was an insurance company and a corporation.

A reading of the record convinces us of this truth, and such proceedings should not be countenanced, and the trial judge, when such conduct is called to his attention, should be prompt in admonishing counsel of their duty in that regard; yet we cannot say in this case that the jury was influenced in its verdict on account of such conduct.

Upon the whole we believe that the verdict of the jury, with the modification made in this opinion, does substantial justice. That the attachment in the first instance was wrongful, cannot be gainsaid. The verdict of \$920 as actual damages suffered by the defendants in error on account of the wrongful attachment included the expense of counsel, witnesses, loss of time for two trials before the justice of the peace of Hennessy township, and the trial in the district court of Kingfisher county. The defendants in error were required to travel long distances and appear in court several times. In addition to this, 20 acres of cotton was attached, and, according to all of the evidence, entirely destroyed. The testimony of several witnesses, qualified to give evidence of the value of the cotton destroyed, estimated the same to be worth from \$500 to \$700, after paying the expenses of picking and hauling to market. We believe the judgment, under the evidence, was no more than a fair and reasonable estimate of the actual damages sustained.

Finding no prejudicial error in the record, except as indicated, we recommend that upon the defendants in error agreeing to remit \$280 of the judgment, the cause be in all things affirmed. In the event defendants in error refuse or fail to remit the said \$280, we recommend that the cause be reversed and remanded, with directions to grant a new trial.

PER CURIAM. Adopted in whole.

MITCHELL-CRITTENDEN TIE CO. v. CRAWFORD. (No. 7847.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. INDIANS §15(1)—LANDS—CONVEYANCE OF GROWING TIMBER.

Adopting the construction of certain acts of Congress (Acts Cong. June 28, 1898, c. 517, 30 Stat. 495; July 1, 1902, c. 1375, 32 Stat. 716; Jan. 21, 1908, c. 195, 32 Stat. 774; April 26, 1906, c. 1876, 34 Stat. 137), upon which the Department of the Interior has acted for many years, held, that a conveyance

by a member of the Cherokee Tribe of growing timber upon his allotment is not void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37, 38, 40-44; Dec. Dig. § 15(1).]

2. LOGS AND LOGGING §3(11) — CONVEYANCES OF STANDING TIMBER—TIME FOR REMOVAL—REASONABLE TIME.

An instrument conveying standing timber, which specifies no time for its removal, grants a terminable estate in such timber, which may end when a reasonable time for such removal expires. What constitutes such reasonable time is dependent upon the facts and circumstances of the particular case.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3(11).]

Commissioners' Opinion, Division No. 3. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by John W. Crawford against the Mitchell-Crittenden Tie Company and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

Zevly, Givens & Stoutz, of Muskogee, for plaintiffs in error. Curtis & Pitchford, of Sallisaw, for defendant in error.

BLEAKMORE, C. On November 9, 1906, Cold Springwater, a full-blood allottee of the Cherokee Tribe of Indians, joined by his wife, executed the following instrument, in writing:

"Indian Territory Conveyance of Timber.

"Know all men by these presents that the undersigned, Cold Springwater and Ida Springwater, his wife, of the Eleventh Recording District, Cherokee Nation, in the Indian Territory, in consideration of the sum of \$25.00 to them paid by Mitchell-Crittenden Tie Company, a corporation of the city of Kansas City, in the state of Missouri, the receipt and payment whereof are hereby acknowledged, and the further payment of \$25.00 within five months and \$120.00 within twelve months from the date hereof, have sold and conveyed, and by these presents do sell and convey unto the said Mitchell-Crittenden Tie Company, all the timber suitable for railroad and sawmill purposes standing or being on the following described lands (describing his allotment), together with the free and unobstructed right to said tie company, its agents, servants, and employees at any and all times from the day of the date hereof

until the to go to and from, on and over said land for the purpose of cutting and removing said timber on and from said land; and after last-mentioned day the right of said tie company, its agents, servants and employees to go or to be upon said land shall cease and determine. To make this conveyance effective, the undersigned declare and guarantee that there is no incumbrance of any kind whatever upon said lands that will interfere with the right of said Mitchell-Crittenden Tie Company, its agents, servants, and employees, to cut and remove timber from said lands as hereinbefore provided.

"And I, Ida Springwater, wife of the said Cold Springwater, for and in consideration of said sum of money, do hereby release and relinquish unto said Mitchell-Crittenden Tie Company, all my right to dower in and to said timber."

In May, 1908, Cold Springwater died intestate, and subsequently, by virtue of proper

conveyances, John W. Crawford acquired title and the possession of said land, and on September 1, 1914, commenced this action, seeking cancellation of said timber conveyance as a cloud upon his title on the ground that the same was void, for the reason that the allottee had no legal capacity to execute the same, he being at the time a restricted full-blood Indian. The defendant, the Mitchell-Crittenden Tie Company, answered asserting the validity of such conveyance, that it constituted no cloud upon the title of the plaintiff, and alleging that the plaintiff had acquired the land in question with knowledge, actual and constructive, of the rights of the defendant under such conveyance, etc. Demurrer to the answer was sustained, and judgment rendered for plaintiff on the pleadings, from which defendant has appealed.

In construing the foregoing conveyance the trial court held:

"That said contract expired by reason of its own limitation at the expiration of two years from the date thereof, and that said contract is not sufficient to and does not at this time convey any right, title or interest in said land or the timber thereon."

[1] The principal question for consideration is the power of a full-blood member of the Cherokee tribe of Indians to execute a valid conveyance of growing timber on his allotted lands.

Section 16 of an act of Congress approved June 28, 1898 (30 Stat. L. 495), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," provides:

"Sec. 16. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of any one else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the treasury of the United States to the credit of the tribe to which they belong: Provided, that, where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him: Provided, further, that nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their allotment."

By act of Congress of July 1, 1902, known as "The Cherokee Treaty," and ratified by that tribe August 7, 1902 (32 Stat. L. 716), it is provided:

"Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt, or obligation, or be alienated by the allottee or his heirs, before the expiration of

five years from the date of the ratification of this act.

"Sec. 15. All lands allotted to the members of said tribe, except such land as is set aside to each [member] for a homestead as herein provided, shall be alienable in five years after issuance of patent."

"Sec. 73. The provisions of section thirteen of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made."

By act of Congress of January 21, 1903 (32 Stat. L. 774), it is provided:

"That the act entitled 'An act to provide for the use of timber and stone for domestic and industrial purposes in the Indian Territory,' approved June sixth, nineteen hundred, be amended so as to read as follows: That the Secretary of the Interior is authorized to prescribe rules and regulations for the procurement of timber and stone for domestic and industrial purposes, including the construction, maintenance, and repairs of railroads and other highways, to be used only in the Indian Territory, or upon any railroad outside of the said territory, which is part of any continuous line of railroad extending into the said territory, from lands belonging to either of the Five Civilized Tribes, and to fix the full value thereof to be paid therefor and collect the same for the benefit of said tribes: Provided, however, that nothing herein contained shall be construed to prevent allottees from disposing of timber and stone on their allotments, as provided in section sixteen of an act entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' approved June twenty-eighth, eighteen hundred and ninety-eight, from and after the allotment by the Commission to the Five Civilized Tribes."

The provisions, supra, of the foregoing congressional enactments were construed by the Assistant Attorney General for the Department of the Interior in an opinion given to the Secretary on August 3, 1903, wherein it was said:

"After a careful consideration of this matter, I am of the opinion, and so advise you, that the various provisions of law in relation thereto when read and construed together must be held to permit members of the Choctaw and Chickasaw Nations to dispose of timber on the land selected for allotment from and after the time a selection duly made in accordance with law has been approved by the Five Civilized Tribes and certificate to that effect has been duly issued.

"An examination of the agreement with the Cherokee Nation, approved by act of July 1, 1902 (32 Stat. 716), shows that the provisions thereof affecting the subject under consideration are substantially the same as those relating to the Choctaws and Chickasaws. It is not necessary to repeat the discussion, but is sufficient to say that in my opinion the rule which governs the matter in the Choctaw and Chickasaw Nations applies equally in the Cherokee Nation."

It appears that this construction was adopted and has since been continuously acted upon by the departmental officers in the exercise of their superintending control

the affairs of the Five Civilized Tribes, relative thereto Mr. Bledsoe, in his work on Indian Land Laws, says:

Section 16 of the act of June 28, 1898, is aptly construed by Congress in section 2 of act of January 21, 1903, to permit allotment of the Five Civilized Tribes to dispose of timber on their allotments from and after the date of August 8, 1903. This construction has been adhered to by the department ever since. The Assistant Attorney General was of opinion that a conveyance of timber could be made until after issuance of the allotment certificate. It will be noted that none of the provisions contain affirmative authority to that Congress by these several provisions added that the members of the Five Civilized Tribes should 'from and after allotment by the mission,' be permitted to sell and convey timber upon their allotments. While the usage appears to be more in recognition of right than a positive declaration of the same, it is fairly susceptible of the construction authorizing such sale and disposition. If it does confer upon the allottee the right to sell timber after he takes his land in allotment, the provisos to the act of June 28, 1898, of January 21, 1903, are each ineffectual for any purpose."

In the construction of a doubtful and ambiguous law the contemporaneous construction of those who are called upon to act under the law and were appointed to carry its provisions into effect, is entitled to very great respect." *Man v. County Commissioners*, 3 Okl. 325, 106 Pac. 566.

While "the courts are bound to construe all laws coming before them according to their judicial views, yet the practical construction put upon an act by the governmental officers charged with its execution ought not to be disregarded." So, *McAlester-Eufaula Telephone Co. v. State*, 25 Okl. 524, 106 Pac. 962.

In *McMichael v. Murphy*, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766, it is said:

It is our duty not to overrule the construction of a statute upon which the land department has uniformly proceeded, in its administration of the public lands, except for cogent reasons, also, 32 Cyc. 1023.

It is insisted, however, that the allottee in the instant case was without authority to execute the conveyance in question by reason of the following provision of an act of Congress of April 28, 1906 (34 Stat. L. 137):

Sec. 19. That no full-blood Indian of the Five Civilized Tribes, Chickasaw, Cherokee, Creek or Seminole, shall have power to alienate, sell, lease, or otherwise dispose of, or incur in any manner any of the lands allotted to him for a period of twenty years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribe shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior. * * *

It is unable to agree with this contention.

In our opinion the language employed is not sufficiently comprehensive to operate in repeal of the provisions of the Acts of 1898 and 1903, *supra*, or in itself to impose

an absolute restraint upon the sale of timber by allottees of the Five Civilized Tribes.

It is a matter of common knowledge of which the courts may properly take notice that members of the Five Civilized Tribes since receiving their allotments have in numerous instances, with the apparent sanction of the officers of the Department of the Interior, disposed of the growing timber thereon to persons who, relying in good faith upon the foregoing departmental construction of the controlling congressional legislation, have invested vast sums in the purchase of such timber and in the construction and maintenance of mills, railroads, tramways, and other equipment necessary and incident to the cutting and manufacture of such timber into lumber and other commodities. In the absence of clear and explicit inhibition against such transactions we are not disposed to place an interpretation upon such acts at variance with that of the Interior Department and thereby strike at the heart of one of the great industries of the state. We therefore conclude that the allottee had the capacity to execute the conveyance in question.

[2] By striking the words, "until the," from the conveyance, it was the obvious purpose of the parties thereto not to fix any definite term within which the grantee therein might enter upon the premises and cut and remove the timber therefrom. Such being the case, the conveyance in question was that of a terminable estate in the timber, which would cease when a reasonable time for the removal of such timber after the date of the execution of such conveyance had expired. *Liston v. Chapman & Dewey Land Co.*, 77 Ark. 116, 91 S. W. 27; *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *Houston Oil Co. v. Boykin* (Tex. Civ. App.) 153 S. W. 1176.

It is here contended by the plaintiff that a reasonable time for the cutting and removal of the timber in question had expired when this action was instituted.

In *Liston v. Chapman & Dewey Land Co.*, *supra*, it is said:

"What is a reasonable time is generally a mixed question of law and fact. The facts are to be ascertained by an inquiry into the conditions of the land and timber, the obstacles opposing, and the facilities favoring, and the conditions surrounding the parties at the time the contract was made. When all the circumstances are considered, and the facts are determined, the law will declare whether reasonable time has expired for cutting and removing the timber conveyed. *Carson v. Lumber Co.* [108 Tenn. 681, 69 S. W. 320], *supra*. No fixed rules can be established for ascertaining what is a reasonable time. The facts and circumstances of each particular case must determine this."

It nowhere appears in the pleadings by particular facts or circumstances alleged what was a reasonable time for cutting and removing the timber so conveyed; and we are unable to say as a matter of law, in the absence of either pleading or proof relative

thereto, that the eight years which had expired between the making of the conveyance and the commencement of the action afforded such reasonable time, and that the failure of defendant to avail itself of its privileges in that respect within that period authorizes the cancellation of the instrument and forfeiture of all rights thereunder.

The judgment of the trial court should be reversed, and the cause remanded, with directions to permit such amendment of the pleadings as the parties may desire to make.

PER CURIAM. Adopted in whole.

COMMERCIAL NAT. BANK OF CHECOTAH v. PHILLIPS. (No. 7926.)
(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

1. BANKS AND BANKING \S 270(11)—**NATIONAL BANKS—RECOVERY OF USURY PAID—DEMAND.**

An action against a national bank to recover double the amount of usurious interest paid is governed by section 5198, Rev. St. U. S. (U. S. Comp. St. 1913, § 9759), and not by section 1006, Rev. Laws Okl. 1910, and in such an action it is not necessary to allege and prove a demand for the return of the usury claimed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1042-1053; Dec. Dig. \S 270(11).]

2. COURTS \S 489(11)—**CONCURRENT JURISDICTION—NATIONAL BANKS—RECOVERY OF USURY.**

A suit against a national bank for the recovery of a penalty for charging usury is cognizable in a state court having general jurisdiction of suits to recover usury and penalties therefor, and such state court is not divested of jurisdiction, where no demand for the return of the usury is alleged or proved, by reason of the fact that the state statute requires a demand for the return of the usury as a condition precedent to the maintenance of a suit to recover a penalty for reserving or charging the same.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1334, 1336; Dec. Dig. \S 489(11).]

3. BANKS AND BANKING \S 270(11)—**NATIONAL BANKS—ACTION FOR USURY—DIRECTION OF VERDICT.**

Where, in such a case, the facts are undisputed and show a simple loan of money, upon which a sum is collected as interest in amount greatly in excess of that allowed by law, there being no other contracts or transactions involved, and the whole matter being carried on by one of the officers of the defendant bank, the trial court is justified in assuming that the collecting of such usurious interest was knowingly done, and in peremptorily charging the jury to return a verdict for the plaintiff.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1042-1053; Dec. Dig. \S 270(11).]

(Additional Syllabus by Editorial Staff.)

4. COURTS \S 489(11)—**EXCLUSIVE OR CONCURRENT JURISDICTION—SUITS BY OR AGAINST NATIONAL BANKS—"SIMILAR."**

The word "similar," as used in Rev. St. U. S. § 5198 (U. S. Comp. St. 1913, § 9759), governing suits against national banks for recovery of penalties for usury, and providing that suits therefor may be brought in any state,

county, or municipal court having jurisdiction in "similar cases," refers to cases of like general nature, having the same general characteristics, and does not mean cases exactly the same as that under the federal statute, although in its context the word "similar" may sometimes mean exactly like.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1334, 1336; Dec. Dig. \S 489(11).]

For other definitions, see Words and Phrases, First and Second Series, Similar.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, McIntosh County; T. P. Clay, Judge.

Action by S. A. Phillips against the Commercial National Bank of Checotah. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. R. Freeman, of Checotah, for plaintiff in error. W. T. Banks, of Henryetta, for defendant in error.

BURFORD, C. This was an action instituted in the district court of McIntosh county, Okl., by S. A. Phillips as plaintiff, against the Commercial National Bank of Checotah as defendant, to recover twice the amount of usurious interest charged by the bank and paid by him. There was no allegation in the petition or proof at the trial that any demand had been made for the return of the usury. The suit being against a national bank was brought under the authority of section 5198, Rev. St. U. S. There was a demurrer to the petition, which was overruled. Thereupon the defendants answered alleging specifically that no demand for the return of the usury had been made, and denying generally the allegations of the petition. At the trial the plaintiff introduced evidence, to which the defendant demurred, and upon said demurrer being overruled introduced no evidence. Whereupon the trial court gave the jury a peremptory instruction to return a verdict for the plaintiff for the amount claimed. The evidence clearly showed that the plaintiff had carried on two transactions with the cashier of the defendant bank; that the loans were both made by and the payments made to the same officer. There was no question of any mistake in the amount of the loan or in the amount paid, though the defendant was somewhat in doubt as to when he paid the notes. These notes, however were in evidence and showed the bank's indorsement as to when they were paid. The notes were not usurious on their face, but the testimony clearly showed that there was included in the face of the notes an amount in excess of the principal, which, together with other payments made as interest, made the amount charged for the use of the money greatly in excess of anything that could possibly have been lawfully charged under the state statute.

[1] It is here alleged as error (first) that the action could not be maintained for the reason that no demand for the return of the

usury was alleged or proved. That such a demand is not necessary is settled by numerous decisions of this court. In *Pauls Valley National Bank v. Mitchell*, 154 Pac. 1188 (not yet officially reported), it was said:

"An action to recover double the amount of usurious interest paid, against a national bank is governed by section 5198, Revised Statutes United States (U. S. Comp. Stat. 1913, § 9759), and not by section 1006, Revised Laws 1910, and it is not necessary in such an action to allege and prove a demand for the return of the usury claimed."

The same principle is announced in *First National Bank of Wellston v. Green*, 155 Pac. 502, *First National Bank of Stigler v. Howard*, 158 Pac. 438, and is discussed in *Miller v. Oklahoma State Bank of Altus*, 157 Pac. 767.

[2, 4] The additional point is made that the federal statute confers jurisdiction to entertain suits of this nature only upon state courts "having jurisdiction in similar cases," and that inasmuch as demand is necessary, as a condition precedent to maintaining such a suit against a state bank or an individual brought under the state statute, the courts in this state have no jurisdiction to entertain a suit for the recovery of a penalty for usury against a national bank, unless demand be proved, for the reason that unless such a demand be proved a state court has no jurisdiction "of any action similar" to that arising under the federal statute. With this contention we are not able to agree. In our judgment the word "similar," used in the federal statute, refers to cases of like general nature, and does not mean cases exactly the same as that under the federal statute. It has been said, beginning with *Farmers' and Mechanics' Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196, followed and approved by this court in many cases, among them those above cited, that, in the language of that opinion, "the states can exercise no control over [national banks] nor in any wise affect their operation, except in so far as Congress may see proper to permit," and that the state statutes in relation to usury have no relation to a national bank. *Farmers' and Mechanics' National Bank v. Dearing*, supra; *Schuyler National Bank v. Gadsden*, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258, and cases cited.

The district court of McIntosh county did have jurisdiction to entertain suits for the recovery of a penalty for usury. This, in our judgment, was what was contemplated by the federal statute. Under the decisions above quoted both of the Supreme Court of the United States and of this court, a state law could not affect the right of action given by the federal statute. It did create a right of action in "a similar case" and gave jurisdiction to the district court to entertain it. It therefore had the right to entertain the cause of action given by the federal statute.

In *Sigsbee v. Birmingham*, 160 Ala. 196, 48 South. 843, the court was construing a stat-

ute providing that no election for annexation of territory to the city should be had within six months after election had been held under that or "any similar law." It was there held that the word "similar" did not mean "precisely like," but "with more or less resemblance."

In *Greenleaf v. Goodrich*, 101 U. S. 278, 25 L. Ed. 845, the court was construing that part of the revenue act of 1862 fixing a duty to be paid on cloth composed of worsted wool, mohair, and goods of "similar" description. It was there said that the word "similar" was "intended to express goods like and not identical with those named."

It is true that in its context the word "similar" may sometimes mean "exactly like." As was said in *Frankel v. Tyrolean Alps Co.*, 121 Mo. App. 51, 97 S. W. 961:

"Similar means: (1) Exactly corresponding, resembling in all respects; precisely like. (2) Nearly corresponding, resembling in many respects; somewhat alike; having a general likeness. (3) Homogeneous; uniform."

In our judgment the word used in the federal statute as above stated means having the same general characteristics. In other words, a state court has jurisdiction to entertain suits under the federal statute when it has jurisdiction to entertain suits of any nature for the recovery of usury and the penalties provided thereon under the state statute. In other words, when the state court has jurisdiction of a cause of action for the recovery of usury or a penalty therefor, it has jurisdiction to enforce the right given by the federal statute, the action being "similar" though not exactly alike in all characteristics. This construction is strengthened by the fact that, so far as our investigations have shown, no state court having general jurisdiction of a suit to recover a penalty for usury has ever been denied jurisdiction to entertain a suit under the federal statute, whereas, in many instances, not only in other states, but in our own in the cases above cited, the jurisdiction has been upheld. In fact, the same proposition here announced was discussed in *Pauls Valley National Bank v. Mitchell*, supra, where it was said:

"It is, however, argued by plaintiff in error that, while defendant in error can only recover the penalty prescribed by the Revised Laws of the United States, yet, having brought his action in a state court, he is bound by the procedure governing actions for the recovery of the penalty provided by Revised Laws 1910, § 1006, for the taking of usurious interest. The fallacy of the argument of plaintiff in error lies in the fact that the action of defendant in error is not brought to recover the penalty prescribed by the Revised Laws 1910, but to recover the penalty prescribed by the Revised Laws of the United States, and, no demand being prescribed by such statute, it was not necessary for defendant in error to make demand in order to entitle him to a recovery."

[3] The final contention is that the trial court erred in giving a peremptory instruction for the plaintiff upon the ground that the question of whether or not usury was

knowingly charged was for the jury. There was no dispute at the trial as to any of the facts. The defendant offered no testimony; that of the plaintiff clearly showed two simple transactions for the loan of money, all consummated with the same officer of the bank, all payments made to such officer. The amount charged was greatly in excess of the amount which could properly be charged under the statute. In the absence of any testimony establishing it, there could be no question of mistake; no other transactions were involved; there was nothing except a simple loan of money with a rate of interest charged and paid greatly in excess of that allowed by law. The evidence of the plaintiff, although somewhat uncertain as to some dates of payment of the different amounts, did fix certain final dates prior to which he was certain all payments were made, and, considering this evidence in its most favorable light for defendant, the interest charged was usurious. Supplementing this were the notes bearing the indorsement of the defendant bank, showing when they were paid. Under this state of facts, which it might be said in passing varies greatly from that involved in *Merchants' and Planters' Nat. Bank v. Horton*, 27 Okl. 689, 117 Pac. 201, cited by plaintiff in error, we think the trial court was justified in assuming that the interest was knowingly charged and received, as alleged in the petition, and that the peremptory instruction for the plaintiff was justified. There was no dispute in the facts, and the inferences to be drawn therefrom, and therefore no question for the jury to pass upon.

We find no error in the record, and therefore the judgment is affirmed.

PER CURIAM. Adopted in whole.

WELSH v. CHURCH. (No. 7458.)

(Supreme Court of Oklahoma. July 25, 1916.
On Rehearing, Nov. 21, 1916.)

(Syllabus by the Court.)

LANDLORD AND TENANT — 231(6) — RENTS — ACTIONS — EVIDENCE.

Evidence in this case examined, and it is held that it is insufficient to justify a recovery in behalf of the plaintiff in error, and the judgment of the lower court, denying the same, was proper.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 933, 934; Dec. Dig. 231(6).]

Commissioners' Opinion, Division No. 3. Error from District Court, Custer County; Thomas A. Edwards, Judge.

Action by A. J. Welsh against W. W. Church. Judgment for defendant, and plaintiff brings error. Affirmed.

A. J. Welsh, pro se. Chas. T. Randolph, of Carmi, Ill., for defendant in error.

HOOKER, C. In March, 1904, the then owners of lot 1 in block 31 in Clinton, Okla., leased a part of the same to the Schlitz Brewing Company for a period of ten years for the purpose of erecting improvements thereon, to be used by the company for storage purposes, and under the contract made between them and the company the improvements were to be personal property, and removable from the real estate at the expiration of the lease. These improvements were erected and used by the company for the purpose for which they were intended until the advent of statehood, when the change in the law rendered the use of said improvements impossible. Some years after statehood the owners of the fee sold the real estate to one Thompson, who in the spring of 1911 sold the same to Church by deed of date, May 15, 1911, and which deed excepted the icehouse then situated on the lot. The evidence here clearly establishes that Church at the time he purchased this property had actual knowledge of the rights of the company to the improvements, for on April 12, 1912, he wrote to the company, informing it that he had purchased the ground upon which these improvements were erected, and referred to an old icehouse thereon, belonging to it, and offered to rent the same at \$5 per month. It further appears that in December, 1913, the company sold the house to the plaintiff in error, A. J. Welsh, and that Welsh demanded possession thereof from the defendant in error, Church, but possession was refused, and it further appears that thereupon Welsh demanded of the company a return of his money, but the company refused to repay the same to him, and after some parleying between the company and Welsh it was agreed that in order to compensate Welsh for the trouble and expense that would accrue to him in obtaining the possession of this house from Church, the company would and did assign to him a claim for rent against Church from May, 1912, to December, 1913, and thereupon Welsh instituted this suit to recover rent at the rate of \$5 per month.

It appears that the company and the defendant in error never consummated any contract with reference to the rent of this property at the time the defendant in error wrote the company on April 12, 1912, and that the company at no time demanded any rent from the defendant in error, or ever offered to pay any rent upon the ground on which said building was located, nor exercised any acts of ownership over the building in question until it sold the same to the plaintiff in error in December, 1913.

The plaintiff in error instituted suit in the court below for the rent alleged to be due by the defendant in error for the use and occupancy of this property from May, 1912, to February 4, 1914, and in the petition it is claimed by the plaintiff in error that the de-

defendant in error agreed to pay the Schlitz Brewing Company, as the owner of said property, rent at the rate of \$5 per month therefor, and that under the contract and agreement between the Schlitz Brewing Company and the defendant in error there was due and owing the sum of \$98.83, as rent on said property from May, 1912, up to December 23, 1913, for which said action was instituted.

It will be borne in mind that the cause of action is based upon an express promise but the proof introduced on behalf of the plaintiff in error in the court below does not sustain any express promise upon the part of said defendant in error to pay rent at the rate of \$5 per month, or any other sum for the use of said property, and we must therefore hold that, there being no evidence to support the allegation of the pleading, the judgment of the lower court, denying the right of the plaintiff to recover, must be upheld.

As to that part of the cause of action sued for herein, accruing after December 23, 1913, the plaintiff in error is not entitled to recover, for the reason that under the lease the same cannot be assigned unless the consent of the lessor, in writing, be first obtained and under the evidence here it does not appear that this provision of the lease was complied with; and, the assignment being in violation thereof, plaintiff in error is not entitled to recover thereunder.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. Upon examining the record upon rehearing, the court is convinced that the judgment of the court below is correct, and was properly affirmed.

There is no merit in the contention that the case is governed by section 3802, Rev. Laws 1910, which provides:

"The occupant of any land, without special contract, shall be liable for the rent to any person entitled thereto."

The building for which the plaintiff claims rent is not "land," but personal property, and was so treated by all the parties. In these circumstances, we find no support for the assertion that the defendant was an "occupant of any land" belonging to the plaintiff, or his assignee, within the meaning of the statute.

The petition for rehearing is denied.

=====

SHUFELDT v. BANK OF MOUND CITY.

(No. 7280.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(*Syllabus by the Court.*)

1. JUDGMENT — 938 — FOREIGN JUDGMENT — ACTION — PETITION.

In a suit pending upon a foreign judgment, an allegation in the petition that such judgment

was rendered in the circuit court of the county of Holt, state of Missouri, which said court has, and had at said time, jurisdiction of the subject-matter and persons and parties, and to which petition a certified copy of said judgment is attached as an exhibit, states a good cause of action upon such foreign judgment, and a demurrer thereto was properly overruled.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1772-1774; Dec. Dig. 938.]

2. EVIDENCE — 348(2) — FOREIGN JUDGMENT — AUTHENTICATION.

The certified copy of the foreign judgment sued on held to be properly authenticated under the act of Congress (Rev. St. U. S. § 905 [U. S. Comp. St. 1913, § 1519]), relating to the authentication of records in judicial proceedings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1369-1383; Dec. Dig. 343(2).]

Commissioners' Opinion, Division No. 1. Error from District Court, Roger Mills County; Frank Mathews, Judge.

Action by the Bank of Mound City against George E. Shufeldt. Judgment for plaintiff, and defendant brings error. Affirmed.

Hendrix & Tracy, of Sayre, for plaintiff in error. E. L. Mitchell and Frank Pitser, both of Cheyenne, for defendant in error.

RUMMONS, C. This is an action on a foreign judgment, commenced in the district court of Roger Mills county, by the defendant in error against the plaintiff in error. The parties will hereinafter be designated as they appeared in the court below. Defendant filed demurrer to the petition of plaintiff, which being overruled, he saved his exception, and, at the trial, objected to the introduction of any evidence by the defendant because the petition failed to state a cause of action. This objection was overruled, and exception saved to such ruling. At the conclusion of plaintiff's evidence, defendant demurred thereto, which demurrer having been overruled and exception having been saved to said ruling, the defendant elected to stand upon such demurrer. Judgment was rendered in favor of plaintiff, and defendant, having unsuccessfully moved for a new trial, brings this proceeding in error to reverse the judgment of the court below.

Counsel for defendant in their brief make several assignments of error, but the only assignments argued are the alleged error of the court in overruling the demurrer of defendant to the petition, and his objection to the introduction of evidence and error alleged because of the admission in evidence of the transcript of the foreign judgment.

[1] We will first consider the sufficiency of the petition. It is alleged, in substance, that plaintiff, on the 3d day of November, 1913, by the consideration of the circuit court in and for the county of Holt, state of Missouri, in a cause therein pending, in which said Bank of Mound City was plaintiff and said George E. Shufeldt was defendant, at the regular October term, 1913, of said court, begun on the 4th Monday of October, 1913,

which said court has and had at said time jurisdiction of the subject-matter and persons and parties, recovered a judgment against the said George E. Shufeldt for the sum of \$5,695.33 debt, and \$13.31 costs, which said judgment still remains in force and effect, and is in no wise reversed, annulled, or set aside, and that said judgment bore interest from date of its rendition at the rate of 6 per cent. per annum. A certified copy of said judgment is attached to said petition as an exhibit, and made a part thereof.

Counsel for defendant contend that the petition is defective in that it fails to allege that the court rendering judgment was a court of record and of general jurisdiction. We are unable to agree with this contention of the defendant, for the reason that the petition alleges that the Missouri court had jurisdiction of the subject-matter and of the persons and the parties to said action. The certified copy of the judgment attached to the petition as an exhibit shows that the circuit court of said county of Holt, state of Missouri, was a court of record.

"The rule of proof of records of courts to which the federal authentication acts apply differs from that in the case of nonjudicial records. As to court records, the authenticated transcript is itself sufficient proof of the laws of the sister state, showing the organization and jurisdiction of the courts, being unnecessary. * * * Where the record of the court of another state, the court having a clerk and seal, is duly authenticated as required by the act of Congress, it is not necessary to produce the Constitution and laws of the state from which the record comes, to show the creation and jurisdiction of the court." *Wilcox v. Bergman*, 5 L. R. A. (N. S.) Note, p. 980.

It being unnecessary to prove the laws of the state of Missouri, giving jurisdiction to the circuit court, it follows that there was no necessity to plead such laws, and we therefore conclude that the trial court committed no error in overruling the demurrer and objection to the introduction of evidence.

[2] Counsel for defendant next contend that the certified copy of the purported judgment recovered by plaintiff in the circuit court of Holt county, state of Missouri, was improperly admitted in evidence. This transcript contains the petition, summons, with the return of the sheriff thereon, answer of the defendant, and the judgment of the court. It is contended in behalf of the defendant that the transcript does not show that the judgment was signed and filed in said circuit court. Counsel for defendant cites no authority in support of their contention that the judgment should have been signed by the trial judge and filed in the court. It has been held by this court that the entering of the judgment of the court by the clerk of the court upon the journals of the court constitutes a valid and sufficient judgment, even though no precedent for journal entry be signed by the judge and filed in the cause. *Boynton v. Crockett*, 12 Okl. 57, 69 Pac. 869.

The certificate of the clerk shows that the judgment is of record in his office; and, in the absence of any evidence to the contrary, such certificate is sufficient to show that judgment was duly entered upon the records of said circuit court. The authenticated copy of the records of said circuit court of Holt county, state of Missouri, are substantially in compliance with the federal statute as to the authentication and judicial proceedings of the court of any state or territory. Section 905, Revised Stats. U. S. Comp. Stat. 1901, p. 677 (U. S. Comp. St. 1913, § 1519) provides: "The records and judicial proceedings of the courts of any state or territory * * * shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The trial court committed no error in admitting this transcript in evidence.

Finding no error in the record, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

HARN et al. v. PATTERSON. (No. 6932.)
(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Nov. 21, 1916.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF §157—OPERATION AND EFFECT—WAIVER.

Under section 847, St. 1890 (section 941, Rev. Laws 1910), a special promise contract to answer for the debt, default, or miscarriage of another is invalid, at the option of the promisor, unless the same be in writing and be subscribed by him or his agent, but such invalidity is waived where oral evidence of such contract is admitted without objection upon the ground of such invalidity and the trial is concluded without the interposition of this statute as a defense.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 377; Dec. Dig. §157.]

2. TRIAL §296(2)—ACTION FOR PRICE—INSTRUCTIONS.

Where the court first instructs the jury to the effect that, if plaintiff sold and delivered certain material to defendants and the latter agreed to pay a stipulated price therefor, he is entitled to recover that amount for them, and in a second instruction to the effect that he is entitled to recover the fair value of said material as against such defendants, if any, as may be found to have used the same, and in a third instruction to the effect that no recovery could be had against H. and W., two of the four defendants, unless they agreed personally with plaintiff to pay for said material, these instructions, construed together, are not subject to the objection that they authorize a recovery against H. and W. for said material upon the ground of its use alone, especially in view of a state of evidence clearly showing its use by another

defendant and less clearly tending to show its use by all the four defendants.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. ¶296(2).]

3. APPEAL AND ERROR ¶889(3)—PLEADING ¶237(6) — AMENDMENT OF PLEADING — AMENDMENTS REGARDED AS MADE.

The amendment of a plea which ought to have been allowed, if leave to make it had been asked in the trial court, to conform it to the evidence adduced without objection or by the adverse party will be regarded in this court as having been made.

(a) Where the evidence adduced by a defendant, to refute the theory upon which plaintiff seeks to recover, would sustain a verdict and judgment against him upon a theory which might have been presented by the plaintiff in another count of his petition, the trial court ought to allow an amendment, if asked, alleging such other count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3622; Dec. Dig. ¶889(3); Pleading, Cent. Dig. §§ 607, 618; Dec. Dig. ¶237(6).]

4. APPEAL AND ERROR ¶1170(1)—REVIEW—HARMLESS ERROR.

Under section 6005, Rev. Laws 1910, no judgment will be set aside or new trial granted by this court on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of this court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

(a) After an examination of the entire record in this case it does not appear that any error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of any constitutional or statutory right.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. ¶1170(1).]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by L. E. Patterson against W. F. Harn and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Choate & Choate and Burwell, Crockett & Johnson, all of Oklahoma City, for plaintiffs in error. H. A. Kroeger and Ledbetter, Stuart & Bell, all of Oklahoma City, for defendant in error.

THACKER, J. Plaintiffs in error will be designated as defendants, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

Plaintiff commenced this action on July 16, 1912, to recover of defendants \$15,514.85, of which \$13,717.79 is claimed as principal and \$1,779.06 is claimed as accrued interest, as the balance due on account of material of the value of \$19,098.17, sold and delivered to defendants in 1909 for use in the construction of a railway, and for which defendants verbally agreed to pay him said sum, \$19,098.17, and upon which they paid \$5,380.38.

The plaintiff's petition directly alleges and the evidence adduced in his behalf directly shows the facts to be, in substance, as stated

in the last preceding paragraph; and it does not appear necessary to a discussion and decision of this case to more fully set out the pleadings and evidence in his behalf.

The defendants Harn, Hurst, and Winans, averring together, and the defendant Oklahoma City Land & Development Company, averring for itself, all in one answer, deny purchasing, and deny promising to pay for any of the material alleged in plaintiff's petition to have been sold and delivered to them; and all of these defendants further allege that the Oklahoma Interurban Traction Company and the Hubb Construction Company, and not this plaintiff, owned said material at the time of plaintiff's alleged sale and delivery; but the Oklahoma City Land & Development Company admits in its averments that it received such material from the Oklahoma Interurban Traction Company and the Hubb Construction Company, although it does not admit receipt of the full amount of the same alleged in plaintiff's petition.

There was a cross-petition by defendants, demanding damages against plaintiff for an alleged breach of the consolidation agreement hereinafter stated and a reply thereto by the latter; but these pleadings appear to raise no issue that need be stated here, for the reason that the trial court sustained a demurrer to defendant's evidence in support of that petition, to which ruling no exception was taken; and there is no question here arising out of that action of the trial court.

The evidence adduced in behalf of defendants was to the effect that the Oklahoma City Land & Development Company received from the Oklahoma Interurban Traction Company and the Hubb Construction Company a portion of said material, of the value of \$5,380.38 prior to October 4, 1909, and on this date paid \$4,105.70 and on October 19, 1909, \$1,274.68 to the said Oklahoma Interurban Traction Company in full satisfaction for the same; that on said October 4, 1909, the plaintiff, as owner of a major portion of the stock in the Oklahoma Interurban Traction Company and the Hubb Construction Company, and claiming to represent each of these two companies, entered into an agreement with said Oklahoma City Land & Development Company through the defendants Harn, Hurst, and Winans, and one Hare, who together owned all the stock in this company and acted for it in said agreement; that by the terms of said agreement the Citizens' Traction Company should forthwith be organized by the plaintiff and said Hare, Harn, Hurst, and Winans as stockholders therein, and should take over by transfer all of the property and assets of the Oklahoma Interurban Traction Company and the Hubb Construction Company, including all the material mentioned in plaintiff's petition, and all of the railway property and assets of the Oklahoma City Land & Development Company; that the Oklahoma City Land & Develop-

ment Company should, in the meantime, use said material in the construction of the proposed line of railway and transfer the same to the Citizens' Traction Company as a part of its railway property and assets; that the Oklahoma City Land & Development Company should issue to plaintiff one-third of its capital stock and the Citizens' Traction Company should issue to him one-third of its capital stock, and the latter company should also issue to him its first mortgage bonds in the sum of \$100,000, in full satisfaction for the said property and assets of the Oklahoma Interurban Traction Company, the Hubb Construction Company, and of the plaintiff himself; that all the material mentioned in the plaintiff's petition, except the amount so paid for on October 4 and 19, 1909, was received and used by the Oklahoma City Land & Development Company after said consolidation agreement had been entered into and under and by virtue of said agreement for the purpose of immediate use in the construction of said line of railway, and thereupon for the purpose of being transferred as aforesaid to the said Citizens' Traction Company; that neither the Oklahoma City Land & Development Company nor the defendants Harn and Winans agreed to pay plaintiff, or any one else, for said material, or any part of the same; that the said Citizens' Traction Company was organized in November, 1909, in accordance with said consolidation agreement, and the plaintiff was elected president of the same and a member and chairman of its board of directors; that plaintiff received one-third of the stock in the Oklahoma City Land & Development Company, although this was delivered to him without authority; that the defendants offered to plaintiff to transfer the railway property of the Oklahoma City Land & Development Company to the Citizens' Traction Company, and at the same time demanded of plaintiff a transfer of the property and assets of the Oklahoma Interurban Traction Company and of the Hubb Construction Company in accord with the terms of said consolidation agreement, but the plaintiff refused to and did not make such transfer; that the consolidation agreement was thus breached by plaintiff, and that thereafter the Oklahoma City Land & Development Company, acting through the actually personal defendants as its officers, transferred its railway property to the Capital Traction Company, a company organized by the defendants, instead of the Citizens' Traction Company.

The plaintiff, in rebuttal, denied any such consolidation agreement as that to which defendants testified; he denied that there was any agreement under which any of the material mentioned in his petition was delivered to defendants or either of them, except in the sale and purchase alleged and testified to by him; but he admitted conversational negotiations by all of the other parties with himself, directed toward a consolidation agree-

ment which he was inclined to favor, and also admitted receipt of certificates issued to him for one-third of the stock of the Oklahoma City Land & Development Company, with the explanation, however, that the same were voluntarily delivered to him by Mr. Hare, and later destroyed by him when he found that defendants denied Mr. Hare's authority to make such delivery.

It will be understood from what has already been said that, although plaintiff's petition alleges the value of the material, and thus exhibits a distinguishing feature of the common count of quantum valebant or indebitatus, in general assumpsit, the petition is in the nature of one in special assumpsit by reason of the allegation of a verbal, and thus an express, promise by defendants as the basis of the action.

It will also be understood from what has been said that the answer is in effect a plea of non assumpsit, and presents the general issue under which the defendants are entitled to show almost every defense which tends to prove that no debt was due at the time when the action was commenced and certainly all such defenses as arise from any inherent defect in the original promise, express or implied, if not all such as arise from an extinguishment of the liability after it was incurred. 5 Corpus Juris, 1405; 2 R. C. L. § 28, p. 771.

The case was tried to a jury upon four propositions embodied in the instructions of the court to the effect that: (1) The plaintiff was entitled to recover if it was found that he sold and delivered said material to defendants and the latter agreed to pay said amount therefor; that (2) the plaintiff was entitled to recover the fair valuation of said material as against such of the defendants, if any, who might be found to have used said material; that (3) the plaintiff was entitled to recover of the Oklahoma City Land & Development Company the value of said material if the latter used the same, although such material was obtained under a contract of construction, unless this defendant had made or tendered full performance of said contract on its part; and that (4) the plaintiff was not entitled to recover of defendants, or either of them, if the plaintiff delivered said material to the Oklahoma City Land & Development Company, under a contract of consolidation upon which it made or tendered full performance of all conditions precedent on its part.

There was a verdict and judgment for the plaintiff, for the amount he demanded against the defendant Oklahoma City Land & Development Company, and the defendants Harn and Winans.

The defendants assign error and seek a reversal upon the following propositions:

[1] First. The defendants say, in effect, that, assuming all the evidence and every reasonable inference that may be deduced therefrom in favor of plaintiff is true, the

defendants Harn and Winans are not liable because no note or memorandum of their contract to pay was in writing and subscribed by them, as required by section 847, Statutes 1890 (section 941, Rev. Laws 1910) to bind any one to answer for the debts, etc., of another, and their promise was merely collateral to the debt of the Oklahoma City Land & Development Company, in view of the fact that all of said material was sold and purchased for the use and benefit of this company, and the defendants Harn and Winans had no personal, immediate, and pecuniary interest in the transaction, under the rule that, one quid pro quo cannot give rise to distinct debts and no joint indebtedness could arise out of this transaction. 8 Modern Am. L. 186, 187; 8 Harvard L. Rev. 266-264; Browne on Statute of Frauds (5th Ed.) §§ 197-199, pp. 249-255; Waldock v. First National Bank of Idabell, 48 Okl. 348, 143 Pac. 53; Kesler v. Cheadle, 12 Okl. 489, 72 Pac. 367; Davis v. Patrick, 141 U. S. 490, 12 Sup. Ct. 58, 35 L. Ed. 826; Emerson v. Slater, 22 How. 28, 16 L. Ed. 860; D'Wolf v. Jacques Raband, 1 Pet. (26 U. S.) 476, 7 L. Ed. 227; Williams v. Auten, 62 Neb. 832, 87 N. W. 1061, on rehearing, 68 Neb. 26, 93 N. W. 943; Hurst Hardware Co. v. Goodwin, 69 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912B, 218; Bloom v. McGrath and Compton, 53 Miss. 249; Sherman v. Alberts, 153 Mich. 361, 116 N. W. 1090, 126 Am. St. Rep. 486; Matthews v. Milton, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247; Ind. Trust Co. v. Finitzer, 160 Ind. 647, 67 N. E. 520; Welch v. Marvin, 36 Mich. 59; Swigart v. Gentert, 63 Neb. 157, 88 N. W. 159; Pettit v. Braden, 55 Ind. 201. We deem it unnecessary, however, to decide this question in view of the fact that the defense of the statute of frauds, not only does not appear to have been interposed by objection to the verbal evidence of such promise, but does not appear to have been interposed at any time during the trial; and although such denial as is made in the answer of the defendants is as effectual for letting in the defense as if the statute of frauds had been specifically pleaded, where oral evidence of such contracts is admitted and the trial is concluded without the question being raised in any manner, the benefit of the statute of frauds is deemed to have been waived. Browne on the Statute of Frauds (5th Ed.) § 135, p. 164; 2 Reed on Statute of Frauds, § 529, p. 143; Graham v. Heinrich, 13 Okl. 107, 74 Pac. 828; Ossand v. Bunker, 2 S. D. 204, 50 N. W. 84; McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; McDonald v. Mission View Homestead Ass'n, 51 Cal. 210; H. P. Moore Lumber Corp. v. Walker, 110 Va. 775, 67 S. E. 374, 19 Ann. Cas. 314 and notes.

[2] Second. The defendants say, in effect, that the instruction that the plaintiff was entitled to recover the fair valuation of

said material as against such of the defendants, if any, who might be found to have used said material is prejudicial error, in that it permitted a recovery without regard to whether such material was so used rightfully or wrongfully, that is, without regard to whether it was so used in accord with said consolidation agreement or contrary to the same, and without regard to whether defendant's liability, if any, for any wrongful use that might have been found arose out of the cause of action alleged in plaintiff's petition, or out of its breach of its consolidation agreement. The instruction complained of most vigorously under this proposition is the sixth, and reads as follows:

"(6) If you find from the evidence that neither the Oklahoma City Land & Development Company, nor J. F. Winans, nor W. F. Harn did expressly agree to pay for the material after the \$5,380.30 payment was made, still if you find that the defendants, or any of them, used said material, you will find for the plaintiff, and against the defendants, or defendant, that used said material, for such sum as would be a fair valuation for said material so used."

It may be here observed that the material in question appears to have been worth the price that plaintiff alleged and testified was agreed upon and fixed in the alleged sale and delivery. And in complaining of the giving of this instruction in addition to the one allowing a recovery on a count for an agreed and fixed amount the defendants, at page 173 of their brief, say:

"This, we contend, was error, not so much on the grounds that it gave the jury two measures of damages, for under the evidence at the trial the measure of damages in both cases would be the same, but we do strongly urge that it submitted to the jury our liability, not only on the express contract as pleaded and sought to be proven, but also on an implied contract."

It appears that the Oklahoma City Land & Development Company is the only defendant that can claim to be affected by the foregoing instruction, as no verdict or judgment was asked or given against the defendant Hurst, and the trial court, in effect, relieved the defendants Harn and Winans from what otherwise might have been the effect of said instruction upon them by instructing the jury in the next paragraph of the instructions as follows:

"(7) The jury is instructed that unless they find by a preponderance of the evidence that J. F. Winans and W. F. Harn agreed personally with plaintiff that they would pay for any material furnished by him which was used in the construction of the railroad line of the Oklahoma City Land & Development Company, then you must find for the defendants Harn and Winans."

And if, as we have stated this, the seventh instruction excepts the defendants Harn and Winans from those defendants against whom a recovery could be had under the instruction first quoted, it only remains to consider the said sixth and the eighth and the ninth instructions as they affect the Oklahoma City Land & Development Company. As to the Oklahoma City Land & Development Com-

pany, the court instructed the jury in the eighth and ninth instructions as follows:

"(8) If you find and believe from the evidence that a contract of construction was made, and that the materials in question were furnished by the plaintiff under such contract, but that the same was not carried out nor full performance tendered on the part of defendant Oklahoma City Land & Development Company of the things to be done and performed on the part of said defendant, and if you find and believe from the evidence that the Oklahoma City Land & Development Company used said material, then plaintiff would be entitled to recover the fair valuation of said material used, after deducting the sum of \$5,380.88 paid on said material, as against the defendant Oklahoma City Land & Development Company."

The court further instructed:

"(9) However, if you find and believe from the evidence that the materials and equipment in question were delivered by the plaintiff to the defendant Oklahoma City Land & Development Company, under a contract of consolidation, and if you find and believe that the defendant Oklahoma City Land & Development Company performed, or tendered full performance of, all the conditions precedent to be performed on its part under such contract, then you will find for the defendants, and each of them."

[4] Some of the foregoing instructions may be subject to criticism; but, after an examination of the entire record, it does not appear that the errors complained of in respect to these instructions, or any one of them, has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right within the meaning of section 6006, Rev. Laws 1910.

The defendant Oklahoma City Land & Development Company requested no instruction requiring the court to submit to the jury the question as to whether the plaintiff had failed to perform any condition precedent to his right to recover a quantum valebant; and it does not appear that the state of the evidence required the court to voluntarily so qualify the instructions given although it would seem better to have done so.

On the other hand, nothing has been presented to us that would warrant us in affirming that there was no conditions precedent to be performed by the Oklahoma City Land & Development Company under the consolidation agreement claimed to enable it to urge that it received and had a right to use the material under that agreement as a defense to this action; and it appears probable that proof of an offer to perform, as well as proof of ability to do so on the part of this defendant, is a condition precedent to its right to recover a quantum valebant upon this explanation of its receipt and use of the material.

This defendant asked no specific instruction as to what would or what would not constitute a condition precedent on its part to defeat plaintiff's right to a quantum valebant and there appears to be no reversible error in the sixth, eighth, or ninth instructions given by the court in this regard.

The question of error in the giving of the

sixth instruction, the one first above quoted which allowed a recovery against the Oklahoma City Land & Development Company as if the action was one in general assumpsit on an indebitatus or quantum valebant count, in addition to plaintiff's count upon an express promise, is the principal question in this case. That a count in general assumpsit, such as a quantum valebant count, may be joined with a count in special assumpsit, such as that alleged by plaintiff, may be seen from an examination of *Mellon v. Fulton*, 22 Okl. 636, 98 Pac. 911, 19 L. R. A. (N. S.) 960. Also see *Berry v. Craig*, 76 Kan. 345, 91 Pac. 913.

[3] Although plaintiff's petition does not contain an indebitatus or quantum valebant count, but alleges an express promise, the defendants themselves gave evidence under which it was proper to submit to the jury the question of the liability of the Oklahoma City Land & Development Company as if there had been such count in general assumpsit when they testified that they secured the material in question under the aforesaid consolidation agreement and converted the same to another use by transfer to the Capital Construction Company, as a plaintiff may recover in assumpsit for conversion, notwithstanding the tort. 7 *Modern American Law*, pp. 385-388; 10 *Id.* 34; 2 *R. O. L.* 753-755; 1 *Corpus Juris*, 1081 et seq.

And, under the rule that an amendment of a plea which ought to have been allowed, if leave to make it had been asked in the trial court, to conform it to the evidence adduced without objection or by the adverse party will be regarded in this court as having been made (*Carson v. Butt*, 4 Okl. 133, 46 Pac. 596; *First National Bank of Mill Creek v. Langston*, 32 Okl. 795, 124 Pac. 308; *Love v. Kirkbride Drilling & Oil Co.*, 37 Okl. 804, 129 Pac. 858), the plaintiff's petition will be regarded as amended so as to contain a common count of indebitatus or quantum valebant in general assumpsit to conform the pleadings to the evidence given by defendants in favor of plaintiff's right to recover.

It follows from what has been said that there appears to be no error in this case which requires a reversal, and the judgment of the trial court is therefore affirmed. All the Justices concur.

MUTUAL LIFE INS. CO. OF NEW YORK
v. BUFORD et al. (No. 6761.)

(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐ 562—MOTIONS ⇐ 56(1)—ORDERS—ENTRY IN JOURNAL—NECESSITY.

The requirements of section 5317, Revised Laws of 1910, as to entering all orders upon the journal of the court is directory, and it is not essential to the validity of such orders that the

be so entered, and that the case-made show affirmatively such recording.

Note.—For other cases, see Appeal and Cent. Dig. §§ 2495-2499; Dec. Dig. ☞ Motions, Cent. Dig. § 67; Dec. Dig. ☞

PEAL AND ERROR ☞511(3)—RECORD—EFFECTS—EFFECT.

That the case-made does not affirmatively that orders extending time to prepare and it case-made are entered upon the journal court, is not sufficient ground for dismissal appeal.

Note.—For other cases, see Appeal and Cent. Dig. § 2321; Dec. Dig. ☞511(3.)

INSURANCE ☞400, 681—ACTIONS ON POLICY—PLEADING—CONDITION.

Where a policy of life insurance contains provision that after two years from date of issue said policy is incontestable, such provision is not a waiver, but a condition, and such condition is not specifically pleaded in petition, but a copy of such policy of insurance is attached, as an exhibit to and a part of said petition, such condition as to contestability of such policy of insurance is not specifically pleaded.

Note.—For other cases, see Insurance, Dig. §§ 1086, 1588, 1589; Dec. Dig. ☞31.]

INSURANCE ☞400—AVOIDANCE—BREACH—WARRANTY.

Where the only defense interposed to an action on a life insurance policy, containing a condition of incontestability after two years from date of policy, is a breach of the warranty in the application for the issuance of policy, such defense pleaded more than two years after the date of issue of the policy does not constitute a valid defense.

Note.—For other cases, see Insurance, Dig. § 1086; Dec. Dig. ☞400.]

INSURANCE ☞400—CANCELLATION—RIGHT OF INSURER.

After the issue of a policy of insurance, the insurer cannot cancel such policy on the grounds of the warranties in the application for insurance, except with the consent of the insured and beneficiary named in the policy, who have a vested interest in the policy, except in the case provided in the policy, unless proper notice is taken prior to the time named in the policy in which the same became incontestable.

Note.—For other cases, see Insurance, Dig. § 1086; Dec. Dig. ☞400.]

INSURANCE ☞289—CANCELLATION—RIGHT OF INSURER.

An insurer cannot cancel a policy of life insurance against the objections of the insured arising from the policy canceled upon the ground that the insured falsely represented his family occupation, place of residence, and use of intoxicating liquors, and tendering back to the insurer the premiums paid by him; there is no provision in the policy authorizing the insurer to thus cancel the policy.

Note.—For other cases, see Insurance, Dig. §§ 670, 675; Dec. Dig. ☞289.]

INSURANCE ☞668(4)—ACTIONS—DIRECTIONS OF VERDICT.

Where the petition states, and the evidence shows a good cause of action upon a policy of insurance, containing a condition of non-contestability after two years from the date of issue of policy, and the only defense pleaded is that of the warranties contained in the application for the insurance, pleaded more than two years after the policy became incontestable,

such breach constitutes no defense, and the court should direct a verdict for the plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1735-1740, 1758-1760; Dec. Dig. ☞668(4).]

Commissioners' Opinion, Division No. 1. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by Caprice Buford and others against the Mutual Life Insurance Company of New York. Judgment for plaintiffs, and defendant brings error. Affirmed.

Grinstead & Scott, of Pawhuska, for plaintiff in error. Locke & Locke, of Dallas, Tex., and Stephen C. Treadwell, of Oklahoma City, for defendants in error.

COLLIER, C. This is an action brought by defendants in error, beneficiaries named in a policy of insurance issued by the plaintiff in error, on May 17, 1906, on the life of their father, Wallace Buford, to recover on said policy. Hereinafter the parties will be designated as they were in the trial court.

It is admitted by the defendant that the policy was issued as stated in the petition, and that the annual premium due on said policy was \$118.08; that two annual premiums were paid by the insured on the policy, which payments paid all payments due on said policy up to and including May 17, 1908, and thirty days thereafter, as provided by the terms of said policy, and for more than two years from date of issue of said policy.

The uncontradicted evidence is that on the 30th day of October, 1907, while the policy was in good standing with premiums paid to May 17, 1908, and with 30 days' grace thereafter in which to make additional payments, defendant undertook to cancel said policy for the reason, as defendant claims in its answer, that the said Wallace Buford, in his said application for insurance, made statements, as to his habits as to the use of wines, fermented and malted liquors, that were not true, and defendant so notified said Buford and offered to return to him, with interest, the premiums which he paid for said insurance, which offer the said Buford first agreed to accept and finally declined so to do, and thereafter offered to pay the premium for the succeeding year, which the company refused to accept.

On the 8th day of November, 1911, the insured departed this life, and notice of such death was furnished the defendant and demand for the payment of said policy made, which payment was refused, and thereupon this action was instituted.

The petition is in the usual form for an action on a life insurance policy, and attached thereto and made a part thereof is a copy of said policy of insurance. In said policy of insurance, a copy of which is attached to said petition, there is contained a

provision that after two years from the date of issue of said policy, the same will be incontestable, if the premiums have been duly paid thereon. There is no specific allegation in the petition proper as to said condition of nonforfeiture. The only defense interposed by the said answer of the defendant is that there were misrepresentations by the insured in his application for said insurance in regard to his family history, occupation, residence, and excessive use of alcoholic liquors. The defendant concedes that there is no defense to this action on account of any failure to pay premiums thereon.

In the trial of the cause, no evidence whatever was offered tending to show any breach of warranties in the application for insurance as to the use of intoxicating liquors by the insured; while the preponderance of the evidence was that there had been a breach of the warranties of the insured as to his habits, residence, occupation, and family history, but none of these breaches of warranties were legally set up within two years from the date of issuance of policy, and therefore the defendant was estopped from setting them up at the trial, the policy long before the trial having become incontestable.

Answer was filed in 1913, years after the policy had become incontestable, which was the first attempt of the defendant to legally avoid the policy of insurance on the grounds of misrepresentation of warranties contained in the said application of insurance.

The death of the insured was admitted by the pleadings, together with the fact that defendant had refused to accept the premiums offered by the insured during his lifetime, other than the two first annual premiums paid; and that the defendant upon notice of the death of the insured had refused, upon demand, to pay the amount of insurance stipulated to be paid by the policy.

Upon the conclusion of the evidence of the plaintiffs, the defendant demurred to the evidence, which was overruled, and duly excepted to; thereupon the defendant moved for an instructed verdict, which was refused and excepted to. Upon the conclusion of all of the evidence, plaintiffs moved for an instructed verdict, which was given by the court, and verdict rendered by the jury for the plaintiffs in the sum of \$2,925.18, the face of the policy herein sued on and interest thereon, less \$472.32, the amount of the unpaid premiums and interest thereon.

Within the statutory time defendant moved for a new trial, which was overruled, and judgment entered on the verdict rendered, to which defendant duly excepted. To reverse the judgment rendered, this appeal is prosecuted.

The defendant in error moves to dismiss this appeal on the following grounds: (1) That the case-made herein was not served upon the defendant in error within the time provided by law and the extensions allowed

by the trial court; (2) that the order of the trial court purporting to extend the time for making and serving a case-made does not show to have been extended upon the journal of the court.

[1, 2] In support of the motion, the following cases are cited: *Springfield F. & M. Co. v. Gish et al.*, 23 Okl. 824, 102 Pac. 708; *Fife et al. v. Cornelous et al.*, 35 Okl. 402, 124 Pac. 957; *Mobley v. C., R. I. & P. Ry. Co.*, 44 Okl. 788, 145 Pac. 321; *In re Garland*, 158 Pac. 153; *Keenan v. Chastain*, 157 Pac. 326. We are of the opinion that the record discloses that the case-made was served upon the defendant within the time provided by extension of time for presenting the same.

In the case of *St. L. & S. F. R. R. Co. v. W. N. Taliaferro*, 160 Pac. 610 (not yet officially reported), in the third syllabus, it is said:

"Section 5317, requiring orders made out of court to be forthwith entered on the journal of the court by the clerk, is directory, and compliance with said requirement that such orders be so entered is not essential to the validity of such orders, nor is it necessary that the case-made show affirmatively the recording thereof."

This holding is contrary to the above authorities cited by defendant, and in said case of *St. L. & S. F. R. R. Co. v. Taliaferro*, the said cases are expressly overruled. We are of the opinion that the motion to dismiss is without merit, and must be denied.

[3] In considering the merits of the cause we are confronted by the contention on the part of the defendant that if the condition of the policy as to nonforfeiture was available as an answer to the averments of the misrepresentations contained in the application for insurance, that said nonforfeiture was a waiver and was not properly pleaded, and that in order that a waiver may be available it must be specifically pleaded. *Grimes v. Cullison*, 3 Okl. 288, 41 Pac. 355; *Whiteacre v. Nichols*, 17 Okl. 387, 87 Pac. 865; *Long v. Shepard*, 35 Okl. 489, 130 Pac. 131; *Davis et al. v. Board Co. Com'rs*, 158 Pac. 294.

[4] The admissions in the answer show beyond question the issuance of the policy, payment, and proper tender of payment of the premiums thereon, death of the insured, notice to the company of such death, and refusal of the company to pay such policy, and that more than two years had elapsed since the date of issue of the policy, and the defendant failing to show that within two years from the date of policy that legal action had been taken to avoid the policy on account of breaches of the warranties in the application for insurance, or that said policy had been canceled with the assent of the insured, the court properly overruled defendant's demurrer to the evidence, correctly denied motion for a directed verdict for defendant, and properly directed a verdict for the plaintiff.

We are of the opinion that the court properly sustained the objection to the answers

J. W. Duke to the tenth and eleventh interrogatories, respectively, propounded to him as a witness for defendant—that he (Duke) would not have approved said application for insurance had he been advised at certain members of the family of the insured had died of tuberculosis, for the reason that by the condition in the policy as to being noncontestable after two years from date of issuance, and such two years had long since expired, it was entirely immaterial as to what representations had been made in the application, or that if such misrepresentations had not been set forth in the application that the policy could not have been issued; there being no proof on the part of the defendant of any proper action having been taken by the defendant within two years from the date of issue of the policy to cancel the policy on account of breaches of warranties in the application. In unwarranted effort on the part of the defendant within two years from date of the policy to declare said policy void on account of the breaches of warranties in the application of insurance, as to the habits of the insured as to the use of intoxicating liquors, and not, in our opinion, entitle the defendant, after the expiration of two years after date of issue of said policy, to interpose a defense to the action on other breaches of warranties contained in said application of insurance.

[5] As the failure on the part of the insured to pay the premiums provided to be paid by the policy is not set up in the answer as a defense, and the only defense set up is the breach of the warranties contained in the application for insurance, we are of opinion that the answer did not set up a defense to the action, and that had a surer been interposed to the answer that same should have been sustained. Certainly, in the absence of authority contained in the contract of insurance, the insurer was without power to determine as to the truth or falsity of statements contained in the application for insurance, and to declare the policy forfeited. If the insurer desired to void the policy, on the ground of misrepresentations contained in the application for insurance, it should, in the absence of the consent on the part of the insured and the beneficiaries named in the policy, have taken legal steps to do so within two years from date of issuance of the policy, and, failing to do so within two years from the date of issue of the policy, the policy of insurance was incontestable on the ground of breaches of warranties contained in the application.

In the case of *Washington Life Ins. Co. v. Berwald*, 97 Tex. 111, 76 S. W. 442, 11 Cas. 682, it is held:

The interest of one named as beneficiary in a life insurance policy is a vested interest, and the contract of insurance cannot be terminated by the insured or insurer without the con-

sent of the beneficiary except in the manner provided by the policy or by law."

The interest of one named as beneficiary in an ordinary life insurance policy is a vested interest, and the contract of insurance cannot be terminated by the insured or the insurer without the consent of the beneficiary, except in the manner provided in the policy or by law. In *re Richardson*, 47 L. T. N. S. 514; *Ex parte Dever*, 18 Q. B. D. 664; *Scott v. Scott*, 20 Ont. 313; *Central Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Brockhaus v. Kemna* (C. C.) 7 Fed. 609. Compare *Union Mut. L. Ins. Co. v. Stevens* (D. C.) 10 Fed. 671; *Robinson v. U. S. Mut. Acc. Ass'n* (C. C.) 68 Fed. 825; *Drake v. Stone*, 58 Ala. 133; *Waldrom v. Waldrom*, 76 Ala. 285; *Johnson v. Hall*, 55 Ark. 210, 17 S. W. 874; *Block v. Valley Mut. Ins. Co. Ass'n*, 52 Ark. 202, 12 S. W. 477, 20 Am. St. Rep. 166; *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; *Yore v. Booth*, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81. See, also, *De Silva v. Supreme Council, etc.*, 109 Cal. 373, 42 Pac. 32; *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 294; *Conn. Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Pace v. Pace*, 19 Fla. 438; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Mutual L. Ins. Co. v. Allen*, 212 Ill. 134, 72 N. E. 200; *Hubbard v. Stapp*, 32 Ill. App. 541; *Otis v. Beckwith*, 49 Ill. 121; *Sauerbier v. Union Cent. L. Ins. Co.*, 39 Ill. App. 620; *Wilburn v. Wilburn*, 83 Ind. 55; *Kline v. National Ben. Ass'n*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; *Pence v. Makepeace*, 65 Ind. 345; *Wilmaser v. Cont. L. Ins. Co.*, 66 Iowa, 417, 23 N. W. 903, 55 Am. Rep. 277; *Haerther v. Mohr*, 114 Iowa, 636, 87 N. W. 692; *Olmstead v. Masonic Mut. Ben. Soc.*, 37 Kan. 93, 14 Pac. 449; *Bayse v. Adams*, 81 Ky. 368; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Matter of Kugler*, 23 La. Ann. 455; *Pilcher v. N. Y. L. Ins. Co.*, 38 La. Ann. 322; *Lambert v. Pen. Mut. L. Ins. Co.*, 50 La. Ann. 1027, 24 South. 16; *Small v. Jose*, 86 Me. 120, 29 Atl. 976. See, also, *Cables v. Prescott*, 67 Me. 582; *Preston v. Conn. Mt. L. Ins. Co.*, 95 Md. 101, 51 Atl. 838; *Pingrey v. Nat. L. Ins. Co.*, 144 Mass. 374, 11 N. E. 562; *Boyden v. Mass. Mut. L. Ins. Co.*, 153 Mass. 544, 27 N. E. 669; *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294; *Crittenden v. Phoenix Mut. L. Ins. Co.*, 41 Mich. 442, 2 N. W. 657; *Lockwood v. Mich. Mut. L. Ins. Co.*, 108 Mich. 334, 66 N. W. 229; *Allis v. Ware*, 28 Minn. 166, 9 N. W. 666; *Schoenau v. Grand Lodge, etc.*, 85 Minn. 349, 88 N. W. 999; *Grego v. Grego*, 78 Miss. 443, 28 South. 817; *Jackson Bank v. Williams*, 77 Miss. 398, 26 South. 965, 78 Am. St. Rep. 530; *U. S. Casualty Co. v. Kacer*, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641, overruling *Gambs v. Covenant Mut. L. Ins. Co.*, 50 Mo. 44; *Conn. Mut. L. Ins. Co. v. Ryan*, 8 Mo.

App. 535; Warner v. M. W. of A. (1903) 67 Neb. 233, 93 N. W. 897, 61 L. R. A. 603, 108 Am. St. Rep. 634, 2 Ann. Cas. 660; Fisher v. Donovan, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; Bowers v. Parker, 58 N. H. 565; City Sav. Bank v. Whittle, 63 N. H. 587, 3 Atl. 645; Supreme Council, etc., v. Adams, 68 N. H. 236, 44 Atl. 380; Landrum v. Knowles, 22 N. J. Eq. 594; Loco. Engrs. Mut. L., etc., Ins. Ass'n v. Winterstein, 58 N. J. Eq. 189, 44 Atl. 199; Fowler v. Butterfly, 78 N. Y. 68, 34 Am. Rep. 507; Greeno v. Greeno, 23 Hun (N. Y.) 478; Ruppert v. Union Mut. Ins. Co., 30 N. Y. Super. Ct. 155; Butler v. State Mut. L. Assur. Co., 55 Hun (N. Y.) 296, 8 N. Y. Supp. 411; Barry v. Equitable L. Assur. Soc., 59 N. Y. 587; Martin v. Mfgs. Acc. Indem. Co., 60 Hun (N. Y.) 535, 15 N. Y. Supp. 309; Stilwell v. Mut. L. Ins. Co., 72 N. Y. 385; Merchant v. White (Sup. Ct. Tr. T.) 37 Misc. Rep. (N. Y.) 376, 75 N. Y. Supp. 756, affirmed, Id., 77 App. Div. (N. Y.) 539, 79 N. Y. Supp. 1; Sanguinitto v. Goldey, 88 App. Div. (N. Y.) 78, 84 N. Y. Supp. 989; Carpenter v. Negus (Sup. Ct. Sp. T.) 17 Misc. Rep. (N. Y.) 172, 40 N. Y. Supp. 995; Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; Sterrit v. Lee (Sup. Ct. Sp. T.) 24 Misc. Rep. (N. Y.) 324, 52 N. Y. Supp. 1132. Compare Hutchings v. Miner, 46 N. Y. 456, 7 Am. Rep. 369; Burwell v. Snow, 107 N. C. 82, 11 S. E. 1090; Herring v. Sutton, 129 N. C. 107, 39 S. E. 772; Scull v. Aetna L. Ins. Co., 132 N. C. 30, 43 S. E. 504, 60 L. R. A. 615, 95 Am. St. Rep. 615. Compare Conigland v. Smith, 79 N. C. 303; Tudor v. Tudor, 11 Ohio Dec. (reprint) 422, 26 Cinn. Law Bul. 368; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806; Fraternal Mut. L. Ins. Co. v. Applegate, 7 Ohio St. 293; Waltz v. Mutual Aid Soc., 5 Pa. Co. Ct. 208; Malone's Estate (Pa.) 9 Ins. Law J. 767; Brown's Appeal, 125 Pa. 303, 17 Atl. 419, 11 Am. St. Rep. 900; Aetna L. Ins. Co. v. Mason, 14 R. I. 583; Macaulay v. Cent. Nat. Bank, 27 S. C. 215, 3 S. E. 193; Pratt v. Globe Mut. L. Ins. Co. (Tenn. 1875) 17 S. W. 352. But see Rison v. Wilkerson, 3 Sneed (Tenn.) 565; Williams v. Corson, 2 Tenn. Ch. 269; Weil v. Trafford, 3 Tenn. Ch. 108; Atkins v. Atkins, 70 Vt. 565, 41 Atl. 503.

In Clement v. Insurance Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650, it is held:

That "a stipulation that a life policy shall be incontestable after one year, if the premiums are paid, operates to preclude the insurer, after the year has elapsed and premiums have been paid, from denying his liability to the beneficiary, or to a bona fide assignee, upon the ground that the policy was obtained by fraudulent misrepresentation, or upon any other ground going to the original validity of the policy."

In Thompson v. Fidelity Mutual Life Insurance Co., 116 Tenn. 557, 92 S. W. 1098,

6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823, it is held:

"Where a policy provided that it should be incontestable after three years if the premiums should be paid when due, such clause should be construed to mean that the policy should be incontestable for causes other than the nonpayment of premiums."

[7] In effect, the directing by the court of a verdict for the plaintiff was to sustain a demurrer to the answer.

In the case of Wright v. Mutual Ben. Ass'n of America, 43 Hun (N. Y.) 61, it is said:

"The stipulation provides that the validity of the policy shall not be questioned after * * * two years after date of its issue. * * * The practical and intended effect of the stipulation is, as held by the trial court, to create a short statute of limitations in favor of the insured, within which limited period the insurer must test, if ever, the validity of the policy."

In case of Thomas Murray v. State Mutual Life Ins. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742, it is said:

"The insurer is bound by a provision in the policy that 'this policy shall be incontestable after two years from the date of its issue, provided the premiums are paid as agreed,' and is precluded from setting up a defense based upon false and fraudulent answers made by the insured in his application."

In the Royal Circle v. Elizabeth Achter-rath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224, which is in keeping with all the authorities, it is held:

That "the 'incontestable clause' of a benefit certificate is to be liberally construed in favor of the insured."

In Indiana National Life Insurance Co. v. Melissa McGinnis, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192, it is said:

"It seems to be a well-recognized principle of insurance law that a provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such * * * policy other than the defenses excepted in the provision itself. It also seems to be generally held that such a clause precludes the defense of fraud, as well as other defenses, and that it is not invalid on the theory that it is against public policy, provided the time in which the defenses must be made is not unreasonably short. An examination of the following cases will show that the holding of the courts of this country has been * * * universally that every defense to a policy of insurance embraced within the terms of the 'incontestable clause' is completely lost to the insurer, if it fails to make the defense or take affirmative action within the time limited by the policy." Kline v. National Ben. Ass'n, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; Federal L. Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; Court of Honor v. Hutchens, 43 Ind. App. 321, 82 N. E. 89; People's Mut. Ben. Soc. v. Templeton, 16 Ind. App. 128, 44 N. E. 809; Wright v. Mutual Ben. L. Ass'n, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; Clement v. New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; Reagan v. Union Mut. L. Ins. Co., 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362; Goodwin v. Provident Sav. Life Assur. Ass'n, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; Murray v. State L. Ins. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; Royal

Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; Mut. Reserve Fund Life Ass'n v. Austin, 73 C. C. A. 498, 142 Fed. 398, 6 L. R. A. (N. S.) 1064; Mass. Ben. Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 281; Northwestern Mut. L. Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79; N. Y. L. Ins. Co. v. Baker, 27 C. C. A. 653, 83 Fed. 647; Kansas Mutual L. Ins. Co. v. Whitehead, 123 Ky. 21, 93 S. W. 609, 18 Ann. Cas. 301; Williams v. St. Louis L. Ins. Co., 189 Mo. 70, 87 S. W. 499; Teeter v. United Life Ins. Ass'n, 159 N. Y. 411, 54 N. E. 72; Thompson v. Fidelity Mutual L. Ins. Co., 116 Tenn. 567, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823; Patterson v. Natural Premium Mut. L. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899.

Finding no prejudicial error in the trial of the cause, this judgment should be affirmed.

PER CURIAM. Adopted in whole.

MISSOURI, O. & G. RY. CO. v. OVERMYRE. (No. 4863.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Nov. 21, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇨258(18)—INJURIES TO SERVANT—ACTIONS—PLEADING.

It being competent to show a general custom among others in the same business with regard to their places for work, or methods commonly used in connection therewith, as bearing on the question of the master's exercise of due care in providing reasonably safe instrumentalities or places with and in which to work, it was not error to refuse to strike from the petition an allegation charging such custom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 833; Dec. Dig. ⇨258(18).]

2. MASTER AND SERVANT ⇨278(7)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

Where it is shown that the switch tracks in the yards of a railroad company were located so closely together at a point in said yards, as not to afford sufficient space to enable a hostler's helper, in the employ of said company, to properly discharge his duties, and whereby and while so engaged he was killed, the primary negligence of the company is sufficiently established.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 963; Dec. Dig. ⇨278(7).]

3. MASTER AND SERVANT ⇨270(10)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action brought by the administrator of the estate of a deceased railroad employé, on account of the death of such employé, brought about by the alleged negligence of the railroad company, it is competent to inquire into the manner of the construction and location of the tracks of the railroad company, though the inquiry involves an engineering question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 920; Dec. Dig. ⇨270(10).]

4. MASTER AND SERVANT ⇨205(2)—INJURIES TO SERVANT—PLACE TO WORK—CARE REQUIRED.

It is the duty of a railroad company to so construct its tracks in its yards as will make

them reasonably safe for its employés to perform their duties; and a party entering the service has the right to assume that this obligation has been discharged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547; Dec. Dig. ⇨205(2).]

5. MASTER AND SERVANT ⇨219(5)—INJURIES TO SERVANT—ASSUMED RISKS—APPLIANCES AND PLACE TO WORK.

An employé is not considered as assuming such risks as are not naturally incident to the occupation, arising out of the failure of the employer to exercise due care with respect to providing a safe place to work and safe appliances for the work, until he becomes aware of the defect and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 614; Dec. Dig. ⇨219(5).]

6. MASTER AND SERVANT ⇨217(21)—INJURIES TO SERVANT—ASSUMED RISKS—NOTICE OF DANGER.

Notice of the danger and appreciation of the risk resulting from the act of the hostler in moving an engine of the larger class, such as shown by the evidence, past another engine of the same class at the time standing on the track over the cinder pit, cannot be imputed to the helper solely by reason of the fact that he was aware of the location of the switch tracks at said point, or because he may have been informed generally of the dangers of the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 589; Dec. Dig. ⇨217(21).]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by A. S. Overmyre, administrator of the estate of Guy E. Overmyre, against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Jones and J. C. Wilhoit, both of Muskogee (Arthur Miller, of Kansas City, Mo., of counsel), for plaintiff in error. B. B. Blakey and J. H. Maxey, Jr., both of Muskogee, for defendant in error.

SHARP, J. On March 19, 1912, Guy E. Overmyre, the deceased, aged 20 years, was in the employ of the Missouri, Oklahoma & Gulf Railway Company, as a hostler's helper, at the shops and in the yards of the defendant company at Muskogee. While in the discharge of his duties on said day, on the tender attached to engine 223, controlled by the hostler, F. M. Scott, and at a time when said engine and tender were being backed into the roundhouse, the said Overmyre was struck and killed by engine 219, at the time standing over the cinder pit on an adjoining track in the yards of said company. In an action to recover damages on account of the alleged negligent killing of said employé, his father, A. S. Overmyre, who was appointed administrator of the estate of his deceased son, recovered judgment in the sum of \$5,000, to reverse which the present proceedings in error were instituted.

[1] It is first urged that the court erred in overruling the defendant's motion to strike certain portions of plaintiff's petition charging:

"That successful and thorough engineering such as is in common, ordinary use by railroad companies on the lines of railroad in Oklahoma and elsewhere, requires that such tracks should be constructed allowing a space intervening of not less than seven and one-half feet between rails, so that the engines and cars placed on one track would not peril the safety and lives of operators of engines and cars upon the adjoining track, and that said custom was well known to said defendant and by it recognized in the construction of its other tracks at all other places and points on said line."

The principal objection to the allegation is that the location of the tracks of the company in its yard, was an engineering question to be determined entirely by the railroad company through its management, and was not, therefore, a question to be submitted to a jury; and the further objection, that whether the yards of the defendant were a reasonably safe place in which to work was to be determined by the actual condition thereof, and not by comparing them with the tracks in the yards of other railroad companies. Neither objection, upon the record, is well taken. The first will be discussed later under another head.

It is competent to allege and prove a general custom among others in the same business respecting their places for work, or methods employed, on the question of the master's exercise of due care in providing reasonably safe places in which to work. *St. Louis & S. F. R. Co. v. Long*, 41 Okl. 177, 137 Pac. 1156, Ann. Cas. 1915C, 432. Concerning the competency of evidence of usage in such circumstances, it is said in *Labatt, Master and Servant* (2d Ed.) 939:

"It may be laid down as an undisputed proposition that, where the injury complained of was caused by an instrumentality or method which, at the time of the accident, was in its normal condition, evidence going to show that such an instrumentality was or was not commonly used under similar circumstances by persons in the same line of business as the defendant is always competent for the purpose of proving that he was or was not in the exercise of due care in adopting or retaining that instrumentality as a part of his plant."

The same general rule is announced in 26 Cyc. 1431, 1433, 1434, and is supported by many authorities, including *Hennessey v. Bingham*, 125 Cal. 627, 58 Pac. 200; *Louisville, B. & I. Co. v. Hart*, 122 Ky. 731, 92 S. W. 951; *Holland, Adm'r. v. Tennessee, C. I. & R. Co.*, 91 Ala. 444, 8 South. 524, 12 L. R. A. 232; *Anderson v. Illinois Cent. R. Co.*, 109 Iowa, 524, 80 N. W. 561; *Myers v. Hudson Iron Co.*, 150 Mass. 130, 22 N. E. 631, 15 Am. St. Rep. 176. Of the rule it is said in *Wigmore on Evidence*, § 461:

"This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person, in that situation, but (2) it is not to be taken as fixing the legal standard for the conduct required by law."

It being competent to prove the common usage of other railroads respecting the location of their tracks in railroad yards, under like circumstances, as bearing on the question of the master's exercise of due care in providing reasonably safe places in which to work, it was proper that the issue be tendered by suitable averment in the petition.

[2, 3] The next three assignments of error may be considered together as all involve the consideration of the contention that the location and construction of switch tracks in the railroad yards was an engineering question to be determined by the management of the railway company. It is claimed by the company in this respect:

"Our contention is that this situation did not disclose negligence; that the location of its tracks by the defendant railroad company was an engineering question to be determined by the management of the defendant company, and could not properly be left to a jury for determination; that in the location and construction of the tracks the defendant railroad company had the right to construct them as it saw fit, so as to better handle its business; and that negligence could not properly be predicated on the location of such tracks, and therefore the question of the location of such tracks could not properly be submitted to the jury."

For the purposes of the discussion, we may consider that the principal evidence of negligence lies in proof of the fact that on the roundhouse track adjoining the cinder pit engines of the size and kind used on the night in question would barely clear each other. There are authorities sustaining counsel's contention, the principal one of which is *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114. In that case two of the justices dissented. Immunity on account of negligence in the location of railway tracks is denied in other jurisdictions. In *Gordon v. Chicago, etc., Ry. Co.*, 129 Iowa, 747, 106 N. W. 177, counsel made very much the same defense that is now before us. It was there charged that the defendant's road was negligently constructed and maintained, with a sharp depression in the track, and that freight trains in passing over this depression were liable to become uncoupled. It was held that the court would not give its approval to the proposition advanced that in actions such as the one before the court the construction of the road could not be questioned, or that "it will not do to allow juries to inquire into questions of this character." Referring to the opinion of the Supreme Court in the *Tuttle Case*, it was said:

"In that case the majority opinion contains a few sentences which, standing alone, would appear to be in harmony with appellee's view of the law, but a reading of the entire opinion discloses that the employé who was there seeking a recovery of damages had entered into and remained in the company's service with full knowledge of the defective track on and about which he worked, and was therefore held to have assumed the risk of injury therefrom. Such being the case, the language quoted by appellee herein may be considered dictum."

After referring to the general rule that the master owes to the employé the duty of furnishing a reasonably safe place to work, and that said rule applies to railroads, it was said concerning the question before us, in *Whelan v. Detroit, G. H. & M. R. Co.*, 122 Mich. 232, 81 N. W. 103:

"It is urged that a railroad company has a right to construct its road and structures after plans of its own, and not subject to the approval of juries, who cannot be allowed to determine such questions. This is equivalent to saying that the doctrine that a master must furnish a reasonably safe place for his employé's work does not apply to railroads. We appreciate the practical consequences of leaving such a question to a jury, and the proneness of such tribunals to accept the fact of an accident as sufficient evidence of fault upon the part of the master. We should hardly like to admit that lawyers and juries know more about proper railroad building than those experienced therein. But, on the other hand, we cannot say that railroads are free from defects, or the owners and their employes from negligence; or is there authority or reason for exempting them from the general law pertaining to master and servant."

In *Baltimore & O. S. W. R. Co. v. Roberts*, 31 Ind. 1, 67 N. E. 530, the facts were very much the same as in the case at bar, and it was held, in an action by a freight brakeman for personal injuries, caused by the alleged negligence of defendant in maintaining its tracks in such close proximity to each other, and in leaving a car loaded with lumber standing on one of its tracks, which struck plaintiff as he passed on a car, in the line of his duty, that the negligence of the railroad company was properly submitted to the jury. In *Vorhees v. Lake Shore & M. S. R. Co.*, 193 Pa. 115, 44 Atl. 335, there were five tracks at the place where the accident occurred, two main tracks, two main sidings, and an extra siding or spur, known as the Porter siding. The regulation distance between the tracks of the railway company was from seven feet to seven feet two inches, the Porter siding was so constructed as to leave only from five feet six inches to six feet between it and the south main siding. The space thus left between the south rail of the south main siding and the north rail of the Porter siding was alleged to be insufficient to enable a brakeman of a freight train on the former to safely discharge his duties when cars were on the Porter siding. While descending on the ladder from the top of the cars, and while at the side of one of them, the brakeman was struck and injured by coming in contact with a car standing on the Porter siding. In the opinion it was held at the evidence before the jury clearly needed to prove the faulty construction of the Porter siding; reference to it being made as a "dangerous man trap that was thereby set for brakemen and other employes of the company." In *Mulvaney v. Brooklyn City R. Co.*, 1 Misc. Rep. 425, 21 N. Y. Supp. 427, affirmed in 142 N. Y. 651, 87 N. E. 568, the plaintiff, a brakeman on one of the defendant's trains, while forcing an intoxicated

passenger to get off the side track and into the car, was knocked off and injured by a train moving in an opposite direction. It appeared that the track was improperly laid, being too close for trains to pass safely; that the outer rail was not raised, and that the curve was made of straight instead of curved rails; that it was not safe for trains to pass each other on the curve. There were no rules that trains should not pass each other on the curve, or, if they did, that they should slacken speed, or that all persons must keep off the steps while rounding the curve. It was held that the facts unexplained warranted the jury in finding the railroad guilty of negligence. In *Mohr v. Lehigh Valley R. Co.*, 55 App. Div. 176, 66 N. Y. Supp. 899, the trial court was sustained in submitting to the jury whether the defendant was negligent in the laying of its tracks. In *True v. Niagara Gorge R. Co.*, 70 App. Div. 383, 75 N. Y. Supp. 216, affirmed in 175 N. Y. 487, 67 N. E. 1090, a trolley car company's negligence was held to have been established by proof that, without cause, it constructed its double tracks so that for a few feet they were so close that when cars passed at that point a conductor standing on the running board of one, as was necessary to collect fares, would be struck by the other, and that the conductor was not warned thereof. In *Thompson on Negligence*, § 4269, it is held to be the duty of a railway company towards its employes to so construct its tracks that they shall be reasonably safe, and that said duty is violated where the tracks are so near together that an employé engaged in his duties on the side of the car is liable to be brought into contact with cars on the other track and killed or injured. The principle involved in the rule contended for is disapproved in *Labatt on Master and Servant* (2d Ed.) § 932b, where it is said that, while the argument is plausible, it is scarcely satisfactory.

Counsel for plaintiff in error rely largely upon *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191, as announcing a principle calling for a reversal of the judgment. The question determined in that case was that a master has some discretion concerning the kind of machinery which he will use; that he may use new or old machinery as he likes; he may use an old pattern or a new one, as he pleases, provided the machinery which he uses is sound and performs the work which it is designed to do. And mere proof that he is using machinery of a certain kind and that an accident happens in the use of it does not tend to show negligence, unless it is coupled with some evidence, not mere speculation, that it is not properly performing its functions. While some of the authorities cited support a conclusion in conflict with that which we have reached, and there are perhaps some rather broad expressions found

in the opinion, at the same time the rule of law there announced in the syllabus is correct, and not in conflict with the views herein expressed. *Ft. Smith & W. R. Co. v. McCormick*, 25 Okl. 782, 108 Pac. 377.

[4] It is a very general rule that the question of the negligence of a railroad in constructing or maintaining a permanent structure along its track so as to injure a person on a passing train is one of fact to be decided by the jury. Whether the railroad acts from necessity in erecting a certain form of structure, or whether it is negligence to use them, is in such cases for the jury to decide. Cases announcing this rule are very numerous. Many of them will be found in a note to *Chicago, M. & St. P. Ry. Co. v. Riley*, 145 Fed. 137, 76 O. C. A. 107, 7 Ann. Cas. 327; and in chapter 2 of *Bailey, Personal Injuries* (2d Ed.), upon the subject of a safe place to work. The principle involved is thus stated in *St. Louis, F. S. & W. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266:

"It was the duty of the railroad company to use ordinary care in providing tracks and bridges that would be reasonably safe for its employes in discharging the duties they were called on to perform. Brakemen and conductors of freight trains are frequently required to be on the top of the cars both night and day. The hazards of such positions are great, and the duty of the company required that its employes should not be subjected to unnecessary perils from structures over and along the track which, by proper diligence on the part of the company, might be changed or removed. The necessity for a contrivance as dangerous as the overhead structure of this bridge was is not apparent. Indeed, it seems to have been otherwise planned, but was botched in the construction."

The court ruled that it was the duty of the railway company to construct and maintain its roadway and overhead structures in such a condition that an employe could perform all the duties required of him with reasonable safety.

In *Union Pacific R. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766, it was held that a railroad company owes to its trainmen the duty to exercise the care which the exigencies reasonably demand, in furnishing proper roadbed, track, and other structures, including culverts for the escape of water collected and accumulated by its embankments and excavations. In *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, the railroad company was held to be negligent as a matter of law for maintaining an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of the brakemen on its trains, where it might readily have been so constructed and hung as to be safe. The car upon which McDade was engaged at the time of the injury was a furniture car, wider and higher than the average car, and of such size as to make it highly dangerous to be on top of it at the place it was necessary to be when giving signals, in view of the fact that the spout cleared the

car by less than the height of a man above the car when in a position to perform the duties required of him. In *Texas & P. R. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382, it was held that a railway company could not be said, as a matter of law, to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ, when it had located scales where the tracks were only the standard distance apart, leaving a space of less than two feet for the movements of a switchman between the side of a freight car and the scale box, when incumbered with a lantern employed for signal purposes, especially if the necessity of the situation did not require the scales to be constructed in that way. In the opinion it is said:

"It was therefore properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and, if not, whether the plaintiff had notice thereof. The Court of Appeals was of opinion, and rightly, we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection as to justify taking from the jury the determination of the question whether there had been an assumption of the risk."

The general principle involved in the *Tuttle* Case was present in the latter cases, and while the earlier opinion is not referred to or expressly overruled, it was at least not followed.

Rejecting, as we do, the rule that the question of the location of the switch tracks, being an engineering question, could not properly be submitted to a jury, it is unnecessary to consider at any length the evidence tending to show the faulty location of the tracks at the place of the accident. In the brief of counsel for plaintiff in error, in respect to the location of tracks at the cinder pit, it is said:

"It would appear from an examination of the evidence offered by the plaintiff below that the plaintiff established one and only one condition upon which he predicated negligence, and that condition was that the cinder pit and roundhouse tracks of the defendant railway company were constructed so close together that an engine standing on the cinder pit track would not clear a man clinging on the inner side of an engine passing on the roundhouse track, which was adjacent thereto."

But the evidence goes even further than the candid admission of counsel. Engines passing along the roundhouse track, it seems, could safely pass other engines at the east end of the cinder pit stub, at a point beyond the cinder pit. Opposite the cinder pit the space between the cinder pit track and the roundhouse track was considerably narrower than at other places. Engines of the smaller type, it further appears, could safely pass other engines of like make while standing over the cinder pit, but this was not true of engines of the 200 class. E. G. Bowman, an employe of the railway com-

pany, present at the time of the accident, testified in this connection:

"Q. Now, Mr. Bowman, if you have ever seen the big engines sitting on the cinder pit track there, when an engine and cars attempted to pass on the roundhouse track—have you ever? A. Yes, sir. Q. What would happen? A. Well, as a general rule, they would take the engine all off the cinder pit track and take the cars by. Q. Well did you ever see one when it attempted to pass on there with one on there? A. Yes, sir. Q. What happened? A. Well, if it is a small engine on the cinder pit track, it generally went by, but one of those large engines would hardly ever; they hardly ever taken them by any cars or anything. Q. Then you cannot say that you ever saw an engine attempting to pass, a large engine, on the cinder pit track? A. No, sir; I cannot. Q. You know, these coaches you say you tended to, did you ever notice any scars on them because of them attempting to pass the cinder pit? A. Yes, sir. Q. What kind of scars? A. It would be from a contact against the grubbing iron and things like that. Q. You say the general rule was they take off an engine before they attempted to pass. A. Yes, sir. Q. When the engine was moved back here on the bumper (indicating) on the cinder pit track, state whether it could be cleared then. A. Yes, sir. They have cleared them past or passed them there, but I have never seen one pass there."

O. D. Gordon, another employé of the defendant at the time of the accident, being asked in reference to the engines passing opposite the cinder pit on the roundhouse track, testified that the smaller class of engines would; and, being asked with reference to the larger engines, his testimony was:

"Q. The larger class, what will they do? A. The larger class engines—what track did you refer to this engine being on? Q. An engine on the cinder pit track trying to pass an engine on the roundhouse track? A. They will pass. Q. Where would the engine on the cinder pit track have to be located? A. It will have to be clear back. Q. Clear back to this bumper? A. Yes; this end here; the bumper is over here. They have to put it back there to pass. Q. Did you ever see an attempt made to pass when it was situated over the cinder pit? A. Well, I have saw it until a lot of them got used to it around there. Q. What resulted when it was attempted to do that? A. They hung up their pilot beams occasionally. Q. They hung up their pilot beams occasionally? A. Yes, sir. Q. Anything else? A. And got a grubbing iron once in a while. Q. Tore off the grubbing iron you mean? A. Yes; I mean the grubbing iron on the tender, not on the engine. Q. You went to work there some three years ago? A. Yes, sir. Q. I will ask you to state if, during the first year you worked there, that these grubbing irons struck as you say, that any time that ever occurred during that year? A. No, sir. Q. When did it occur? A. After it got the larger class of engines, the middle class will pass."

The witness further testified that the railway company used different classes of engines, numbered 40, 50, 60, 100, and 200. The No. 40 was a small engine, while the No. 200 was of a larger class. The smaller engines were first in use by the railroad company when, as we understand, the tracks were laid out; the larger engines, or those of the 200 class, having been put in use during the period of witness' employment by the company. J. A. Robertson, the roundhouse

foreman, a witness for defendant, and who saw the accident, testified:

"Q. You had your attention directed toward the beam, the pilot beam? A. Yes, sir. Q. That was the—that was one of the widest parts of the engine? A. Yes, sir; this is the widest. Q. It is the widest part of the engine? A. Yes, sir. Q. It extended out further than any other part? A. Yes, sir. Q. You assumed, if it passed, the rest of it would? A. Yes, sir; that was my idea in watching it. Q. And therefore did not look out to see what Guy was doing? A. No, sir. Q. And you assumed if it passed the other part would too? A. Yes, sir. Q. Where did it hit? A. It hit what we call the sill on the end of the tank. Q. What is that? A. The big heavy beam that the draw head bolts into."

The foregoing and other evidence conclusively establishes the faulty location of the switches at the place where the accident occurred, or of their use by the larger class of engines. While, perhaps, with reference to the smaller engines, the tracks were sufficiently wide apart to permit their safe operation, yet, as to the engines of the larger class, which protruded out over the rails for a greater distance, manifestly the tracks were improperly located, not only in respect to the safety of the company's employes, but of the engines and cars of the company as well. The issue of negligence in the location of its tracks was submitted to the jury upon four separate instructions, prepared by and given at the company's request. These instructions we have examined, and find that three of them were most liberal in the company's behalf; in fact, it will be doubted that said instructions should have been given.

[8] The giving of instruction No. 5 did not constitute error. The argument made against it is that, as it was the master's positive right to carry on its business in its own way, the manner of the location of its tracks was not a question that could be submitted to the jury. This contention we have already considered. The objection to that part of the instruction referring to the risk assumed by a servant entering the service of a master is not well taken. Among the duties enjoined upon the master is that he is bound to exercise reasonable care and diligence to provide his servant with a reasonably safe place in which to work. *Chicago, R. I. & P. R. Co. v. Wright*, 39 Okl. 84, 184 Pac. 427, and cases cited. While a person entering voluntarily into a contract of service assumes all the risks and hazards ordinarily incident to the employment, and such as are liable to arise from defects which are patent and obvious to a person of his experience and understanding, he does not, generally speaking, assume risks arising out of the negligence of the master. The servant assumes all the ordinary risks of the employment which are known to him, and which could have been known with the exercise of ordinary care to a person of reasonable prudence and diligence under like circumstances. Risks not naturally incident to the occupation, but which may arise out of the failure of the employer

to exercise due care with respect to providing a safe place to work and safe appliances for the work, the employé is not considered as assuming until he becomes aware of their defect or improper construction, and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. Ed. 596, 600; *Texas & P. R. Co. v. Harvey*, 228 U. S. 319, 321, 33 Sup. Ct. 518, 57 L. Ed. 852, 855; *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 102, 34 Sup. Ct. 229, 58 L. Ed. 521, 524; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1063, 1070, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016. The master's negligence of which the servant is ignorant, or not properly chargeable, is a risk not assumed by the latter. *Coalgate v. Hurst*, 25 Okl. 588, 107 Pac. 657; *Chicago, R. I. & P. R. Co. v. Duran*, 38 Okl. 719, 134 Pac. 876; *Dewey Portland Cement Co. v. Blunt*, 38 Okl. 182, 132 Pac. 659; *Chicago, R. I. & P. R. Co. v. Wright*, supra. Whether the risk was an ordinary risk of the employment, or whether an extraordinary risk, known to and appreciated by the deceased, or with knowledge of which he was properly chargeable, was a question of fact to be left to and determined by the jury. Primary negligence being shown, the question of assumed risk was properly in issue. *St. Louis & S. F. R. Co. v. Long*, 41 Okl. 177, 137 Pac. 1156, Ann. Cas. 1915C, 432. At the time of his death the deceased had been employed as a helper to the hostler for about 30 days. His experience in that capacity was therefore limited. While there is evidence tending to show that he had been warned by fellow servants of the dangers of the employment, whether or not at the time of the accident he had been informed of and warned against the particular danger that resulted in his death, or whether he knew or should have known of and appreciated the danger arising out of the use of the larger class of engines at the place of the accident, was for the jury to decide. The defense of assumption of risk being made, by section 6, art. 23, Constitution, a question of fact to be left to the jury, and there being evidence properly warranting its submission, the verdict of the jury thereon is conclusive. *Muskogee Vitrified Brick Co. v. Napier*, 34 Okl. 618, 126 Pac. 792; *Chicago, R. I. & P. R. Co. v. Hill*, 36 Okl. 540, 129 Pac. 14, 43 L. R. A. (N. S.) 622; *Frederick Cotton Oil Co. v. Traver*, 36 Okl. 717, 129 Pac. 747; *Sulsberger & Sons v. Castleberry*, 40 Okl. 613, 139 Pac. 837; *Frisco Lbr. Co. v. Thomas*, 42 Okl. 670, 142 Pac. 310; *Osage Coal & Min. Co. v. Sperra*, 42 Okl. 726, 142 Pac. 1040.

[6] That the deceased had worked in the

yards for some 30 days, and knew of the location of the switch tracks at different points therein, including the point of accident, is not proof that he knew of or appreciated the particular danger that resulted in his death. As was said in *St. Louis Ft. S. & W. I. R. Co. v. Irwin*, supra:

"In this case the jury have said, and not without testimony, that Irwin had no knowledge or opportunity to know of the dangerous character of the bridge. It is true that he had run over the road and through the bridge daily for three months preceding the accident. He knew of the existence of the bridge, and that it was constructed with overhead timbers, but it does not necessarily follow that he was acquainted with the proximity of the braces to the top of the caboose or cars."

And further:

"The law, however, does not require that an employé shall know of all defects or obstructions that may exist on the road, or in the service in which he is engaged; and it cannot be said that the peril in this case was so obvious and patent that Irwin must have known it. He had a right to assume that the company had done its duty and placed its track in such a condition that he could perform his duties with reasonable safety. The fact that a portion of the bridge was sufficiently high to clear a man's head while standing on the top of the car, and other parts were not, made the bridge all the more deceptive and dangerous."

The fact that at all other points in the yard, except at the converging points of the switches, the tracks were sufficiently far apart to obviate danger, together with the fact that the smaller type of engines could pass with safety at the cinder pit, while the larger engines could not, were proper questions for the jury to consider in determining the defense of assumed risk. The instruction told the jury, in effect, that if the plaintiff had knowledge of the defective location of the tracks and appreciated the danger to him of such location in the performance of his duty, in such circumstances he assumed the risk. In this there was no error.

Five instructions on the question of assumed risk were given by the court at the request of the defendant. These instructions fairly and favorably submitted to the jury the defendant's theory of the case, and it is principally because the court refused to accept the defendant's claim of immunity that the objection is made. It may be admitted that the location of the side tracks was an engineering question. The fact that it was, however, does not place the railroad company beyond the reach of the law when negligence in the construction is shown.

The instruction in regard to discovered peril was properly given. No objection to its form or sufficiency is urged, but it is said there is no evidence authorizing its submission. The testimony of both the fireman and hostler was that they were aware of the danger to which Overmyre was exposed in the situation in which he was placed, as engine No. 223 was being backed toward the roundhouse past engine No. 219 on the cinder

pit. It does not appear that either of said employes made any effort to warn Overmyre of the peril of his position, or prevent injuring him by stopping the engine, though it would seem that sufficient opportunity to do so was afforded. Knowledge on the part of Overmyre of the imminent danger to which he was exposed is to charge him, not of contributory negligence alone, but of a suicidal purpose as well. Considering his limited experience in the capacity in which he was at the time employed, the variation in the width of the tracks at different points, the dissimilarity in the size of engines in use, the fact that engine 219 had been spotted on the cinder pit by other employes during his absence from the immediate part of the yards, the testimony authorizing the conclusion that at the time his attention was wholly occupied in the performance of his duties, and the rules of the company forbidding the attempt to clear cars at the cinder pits, there is abundant ground for belief that the deceased did not know and appreciate his perilous situation. The instruction told the jury that if employes having control of the action of the deceased, and of the movement of the engine and tender on which he was riding, saw his dangerous position, and had knowledge of the location of the engine on the cinder pit track, and appreciated the danger in which the deceased was placed as the engine on which he was riding was being moved, and failed to warn him of his danger, then by the use of reasonable care warning could have been given, then on account of such failure said other employé would be guilty of negligence, and the plaintiff would be entitled to recover, even though the deceased was guilty of contributory negligence. The evidence fairly authorized the conclusion that, had the hostler and foreman, or either of them, exercised reasonable care and prudence on the occasion, the fatal consequences could have been avoided. The rule announced in the instruction has been followed in its jurisdiction in *Atchison, T. & S. F. R. Co. v. Baker*, 21 Okl. 51, 95 Pac. 433, 16 L. A. (N. S.) 825, *Clark v. St. Louis & S. R. Co.*, 24 Okl. 764, 108 Pac. 361, *Oklahoma City Ry. Co. v. Barkett*, 30 Okl. 28, 118 Pac. 350, and other cases. It is well established that, when a defendant charged with duty to an employé, after having become aware of said employé's negligence, and the danger to which it had exposed him, fails to exercise ordinary care in avoiding it, such defendant is liable for the injury. *Whitaker's Smith on Negligence*, p. 375; *Wharton*

Negligence, §§ 334, 335; *Inland & Seaward Coasting Co. v. Tolson*, 139 U. S. 551, Sup. Ct. 653, 35 L. Ed. 270.

Instruction No. 7, when considered in connection with the other instructions, fairly submitted to the jury the law making it the duty of the railroad company to warn its

employes concerning the dangers of the service in which they were engaged.

Nor was there error in refusing to give defendant's requested instruction No. 28, on the question of contributory negligence. This defense was submitted to the jury fully and favorably in five instructions requested by the defendant.

From what has been said we are constrained to hold that defendant company was given every legal consideration in the trial to which of right it was entitled. It requested the giving of 36 instructions covering its theory of the case, 28 of which were given. The primary negligence of the railroad company was fully established by the evidence. Its defenses of contributory negligence and assumed risk were fairly submitted and found not sufficient to relieve it of liability.

The proximate cause of the death of young Overmyre being the negligence of the company, it follows that the judgment of the trial court should be, and is affirmed. All the Justices concur.

Ex parte MYERS. (No. A-2215.)

(Criminal Court of Appeals of Oklahoma. Nov. 20, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW §163—FORMER "JEOPARDY"—SECOND JUDGMENT.

The constitutional provision, "nor shall any person be twice put in jeopardy of life or liberty for the same offense," section 21, Bill of Rights, and the common-law principle therein declared, is broad enough to mean that no one can be twice lawfully punished for the same offense. Hence, when a court has pronounced a judgment and sentence upon the verdict of a jury, and such judgment has been carried into execution, the power of the court as to that offense is at an end, and the court is without jurisdiction to render a second judgment and sentence upon the same charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 288; Dec. Dig. § 163; Action, Cent. Dig. § 35.]

For other definitions, see Words and Phrases, First and Second Series, Jeopardy.]

Original application by Dave Myers for writ of habeas corpus. Writ granted and bail bond of petitioner discharged.

W. F. Harn, of Oklahoma City, for petitioner. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. On March 18, 1914, there was filed in this court a petition, duly verified, praying that a writ of habeas corpus issue to M. C. Binion, sheriff of Oklahoma county.

The petition, in substance, avers: That on the 29th day of December, 1913, in the superior court of Oklahoma county, the petitioner was sentenced in accordance with the verdict of a jury to be confined for 30 days in the county jail and to pay a fine of \$500, for the offense of "bartering, selling, and oth-

erwise furnishing intoxicating liquors." That petitioner was on that day committed, and since has been confined in the county jail, and that he is now illegally imprisoned and has been unlawfully restrained of his liberty since the 28th day of January, 1914, at which time the confinement part of said sentence had been fully executed and satisfied. That on the 16th day of March, 1914, he filed his petition for a writ of habeas corpus, in the district court of Oklahoma county, whereupon the county attorney of Oklahoma county gave oral notice that an application would be made to the superior court aforesaid to amend the judgment and sentence of said court on which said petitioner stands committed, and on said day the judge of the superior court of Oklahoma county at chambers caused to be entered a new judgment and sentence for the offense of "keeping a place with the intention and for the purpose of violating the prohibitory law," and which judgment concludes as follows:

"It is further ordered; adjudged, and decreed by the court that at the expiration of said 30 days, if the said fine of \$500 and costs are not paid, that he be imprisoned until the fine and costs are satisfied, and that the said fine and costs be satisfied and liquidated by imprisonment in the county jail at the rate of one day for each \$2 of said fine and costs."

That thereupon his application for the writ was denied by the district court of Oklahoma county. It is further averred that the judge of the superior court had no power to modify the judgment after the term of court at which the judgment was rendered had expired, and after the defendant had served the term of confinement fixed by the original judgment and sentence of the court. To the petition the respondent interposed a demurrer. Upon the consideration of the demurrer, it is the judgment of this court that the same should be overruled as not well taken. It appears from the petition, and it is not traversed, that the original judgment and sentence of imprisonment had been fully executed and satisfied before the court attempted to modify the judgment so as to include further imprisonment in case of default of the payment of the fine and costs.

The question presented has been fully considered and answered by this court in the case of *Rupert v. State*, 9 Okl. Cr. 226, 131 Pac. 713, 45 L. R. A. (N. S.) 60. The language of that opinion is as follows:

"The general power of a court to reconsider its judgment and sentence and reverse, vacate, or modify it at any time during the term in which it was rendered, or to increase or diminish the sentence which it has imposed, where the original sentence has not been executed or put into operation, is undeniable. *Bish. New Crim. Proc.* § 1288, and cases cited. This power is inherent in all courts of record. However, it would seem there must, in the nature of the power thus exercised by the court, be in criminal cases some limit to it. It is clear that a court cannot pass two sentences for the same offense, to be enforced at the same time. And the validity of a second judgment and sentence must be because the first judgment and sentence is legally annulled or revoked and made void.

That no person shall be twice put in jeopardy for the same offense is a universally accepted principle of the common law, and this principle has been embodied in the federal Constitution and in all state Constitutions, and it is incorporated in the Constitution of the state of Oklahoma by express provisions, as follows: 'Nor shall any person be twice put in jeopardy of life or liberty for the same offense.' Section 21, Bill of Rights. Jeopardy, in its constitutional or common-law sense, has a strict application to criminal prosecutions only. The word 'jeopardy,' as used in the Constitution, signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when put upon trial before a court of competent jurisdiction under a valid indictment, information, or complaint, and in this use it is applied only to strictly criminal prosecutions. *Stout v. State*, 36 Okl. 744, 130 Pac. 553, 45 L. R. A. (N. S.) 884. 'A person is not in legal jeopardy until put upon trial before a court of competent jurisdiction under an information or indictment sufficient in form and substance to sustain a conviction.' *Cooley, Const. Lim.* (7th Ed.) 467, and cases cited. We think this provision of the Bill of Rights, and the principle therein declared, is broad enough to mean that no person can be twice lawfully punished for the same offense. The one follows from the other, and this constitutional provision is designed and intended to protect the accused from a double punishment as much as to protect him from two trials. For this reason we think that, where a judgment and sentence has been executed and satisfied, that ends the prosecution, exhausts the power of the court, and terminates its jurisdiction, and the court is without power or jurisdiction to render another judgment and sentence in the case. The leading case upon this question is *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872. In that case the defendant was convicted of appropriating mail bags, of the value of less than \$25, the punishment for which offense, as provided by statute, was imprisonment for not more than one year or a fine of not less than \$10 or more than \$200. The sentence was one year's imprisonment and \$200 fine. The defendant was committed in pursuance of the sentence, and paid the fine the day after his commitment. On the second day after his commitment he was brought by habeas corpus before the same judge who sentenced him, who vacated the former judgment and sentenced the defendant anew to one year's imprisonment. The case came before the Supreme Court of the United States on habeas corpus, and the defendant was discharged, on the ground that, where a statute imposes as a punishment a fine or imprisonment, and the court has both fined and imprisoned the defendant, who thereupon pays the fine, the court has no power, even during the same term, to modify the judgment by imposing imprisonment instead of the former sentence. One of the alternative requirements of the statute having been satisfied, the power of the court as to the offense was at an end."

Our procedure criminal provides that:

"A judgment that the defendant be imprisoned and pay a fine and costs may also direct that at the end of the prison sentence he be imprisoned until the fine and costs are satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine and costs." Section 5958, Rev. Laws.

Therefore, after the execution of the 30-day sentence, the defendant could not be legally held until the fine and the costs were satisfied as by law provided, for the reason that the judgment and sentence rendered against the defendant on the 29th day of December, 1913, and set forth in the commitment on which he was being held, did not

direct that in default of the payment of the fine and costs he be further confined until such fine and costs are satisfied as by law provided, and the trial court was without jurisdiction to render a second judgment and sentence upon the same charge or correct the original judgment after such judgment had been executed, as in this respect the power of the court must be exercised when the original judgment is rendered. It follows that the second judgment and sentence was illegal and void.

The petitioner having been enlarged on bail pending the determination of this cause, said bond is discharged.

FENN v. LATOUR CREEK R. CO. et al.

(Supreme Court of Idaho. Oct. 23, 1916.)

1. MASTER AND SERVANT §83 — COMPENSATION FOR SERVICES—STATUTORY PROVISIONS.

Chapter 170, Sess. Laws 1911, p. 565, which provides for the protection of employes who are discharged or quit their employment without having received the wages due them, by its terms is limited to the employer of labor, and does not embrace an owner of property upon which labor is performed, when such owner was not the employer of the persons who performed such labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. §83.]

2. RAILROADS §159(4)—LIENS—CLAIMS PROTECTED.

Held, there is no provision of the statutes of this state under which a lien may be created against property of a railroad corporation for board furnished by a boarding house keeper to the employes of a contractor, or in favor of a third party for horses hired from such party by a contractor and used in the construction of railroad works, or in favor of a third person for horse feed furnished to a contractor while engaged in the construction of such railroad works.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 489, 490; Dec. Dig. §159(4).]

Appeal from District Court, Kootenai County; Robt. N. Dunn, Judge.

Action by William Fenn against the Latour Creek Railroad Company and another. From a judgment for plaintiff, defendants appeal. Remanded, with instructions to modify judgment, and judgment as modified affirmed.

Edward H. Berg, of Coeur d'Alene, for appellants. McFarland & McFarland, of Coeur d'Alene, for respondent.

BUDGE, J. This action was brought by respondent to foreclose, against the property of appellant railroad company, five liens, one held by respondent in his own right, and four which had been assigned to him. Two of the liens were for work and labor performed in the construction of appellant's railroad; one, that of Cahill, was for such labor and for board furnished to men working upon the railroad grade; one, that of Mrs. Richards, for team hire; and the fourth, that of Francis, for such labor and for horse feed. The board, team hire, and horse feed were

furnished to one Watson, a contractor for the appellant railroad company, and not to said company. The trial court awarded judgment of foreclosure in favor of respondent not only for the full amount of the liens, which was \$319.75, but also for penalties covering the liens for labor for a period of 30 days, amounting to \$390; for witness fees in favor of each lienholder at \$3 per day and 25 cents per mile, amounting to \$39.60; for costs for filing each lien, amounting to \$26.20; and for \$150 attorney fee—making a total of \$1,096.20. From this judgment the present appeal is taken, and for a reversal of this judgment counsel for appellant assigns and relies upon eleven assignments of error, all of which involve the sufficiency of the evidence to support the findings of fact made by, and the judgment of, the trial court, and will be disposed of together.

At the outset it is conceded that the property of appellant is subject to the liens for work and labor actually performed upon appellant's railroad right of way, for the costs of filing such liens, and for reasonable attorney's fee for the foreclosure thereof. This would be true whether such labor was performed at the instance of the appellant or its contractor, Watson:

The respondent seeks, also, to subject the property of the appellant company to penalties, as provided in chapter 170 of 1911 Sess. Laws, p. 565, which provides as follows:

"Section 1. Whenever any employer of labor shall hereafter discharge or lay off his or its employes without first paying them the amount of any wages or salary * * * due them, in cash, lawful money of the United States, or its equivalent, or shall fail or refuse on demand to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of his or its employes may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default until he is paid in full, without rendering any service therefor; provided, however, he shall cease to draw such wages or salary thirty (30) days after such default.

"Sec. 2. Every employe shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages as he would have been entitled to had he rendered services therefor in manner as last employed."

[1] From the record in this case it clearly appears that all the lienholders were hired by H. C. Watson, a contractor of the appellant company, who was also made a joint defendant with appellant company, and that they were not employed by the appellant company. Their testimony shows that they never had any agreement of employment with appellant company, that they were never discharged or laid off by said company, and that they made no demand upon it for their pay. In other words, no contractual relationship existed between the appellant company and the lienholders. This being true, it is our opinion that under the provi-

sions of the statute set out above the appellant company is not liable for statutory penalties. The statute, by its terms, is limited to the employer of labor, and it cannot be so construed as to embrace the owner of property upon which labor is performed, when such owner was not the employer of the laborers in question. The judgment of the trial court, in so far as it undertakes to assess penalties against the appellant company, is void.

[2] The next question for our consideration is the validity of that portion of the judgment covering board furnished employes of the contractor, amounting to \$129.45, horse hire amounting to \$36, horse feed amounting to \$5.20, and the expenses of filing the liens covering these three claims.

We are aware of no statutory authority under which a lien may be created in favor of a third party against property of an owner for an indebtedness incurred for horse hire by a contractor, or for horse feed furnished to a contractor; nor do we know of any statutory authority pursuant to which a lien may attach to the property of one in favor of a boarding house keeper for board furnished employes of a contractor, engaged in the construction of a railroad grade or works.

In the case of *Anderson v. Great Northern Railway Co.*, 25 Idaho, 433, 138 Pac. 127, Ann. Cas. 1916C, 191 (a case which, although not directly in point, involves the same principles as the case now under consideration), this court declared unconstitutional that part of chapter 228, Sess. Laws 1911, p. 727, which provided that "every person, firm, company or corporation selling or furnishing supplies, groceries, feed or other necessities to any contractor, boarding house keeper or other person, firm or corporation to be used upon and while such contractor, boarding house keeper or other person, firm or corporation, or the employer of such contractor, boarding house keeper or other person, firm or corporation is engaged in obtaining, securing, cutting or manufacturing saw logs, spars, piles, cord wood, ties or lumber, has a lien upon the same for the value of the supplies, groceries, feed or other necessities so furnished," for the reason that it did not provide for notice to such owner, and therefore constituted the taking of property without due process of law. Among other things, the court said in that case:

"It furnishes the owner of the property no notice and affords him no method of protecting himself against any such claim, and charges him with a claim which may equal or exceed the value of the property, although he has paid the contract price to the man who actually did the labor. * * * When the owner of property makes a contract to have work done on such property, he presumably contracts to pay the full value of such work, and he certainly cannot foresee what groceries, feed, and supplies the contractor or laboring men may purchase or need in course of the performance of such work. Men

must eat, and teams must be fed, whether they be working or not, and to charge a property owner or one having building done or material furnished with all the 'supplies, groceries, feed or other necessities' which the contractor or any of his men may purchase and use during the performance of such work, without giving or serving any notice thereof on the person to be charged, would certainly be taking the property of one man and giving it to another without 'due process of law' and without affording the party 'the equal protection of the law.'"

It therefore follows that that portion of the judgment in favor of respondent covering penalties amounting to \$390, board furnished employes of the contractor amounting to \$129.45, use of horses hired by said contractor amounting to \$36, horse feed amounting to \$5.20, and the costs of filing the lien for team hire, that particular lien having been filed for team hire exclusively, is void.

This cause is remanded, with instructions to the trial court to modify its judgment in accordance with the views herein expressed, and the judgment as so modified is affirmed. Costs are awarded to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

TAYLOR v. LYTLE

LYTLE v. SPRINGSTON LUMBER CO.
(TAYLOR, Intervener).

(Supreme Court of Idaho. Oct. 25, 1916.)

1. FRAUD \S 55 — REMEDIES OF PARTIES — ADMISSIBILITY OF EVIDENCE.

While the purchaser of real property has a right to rely upon the representations made by the vendor as to the boundary lines thereof, where, as in this case, purchase of timber situated upon certain land has been made and the purchaser testifies that a blazed line was pointed out to him by the vendor as the true boundary and that he believed the representation so made and acted upon it to his injury, and the vendor denies that he made such representation, and where it appears that the purchaser and others, prior to the transaction being completed, made an estimate of the timber in question, it is not error to admit evidence showing that it is customary for timber cruisers to definitely locate the boundaries of land upon which timber is situated, before making an estimate thereof, and that it would have been easy to do so, as tending to establish the probability, or improbability, of the testimony of the parties.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 52; Dec. Dig. \S 55.]

2. TRIAL \S 295(1) — INSTRUCTIONS — CONSTRUCTION AS WHOLE.

Although certain instructions, and portions of others, may not accurately state the law applicable to the facts in a case, when read and considered alone, if read in the light of the entire charge given to the jury they are not misleading the giving of such instructions will not constitute reversible error. All instructions given in a case must be read and considered together, and where they are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration

to the instructions as a whole rather than to an isolated portion thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713; Dec. Dig. § 295(1).]

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by H. C. Taylor against Clarence L. Lytle. From a judgment for defendant, plaintiff appeals. Action by Clarence L. Lytle against the Springston Lumber Company. H. C. Taylor, intervener. From a judgment for plaintiff, defendants appeal. Affirmed.

Ezra R. Whitla, of Cœur d'Alene, for appellants. O. H. Potts, of Cœur d'Alene, for respondent.

MORGAN, J. During the fall of 1911, negotiations were entered into between appellant Taylor and the respondent looking to the purchase by the former from the latter of the timber situated upon the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 34, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 33, township 49 N., range 2 W., B. M. The result of these negotiations was that the parties agreed upon \$12,000 as the purchase price of the timber and, Taylor being unable to finance the deal, procured appellant Springston Lumber Company to do so for him. On December 12, 1911, the parties met in Spokane, Wash., where Lytle and his wife made, executed, and delivered to the lumber company a deed transferring to it title to the timber and received from it, in consideration therefor, the sum of \$6,000 and its three promissory notes for \$2,000 each. It appears that the deed was so drawn as to convey title to the lumber company, instead of to Taylor, in order to secure the repayment to it by him of the purchase price, and that at the time, and as a part of the transaction, it entered into a contract with him whereby it purchased all the white pine saw timber on the land. It further appears that two of the promissory notes have been paid and that the other remains unpaid. It is contended by Taylor that in this transaction Lytle, with the intent and purpose of deceiving and defrauding him and of inducing him to buy the timber, pointed out a certain blazed line which he represented to be the true north boundary of his land; that it was not the true line, but was located about 265 feet north of and parallel with the actual boundary; that by reason of this fraud, misrepresentation, and deception he was led to believe, and did believe, he was purchasing and would receive a body of valuable timber situated upon a strip of land about 265 feet wide and three-quarters of a mile long which was no part of the land of respondent but, in truth and in fact, lies immediately north of and contiguous to the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 34 and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 33 above described. It is further contended by Taylor that had he not

been so misled, deceived, and defrauded he would not have purchased the timber, and that by reason thereof he has suffered the damages, in order to recover which the action of Taylor v. Lytle was commenced. The case last above mentioned has been before this court heretofore upon appeal from an order of the district court sustaining a demurrer to the complaint, and is reported in 26 Idaho, 97, 141 Pac. 92, where the substance of Taylor's contention is set out. Lytle, in his answer, denied the material allegations of the complaint, and it is his contention that he did not point out the blazed line in question as the true north boundary of his land. In case of Lytle v. Springston Lumber Company the respondent here seeks to recover upon the unpaid promissory note of \$2,000, heretofore mentioned. In this action the lumber company answered and Taylor intervened, both relying upon the facts disclosed in the complaint in case of Taylor v. Lytle as a defense to the action upon the note. The cases were consolidated in the district court, where trial was had to a jury which resulted in verdicts in both cases in favor of Lytle upon which judgments were entered, from which these appeals have been taken.

A motion to dismiss the appeal in case of Taylor v. Lytle was made by respondent which is based upon the ground that the transcript was not filed, nor served, within 60 days after the appeal was perfected. In opposition to this motion, the attorney for appellant has made an affidavit setting forth the reasons for the delay from which it satisfactorily appears to this court it was due to no fault upon the part of appellant nor his counsel. The motion is therefore overruled.

[1] Counsel for appellants complain of the action of the trial judge in permitting evidence to be introduced tending to show the usual custom of timber cruisers in estimating timber. It appears from the record that Taylor had this timber estimated before he bought it and that he assisted in the work. The testimony complained of tends to show that it is the usual custom, before making an estimate of timber, to locate the boundaries of the land upon which it is situated and that it would have been easy to have done so in this case. It is appellants' contention that such testimony has no place in a case of this kind, since Taylor had a right to rely upon the representations made by Lytle. It is clear this evidence was offered and accepted as tending to show the probability, or improbability, of the contention of Taylor that respondent represented to him the blazed line as the true north boundary of his land and of Lytle who testified that he did not make such a representation. The testimony was competent for that purpose and it was not error to admit it. The action of the court in admitting certain other evidence is assigned as error, but we find these assignments to be equally without merit.

[2] It is urged that certain instructions given to the jury do not correctly state the law, and the action of the trial judge in refusing to give others is assigned as error.

It is true that some of the instructions, and portions of others, complained of, when read and considered alone, do not accurately state the law applicable to the facts in the case; but, when read in the light of the entire charge given to the jury, they are not misleading and do not constitute reversible error. The rule in this state is well established that all the instructions given in a case must be read and considered together as a whole, and where they are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole instructions rather than to an isolated portion thereof. *Cady v. Keller*, 28 Idaho, 368, 154 Pac. 629, and cases therein cited.

The judgment of the trial court is affirmed. Costs are awarded to respondent.

SULLIVAN, C. J., and BUDGE, J., concur.

DRUMHELLER v. DAYTON et ux.

(Supreme Court of Idaho. Oct. 31, 1916.)

1. PLEADING \S 166—ANSWER—ALLEGATIONS DEEMED CONTOVERTED.

The statement of any new matter in an answer in avoidance or constituting a defense or counterclaim is, on the trial, deemed to be controverted by the opposite party.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 321½-328; Dec. Dig. \S 166.]

2. TRIAL \S 191(2)—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS.

Instruction numbered 6 examined, and found to be erroneous, in that it assumed that a material controverted fact, in support of which no evidence was offered, had been established. *Held*, that by reason of this error the action of the judge in setting aside the verdict and granting a new trial was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 422, 426; Dec. Dig. \S 191(2).]

Appeal from District Court, Boundary County; John M. Flynn, Judge.

Action by Jerome L. Drumheller against Denver P. Dayton and wife. From an order granting a new trial, defendants appeal. Affirmed.

J. F. Ailshie and J. Ward Arney, both of Coeur d'Alene, for appellants. A. H. Conner, of Sandpoint, for respondent.

MORGAN, J. This action was commenced by respondent to foreclose a mortgage on 160 acres of farm land in Boundary county and to recover possession of certain personal property.

The record discloses that appellants purchased the real estate and personal property in question from respondent on August 17, 1912; that the purchase price agreed upon was \$10,000; that \$2,500 thereof was paid

in cash; that a prior mortgage, given to secure the payment of \$5,000, was assumed by the purchasers, and that the indebtedness of \$2,500 remaining was evidenced by two promissory notes of \$1,250 each, executed and delivered by appellants to respondent, one due on or before one year and the other on or before two years after the date thereof; that the mortgage, the foreclosure of which is sought, was given to secure the payment of these notes; and that when it was given, and as a part of the transaction of purchase and sale, the parties entered into a contract wherein it was agreed, among other things, that appellants should have immediate possession of all the property, and upon payment of the note first to fall due respondent would execute and deliver to them a bill of sale of the personal property. It further appears that at the time of the commencement of this action both notes were, according to their terms, past due, and \$1,987.77, together with interest thereon from August 17, 1913, remained unpaid.

Appellant Denver P. Dayton alleged in his separate answer that the note for \$1,250 first to become due represented the purchase price of the personal property, and, further, by way of counterclaim, that respondent, prior to the purchase and sale of the property, falsely and fraudulently represented to him and led him to believe that only four or five acres of the land overflowed, and that water did not remain upon it a sufficient length of time, nor in sufficient quantity, to interfere with the production of crops thereon; that, in truth and in fact, much more than that amount of the land overflowed annually, and that water remained thereon for such a length of time and in such quantity as to make it practically unfit for the production of agricultural crops, and that, had he not been so misled and defrauded, but had he known the true conditions, he would not have purchased the land; that, had the real estate been as represented, it would have been worth the price he contracted to pay for it, namely, \$3,750, but that it was not actually worth to exceed \$5,000; and that by reason of the fraud perpetrated upon him by respondent he has been and is damaged in the sum of \$3,750.

The case was tried to a jury, which rendered a verdict upon the counterclaim of appellant, Denver P. Dayton, in his favor, and assessed his damage at \$3,750. Respondent filed a motion for a new trial, and, after considering the same, the court made and entered an order which is, in part, as follows:

"It is further ordered that the motion of the plaintiff to vacate the verdict of the jury rendered upon the issues presented by the counterclaim and affirmative defense of the defendant, and to grant a new trial on said issues, be, and the same is hereby, granted upon the following grounds, to wit: (1) That the verdict is against the law; (2) that the court erred in giving in-

struction No. 6 to the jury; (3) that substantial justice has not been done by the verdict of the jury."

This appeal is from that order.

[1] As will be observed from the foregoing, the allegations that the purchase price of the land was \$8,750 and that of the personal property \$1,250 occur in the answer as an affirmative defense and counterclaim. These allegations are deemed to be denied by respondent who was plaintiff below. Section 4217, Rev. Codes, is as follows:

"Every material allegation of the complaint not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party."

[2] These were material allegations of fact necessary to be established by the appellant Denver P. Dayton in order to fix the amount of damage he sustained by reason of the fraud which he alleged was perpetrated upon him. The record discloses no evidence tending to establish the purchase price of the land alone, but it is agreed that the real estate and personal property together were sold for \$10,000. The fact that a bill of sale was to be made conveying absolute title to the personal property to appellants upon the payment of one of the promissory notes for \$1,250 cannot be deemed to fix its value at that amount since, in the transaction, \$2,500 was paid in cash, a part or all of which may have been considered as applying upon the purchase price of the personal property.

The instruction numbered 6 mentioned in the order appealed from is as follows:

"If you find for the defendant upon the question of fraud as alleged in his counterclaim, then it will be necessary for you to determine the amount of the defendant's damages. The defendant claims that the contract price of the land is \$8,750, and if you find for him, his damages will be the difference between that sum and the value of the land as the evidence shows it to have been in the condition it was on August 17, 1912; in other words, you will fix and determine the value of the land in its actual condition on the 17th day of August, 1912, and subtract that sum from \$8,750, and the difference will be the amount of the defendant's damages, and this amount you will return in your verdict, without regard to the notes in suit or either of them."

It was manifestly error for the trial judge to assume that \$8,750 was the purchase price of the land, and no other instruction was given which would have a tendency to correct it. As above indicated, this was a controverted fact for the jury to determine from the evidence. 38 Cyc. 1657. When the attention of the learned trial judge was directed to this error, he set aside the verdict and granted a new trial, as it was his duty to do.

Counsel for the respective parties have discussed the evidence at considerable

length in support of and in opposition to the third reason stated in the order granting a new trial "that substantial justice has not been done by the verdict of the jury," and many authorities have been brought to our attention tending to establish the rule that the granting or denying of a new trial rests in the sound discretion of the trial court. Since the giving of instruction numbered 6 in this case was a sufficient reason for setting aside the verdict, and since a new trial of the case must be had, we do not deem it to be necessary, nor would it be proper, for us to discuss the sufficiency of the evidence.

The order appealed from is affirmed. Costs are awarded to respondent.

SULLIVAN, C. J., and BUDGE, J., concur.

IN RE BROWN'S ESTATE. (No. 13472.)

(Supreme Court of Washington. Nov. 13, 1916.)

EXECUTORS AND ADMINISTRATORS \S 111(8)—
COSTS—RES JUDICATA.

Where on final judgment after affirmance on appeal of a judgment in a will contest, the court refused to tax costs against the unsuccessful contestants, the executrix of the estate could not charge the contestants with fees and expenses of the contest proceedings in her final account, since the prior ruling of the court on application for such taxation was conclusive.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 451-463; Dec. Dig. \S 111(3).]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

In the matter of the estate of Sarah J. Brown, deceased. Appeal by Nellie Camp, executrix, from order refusing to allow an item in final account, charging George H. Godfrey and another, unsuccessful contestants of the will, with fees and expenses of contest. Affirmed.

Hamblen & Gilbert, of Spokane, for appellant. W. D. Scott, of Spokane, for respondent.

FULLERTON, J. On June 30, 1912, the respondents, by their guardian ad litem, instituted proceedings in the superior court of Spokane county to contest the will of Sarah J. Brown, deceased. The lower court sustained the validity of the will, and on appeal to this court the judgment was affirmed. In re Brown's Estate, 83 Wash. 528, 145 Pac. 591. In the final judgment entered in the contest proceedings, the trial court refused to tax the fees and expenses of the appeal to the losing party. There was no cross-appeal on the part of the defendants in the proceedings, and the question was not touched upon in the opinion of this court. There were two persons named as executrices of the will. At the conclusion of the contest proceedings one of the executrices filed a final account with the estate. In this ac-

count she sought to charge the contestants with the fees and expenses of the contest proceedings, and to have the amount thereof set off against the share of the estate to which the contestants were entitled by the terms of the will. The trial court refused to charge the contestants with the fees and expenses, or to allow the offset. This is an appeal from the order of the court expressing its ruling.

It is our opinion that the court ruled correctly. Had a judgment been entered in the contest proceedings for costs in favor of the estate and against the contestants, undoubtedly the executrix could have set off the judgment against any distributive share of the estate awarded to the contestants. *Dray v. Bloch*, 29 Or. 347, 45 Pac. 772. But no such judgment was entered therein. On the contrary, the court refused to assess the costs on application being made to it for that purpose. This was conclusive of the matter. The proper place to try out the question was in that proceeding, and since it was tried out there, and adjudicated against the estate, the executrix cannot have a retrial of the issue on the settlement of the final account.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, MAIN, and CHADWICK, JJ., concur.

KELLER v. DAVIS et ux. (No. 13490.)
(Supreme Court of Washington. Nov. 13, 1916.)
TAXATION \S 805(1)—ATTACKING TAX DEED—LIMITATIONS.

An action to quiet title against a tax deed is governed by Rem. & Bal. Code, \S 162, limiting to three years from issuance of such a deed action to set aside or cancel it, or for recovery of the land sold for delinquent taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1593, 1597; Dec. Dig. \S 805(1).]

Department 2. Appeal from Superior Court, Stevens County.

Action by Herman F. Keller against F. E. Davis and wife. From an adverse judgment, plaintiff appeals. Affirmed.

Louis A. Dyar, of Spokane, for appellant.
L. C. Jesseph, of Colville, for respondents.

HOLCOMB, J. Appellant began this action in June, 1915, to quiet title against a tax deed issued by the treasurer of Stevens county after judgment of foreclosure of certificate of delinquency on October 7, 1911.

Appellant averred that the judgment in foreclosure was utterly void for want of valid process, thus avoiding the treasurer's deed; that respondents have never been in possession of the land, which is wild and vacant; that appellant, after execution of the tax deed, paid all general taxes since assessed against the land, thus retaining constructive possession of the land against the purchaser,

and that tender of the amount paid for the certificate of delinquency plus interest had been refused by the purchasers of the tax deed. The court sustained a demurrer to appellant's amended complaint upon the ground that the action is barred by the statute of limitations of such actions (section 162, Rem. & Bal. Code), which is as follows:

"Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed: Provided, this section shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act."

This case is manifestly governed by the reasoning and the rule announced in the cases of *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522; *Savage v. Ash*, 86 Wash. 43, 149 Pac. 325.

The action is barred. The judgment of the superior court is affirmed.

MORRIS, C. J., and MAIN and PARKER, JJ., concur.

SPEAR et al. v. CITY OF BREMERTON.
(No. 13318.)

(Supreme Court of Washington. Nov. 15, 1916.)

En Banc. Appeal from Superior Court, Kitsap County; King Dykeman, Judge.

On rehearing. Former opinion, 90 Wash. 507, 156 Pac. 825, and judgment affirmed.

A. C. Durham, of Bremerton, and Robinson & Robinson, of Seattle, for appellants. Marion Garland, of Bremerton, and Bryan & Colvin, of Seattle (J. W. Bryan, of Seattle, of counsel), for respondent.

PER CURIAM. Upon a rehearing en banc a majority of the court still adhere to the opinion heretofore filed herein as reported in 90 Wash. 507, 156 Pac. 825, and, for the reasons there stated, the judgment is modified.

ARMSTRONG et al. v. MODERN WOODMEN OF AMERICA. (No. 13480.)

(Supreme Court of Washington. Nov. 16, 1916.)

1. APPEAL AND ERROR \S 979(3) — REVIEW — REFUSAL OF NEW TRIAL.

Though the appellate court may believe that the weight of evidence is against the verdict, refusal of new trial, asked on the ground of insufficient evidence, will not be disturbed, unless it appear that there was abuse of discretion in the refusal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3872; Dec. Dig. \S 979(3).]

2. APPEAL AND ERROR \S 1005(2) — REVIEW — REFUSAL OF NEW TRIAL.

Positive testimony of insured having been born in a certain year, with detail by witness

facts and circumstances, lending support to his memory, is substantial evidence of such fact, rebutting disturbance of refusal of new trial, asked on the ground of insufficient evidence of such fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 605(2).]

EVIDENCE § 265(2)—ADMISSIONS—AGE OF INSURED—CONCLUSIVENESS.

Statement in proof of death of age of insured is not conclusive on, but may be controverted by, the beneficiary in an action on a contract of mutual benefit insurance, in the absence of facts creating an estoppel.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1030; Dec. Dig. § 265(2).]

EVIDENCE § 333(1) — RECORDS OF MARRIAGE LICENSE.

The record of a marriage license issued to insured, stating he was over 21, is admissible in the issue of his age, it having been the recorder's duty under a statute not to issue a license to him if under that age, except on consent of another, and to state in the license whether he was of age, and, if not, the name of the person consenting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247, 1250, 1254, 1262-1265; Dec. Dig. § 333(1).]

EVIDENCE § 252 — DECLARATIONS OF INSURED—ADMISSION AGAINST BENEFICIARY.

Declarations of insured are admissible against the beneficiary under mutual benefit insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 289-993; Dec. Dig. § 252.]

Department 2. Appeal from Superior Court, Whitman County; R. L. McCroskey, Judge.

Action by William R. Armstrong and another against the Modern Woodmen of America. Judgment for plaintiffs, and defendant appeals. Reversed and remanded for new trial.

Davis & Heil, of Spokane, Chas. L. Chamberlin, of Colfax, and Truman Plantz, of Warsaw, Ill., for appellant. John Pattison, of Spokane, and J. P. Burson of Tekoa, for respondents.

MAIN, J. The purpose of this action was to recover upon a benefit certificate, issued by the defendant Modern Woodmen of America to George E. Armstrong, the father of the plaintiffs. The defendant interposed the defense that George E. Armstrong, in his application for membership in the order, misrepresented his age. The trial of the cause resulted in a verdict for the plaintiffs. From the judgment entered upon this verdict, the defendant appeals.

The facts necessary to an understanding of the material questions for determination, are these: During the year 1903, George E. Armstrong made application for membership and insurance in the Modern Woodmen of America, a fraternal beneficiary society. In his application for membership, Armstrong presented that he was born on the 10th day of July, 1862. The application for membership was accepted, and a benefit certificate duly issued, in which the respondents in this action were named as beneficiaries. George

E. Armstrong died on the 11th day of February, 1913. From the time of the issuance of the benefit certificate to the date of the death of the insured, all dues, assessments, and demands of the society had been paid. After the death of George E. Armstrong, proof of his death was submitted in accordance with the requirements of the appellant. In the application for membership, it was declared that all answers and statements therein were true, and were to be a condition precedent to any binding contract issued upon the faith of such answers and statements. One of these statements was that the applicant was born on the 10th day of July, 1862. When the proofs of death were submitted to appellant, it appeared from certain statements therein that the insured was born some time prior to the year 1862. For this reason, the appellant refused to pay the beneficiaries named in the certificate the amount of the insurance specified therein. After this refusal, the present action was instituted.

[1, 2] The first question is whether the trial judge erred in denying the motion for a new trial, because there was not sufficient evidence to sustain a verdict. The appellant contends that the great weight of evidence was to the effect that George E. Armstrong was born on the 10th day of July, 1858, instead of on the 10th day of July, 1862, and since the great weight of the evidence sustains this contention, there is no substantial conflict in the evidence, and a motion for a new trial should have been granted. In support of this contention, the case of Guley v. Northwestern Coal & Transportation Co., 7 Wash. 491, 35 Pac. 372, is cited. It is true that in that case is found a declaration that where the clear weight of the evidence is with either side, there is no substantial conflict, and the court should take the decision of the case from the jury, but that decision is no longer authority. In the case of Money v. Seattle, Renton & Southern Railway Company, 59 Wash. 120, 109 Pac. 307, it was referred to in this language:

"The Guley Case has been criticized in this court in respect to the question we are considering until it is no longer authority on the subject. Where there is a substantial conflict in the evidence, and the trial court has refused a new trial and has instructed the jury that the weight of the evidence does not necessarily depend upon the relative number of witnesses testifying for or against a given issue, and that they are the sole judges of the credibility of the witnesses and the weight of the testimony, it would involve a legal absurdity for this court to reverse the judgment entered upon the verdict on the ground of the insufficiency of the evidence. To believe one witness and to disbelieve another or others is one of the admitted functions of the jury, and in this respect it cannot be censored or controlled by the courts. While it is true that verdicts must be based upon evidence, it is likewise true that the trial judge is not required to grant a new trial in every case where his opinion upon the facts differs from the opinion of the jury as expressed in the verdict."

Whatever the rule may be in other jurisdictions, it is well settled in this state that where a cause is tried to a jury, and the trial court declines to grant a new trial, in response to the contention that the verdict is against the weight of the evidence, this court will not disturb the holding of the trial court, even though it may believe that the weight of the evidence is against the verdict of the jury, unless it shall appear that the trial court abused its discretion in refusing to grant the new trial. *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Independent Brewing Company v. McCrimmon*, 85 Wash. 610, 148 Pac. 787; *Payzant v. Caudill*, 89 Wash. 250, 154 Pac. 170.

In the present case, there was substantial evidence upon which the verdict of the jury could rest. At least one witness, a man 61 years of age, testified positively that George E. Armstrong was born in the state of Missouri during the year 1862. He detailed certain facts and circumstances which would lend support to his memory. To say that in the light of this testimony, there was no substantial evidence to support the verdict, would amount to usurpation by this court of the functions of the jury.

[3] It is also claimed that a recovery should be denied the respondents as a matter of law, because in the proofs of death, filed with the appellant, the age of the insured was stated as 54 years and 7 months, which, if true, would make the date of his birth earlier than 1862. But where the action is brought upon a contract of mutual benefit insurance, as in this case, statements made in the proofs of death are not conclusive on the beneficiary, in the trial of the case, in the absence of facts creating an estoppel. The beneficiary has the right to controvert the statements made in the proofs of death. *Elliott on Evidence*, vol. 3, § 2387; *Cyc.* vol. 29, p. 150; *Supreme Tent Knights of Maccabees v. Stensland*, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137; *Modern Woodmen of America v. Davis*, 184 Ill. 236, 56 N. E. 300. In the case last cited, it was stated that:

"Proofs of death, if in compliance with the requirements of the order, form a legal basis for an action on a certificate issued by the order, even though the proof contain matter damaging to the case of the beneficiary. 13 Am. & Eng. Enc. Law, 65. The real cause of death remained a question of fact, in the elucidation whereof the beneficiary was not restricted to the testimony of the physician. Her right to recover could not be conclusively determined from the affidavit of the physician filed by her, because the rule of the order required it to be filed. Nor was she estopped to combat the truth of the affidavit of the physician. * * *

There are no facts in this case which would create an estoppel, and the trial court did not err in refusing to overturn the verdict of the jury on this ground.

[4, 5] The next question is whether error was committed by the trial court, in the refusal to admit in evidence a certified copy of

the record of the marriage of George E. Armstrong and Fannie Cotton, in the state of Missouri, on the 9th day of October, 1882. After making the necessary preliminary proofs, the copy of the marriage license, issued by the recorder of Clark county, Mo., and the return thereof by the minister performing the marriage ceremony, was offered in evidence, and, upon objection being made, the trial court declined to admit it. In regard to the admission in evidence of official registers, and certified copies thereof, the rule appears to be that such registers are admissible in evidence of any facts required to be recorded in them, or which occur in the presence of the registering officer. *Greenleaf on Evidence*, vol. 1, § 493; *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524; *Murray v. Supreme Hive Ladies of Maccabees of the World*, 112 Tenn. 664, 80 S. W. 827; *Priddy v. Boice*, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874.

The controversy here is not so much over a statement of the rule as its application. The question then arises whether it was the duty of the recorder, upon issuing the marriage license, to determine and record the fact as to the age of the applicant. At the time the marriage license in question was issued, the statutes (Rev. St. 1889) of the state of Missouri contained a section (No. 6850) which provided that:

"No recorder shall issue a license authorizing the marriage of any male person under the age of twenty-one years, or female under eighteen, except with the consent of his or her father, or if he is dead or incapable, or not residing with his family, of his or her mother or guardian, as the case may be, if he or she have one, which consent, if not given at the time in person, shall be evidenced by a certificate, in writing, subscribed thereto and duly attested. The recorder shall state in every license whether the parties applying for the same, one or either or both of them, are of age, or whether either or both are minors, and if either party is a minor, the name of the father, mother or guardian consenting to such marriage. Laws 1881, p. 162."

By this statute, the recorder had no right to issue a license to a male person under the age of 21 years, except with the consent provided for therein. It is made the duty of the recorder to state in every license whether the parties applying for the same, one or either or both of them, are of age, and if either party be not of age, then the name of the person consenting to such marriage shall be stated. In the marriage license issued to George E. Armstrong and Fannie Cotton, the age of the former was stated to be over 21 years. If this marriage certificate is admissible in evidence on the question of age, it would tend to support the claim that George E. Armstrong was born prior to the year 1862. The duty being placed upon the recorder by the statute of the state of Missouri to determine, before he issued a marriage license to a male person that such person was over the age of 21 years, a mar-

the license issued, reciting the age, would be within the rule relative to the admission of official registers, and would be admissible in evidence upon the question of age. It is of course, conclusive, but it is admissible what it may be worth. In *Murray v. Supreme Lodge of New England Order of Protection*, 74 Conn. 715, 52 Atl. 722, the Supreme Court of Errors of Connecticut had the question before it, and, in passing on the same, used this language:

It thus appears that the age of Ellen T. Murray at the time of her marriage and at the time the birth of her children was a fact which the law made it the duty of the registrar to ascertain, and to make and keep a record of the same so ascertained. The record thus made was a public record, made by a public official, of a fact which the law required him to find and record, and the record was open to public inspection.

The record thus made of this fact the defendant offered in evidence, both in the shape of the record itself, and of a duly certified copy of it; and the court excluded it on the ground, substantially, that it was hearsay evidence. Now, unquestionably, the evidence offered and excluded was hearsay evidence, for it was a statement made extrajudicially by one not under oath, and not subject to cross-examination, and it was offered in proof of one of the facts stated in it, to wit, the age of Mrs. Murray.

Statements so made are generally obnoxious to the hearsay rule, but to that rule there are many exceptions as well established as the rule itself, and among them is one admitting statements made by public officials in a public record made for public use pursuant to law.

The books of the registrar, kept according to law, constitute a public official register; and statements contained therein, when relevant, are admissible in evidence as a clear exception to the hearsay rule. The necessity for the exclusion of such an exception is found in the practically unendurable inconvenience of summing up public officers from their posts on the innumerable occasions when their official doings and records are to be proved in litigation, and the general trustworthiness of such evidence is evident in the circumstances under which the statements are made. 1 Greenl. Ev. (16th Ed.) 62m, 484-486; *Sturla v. Freccia*, 5 App. 623; *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *Cushing v. Railroad Co.*, 143 Mass. 9 N. E. 22; *Enfield v. Ellington*, 67 Conn. 462, 34 Atl. 818; *Hennessy v. Insurance Co.*, 74 Conn. 699, 52 Atl. 490. The evidence offered and excluded in the case at bar comes fully within this exception to the hearsay rule, and was admissible in proof of the age of Mrs. Murray at the time of her marriage, and the dates when her children were born. 1 Greenl. Ev. (16th Ed.) § 493. It was not, of course, conclusive, nor was it offered as such; it was admissible for what it was worth, and the court erred in excluding it."

It may be that the recorder, reciting the age, relied upon the declaration of the applicant, but this would not render it inadmissible. In mutual benefit insurance, the contract is between the society and the member, and the beneficiary has only an expectancy interest. The member insured has full power and dominion over the contract until the time of his death. The beneficiary, prior to such death, has no vested interest in the contract. The declarations of the insured are admissible against the beneficiary, just as they would be against his legal representa-

ative. *Niblack Benefit Societies & Accident Insurance*, § 325; *Thomas v. Grand Lodge of the Ancient Order of United Workmen of Washington*, 12 Wash. 500, 41 Pac. 882; *Hansen v. Supreme Lodge Knights of Honor*, 140 Ill. 301, 29 N. E. 1121; *Supreme Conclave Knights of Damon v. O'Connell*, 107 Ga. 97, 32 S. E. 946.

The failure to admit in evidence the marriage license was reversible error. From the record in the case, we are unable to say that had this been admitted it would not have caused a different verdict to be returned.

Some of the authorities cited by the respondents in support of the ruling of the trial court should be noticed and the distinction pointed out. In *Connecticut Mutual Life Insurance Company v. Schwenk*, 94 U. S. 593, 24 L. Ed. 294, there was offered in evidence the minute book of the lodge of Odd Fellows, for the purpose of showing the age of a member recorded therein. It was there held that the book was not properly admissible for this purpose, apparently for two reasons: First, entries in the minute book could not be regarded as admissions of the person named therein respecting his age; and, second, it does not appear that any duty was imposed upon the keeper of the minute book to ascertain and record the ages of the members.

In *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653, a report of the names of Indians and half-breeds entitled to participate in an allotment of land, under the federal statutes, to the Indian Bureau under instructions to report in full a list of all applicants, showing names, age, sex, etc., was held not admissible in evidence in an action between two parties, each of whom claims under the same person and the same allotment, in order to show the age of that person at the time of the allotment. But, as stated in the opinion in that case:

"* * * Neither the treaty, the act of Congress, nor the instructions of the department contemplated any special inquiry into the ages of the Indians."

In the present case, the Missouri statute contemplated a special inquiry by the recorder into the ages of the applicants for a marriage license.

If the case of *Mutual Benefit Insurance Company v. Tisdale*, 91 U. S. 238, 23 L. Ed. 314, is not distinguishable, then it is not in harmony with the later holding of the same court in *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306, *supra*. There are other grounds urged for a reversal, but these need not be discussed. They are not only without substantial merit, but are such as were incidental to the particular trial, and not likely to occur in another trial of the cause.

The judgment will be reversed, and the cause remanded for a new trial.

MORRIS, C. J., and PARKER and HOICOMB, JJ., concur.

DOLBY v. DOLBY. (No. 13347.)

(Supreme Court of Washington. Nov. 14, 1916.)

DIVORCE — 222 — CUSTODY OF CHILDREN — ALLOWANCE OF SUIT MONEY.

Under Rem. & Bal. Code, § 988, as to the allowance of suit money to the wife in divorce proceedings, existent marriage status is prerequisite to the allowance, and after divorce and award of custody of children, when the husband moves to change the custody award, the wife is not entitled to an award for costs and attorney's fees.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 644; Dec. Dig. — 222.]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Proceeding by Lotan R. Dolby against Libbie Dolby. From an order overruling motion of defendant to require payment of suit money, defendant appeals. Affirmed.

Roche & Onatine, of Spokane, for appellant. Losey & Newton, of Spokane, for respondent.

FULLERTON, J. On February 13, 1909, the appellant, Libbie Dolby, procured an absolute divorce from respondent Lotan R. Dolby. By the terms of the decree the property rights of the parties were fixed and determined and the custody of their minor child awarded to the appellant subject to the right of the respondent to visit the child at fixed periods. A petition was subsequently filed by the respondent, praying that the decree be modified to the extent that he be awarded the care and custody of the child in place of the appellant, alleging, among other things, that the appellant was not a fit and proper person to have the child in her possession. The appellant then moved the court for an order, requiring the respondent to pay to the clerk of the court the sum of \$500 as suit money and attorney fees so as to enable her to employ counsel and prepare her defense to the petition. This appeal is taken from the order of the lower court overruling the motion.

As the respondent's contention is that the court had no legal authority to make such an order after the spouses had been divorced, this appeal presents but a single question of law, namely, is the existence of the marital relation a condition precedent to the power of the court to grant the wife attorney fees? The appellant contends that the court has a right to allow attorney fees in a proceeding of this character because it is not an independent action, but a continuation of the original divorce proceeding, and because the court has continuing jurisdiction over the custody of minor children. It is apparent, however, that this contention is immaterial if respondent's theory is correct. The statute provides (Remington's Code, § 988):

"Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor."

It is evident that this statute presupposes the existence of the marital relation as a condition to the right of the court to award the wife suit money and attorney fees. *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13; *Lake v. Lake*, 194 N. Y. 179, 87 N. E. 87; *Bishop v. Bishop*, 165 App. Div. 954, 150 N. Y. Supp. 660.

After the parties have been divorced and their property rights settled, the reason for the payment of attorney fees by the husband no longer exists, as the court in dividing the property of the litigants takes into consideration their earning capacity in the future. Thereafter they sustain the relation of strangers toward each other, and certainly it could not be seriously contended that a stranger in an action of this kind would be entitled from the opposing party to suit money and attorney fees.

The judgment is affirmed.

MORRIS, O. J., and MOUNT, CHADWICK, and ELLIS, JJ., concur.

SUNEL v. RIGGS. (No. 13285.)

(Supreme Court of Washington. Nov. 13, 1916.)

1. SALES — 461 — CONDITIONAL SALE — SUFFICIENCY OF SIGNATURE.

A conditional sale contract, consisting of an order addressed to the seller by the purchaser, signed by the purchaser and by the seller, and filed for record by the seller, is a valid contract as between the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1349; Dec. Dig. — 461.]

2. COURTS — 93(1) — EFFECTS OF PRIOR DECISIONS — STARE DECISIS.

A decision of court, announcing a rule of property under which property rights have been fixed and determined, must, under the doctrine of stare decisis, be followed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 336; Dec. Dig. — 93(1).]

3. SALES — 479(2) — CONDITIONAL SALE — RIGHTS OF SELLER.

The seller of goods under a conditional sale contract may, upon default in the payments as provided therein, retake the goods at any time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1420, 1424, 1425, 1437; Dec. Dig. — 479(2).]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS — 176(5) — CONDITIONAL SALE — RIGHTS OF ASSIGNEE — BONA FIDE PURCHASER.

The assignee for the benefit of creditors, who at the time of taking the assignment knows of the conditional sale contract by which his as-

nor purchased a safe, is not, as against the holder of the safe, a bona fide purchaser.

Ed. Note.—For other cases, see Assignments Benefit of Creditors, Cent. Dig. § 519; Dec. 7. *—176(5).*

ASSIGNMENTS FOR BENEFIT OF CREDITORS *—176(5)*—CONDITIONAL SALES—RIGHTS OF ASSIGNEE—BONA FIDE PURCHASER.

In such a case, neither is a purchaser from assignee of the assignor's stock of goods, who asserts title to the safe, a bona fide purchaser where, before the sale, the original vendor retook the safe.

Ed. Note.—For other cases, see Assignments Benefit of Creditors, Cent. Dig. § 519; Dec. 7. *—176(5).*

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Jge.

Action by Nelson W. Parker against Arthur Riggs, in which Sam Sunel was substituted as plaintiff. Judgment for defendant, and plaintiff appeals. Affirmed.

Will J. Griswold, of Bellingham, for appellant. Brown, Perlinger & Thomas, of Bellingham, for respondent.

MOUNT, J. On March 10, 1913, one K. S. Mueller purchased from the defendant one bold safe upon a conditional sale contract, providing that the title to the safe remain in the vendor until it was fully paid, and that payments should be made at the rate of \$20 per month. This conditional contract was not recorded. After Mr. Mueller had possession of the safe for about a year, and had not paid for the same, on April 23, 1914, he executed and delivered to Mr. Riggs another conditional sale contract for \$476, that being the purchase price of the safe. The sum of \$201.25 had been paid thereon, and the balance was to be paid in monthly installments of \$20, on the fourth of each month. This contract was filed for record by Mr. Riggs on April 25, 1914. Thereafter, on January 26, 1915, Mr. Mueller made an assignment of his stock of goods to Nelson W. Parker for the benefit of creditors. At the time of this assignment Mr. Parker was informed that the safe was held under a conditional sale contract, and that there was \$160 due thereon. The stock of goods was left by Mr. Parker in the possession of Mr. Mueller. When Mr. Riggs heard of this assignment he took possession of the safe and removed it from the store of Mr. Mueller. Mr. Mueller made no objection, but counsel for Mr. Parker objected to the removal of the safe. Thereafter Mr. Parker demanded the stock of goods and Mr. Sunel, the plaintiff in this action, became the purchaser. The safe was not in the possession of the assignee at the time of the sale. Afterwards the action was brought by Mr. Parker to recover the safe, and Mr. Sunel was substituted as plaintiff in his stead. At the trial of the case, upon these facts the court concluded that the conditional sale contract was

a valid contract between Mr. Mueller and Mr. Riggs; that the assignee, representing general creditors only, acquired no greater interest than Mr. Mueller had, and for that reason denied a recovery. The plaintiff has appealed from that judgment.

[1] It is argued first that the conditional sale contract is not good between the parties because it was not properly signed by Mr. Mueller. Upon its face the conditional sale contract is an order addressed to Mr. Riggs by Mr. Mueller for the purchase of the safe, with the condition that the title to the safe shall not pass until the safe is fully paid for, etc. This order was signed by Mr. Mueller, and also by Mr. Riggs, with his post office address. It was filed for record by Mr. Riggs. It is plain, therefore, under the rule in *Jennings v. Schwartz*, 82 Wash. 209, 144 Pac. 39, which is relied upon by the appellant, that the contract was good as between the parties.

[2] The appellant next contends that, even if it was good as between the parties, the contract was not good as against the assignee. This point is controlled by the case of *Malmo v. Washington R. & F. Co.*, 79 Wash. 534, 140 Pac. 569, and reaffirmed in this court on rehearing in *Ellers Music House v. Ritner*, 88 Wash. 218, 152 Pac. 1008; 154 Pac. 787. In the latter case, after referring to the rule in the *Malmo* Case, and the department ruling in the *Ritner* Case, we said: "While we are not in harmony as to which rule is the better, were the question a new and independent one, we are all of the opinion that, as the *Malmo* Case announced a rule of property, and property rights have become fixed and determined thereunder, the doctrine of stare decisis demands it be followed, except as otherwise determined by the act of 1915."

[3] That is determinative of the same question in this case. The appellant next argues that there was nothing due the defendant on the purchase price of the property at the time he took the safe away from the store of Mr. Mueller. The evidence is conclusive upon this question that there was \$160 due, and, of course, if the conditional sale contract was valid as between the parties to it, then under its terms he had a right to take the property away.

[4, 5] It is next contended that when Mr. Riggs took the safe he took it wrongfully. Whether the taking was wrongful or rightful depends upon the contract, which we have seen above was valid between the parties to it. Under its terms Mr. Riggs had a right to take possession of the safe if the contract was not complied with. He did so with the consent of Mr. Mueller, but over the objection of Mr. Parker. Mr. Parker, at the time he took the assignment, was informed of the conditional sale contract, and, of course, was not a bona fide purchaser. At the time the plaintiff in this action purchased from Mr. Parker, the safe was not in Mr. Parker's possession, and, of course, the plaintiff in

this action cannot be said to be a bona fide purchaser without notice of the rights of Mr. Riggs.

We find no error in the record. The judgment is therefore affirmed.

MORRIS, C. J., and CHADWICK and ELLIS, JJ., concur.

CHASE & BAKER CO. v. OLMSTED.
(No. 18476.)

(Supreme Court of Washington. Nov. 10, 1916.)

1. GARNISHMENT — CLAIMS BY THIRD PERSONS—SUFFICIENCY OF EVIDENCE.

Where an intervener claimed title to portion of defendant's bank account garnished by plaintiff, as proceeds of insurance paid defendant on account of property belonging to intervener and destroyed by fire while in defendant's possession, evidence held sufficient to sustain a finding that the property was the separate property of intervener.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 411-413; Dec. Dig. —218.]

2. GARNISHMENT — CLAIM BY THIRD PERSON—VALIDITY.

If a garnished bank account includes proceeds of insurance on intervener's property, the fact that intervener did not know until after the loss of her property while in defendant's possession that defendant had carried insurance on the property for her benefit, or that she did not pay any part of the premiums, is immaterial.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 395; Dec. Dig. —203.]

3. TRUSTS — COMMINGLED FUNDS—INTEREST OF BENEFICIARY.

The right of a beneficiary to reclaim a trust fund is based upon his right of property, and not upon any right as a preferred creditor of the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 514; Dec. Dig. —349.]

4. TRUSTS — COMMINGLED FUNDS—EVIDENCE—BURDEN OF PROOF.

The burden is on the cestui que trust of money blended by the trustee with his own in a bank account to prove his title as against creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 600; Dec. Dig. —372(1).]

5. TRUSTS — COMMINGLED FUNDS—EFFECT OF WITHDRAWAL.

The cestui que trust of money blended by the trustee with his own in a bank account, aided by every presumption, cannot recover more than the lowest balance to which the blended account has been reduced pending its currency as shown by the bank's books.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607-612; Dec. Dig. —374.]

6. EVIDENCE — DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

Where funds belonging to the intervener in an action had been received by the defendant and deposited in his bank account, garnished by plaintiff, the bank's books are admissible to show the actual state of the account at all times during its currency.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1437; Dec. Dig. —354(1).]

7. APPEAL AND ERROR — REVIEW—INVITED ERROR.

Where defendant had deposited funds belonging to intervener in his bank account garnished by plaintiff, the error of the court in refusing to accept the bank's books on the evident assumption that the actual state of the blended account during its currency was immaterial, and the final balance was charged as a matter of law, was not the error invited by plaintiff's counsel in objecting to their admission on the ground that it was immaterial what was in the bank if checks had been issued against the account and subsequently paid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3600; Dec. Dig. —882(10).]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the Chase & Baker Company against the Empire Music House, in which the Old National Bank was summoned as garnishee and E. L. Olmsted appears as intervener, claiming the moneys impounded by the writ of garnishment. From a judgment for intervener, plaintiff appeals. Reversed and remanded with directions.

Tolman & King, of Spokane, for appellant. Hamblen & Gilbert, of Spokane, for respondent.

ELLIS, J. This case presents a contest between plaintiff and intervener as to the right to certain moneys in bank impounded by writ of garnishment.

Plaintiff, Chase & Baker Company, brought an action against the Empire Music House to collect a debt of approximately \$600, summoning the Old National Bank as garnishee. The writ was served July 6, 1915. The bank answered, admitting a debt to the Music House in the sum of \$551.07 at that time. Thereafter Mrs. E. L. Olmsted intervened, claiming \$525 of this money as the proceeds of insurance which had been carried upon a certain piano player and music which she had left with the Music House for sale or exchange, and which had been destroyed by fire. The evidence showed that in the summer of 1914 intervener delivered to the Music House for sale or exchange a player and music, which she testified were gifts from her husband. In the spring of 1915 a fire destroyed this player and music, together with other musical instruments and property which belonged to defendant. The defendant Music House carried three policies of insurance in different companies covering its own and intervener's property. The insurance adjusters fixed the loss on the player at \$500 and on the music at \$25. The total loss upon all the property, exclusive of fixtures, was adjusted at \$2,296.28, which amount was apportioned ratably between the three insurance companies. Pursuant to this adjustment the Fidelity Phoenix Insurance Company of New York paid \$765.46 on June 18, 1915, the London Assurance Company of London paid \$1,020.61 on June 21st, and the

St. Paul Fire & Marine Insurance Company paid \$510.21 on July 1st. These sums were deposited by the Music House in its own checking account in the Old National Bank on the dates of their respective payment. Of these payments \$175 of the first, \$233.63 of the second, and \$116.37 of the third were paid on account of intervenor's player and music. The manager of the Music House testified that he informed the insurance adjuster of intervenor's ownership of the player and music, and that the adjustment was made according to its proportion of the entire insurance. In this he was corroborated by the adjuster. On cross-examination the manager testified that the Music House checked against these deposits indiscriminately, and that its check book showed that on June 30, 1915, some days after the deposits of all the money save the last payment, the account of the Music House had been checked down to \$.44, but that he had no means of telling what checks had been presented for payment, or how much money was actually in the bank standing to the credit of that account on June 30th. Intervenor then asked permission to show from the individual ledger of the bank the actual balance that then stood to the credit of the Music House. Plaintiff's counsel at first assented to this, but afterwards objected on the ground that it was immaterial what was in the bank if checks had been issued against the account and were subsequently paid. The court sustained the latter view, stating that in this proceeding it was immaterial what checks were paid. Intervenor thereupon rested, and plaintiff offered no testimony.

The court, evidently entertaining the view that the state of the account at any time throughout its currency was immaterial, and that the balance remaining at the time of service of the writ of garnishment should be charged with the whole amount of the insurance paid on account of intervenor's instrument and music, made no findings as to the dates when the several payments were deposited, and no finding as to the state of the account at any time during its currency. The court merely found that of the sums paid and deposited on account of the insurance \$525 had been paid on account of the loss sustained by the intervenor, and that at the time of the service of the writ there remained, in the bank \$561.07 to the credit of the Music House which had been paid by the bank into the registry of the court, concluding as a matter of law that of this sum \$525 were held by defendant in trust for the intervenor. The court adjudged that of this money deposited with the clerk of the court intervenor was the owner of \$525, and ordered that the clerk pay to intervenor that sum and costs. Plaintiff appeals.

Appellant contends: (1) That the evidence was insufficient to show that intervenor was the owner of the player and music; (2) that

in any event intervenor failed to show any title to the money on deposit in the bank at the time of the service of the writ of garnishment.

[1] As sustaining the first contention it is argued that, inasmuch as the player and music were acquired during the marriage relation of intervenor and her husband, the property was community property and not her separate property. Intervenor, however, testified that the player and music were gifts from her husband. There was no evidence to the contrary. It is evident that the husband had permitted intervenor to treat this property as her own. He at least would be estopped to claim any interest in it. We are satisfied that the evidence was sufficient to sustain the court's finding that the player and music were the separate property of intervenor. Moreover, so far as the record shows, the question of defect of parties was not raised at the trial.

[2] It is next urged that the intervenor had no right to any part of the insurance money because she paid no part of the insurance premiums. But the evidence shows that the insurance was carried upon her instrument for her benefit, and that the loss was adjusted and paid with that understanding. The fact that she did not know until after the loss that the property was insured, and that she did not pay any part of the premiums, is wholly immaterial to appellant's rights in the premises.

[3] Appellant's main contention is that, inasmuch as the money paid on account of the loss of intervenor's property was commingled with moneys belonging to the Music House and deposited in its checking account, the burden was upon intervenor to show, in order to a recovery of the full amount, that the blended account had never fallen during its currency below the amount paid on account of her loss. It is not disputed that as a matter of law the \$525 was a trust fund held by the Music House for intervenor and commingled with its own funds. The right of a beneficiary to reclaim a trust fund is based upon his right of property, not upon any right as a preferred creditor of the trustee. Hence it was formerly held that the blending of trust money with that of the trustee defeated the owner's title, and reduced his status to that of an unsecured creditor of the trustee. This on the theory that, having lost its identity, the trust money could not be followed and recovered in specie. The inequitable results of this doctrine finally led a great majority of the courts to adopt the rule that where money held by one person as trustee for another has been commingled with money of the trustee and deposited in a bank to the trustee's individual credit, the balance in the bank may be charged with the trust. This on the reasonable presumption that the trustee intends to use only what he has the right to use, and that whatever the trustee withdraws from the account

is from his own part of the common fund, and that the balance remaining includes the trust fund. *Board of Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; *Waddell v. Waddell*, 36 Utah, 435, 104 Pac. 743; *Widman v. Kellogg*, 22 N. D. 396, 133 N. W. 1020, 39 L. R. A. (N. S.) 563; *Lincoln Savings Bank, etc., Co. v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; *Smith v. Fuller*, 86 Ohio St. 57, 99 N. E. 214, L. R. A. 1916C, 6 Ann. Cas. 1913D, 387; *Brennan v. Tillinghast*, 201 Fed. 609, 120 C. C. A. 37; *Southern Cotton Oil Co. v. Elliotte*, 218 Fed. 567, 134 C. C. A. 295; *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448; *Spokane County v. First Nat. Bank*, 68 Fed. 979, 16 C. O. A. 81.

But as a resulting corollary it is still held that if at any time during the currency of the blended account the withdrawals leave a balance less than the trust fund, that fund must be regarded as dissipated, except as to such balance. Sums subsequently added to the account from other sources cannot be attributed to the trust fund. *Board of Commissioners v. Strawn*, supra; *Hewitt v. Hayes*, supra.

Some courts have refused to recognize this corollary, but they are few, and at least one of these has in more recent decisions receded from its former position. *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *In re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96.

[4] For a full statement of the foregoing principles substantially in the language of the leading cases, see 3 R. C. L. § 180. As between other creditors and the cestui que trust the burden of proving his title still rests upon the latter. *Schuyler v. Littlefield*, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806.

[5] Aided by every presumption, he can only recover the lowest balance to which the blended account had been reduced pending its currency as shown by the bank's books. *Powell v. Missouri & A. Land & Mining Co.*, 99 Ark. 553, 139 S. W. 299.

[6, 7] Applying these principles to the case before us, it is clear that the judgment must be reversed. Prior to the last deposit of July 1, 1915, of \$510.21, there had been deposited and commingled with money of the Music House, \$408.63 of Intervener's money. The evidence is undisputed that prior to this last deposit the Music House had checked against this account, but there is no evidence as to what checks had been paid, or what was the lowest ebb of the account prior to the last deposit. The burden was upon Intervener to show this, since no part of the last deposit save \$116.37 paid on account of the loss of her property can be attributed to the trust fund. Counsel for Intervener offered to show the actual state of the account

by the bank's books. The court held that this was immaterial. This was error. It may be asserted that the error was invited by counsel for appellant through his objection to this offer. And this is true, but it is manifest that the court's ruling was at least calculated to lead appellant's counsel to believe that the check book of the Music House was the only competent evidence of the state of the blended account. The error invited by appellant was not the error committed by the court and carried into its findings. The court's error went deeper. It consisted in the evident assumption that the actual state of the blended account during its currency prior to the last deposit was immaterial, and that the final balance, whatever its source, was charged, as a matter of law, with the trust to the full amount of the trust fund. Appellant's error was as to the character of the evidence competent to establish the condition of the account during its currency. It would be unfair to hold appellant estopped to question the judgment for that reason, since even had the Intervener been permitted to prove the condition of the account from the bank's books the court's findings show that the judgment would have been the same as that rendered.

Of the moneys in court Intervener is entitled to \$116.37, the trust money contained in the last deposit, plus the lowest balance to which the blended account had been reduced subsequent to the first deposit of June 18th, and prior to the last deposit of July 1st, but in no event the total to exceed the sum of \$525 and her costs. Since she was compelled to go into court to recover any part of the trust fund, it is clear that in addition to whatever she is permitted to recover of that fund she is entitled as against plaintiff, a mere general creditor, to have her costs paid from the money in court. The case is here for trial de novo, but the evidence essential to its proper determination is not before us, and was not before the trial court.

The judgment is reversed, and the cause is remanded, with direction to take further evidence as to the condition of the blended account at all times between June 18 and July 1, 1915, make an additional finding thereon, and enter judgment for Intervener in accordance with this opinion.

MORRIS, C. J., and FULLERTON, J., concur.

HAAS et al. v. WASHINGTON WATER POWER CO. (No. 13362.)

(Supreme Court of Washington, Nov. 10, 1916.)

1. APPEAL AND ERROR — 171(3) — REVIEW — CHANGE OF THEORY.

Where the answer denied allegation in paragraph 7 of the complaint, but evidently referred to paragraph 8, there being no paragraph 7, and the evidence shows that during the trial the

court and counsel on both sides treated the allegations of paragraph 8 as denied by the paragraph in the answer specifying paragraph 7, the theory upon which the trial proceeded cannot be rejected for the first time in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1056-1061; Dec. Dig. ☞ 171(3).]

2. DISCOVERY ☞70—INTERROGATORIES—REFUSAL TO ANSWER—GROUNDS.

That answering an interrogatory would enable plaintiffs to shape their evidence accordingly was not a good excuse for refusal to answer, as it cannot be assumed that either party would be more apt to give false testimony than the other, in the absence of some showing to that effect.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 84-86; Dec. Dig. ☞70.]

3. DISCOVERY ☞70—FAILURE TO ANSWER INTERROGATORIES.

Although Rem. Code 1915, § 1230, makes the penalty for refusing to answer interrogatories the striking of the defending party's pleadings and rendition of judgment against him, where defendant failed to answer an interrogatory until the opening of the trial, but plaintiff made no motion to strike but only moved for judgment, the court will not be put in error for denying the motion; it not appearing that failure to answer earlier was prejudicial.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 84-86; Dec. Dig. ☞70.]

4. ELECTRICITY ☞19(6)—ACTION FOR INJURIES—QUESTION FOR JURY.

Evidence held sufficient to take to the jury the question whether or not the injury was caused by the current turned on the transmission circuit, to test it, not knowing that it contained a broken wire.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ☞19(6).]

5. ELECTRICITY ☞14(1)—INJURIES INCIDENT TO USE—DUTY OF ELECTRIC COMPANY.

Those furnishing electric power, because of the extremely dangerous character of that agency, are charged with the highest degree of care compatible with practical operation, especially in their relation with the public to whom they sell and distribute power.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ☞14(1).]

6. ELECTRICITY ☞19(6)—ACTION FOR INJURIES—OVERCHARGED WIRES—QUESTION FOR JURY.

Where it appeared that defendant took the only practical method of discovering the cause of trouble on its line, and there was a conflict in the testimony of its witnesses as to the amount of current turned on to make the test, whether defendant was guilty of negligent operation held for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ☞19(6).]

7. ELECTRICITY ☞19(4)—ACTION FOR INJURY—ADMISSIBILITY OF EVIDENCE.

While Laws 1913, p. 397, prescribes certain rules for construction of electric lines, compliance with the statute is not evidence of proper construction, except in those particulars covered by the statute, so that evidence that by the use of lightning arresters the defendant electric power company's wires would have been so grounded as to prevent excess of current from entering appellant's premises on service wires is admissible.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ☞19(4).]

8. APPEAL AND ERROR ☞1178(1)—REVIEW—REVERSAL—REMAND.

Where the defendant moved for and obtained judgment notwithstanding the verdict, and, upon a finding by the Supreme Court that judgment was improperly granted, the case must be remanded, in order that the trial court may pass upon the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4004-4610; Dec. Dig. ☞1178(1).]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Louis J. Haas and another against the Washington Water Power Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded, with directions.

Robertson & Miller and Rosenhaupt & Grant, all of Spokane, for appellants. Post, Russell, Carey & Higgins, of Spokane, for respondent.

ELLIS, J. Action for personal injuries. Defendant operates an extensive electric power system in Eastern Washington and Southern Idaho. It has a number of generating plants. One of these, a water power plant, is located on the Spokane river at Post Falls, Idaho. These generating plants are all tied into one system by means of high-power transmission lines which are controlled from a substation in the city of Spokane, known as the Twenty-Ninth Avenue substation. The Post Falls plant is connected with the general system by two high-tension transmission lines running by different routes from Post Falls to the Twenty-Ninth Avenue substation. One of these lines passes through Otis Orchards, a community about 16 miles easterly from Spokane. This line normally carries from 60,000 to 64,000 volts. It consists of three wires. The poles carrying these wires in the vicinity of Otis Orchards are set along the south side of a highway known as the Trent road, which runs in an easterly and westerly direction. One of the high-tension wires is strung on the extreme top of the poles, the other two near either end of a cross-arm attached to the pole a few feet below the top. These wires are at regular intervals transposed so that what is the top wire at one point is the north or south cross-arm wire at another point. These high-tension wires are uninsulated large aluminum wires, and are protected from contact with the poles and cross-arms by large insulators at the points where they are strung. This pole line also carries another power line running from Post Falls to a point some distance west of Otis Orchards, but not as far as Spokane. This second line also consists of three wires which normally carry approximately 6,900 volts. These wires are strung on a second cross-arm about 5 feet below the cross-arm carrying the two high-tension wires. The 6,900 volt wires con-

stitute a distribution line, that is, they carry power intended for distribution to consumers along the route, among them the consumers at Otis Orchards. Two of these distribution wires are attached to that part of the cross-arm extending southerly from the pole. The third is attached to the opposite or northerly end of the cross-arm. The service wires, which must not be confused with the distribution wires, lead from the distribution wires on the poles to the premises of each individual consumer. Normally there is no connection between the high-tension 60,000 volt line and the 6,900 volt distribution line. The high-tension line is used exclusively to transmit current from the Post Falls plant to the Twenty-Ninth Avenue substation. All the power used by consumers along the route is transmitted over the 6,900 volt distribution line. The power is delivered to each individual consumer from this line through a transformer placed on the pole in front of his premises immediately beneath the cross-arm carrying the distribution wires. By the transformer the current of 6,900 volts is stepped down to 110 or 220 volts before it is passed onto the service wires. The side of the transformer into which the 6,900 volt current is received from the distribution wires is called the primary side and the other the secondary side. On each side of the transformer is a fuse box containing the fuse, which is a section of wire made of lead or other soft metal which will melt in case of an excessive charge of electricity, thus automatically severing the connection between the primary side of the transformer and the distribution wire, the fuse box on the other side being intended to perform the same office of severing the connection between the transformer and the service wire, in case an excessive current should find its way through the transformer. On the pole immediately in front of the plaintiffs' house there were two ground wires. One of these extended from the secondary side of the transformer down the pole into the ground. The other extended, from the ground to the top of the pole, and had branches extending horizontally along the upper side of the uppermost cross-arm; that is, the cross-arm carrying the two 60,000 volt wires. The function of the first is to conduct into the ground any excess current that might pass through the transformer to the secondary side, that of the second to ground any current that might escape from the high-tension wires.

Plaintiffs live at Otis Orchards on the south side of the highway, and receive power from the defendant with which to light their dwelling. On plaintiffs' premises are located two dwellings. The larger is occupied by plaintiffs and their family, the smaller by the family of plaintiffs' married son. The two buildings are about 18 or 20 feet apart. Both are furnished with light by the same service wires which pass from the transformer to plaintiffs' dwelling and thence to that of

their son. There was evidence indicating that only the two distribution wires strung on the south end of the lower cross-arm entered the transformer and furnished the power for the lighting of these two buildings, and that the wire strung on the end of the lower cross-arm north of the pole had no connection with the transformer.

Between 11 o'clock a. m. and noon on June 27, 1914, there was a severe electrical storm, accompanied with rain and hail in the vicinity of Otis Orchards. Lightning struck defendant's high-tension transmission line a short distance to the west of the pole immediately in front of plaintiffs' premises. Some of the witnesses testified that they saw a ball of flame or fire traveling along the upper wire until it reached this pole, when it passed down the pole to the ground. Afterwards it was discovered that the insulator on the top of this pole was shattered and the top wire which it bore was thrown down, so that it lay across the top cross-arm about 2 feet from the pole. This same wire (which about one-half a mile to the west of the plaintiffs' residence was transposed to the north end of the cross-arm, so that at that point it was the north transmission wire) was broken a little less than 2 feet from the cross-arm of the pole at that point; that end of the broken wire projecting into the air. The other end had fallen to the ground, and was hanging from the cross-arm of the next pole to the west, the end lying on the ground a little to the north of the pole line and passing about eight inches or a foot north of the north distribution wire on the lower cross-arm. The fuse box on the primary side of the transformer on the pole in front of plaintiffs' premises was shattered by the lightning, and the fuse melted. The transformer was subsequently tested and found to be in perfect working condition. At the time of the storm plaintiff Wilhelmina Haas and her daughter were at work in the kitchen of plaintiffs' house. They were on either side of a table, over the middle of which was suspended from the ceiling an electric light. It seems to be conceded that a charge of lightning entered the house and shocked the daughter, throwing her to the floor and rendering her unconscious for a short time. When she recovered consciousness she discovered fire in the basement of her brother's house. She and her mother at once went into the other house and extinguished the fire. When the fire was discovered plaintiffs' daughter-in-law started towards a clubhouse about a quarter of a mile to the west, where her husband was employed to give an alarm. Plaintiffs' son and several fellow workmen, together with others, hastened to the scene of the fire, but by the time they reached it the fire had been extinguished. Immediately after the fire it was found that the electric light wires in the basement were disarranged and burned off, and that the electric light bulb was demolished. The burned wires were the wires

of a switch which was placed on the door jamb of the cellar door. The ends of these switch wires were either hanging in the door or a short distance within the cellar. When the men came from the clubhouse and its vicinity, plaintiff Mrs. Haas and a young man named Morgenthaler, with several of the men, went into the basement to see that the fire was wholly out. Some of the men had passed out, but Mrs. Haas, Morgenthaler, and another man were in the act of passing out when Mrs. Haas, in passing under one of the wires which had been burned off, received a shock which severely burned her about the face, head, and soles of her feet. At the same time Morgenthaler, who was standing about 4 feet from the wire, but was uncertain whether he was touching Mrs. Haas or not, received a shock which threw him to the cellar floor and rendered him unconscious for a short time. One of the witnesses testified that, hearing the flash, he looked in the direction of Mrs. Haas and saw a flame passing from the ends of the wires directly into her face. From the evidence it seems to be fairly established that this occurred about 10 or 15 minutes after the defendant's power line was struck by lightning, and after the shock received by plaintiffs' daughter in the other house. It appears that the switchboard in defendant's substation at Twenty-Ninth avenue in Spokane is equipped with oil switches, so arranged that in case of any interruption of the circuit on the transmission wires the switch will be thrown, thus automatically disconnecting the transmission line and shutting off the current. In the power house at Post Falls it does not appear that there were any of these automatic oil switches, but it does appear that an interruption or trouble on the line was detectable by a noise in the machine. It was shown from the records kept at the substation in Spokane that the oil switch tripped out on the 27th day of June, 1914, at 11:37 a. m. The Post Falls station operator testified that at 11:37 a. m. he detected trouble on the high-power transmission line through the noise in the machine. His testimony was as follows:

"Q. Now, to get it down into language that we can all understand, tell me what this means; what did you do? A. When the trouble came on? Q. Yes; first, when did you observe any trouble on the high-power transmission line? A. Why, I noticed that on the machines. Q. When was it? A. At the time stated, and I opened the switch. Q. When was that? A. 11:37 a. m. Q. That is when the trouble was shown on the high-power transmission line? A. Yes, sir. Q. What happened then? What happened to the switch? A. How do you mean? Q. Well, was it closed or open, or did anything else happen to it? A. Well, it was closed, and I opened it. Q. Now, opening the switch, what does that mean? A. Well, that breaks the circuit. Q. The circuit is broken? A. Yes, sir. Q. What had you observed before the switch was opened at 11:37? A. The noise in the machine; that was the first time there was trouble on the line. Then I could hear the spring of the meters, and saw there was trouble on that line, so I opened that line immediately. Q. And

then what did you do? A. I reported to the system operator. Q. What did you do with that line after that? A. After I opened it? Q. Yes, after you opened it? A. I reported it to the system operator that there was trouble on it, and waited for orders. Q. Then what did you do at Post Falls; that is what I want to know? A. Well, I changed over the generators so I could get one generator on one bus, and got ready to try it out, and when I got orders to try it out I cut her in on the generator at half voltage. Q. Half voltage? A. Between 60 and 70; it was about 120 on our machines. Q. You mean you didn't take all of it? A. No. Q. You used 60 volts, or something like that? A. Yes. Q. And you closed the switch at 11:45, or something? A. Yes, sir. Q. And that threw the power on the line towards Otis Orchards? A. Yes, sir. Q. And then what happened after that; did the switch open up again? A. No, sir; I opened it. Q. Well, you opened it; how long was it closed? A. About two or three seconds. Q. And then you opened it? A. Yes, sir. Q. And after that you closed it again, or did it remain open while you were on duty? A. It remained open. Q. Until you went off duty? A. Yes, sir."

On cross-examination he testified as follows:

"Q. Now, you were told from Spokane to put 120,000 volts on the high-power wires? A. 20,000. Q. 120,000, were you? A. I did not put on 120,000. Q. How much did you put on there? A. I would have to figure that out. I put on 60,000 volts from the machine. Q. Does that make more than 60,000 volts? A. No, sir. Q. You put on all you could put on? A. No, sir. Q. You put the maximum voltage on the wires? A. I put on less than half. Q. That is, you put on 30,000 volts? A. Less than half. Q. 27,000 volts? A. Somewhere near that. Q. Now, then, when you did that, you did that at 11:37? A. No, sir. Q. What time? A. 11:45."

In response to interrogatories filed by plaintiffs defendant answered that some disorder on the line was detected between 11 a. m. and 1 p. m. on the date in question, and that the high-power wires between the hour of 11 a. m. and 1 p. m. were charged with approximately 63,000 volts of electricity.

It is plaintiffs' claim that the injury was caused by this charging of the high-power wires with electricity when one of the wires was broken. Defendant, on the other hand, claims that this could not be because of the interposition of the transformer and the fuses, which would have prevented an excessive current of electricity from flowing over the line to the service wires leading into the premises where the injury occurred. The charges of negligence, stated briefly as may be, are these: That with full knowledge, or with means of knowledge, that the high-power wire was broken and in contact with the distribution wires, defendant negligently, and without any attempt to ascertain where the break was, caused the broken wire to be connected with the generating machinery and caused it to be charged with a high voltage of electricity; that the transformer was out of repair, of which defendant had knowledge, or means of knowledge, so that it did not protect the service wires leading to plaintiffs' premises from an overcharge of electricity; that defendant was further negligent in placing the distribution

wires on the same poles with the high-power wires and directly underneath them, without being adequately insulated and without guards or other means of preventing the high-power wires from falling on, over, or against the distribution wires should the high-power wires become broken or dislodged; that defendant was further negligent in failing to use an adequate and proper device known as a lightning arrester which, if properly installed, would have prevented any voltage greater than consistent with safety from entering the plaintiffs' premises. The first two of these allegations of negligence were found in paragraph 8 of the plaintiffs' amended complaint. The paragraphs of the plaintiffs' amended complaint were so misnumbered that no paragraph 7 appeared. Defendant in its answer denied the several allegations of negligence in the amended complaint by reference to paragraphs, and, it is claimed inadvertently, did not deny the allegations found in paragraph 8, but did deny the allegations of paragraph 7. The cause was tried to a jury, which returned a verdict in plaintiffs' favor for \$6,016. Defendant moved for judgment non obstante verdicto, and in the alternative for a new trial. The motion for judgment non obstante verdicto was granted. The motion for a new trial was not passed upon. Plaintiffs appeal.

[1] Appellants first contend that, inasmuch as the allegations of negligence contained in paragraph 8 of the amended complaint were not denied by the answer, they stand admitted, and that therefore they establish such admitted negligence on respondent's part as to make the granting of judgment non obstante manifest error. We are convinced that respondent's denials in paragraph 5 of its answer, though specifying paragraph 7 of the complaint, were intended to be addressed to the allegations found in paragraph 8 of the amended complaint. The evidence shows that throughout the trial the allegations of negligence contained in paragraph 8 were treated by the court and counsel on both sides as denied, the main controversy on the facts being waged upon those allegations. The theory upon which the trial proceeded cannot be rejected for the first time in the appellate court. *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680; *Grant Bros. v. United States*, 232 U. S. 647, 661, 34 Sup. Ct. 452, 58 L. Ed. 776; *In re Lind Estate*, 90 Wash. 10, 155 Pac. 159; *Driver v. Galland*, 59 Wash. 201, 205, 100 Pac. 593; *Nielsen v. Northeastern Siberian Co.*, 40 Wash. 194, 196, 82 Pac. 292; *Standard Furniture Co. v. Anderson*, 38 Wash. 582, 80 Pac. 813.

[2, 3] It is next contended that the court erred in refusing to grant judgment for appellants at the opening of the trial because

of the failure of respondent to answer a certain interrogatory as follows:

"State the exact time or times at which you turned on said current on said date between the hours of 11 a. m. and 1 p. m."

Some time prior to the trial respondent had been ordered to answer the interrogatories, including this one, by the judge of another department of the superior court. When appellants moved for judgment respondent's counsel objected to answering the interrogatory because it would show the exact time when the current was turned on, and thus enable appellants to shape their evidence so as to show that the accident occurred at that very time. The excuse is not a good one. The court would have just as much right to assume that, had appellants' evidence been first put in, the answer to the interrogatory would have been falsely framed to contradict the evidence, as it has to assume that if the answer to the interrogatory were first put in that the appellants' evidence would be falsely framed to correspond with that answer. It cannot be assumed that either party would be more apt to give false testimony than the other in the absence of some showing to that effect. The court committed no error in holding that this interrogatory should be answered at once. The answer was accordingly filed, stating that the current was turned on at 11:46 a. m. But it does not follow that, because there was no sufficient excuse for not answering the interrogatory, the court erred in permitting it to be answered at the opening of the trial, and in not granting judgment for failure sooner to answer it. The statute (Rem. 1915 Code, § 1230) makes the penalty for refusing to answer interrogatories the striking of the offending party's pleading and the rendition of judgment against him. But in this case no motion was made to strike respondent's answer, but only a motion for judgment. Since the penalty prescribed by the statute is a severe one, we do not think the courts should impose it, except where the moving party brings himself within the terms of the statute. Moreover, the interrogatory was answered before any evidence was introduced, and it does not appear that the failure to answer it earlier could have had any prejudicial effect upon the presentation of appellants' case. We have been cited to no case in which the same circumstances as those here presented are found. While the question presented is a close one, we are loath to hold, in the absence of a showing of injury, that a judgment should be rendered against the offending party where, as in this case, the interrogatory was answered in time to meet its original purpose.

[4] Upon the main issue as to whether the court erred in granting judgment notwithstanding the verdict, it is not only impracticable, but unnecessary, to discuss the extremely voluminous evidence in detail. There was some evidence that after the stroke of

lightning which broke the wire and injured appellants' daughter, there was another violent flash of lightning which might have caused the injuries to Mrs. Haas. The evidence as to this second flash was vague, and other witnesses testified that it was perfectly clear at the time of the injury, and that there was no second flash of lightning. There was also much testimony of expert witnesses to the effect that the charge from respondent's power house could not have passed to the service wires on appellants' premises so as to cause the injuries because the fuse leading to the transformer had already been destroyed, and because the ground wires on the pole would have carried the charge into the ground. Other experts, however, denied such impossibility, and expressed the view that, even though the broken wire at the end which was charged did not touch the distribution wires, the wet wooden cross-arm upon which it rested might have acted as a conductor sufficient to carry an excessive charge of electricity over the small insulators of the distribution wires, and thence onto the service wires, and cause the injury. The trial court seemed to be of the opinion, and so are we, that this evidence was sufficient to take to the jury the question whether or not the injury was caused by the current turned on at 11:45 a. m. by the operator at Post Falls.

Whether in turning on this current there was negligent operation is a closer question. Every expert witness who testified upon the subject stated that respondent's appliances for detecting breaks or interruptions in the current on its high-power transmission line were of the best and most approved type; that there is no apparatus known to science which, with a high-power line such as that here involved, would do more than indicate trouble on the line, and that no apparatus would indicate the nature of the trouble. All of the witnesses were of the opinion that an indication of trouble on the switchboard, either in the Spokane substation or in the power house at Post Falls, would not mean that the trouble was serious or the line broken or in otherwise dangerous condition. Every witness who testified on the subject testified that in the usual course of operation the switches or other apparatus for indicating trouble show trouble of some kind frequently, one witness said many times each day. In many instances—one witness said fully 60 per cent.—the switch when closed again shows no further trouble, and in such cases the cause of the trouble is never known. It is therefore evident that the most that the trip out of the oil switch in Spokane and the indication of trouble at Post Falls showed at the time in question was that there was some trouble on the line, but did not indicate to anybody the nature of the trouble, or whether it was serious or not. Every expert witness who testified on the subject said that the universal method, and

the only practical method, of procedure on an indication of trouble was to apply about one-half of the normal voltage of the line to the wire, and that if the connection is maintained it indicates that the trouble has disappeared and the line is clear; that if the current will not go through, the switches will again trip out, thus indicating that there is an absolute break in the line or some other serious trouble. The point of the trouble is then located by sectionalizing the line, trying out one section after another until the break or obstruction is located between two given points and the exact location is then discovered by patrolling the line between those two points. All of the witnesses agreed that the only practical test is to put a current into the troubled line at about one-half the normal voltage, and if it shows trouble again, keep the power off the line until the trouble has been located, in the manner we have mentioned, and removed. There was much discussion with one of the expert witnesses as to the theoretical possibility of testing with a very low voltage a line which shows trouble. The witness answered, in substance, that this could be done with a line of low tension, but would be absolutely impracticable with a line normally carrying a voltage of 60,000 or over, as does the one here involved. This is apparently because the size of the wire would be such as to offer so little resistance to a current of low voltage as to indicate nothing reliable. The evidence makes it reasonably plain, therefore, that there are but two certain ways in which to test a line showing trouble in order to determine whether or not there is a break, the one being the method which was employed here, the other being to patrol the line on each indication of trouble. Since trouble is shown many times a day and in a majority of cases the trouble is not only not serious, but immediately disappears, it is manifest that patrolling the line to look for the trouble would be wholly incompatible with any practical operation of the line. As said by the trial court, it is clear that if respondent was required to patrol the whole line every time a switch opened, the line could not be operated, since before one patrol was completed another obstruction would have appeared. It was upon this ground that the trial court granted the motion, namely, that respondent having done the only practical thing that could be done to determine whether or not there was a break in the line, was not guilty of negligence in so doing. It will be noted, however, that the normal capacity of the line in question was a little over 60,000 volts; that the test, as testified to by the experts, was to turn onto the line when trouble was indicated about one-half the normal voltage. The only person who could testify as to what was actually turned on, namely, the station operator at Post Falls, contradicted himself as to the force of the current which he applied. He

first testified positively that he turned on between 60,000 and 70,000 volts. On cross-examination he repeated this, but finally reduced it to about 27,000 volts. If in fact his first statement was correct, he was clearly guilty of negligent operation, since under all the evidence the proper test requires no more than one-half of the normal voltage, and obviously the greater the voltage the greater the danger.

[5] We have often held, in common with other courts, that those who are furnishing electric power, because of the extremely dangerous character of that agency, are charged with the highest degree of care, especially in their relation with the public to whom they sell and distribute power. *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916; *White v. Reservation Electric Co.*, 75 Wash. 139, 134 Pac. 807.

[6] The highest degree of care in such case is the highest degree of care compatible with practical operation. The conflict in the testimony of the Post Falls operator is further heightened by respondent's answer to the interrogatory that the line was charged with 63,000 volts at the time in question. It seems to us that the extreme doubt raised by respondent's own evidence as to the amount of current turned into this line to test it for trouble presented a question for the jury as to whether or not respondent was guilty of negligent operation. If the amount exceeded that required by the established tests, we cannot say as a matter of law that respondent was not guilty of negligence. Upon the evidence as presented the question was for the jury.

[7] In view of the fact that there may be another trial, we shall notice one other question. Appellants offered to show that, by the use of lightning arresters over the transformer, either lightning or excessive current from the disarranged high-power wires above would have been so grounded as to prevent excessive current from entering appellants' premises. The court excluded this testimony on the ground that the question was one of statutory standard construction. We think this was error. While it is true that the act of 1913, Laws of 1913, c. 130, prescribes certain rules for the construction of electrical lines, that statute does not attempt to define every detail of construction, and, we are inclined to hold that a compliance with the statute is not evidence of proper construction, except in those particulars covered by the statute.

Many pages of the briefs are devoted to a mooted application of the rule *res ipsa loquitur*, but we find it unnecessary to discuss that question, since the evidence, in any event, was sufficient to take to the jury the issue of negligence.

[8] The judgment notwithstanding the verdict was improperly granted, but we cannot

direct the entry of judgment on the verdict. The motion for a new trial remains undisposed of. In such a case we have announced the rule that the cause should be remanded in order that the trial court may pass upon the latter motion. *Paich v. Northern Pac. Ry. Co.*, 88 Wash. 163, 166, 152 Pac. 719.

The judgment is reversed and the cause is remanded, with direction to the trial court to pass upon the motion for a new trial, and either grant a new trial or enter judgment on the verdict.

MORRIS, O. J., and CHADWICK, FULLERTON, and MOUNT, JJ., concur.

FIDELITY NAT. BANK OF SPOKANE v HOSEA et al. (No. 13023.)

(Supreme Court of Washington. Nov. 14, 1916.)

1. BILLS AND NOTES § 296 — LIABILITY OF INDORSER—EFFECT OF PREVIOUS AGREEMENT.

Under the Negotiable Instruments Act (Laws 1899, c. 149), providing that an indorser warrants that the instrument is genuine and what it purports to be, that he had good title, that all prior parties had capacity to contract, that the instrument was at the time of indorsement valid and subsisting, that on presentation it will be accepted and paid according to its terms, or that he will pay the amount of necessary proceedings on dishonor to a holder or subsequent indorser compelled to pay it, the obligation of an indorser on a secured note was a new agreement, warranting the instrument as it then appeared on its face, superseding a prior agreement, written or parol, to accept a deed of the land in full satisfaction of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 667-679; Dec. Dig. § 296.]

2. FRAUDS, STATUTE OF § 74(3) — PAROL AGREEMENT AFFECTING LAND — INDORSER'S OBLIGATION.

A parol agreement, contemporaneous with the indorsement of a secured note, to be bound by a previous agreement that a deed to the land would be accepted in full payment of the note, is void under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 122-127, 129-131; Dec. Dig. § 74(3).]

3. MORTGAGES § 303—GRANTEE OF MORTGAGED PROPERTY—AGREEMENT TO ACCEPT PROP- ERTY IN PAYMENT.

An agreement by the holder of a secured note with the grantee of the mortgagor, who was not obligated to pay the debt, to dismiss foreclosure proceedings in consideration of the grantee's promise to convey the land if he did not pay the interest before a certain date, was not an express agreement to take a deed to the land in satisfaction of the note, and, since the contract was made with a stranger to the obligation, none will be implied.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 869; Dec. Dig. § 303.]

4. PRINCIPAL AND SURETY § 112—DISCHARGE OF SURETY—AGREEMENT TO ACCEPT PROP- ERTY IN PAYMENT.

Where a deed was tendered to plaintiff bank as satisfaction and payment of a secured note, a letter written by the bank when returning the deed, stating that the bank did not wish the deed

made to it, was not an independent agreement to accept the deed in satisfaction of the debt, which would release sureties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 226-234; Dec. Dig. § 112.]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by the Fidelity National Bank of Spokane against Millard S. Hosea and others. From a judgment for plaintiff, certain defendants appeal. Affirmed.

Danson, Williams & Danson, Post, Avery & Higgins, and Burcham & Blair, all of Spokane (Geo. D. Lantz, of Spokane, of counsel), for appellants. Hamblen & Gilbert, of Spokane, for respondent.

FULLERTON, J. On October 16, 1912, Hosea and wife made and delivered to E. H. Stanton & Co., their promissory note, wherein they agreed to pay E. H. Stanton & Co. \$25,000, with interest from date at the rate of 7 per cent. per annum, payable semi-annually. The note contained an accelerating clause to the effect that, if the interest was not paid when due, the principal and interest of the note should become due and payable at the option of the holder of the note. At the time of the execution of the note and as a part of the same transaction, Hosea and wife also executed to the payee of the note a mortgage upon real property, situated in Spokane county, securing the note according to its tenor and effect. Subsequent to the execution of the note and mortgage Hosea and wife conveyed the mortgaged property to James Hunter and O. S. Slawson subject to the mortgage. Certain installments of interest on the note were not paid, and on August 27, 1913, E. H. Stanton & Co., its then holder, brought an action to recover thereon and to foreclose the mortgage. After the institution of the action, Hunter and Slawson, under the date of September 8, 1913, wrote to E. H. Stanton & Co. making the following proposition:

"In consideration of your dismissing the foreclosure suit against lots six (6) and seven (7), block sixty-seven (67), School Section, Spokane, Washington, and extending the payment of interest on the \$25,000.00 mortgage secured by the above described property to, on or before May 1, 1914, we agree to convey by quitclaim deed to you and relinquish all interest in the aforesaid property not later than May 1, 1914, provided the aforesaid interest is not fully paid by us before the aforesaid date to December 1, 1913. In consideration of the extension of payment of interest, we further agree to pay the premiums on all insurance now covering the building on the above-described property, and to pay all taxes for the year 1912."

The company accepted the proposition through its attorney by the following writing:

"Your letter of September 8, 1913, addressed to E. H. Stanton Company was turned over to me by the E. H. Stanton Company for answer. Your proposition is hereby accepted, and I will get the order of dismissal signed tomorrow."

The foreclosure action was thereupon dismissed. Shortly thereafter E. H. Stanton & Co. sold the note and mortgage to one Isabel M. Gray, who in turn sold it to Joseph Zirngibl. However the note was delivered and the mortgage assigned by the company directly to Zirngibl. Subsequently the note was sold and the mortgage assigned by Zirngibl to the plaintiff, Fidelity National Bank, the bank received the same on April 6, 1914, and the purchase was entered on their books as of the next day. On delivering the note to Zirngibl E. H. Stanton & Co. regularly indorsed the same, and on delivery of the note to the bank Zirngibl likewise regularly indorsed it. Hunter and Slawson did not pay the interest as they agreed to do in their communication to E. H. Stanton & Co., but in lieu thereof made and executed and tendered to the bank their deed to the property. This deed the bank returned to them with the following note:

"We return herewith the deed which you sent to us, which should be made in blank. We do not want the deed made to us."

No deed in any other form was tendered. Thereafter the bank demanded payment of the note from the principal and from the indorsers, and on their refusal to pay began the present action to recover thereon and to foreclose the mortgage. The complaint was the ordinary complaint in an action to recover upon a promissory note and to foreclose a mortgage given to secure it. E. H. Stanton & Co. and Zirngibl answered separately. E. H. Stanton & Co., after certain denials, set up affirmatively that Hunter and Slawson, as part consideration for the conveyance to them of the mortgaged property by Hosea and wife, assumed and agreed to pay the mortgage. It set up also the commencement of the foreclosure action, its subsequent dismissal because of the contract between itself and Hunter and Slawson, and averred that it was the understanding between them that the deed therein agreed to be delivered was to be in satisfaction of the note and mortgage sued upon, and that it agreed to take it in full satisfaction of such note and mortgage, averring further that the subsequent transfer of the note and mortgage were made with knowledge of such agreement, and with the understanding and agreement on the part of the several transferees that a conveyance of the land was to be received by such transferee in full satisfaction of the note and mortgage. Zirngibl's answer was to the same effect.

The evidence, as we read it, did not justify these averments in their entirety. There is no evidence that Hunter and Slawson had in any manner assumed the mortgage or had agreed to pay the note, nor was there any evidence, other than the inferences arising from the writings, that either E. H. Stanton & Co., or Zirngibl, or the present holder of the note agreed to take the property in satis-

faction of the debt. Zirngibl knew of the written agreement between E. H. Stanton & Co. and Hunter and Slawson when he purchased the note and took an assignment from that company, and the bank had the same knowledge when it purchased the instruments from Zirngibl. It is the contention of the indorsers that these writings changed the tenor of the note as to the medium of payment—that is, the note was changed by the agreement from an obligation payable in money to an obligation payable in specific property—and the deduction is drawn therefrom that the indorsements were implied agreements that the note would be paid according to its tenor as thus modified, and hence the tender of a deed to the mortgaged property, in accordance with the modified agreement, satisfied the obligation.

[1, 2] We cannot think these contentions tenable. The indorsements were without qualification. They were new and independent contracts, embodying all of the terms of the instrument indorsed in itself. Daniel on Negotiable Instruments (6th Ed.) § 869. By the terms of the Negotiable Instruments Act the indorsers severally warranted: (1) That the instrument was genuine and in all respects what it purported to be; (2) that he had good title to it; (3) that all prior parties had capacity to contract; (4) that the instrument was at the time of the indorsement valid and subsisting; and (5) in addition engaged that on due presentation it would be accepted and paid according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be taken, he would pay the amount thereof to the holder, or to any subsequent indorser who might be compelled to pay it. The warranty was of the instrument as it appeared on its face, free from the burden of any condition either of them may have assented to, prior to the indorsement, not expressed thereon in writing. Knowledge, therefore, by one taking the instrument, that the indorser had agreed to accept payment in something else than money, would not relieve the indorser of his obligation, whatever may be the rule with reference to the other party to the agreement. The instrument being negotiable in form, the indorser without qualification is bound by his own contract; he cannot be heard to plead a prior contract made with another party to relieve himself from the one he subsequently made. In other words, his act of indorsement was equivalent to writing the conditions the law implies from an indorsement on the instrument above his signature, and cannot be varied or altered by showing a prior written or prior parol agreement, or by a contemporaneous parol agreement. The first, if existent, are superseded by the new agreement, and the second is void because of the statute of frauds.

[3] But perhaps we need not go to this ex-

tent in the present instance. The agreement relied upon to relieve from the obligation assumed by the indorsement does not bear the construction the appellants put upon it. It is not an agreement to accept the property in payment of the obligation. The agreement was made with one not obligated to pay the debt, and the expressed consideration was a suspension of the time within which the holder of the mortgage would enforce the debt against the property. There was no express agreement to take the property in satisfaction of the debt, and since the contract was made with a stranger to the obligation none will be implied.

[4] Another contention is that the bank accepted the deed from Hunter and Slawson, and by that act released the sureties. This is founded on the letter written by the bank when it returned the deed Hunter and Slawson had tendered. But it is distinctly stated therein that the bank did not wish the deed made to it. In explanation the officer of the bank having the matter in charge testified that the bank wished the deed in blank so that it might be turned over to E. H. Stanton & Co.; the witness believing that the company would accept the deed and pay the note. But, whatever the motive may have been, there was clearly no independent agreement on the part of the bank to accept the property in satisfaction of the debt.

The judgment is affirmed.

MORRIS, C. J., and ELLIS, MOUNT, and OHADWICK, JJ., concur.

GASCH et ux. v. ROUNDS et al. (No. 13400.)
(Supreme Court of Washington. Nov. 13, 1916.)

1. APPEAL AND ERROR §=171(3)—SCOPE—ISSUE.

Though the answer was in effect a negative pregnant and might be construed as an admission that one of the defendants did the act charged, where the trial below proceeded on the theory that it was a complete denial and the issue thereby made was fully tried, it must be so treated on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1056-1061; Dec. Dig. §=171(3).]

2. APPEAL AND ERROR §=1002—SCOPE—CONCLUSIVENESS OF FINDINGS.

On a primary issue of fact, where the evidence conflicts, the verdict is conclusive on the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. §=1002.]

3. NEGLIGENCE §=32(2) — CARE AS TO INVITEES—"INVITATION."

Invitation, as distinguished from mere license, is implied by law only when the visitor comes for some purpose connected with the business in which the owner or occupant is there engaged, or which he permits there to be carried on, and there must be some real or supposed

mutuality of interest in the subject to which the visitor's business relates.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 43; Dec. Dig. ¶32(2).]

For other definitions, see Words and Phrases, First and Second Series, Invitation.]

4. NEGLIGENCE ¶134(3) — CARE AS TO INVITEES.

Evidence held to show that plaintiff in going upon defendant's premises was a technical trespasser and not an invitee.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. ¶134(3).]

5. TRIAL ¶143—QUESTION FOR JURY—CONFLICTING EVIDENCE.

A vital and positive contradiction by a party of his own witness, whom he introduces as worthy of belief, raises such conflict as to take the question to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 842, 843; Dec. Dig. ¶143.]

6. NEGLIGENCE ¶33(1)—CARE REQUIRED AS TO TRESPASSERS.

The owner of a building owes a technical trespasser no duty except to refrain from wantonly or willfully injuring him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 45; Dec. Dig. ¶33(1).]

7. NEGLIGENCE ¶82—CARE REQUIRED AS TO TRESPASSERS—CONTRIBUTORY NEGLIGENCE.

Where a technical trespasser went into a building in course of construction when it was dark and without a light, and fell into a furnace pit, his own negligence was the proximate cause of his injury, and he took the risk of the attending peril.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. ¶82.]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Rudolph Gasch and wife against E. J. Rounds and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded for dismissal.

Preston & Thorgrimson and Peters & Powell, all of Seattle, for appellants. Wm. Brueggerhoff and Peterson & Macbride, all of Seattle, for respondents.

ELLIS, J. Action for personal injuries. Defendants Osgood and wife owned two lots abutting upon the north side of Third avenue in the town of Renton, with a frontage of 65 feet and running back to a depth of 100 feet. Prior to the time here in question there had stood on the front of these lots a frame building occupied by tenants of the Osgoods, among them one Hardy, a plumber, and one Kane, a dealer in electrical fixtures. At the time here in question this building had been moved to the rear of the lots, Kane vacating and moving across the street, but Hardy still remaining as a tenant of the Osgoods and conducting his business therein. The Osgoods, through Rounds and wife, doing business as Rounds Construction Company, were erecting a two-story brick building about 65 feet square on the front of the

lots. This building was divided into four storerooms of equal width save the westerly one which had 5 feet cut off for a hallway running back to the rear of the building. The walls were up, the roof was on, the studding for the partitions was set, some of the partitions were lathed, and the floors were roughed in. No doors nor windows were hung and the fronts of the storerooms were not in. Some 50 feet back from the front was a wall running east and west cutting off the rear of the storerooms and extending about eight inches into, but not crossing, the passageway along the westerly wall. Immediately off of this passage and immediately back of this rear wall of the westerly storeroom was a cement lined furnace pit 10 feet square and 8 feet deep. This pit was uncovered, unguarded, and unlighted. About 8 o'clock on the evening of November 21, 1914, one McDonald, a man named Dorsey, and plaintiff, desiring to purchase certain electrical fixtures called "rosettes" for use in a house being built by McDonald, were directed to seek them from Kane at Hardy's plumbing shop at the rear of the new Osgood store building, where they supposed Kane still conducted his business. They first went north along Wells street, a cross street about one-third of a block west of the new building, to an uninclosed private space leading back toward the frame building occupied by Hardy. They found this space partially blocked with lumber and piles of wood. In the darkness they despaired of finding the way through in safety, and returned to the front of the new store building on Third avenue. They entered; plaintiff, leading, went back through the westerly storeroom to its rear wall, and plaintiff passed around the end of this wall into the passageway. Seeing a light shining through the back of the building he started toward it and fell into the pit. His companions coming up struck matches, and by their light found him unconscious at the bottom of the pit. He sued to recover for his injuries, alleging Osgood's ownership of the premises, his contract with Rounds and wife doing business as Rounds Construction Company to erect the building, Hardy's occupancy of the old building in the rear as Osgood's tenant, Hardy's invitation to the public to pass through the new building to and trade at his store with the knowledge and consent of the defendants, and negligence on the defendants' part in leaving the pit unlighted and unguarded. Defendants by answer admitted Hardy's occupancy of the building as Osgood's tenant, but denied the invitation to the public as follows:

"* * * They deny that the said Frank H. Osgood, or Georgina Osgood, or Susie Rounds gave any consent to the use of the building on the front part of the lot or its passageways, as access to the rear building."

They also set up contributory negligence as an affirmative defense, which was traversed by the reply. The trial resulted in a verdict for \$900 in favor of plaintiff and against all the defendants. At appropriate times defendants moved for a nonsuit and for a directed verdict. Both motions were denied. From a judgment entered on the verdict all of the defendants appeal.

[1] Appellants contend that respondent was not an invitee, but a trespasser, or at best a mere licensee, to whom appellants owed no duty except not willfully or wantonly to injure him. Respondent retorts that this issue was not presented by the pleadings, because in their answer appellants merely denied that either Osgood or his wife or Mrs. Rounds gave any consent to the use of the new building, or its passageways, as access to the rear building. It is true that these denials are in form a negative pregnant, and, technically construed, amount to an admission that Rounds gave consent, and that Hardy, with the knowledge and consent of all the appellants, held out the invitation. But at the trial it seems to have been assumed by the court and all of the parties that the pleadings were sufficient to present the issue of invitee or licensee. That issue was fully tried; hence we must treat it as an issue here. *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643.

[2, 3] Though unsatisfactory and in the sharpest conflict, the evidence was sufficient to take to the jury the primary question of an implied invitation to pass through the new building to the old one, to such persons as might desire to visit it for any purpose connected with the business there conducted by the tenant Hardy. On that primary question the verdict is conclusive upon us. But it does not follow that respondent was such a person. Aside from the invitation to the public generally, implied from long acquiescence by the owner of private premises in the general public use of a way across his premises, a phase of the subject resting on an independent basis with which we are not here concerned, the rule of implied invitation may be stated as follows: Invitation as distinguished from mere license is implied by law only when the visitor comes for some purpose connected with the business in which the owner or occupant is there engaged or which he permits there to be carried on, and there must be some real or supposed mutuality of interest in the subject to which the visitor's business relates. This rule, which is sustained by almost universal authority, is thus stated in 3 *Shearman & Redfield, Law of Negligence* (6th Ed.) § 706:

"Invitation by the owner or occupant is implied by law where the person going on the premises does so in the interest or for the benefit, real or supposed, of such owner or occupant, or in the matter of mutual interest, or in the usual course

of business, or where the person injured is present in the performance of duty, official or otherwise."

In an opinion reviewing many authorities, the Supreme Judicial Court of Massachusetts states the rule as follows:

"It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." *Plummer v. Dill*, 156 Mass. 426, 427, 31 N. E. 128, 129 (32 Am. St. Rep. 463).

See, also, *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Hart v. Cole*, 156 Mass. 477, 31 N. E. 644, 16 L. R. A. 557; *McCarvell v. Sawyer*, 173 Mass. 540, 54 N. E. 259, 73 Am. St. Rep. 318; *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; *Brehmer v. Lyman*, 71 Vt. 98, 42 Atl. 613; *Pauckner v. Wakem*, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118. The test "of mutuality announced by the Supreme Court of Massachusetts seems to be the best that has been suggested." 3 *Elliott, Railroads* (2d Ed.) § 1249. The rule, of course, does not apply to children of tender years. *Northwestern El. R. R. Co. v. O'Malley*, 107 Ill. App. 599. This court in a recent case has, in effect, sanctioned the rule as we have stated it, and has impliedly recognized mutuality of interest as its basis. *Kroeger v. Grays Harbor Construction Co.*, 83 Wash. 68, 145 Pac. 63.

[4, 5] Under this rule was respondent here an invitee? We think not. True, he testified that McDonald had hired him to help wire McDonald's house, and had asked him to help select the rosettes; that they first went to the Renton Hardware store, and were there told "to go to Hardy, who had them," and that he was not looking for Kane. But in every one of these particulars he was flatly contradicted by his own chief witness McDonald. McDonald, though repeatedly pressed upon the subject, refused to testify that he had hired respondent for any purpose. He testified that he and his wife were paying a neighborly visit to respondent and his wife that evening; that he mentioned the fact that he was wiring his house, and asked respondent to go with him to get the rosettes merely for company, and that Dorsey, who was there at the time, went for the same reason; that the clerk at the hardware store told him he could get the rosettes from Kane, who was "in with Hardy in the plumbing shop in the rear of the new building"; that he knew he was not going to get the materials from Hardy, but from Kane, and was looking for Kane at the time, and that he, McDonald, was going to select the rosettes. True, here is a conflict of evidence;

and, since no authority is cited to the contrary, we shall assume that a vital and positive contradiction by a party of a witness whom he introduces as worthy of belief raises such a conflict as to take the question to the jury, but there still remains the uncontroverted fact that respondent, before he entered the new building, was absolved from any duty to McDonald to enter it. McDonald testified that, when he found that they could not reach Hardy's store from the rear and had returned to the front of the new building, he suggested, because it was so dark, that respondent and Dorsey remain outside while he went through to the store; that as the place was so dark, he thought it would be just as well if they would wait for him. This was not denied by either respondent or any one else. Even assuming that McDonald actually had hired respondent and had been expecting to make his purchase from Hardy, and that he was actually looking for Hardy, not for Kane, still, when he told respondent to wait outside because of the darkness, he removed the only possible ground for a pretense on respondent's part to the status of an invitee. Respondent had no business of his own to transact at Hardy's store and, whatever his relation to McDonald, he no longer had any business of McDonald's at the store. Certain it is, from that time on he merely went as company just as McDonald testified he had done from the start. From the time he entered the building in disregard of McDonald's direction that he stay outside he was technically a trespasser, or at best a mere licensee with no business there either of his own or of another. He had no invitation. Even that of his alleged employer had been withdrawn.

[§, 7] It follows that the appellants owed him no duty except not wantonly or willfully to injure him. He took the way as he found it subject to its attending perils. When he advanced in the darkness, without a light and without any caution, as his own testimony shows he did, and blindly plunged at right angles from the straight passage, he was guilty of negligence which on all authority must be held as a matter of law the proximate cause of the injury. *McConkey v. Oregon R. & N. Co.*, 35 Wash. 55, 76 Pac. 526; *De Graffenried v. Wallace*, 2 Ind. Terr. 657, 53 S. W. 452; *Brugher v. Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420; *Bentley & Gerwig v. Loverock*, 102 Ill. App. 166; *Bridger v. Gresham*, 111 Ga. 814, 35 S. E. 677; *Massey v. Sellar*, 45 Or. 267, 77 Pac. 397; *Blackstone v. Chelmsford Foundry Co.*, 170 Mass. 321, 49 N. E. 685; *Piper v. N. Y. O. & H. R. R. Co.*, 156 N. Y. 224, 50 N. E. 851, 41 L. R. A. 724, 66 Am. St. Rep. 560.

The judgment is reversed, and the cause is remanded for dismissal.

MORRIS, C. J., and MOUNT, CHADWICK, and FULLERTON, JJ., concur.

ROBERTS v. PACIFIC TELEPHONE & TELEGRAPH CO. (No. 12964.)

(Supreme Court of Washington. Nov. 10, 1916.)

1. LIMITATION OF ACTIONS ~~§~~195(4) — RELEASE ~~§~~55—INSANITY—BURDEN OF PROOF.

Where injured employé, in order to avoid the bar of statute of limitations, and also of his release, alleged insanity during at least four months after the accident, he had the burden of proof to show insanity, rendering him incapable of transacting ordinary business during the time alleged.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 712, 714; Dec. Dig. ~~§~~ 195(4); Release, Cent. Dig. §§ 94-100; Dec. Dig. ~~§~~ 55.]

2. DAMAGES ~~§~~216(2) — ACTION — INJURIES — INSTRUCTION.

Where a lineman, in January, four months after the expiration of the period of limitations, sued as a competent person in his own name for personal injuries, alleging he was insane continuously from the accident until his discharge from an insane asylum the preceding August, refusal of instruction that the jury could not find that plaintiff "is now insane or has been insane at any time since he left" the asylum, was error, since from his testimony and that of others, the jury might have considered plaintiff insane at the time of trial, and thus enhanced the damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 348; Dec. Dig. ~~§~~ 216(2).]

3. DAMAGES ~~§~~216(2) — INSTRUCTIONS — CONTINUANCE OF INSANE STATE—APPLICABILITY.

And for this reason, also, an instruction, "if insanity has been established then the presumption is that insanity continues until the contrary is established," was erroneous, since the complaint alleged that plaintiff was insane continuously only until his discharge from the asylum, notwithstanding a further allegation in the complaint that since the injury plaintiff's physical and mental vigor had been destroyed, and he had been unable to do any work, and that he would continue so to suffer during the remainder of his life; these latter allegations being inconsistent, for, under the above instruction, they would permit plaintiff to bring his action as a sane man and recover damages on the ground he was insane.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 348; Dec. Dig. ~~§~~ 216(2).]

4. EVIDENCE ~~§~~332(1) — INSANITY — COMMITMENT PAPERS.

In such action, where plaintiff sought, by claiming insanity, to avoid not only the bar of the statute of limitations, but also his release of his employer from liability, commitment papers, conforming to Rem. & Bal. Code, § 5953, as to examination of a person charged with insanity, in the proceeding whereby he was sent to an insane asylum, including the physicians' certificate and the answers to questions contained therein under their examination, were admissible to show the existence of insanity from the time of his commitment until his discharge, and as tending to show upon what the physicians based their certificate, notwithstanding the proceeding was ex parte.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237, 1240; Dec. Dig. ~~§~~ 332(1).]

5. EVIDENCE ~~§~~63—PRESUMPTIONS—SANITY.

One is presumed sane up to the time he is shown to have become insane.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. ~~§~~ 63.]

6. LIMITATION OF ACTIONS \S 200(1) — RELEASE \S 59—INSTRUCTIONS—PROOF OF SANITY.

In an action by employé for injuries where, to avoid the bar both of the statute of limitations and of his written release, he alleged insanity caused by the accident from that time until shortly before bringing suit, an instruction as to his burden of proving insanity, stating that when insanity of a fixed and settled nature is once established by the evidence, it is presumed to continue until it is overturned by proof of sanity, held proper.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 731; Dec. Dig. \S 200(1); Release, Cent. Dig. \S 115; Dec. Dig. \S 59.]

7. EVIDENCE \S 87(2)—INSANITY—BURDEN OF PROOF.

If insanity of a fixed and settled nature is once shown to exist in the actor at a certain time, by evidence that is clear and convincing, it must be presumed to continue until a contrary state of sanity is made to appear by the adverse party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 87; Dec. Dig. \S 87(2).]

8. INSANE PERSONS \S 2—EVIDENCE OF "LUCID INTERVALS."

Rational conduct and acts and business transactions at a given time may be shown to establish lucidity at such time, the only test being that at such times the actor was able to know and comprehend the nature and effect of his acts, and therefore able to transact with understanding ordinary business, and a "lucid interval" meaning not merely a cessation of violent symptoms of mental disorder, but such a temporary restoration of reason as to create responsibility for acts done during its continuance, for restoration of the mental faculties to their ordinary condition is not necessary, but it is sufficient that the restoration be such that the person is able, beyond doubt, to comprehend and do the act with such reason, memory, and judgment as to make it a legal act.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. \S 4-10; Dec. Dig. \S 2.

For other definitions, see Words and Phrases, First and Second Series, Lucid Interval.]

9. RELEASE \S 15 — MENTAL UNDERSTANDING.

Whether the injured man's lack of capacity at the time of making a release was so great as to render him incapable of understanding the effect thereof or his mental incapacity did not go to that extent, notice of his mental condition when the release is procured is imputed to the party securing such release, and to avoid the release the injured person need not establish by clear and convincing evidence that the party securing it had at the time of the release knowledge or notice of his mental incapacity.

[Ed. Note.—For other cases, see Release, Cent. Dig. \S 30; Dec. Dig. \S 15.]

10. DAMAGES \S 131(3)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a lineman 28 or 29 years of age was able to work at his usual wages less than two months after his injury, his injuries consisting of breaking of some of the small bones of the left hand, a large gash over his left eye, without any evidence of a broken bone, some injuries to his ankles and knees of a temporary nature, an injury in the back of his head and some impairment of sight in one eye, largely remedial by the use of proper glasses, and a possible slight temporary mental derangement had been cured, a verdict of \$24,000 against his employer was grossly excessive and ground for

reversal as necessarily given under the influence of passion and prejudice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 361, 362, 370; Dec. Dig. \S 131(3).]

Morris, C. J., and Fullerton, Mount, and Main, JJ., dissenting.

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Ernest Napoleon Roberts against the Pacific Telephone & Telegraph Company. From judgment for plaintiff and denial of defendant's motion for new trial, defendant appeals. Reversed and remanded.

See, also, 160 Pac. 753.

Post, Avery & Higgins, of Spokane, for appellant. Robertson & Miller and E. W. Robertson, all of Spokane, for respondent.

HOLCOMB, J. Respondent was a lineman working for appellant near Pomeroy, Wash. in reconstruction of a telephone line. A pole which he had climbed broke, and respondent fell with the pole, the cross-arm at the top pinning his head to the ground and knocking him unconscious for a short time. Some of the bones in his left hand were broken, his ankles were hurt, there was a cut over his eye, the back of his head was bruised and swollen, and his eye was bloodshot. The accident happened September 15, 1910. Suit was brought January 12, 1914, or approximately four months after the expiration of the period of the statute of limitations. Various grounds of negligence are alleged in the complaint, but the ground relied upon by respondent was that, at the direction of the foreman of construction, another lineman cut the wires upon a nearby pole, and that such wire cutting caused the pole upon which respondent stood to break and fall. The complaint alleges that the plaintiff became and was insane continuously from the time of the injury until in September, 1913, and that he had been an inmate of the asylum for insane at Stellacoom for about four months. It is not contended in the complaint that the respondent was insane at the time of the commencement of the action, and there was no guardian ad litem appointed to sue for him. Appellant in its answer admits that the respondent was in the employ of appellant, denies all allegations of negligence, and affirmatively alleges the following: (1) That on December 12, 1910, or three months after the accident, plaintiff settled, satisfied, and released all claims and demands arising out of the accident for the sum of \$135 then paid to him; (2) that the action was commenced more than three years after the cause of action accrued, and is barred by the statute of limitations; (3) that there was contributory negligence and fault on the part of the respondent; (4) that the respondent assumed the risk; (5) that the injury was

caused by the negligence of a fellow servant. Respondent in reply alleges in respect to the release that, at the time of executing it, he was incapable of transacting business or knowing the effect of such an instrument because of his weakened mental condition, and that the instrument was obtained from him fraudulently and without consideration; and further alleges that he was insane continuously from the time of the accident until September, 1913.

Twenty-eight errors are assigned by appellant, and the printed abstract of the record comprises 752 pages. The errors assigned, however, involve principally, and this opinion will deal only with, the questions of the running of the statute of limitations, of the validity of the release, of the refusing and giving of instructions to the jury, and of the excessiveness of the verdict. There was a verdict for respondent for the sum of \$24,000. Appellant unsuccessfully moved for a directed verdict in its favor, for judgment notwithstanding the verdict, and for a new trial.

As the action was not brought until January 12, 1914, the injury having occurred September 15, 1910, and approximately four months more than the period of the statute of limitations of such actions had run, and as the release is claimed to have been executed on December 12, 1910, within three months after the accident, it is unnecessary to discuss separately the questions of the validity of the release and the tolling of the statute of limitations. They are co-ordinate and correlated. If respondent was insane for a period of time sufficient to toll the statute of limitations to within three years of the commencement of the suit, then the period of his insanity would cover the time of the execution of the release so that the same would not be binding upon respondent. And, conversely, if he was lucid and mentally competent at any time to transact ordinary business, the statutory period must start running from that time.

The court submitted to the jury three special interrogatories, the first of which was as to whether plaintiff executed the contract of settlement and release in question, to which the jury answered, "Yes." The second interrogatory was: "If you answer the first question 'Yes,' did the plaintiff at the time of signing the same possess sufficient understanding to know the nature and effect of said release?" to which the jury answered, "No." The third interrogatory was, "Was there any time after September 15, 1910, and before January 12, 1911, when the plaintiff was mentally capable of transacting any ordinary business?" to which the jury answered, "No."

[1] The trial court correctly instructed the jury, in instruction 5, that the burden of proof would be upon the plaintiff to show by clear and convincing evidence that, upon

the day when the alleged injuries were sustained, plaintiff became and was insane, and that he was incapable of transacting ordinary business, and that this condition of mind continued for a period of four months or until the 14th day of January, 1911.

The only testimony in behalf of respondent describing the condition of respondent immediately after the injury on September 15, 1910, was that of his brother James Roberts, who was also a lineman working at the same place and time, who testified that, when respondent was placed in an automobile to be taken to Pomeroy for medical attention, respondent seemed to think he was having a joy ride. On the following night the witness went to Pomeroy, and respondent looked distant, and did not want to recognize him. Respondent did not sleep, and would not let the witness sleep. Respondent stated that people were going to hang him. Woke witness and told him that somebody had gotten him out in the street and wanted to whip him, and wanted witness to go out in the street with him. Witness did so and found no one. Respondent kept continually awaking witness. When respondent was brought out to the camp again he made threats to attack the witness, constantly quarreling with him, although he had never been quarrelsome before; that respondent's mind seemed blank; he was just crazy; he didn't know what he was doing. Respondent himself testified that the first thing he remembered after the pole fell was his being in the asylum in Stellacoom in 1913. He did not recollect any event or occurrence between the date of the accident and his partial recovery at the asylum. He testified that he heard noises in his head and heard voices; that he sometimes heard a bell at a distance and saw objects; that he heard people coming in the house when no one was there; that he remembered only the last week in the asylum, although he testified to hearing people laugh at him while there. These were interested witnesses. Appellant introduced apparently disinterested witnesses, two farmers who happened to come along in their automobile shortly after the accident and conveyed the respondent to Pomeroy, to the doctor's office and conversed with him about the accident and other matters, who considered him rational and sane. Other witnesses, who were employed by appellant at the time, observed his manner and appearance while at Pomeroy, and immediately after returning to camp after being in Pomeroy under the doctor's care for a few days and saw nothing wrong with his mental condition. There was testimony in his behalf by his relatives and neighbors describing his acts, manner, and conduct afterwards. Experts for respondent testified upon the hypothesis of the truth of facts related by other witnesses that he was insane. Experts for appellant testified that, from examination and observation of respondent, he was not insane, but was feigning

and simulating insanity. All this, however, furnishes only a conflict in the testimony, all of which went to the jury and upon all of which the jury passed. It is undoubtedly the rule that the showing as to such a condition in order to avoid the running of the statute of limitations and to avoid the validity of the release in question should be clear and convincing. There are other and much more remarkable features in the case, which tend to cast very grave doubt upon the truthfulness of respondent's showing as to his condition during that time. After returning to Spokane on the 30th day of September or the 1st day of October, 1910, he went to the house of his sister, a Mrs. Talbott, and remained there for a short time, after which he went with his sister and her husband, Ed Talbott, to the ranch of the Talbotts near Plummer, Idaho. While in Spokane he wrote the following letter:

"Oct. 9, 1910.

"Mr. Thos. H. Elson, District Supt. of Plant, 508 Fraternal Bldg., Spokane—Dear Sir: While in the employ of P. T. & T. Co. under Foreman McDonald at Pomeroy, Wn., was injured first part of Sept. by pole breaking off at top of ground when wires were off of pole ahead of me; the pole I was on snapped throwing me to the ground, cutting large gash over left eye, breaking small bones in left hand; I sprained both of my ankles; they took me to Pomeroy in an automobile and put me under doctor's care where they left me 5 days then went back to camp, where I stayed ten days with the understanding that my time was to go on until I was able to go to work; came to my sister's in Spokane, 29th day of Sept. and have been with her ever since; they have pay me up until 28th of Sept., when left; can get you doctor's certificate as to my present condition or let the company's doctors examine me; am willing at any time it may be convenient to you; Now Mr. Elson I don't want to have any trouble about this matter but I want what is right and justly my due and I trust that you will after making investigation and finding I have not misstated facts see fit to continue me on pay roll until I am in condition to go to work as my head has bothered me all the time but can not tell what will turn up, but wish to do the right thing, but if can not agree will see attorneys and see what I can do that way. Trusting to hear from you soon I remain,

"Most respectfully,

"[Signed] E. N. Roberts, Plummer, Idaho."

It will be observed that this letter shows coherence and continuity of thought and reason, clearness of memory, and decisiveness of judgment. On November 11, 1910, respondent wrote another letter to the appellant, which was equally intelligent, definite, decisive, and coherent, and in which he mentioned the time and place of the accident, the name of the foreman of the construction crew, and the name of the physician at Pomeroy who attended him, and requested that his claim be given attention. On about December 1, 1910, respondent and two of his brothers, one of whom was a lineman and the other a groundman working for the appellant, went to work for the appellant at Orondo near Wenatchee. Respondent worked until December 12, 1910, when he came to Spokane at the request of an officer of the

appellant who was looking after the claims against the appellant, and after some negotiations he there made the settlement and signed the release before Mr. Higgins, in the office of appellant's counsel, receiving a check for \$135. Previous to this settlement he had received two other checks, one for pay up to the time of the injury, and one for pay up to the time he left camp after the injury; he having been kept on the pay roll until he left camp about the 1st of October, 1910. All of these checks he indorsed and cashed. After this settlement appellant had no further knowledge of him until in February, 1912, when it received a letter from him written at Golden Colo. This letter was addressed to H. J. Tinkham, district superintendent of plant, and it also was a clear, intelligent, rational letter, stating that he had been unable to work since he worked for the company; that he had a doctor bill against him on account of his eye that was injured in the accident at Pomeroy, and would like to know if the company could not do something more for him; that all he wished was that his doctor bill be paid, and that he would give the address of his doctor or have him write the company as quick as he received answer to his (respondent's) letter. He stated also that he would like to have recommendation so he could go to work as quick as able; that he had no funds and he would like for the superintendent to give him a little consideration; signing his name E. N. Roberts, and giving his address as "Box 623, Golden, Colo." The Talbotts, his sister and brother-in-law, testified that they did not call in a physician for respondent while he was in Spokane in October, 1910, nor after they went to the ranch in 1911, or any other time. Mrs. Talbott testified that she did not know of plaintiff's writing any letters to the company or anybody connected with the company, in October, November, or December, 1910, or any other time. She was shown the letter of October 9, 1910, and denied knowledge of its being either respondent's handwriting or his signature. She was shown the second letter, dated November 11, 1910, and stated that she did not see him write the letter, and did not know whether it was respondent's handwriting or signature. She was shown the letter of February, 1912, written and mailed from Golden, Colo., and denied any knowledge as to whether or not it was respondent's handwriting. Respondent himself denied that he knew whether or not it was his writing in any of the letters; that he did not remember of being in Golden, Colo., in 1912. He admitted that the handwriting of the letter ostensibly written there looked like his, but said he did not know his handwriting. It is unquestionably written by the same hand that wrote the other two letters which his relatives testified were copied by him in his own handwriting. It is also manifestly written by

the same hand that indorsed the several pay checks and signed the release.

After the close of appellant's testimony Mr. and Mrs. Talbott were recalled on rebuttal, and contradicted their previous testimony by testifying that Talbott, at the instance of his wife, drafted the letter of October 9, 1910, in their apartment in Spokane, and instructed respondent to copy it, and that respondent sat at a table across from Talbott and, without further assistance, instruction, or direction, copied the letter and Talbott mailed it; that as to the letter of November 11th, Talbott drafted that letter and sent it to his wife to have her cause respondent to copy it at their ranch in Idaho. Mrs. Talbott testified to the same effect. It is peculiar as to the facts detailed in the first letter that James Roberts, brother of respondent, had not been in Spokane after the accident happened to respondent, and himself testified that he never saw his brother after he left the camp near Pomeroy until he saw him up at the ranch near Plummer, Idaho, in November, though Mrs. Talbott, his sister, testified that he had visited her house before the first letter was written. Where the Talbotts obtained the facts stated in the first letter, which goes into detail as to what happened to the respondent at the time of the injury and afterwards, is incomprehensible. No attempt, other than respondent's denial of recollection of it, was made to explain the writing of the letter from Golden, Colo. It was written after the termination of the four months' period following the injury necessary to toll the statute of limitations. Even the copying of the first two letters, unassisted, as was testified to by the Talbotts, would seem an impossible accomplishment for a man who, as he claimed at the trial, had forgotten how to write as he was formerly able, and could only remember how to write or read very slightly. If these letters emanated from the mind of respondent, he was beyond question of sufficient sanity at any one of those times to transact ordinary business, which is the test of his competency. The letter from Golden, Colo., of February, 1912, is unexplained except by himself in his testimony that he did not recollect of having written it, and did not recognize the writing. If this letter emanated from his mind, he was beyond question at the time of sufficient sanity to know and understand his ordinary business affairs. Such being the case, it would indicate very strongly to a fair mind that he had been in the same condition of sanity previously, or at least that he had lucid intervals. Yet the jury, who were the triers of the facts, seem to have accepted his version of the writing of these letters, and to have found in his favor upon all the issues of fact connected therewith.

[2] In the fall of 1912 he again worked for appellant, assisting a crew of line repairers for a few weeks near Lind, Wash., with ap-

parent ability to perform the duties. On May 12, 1913, in Seattle, he was placed in jail for something, and was found there by his brother-in-law Talbott, who swore to a complaint of insanity against him. An inquiry was had, and on that day he was committed to the asylum for insane at Stellacoom. On August 4, 1913, a little less than three months afterwards, he was discharged therefrom as cured. In the record made by the physicians who examined him it appeared that there was testimony that there was insanity or tendency to insanity in the family of respondent, a brother having been subject to epilepsy. Appellant requested the court to instruct the jury as follows:

"I charge you as a matter of law that under the allegations of the complaint you cannot find that the plaintiff is now insane or has been insane at any time since he left Stellacoom asylum, if you find he was ever in such asylum."

This request was refused, to which exception was duly taken. Since the complaint alleges, "that by reason of said injuries plaintiff's mind was affected and plaintiff became and was insane continuously from said time until his discharge from the asylum as hereinafter alleged," and since plaintiff brought his suit as a competent person in his own name, this instruction or one covering the matter in substance should have been given. It was proper to be given for the reason that the jury might have considered respondent insane at the time of the trial, from his testimony and that of others, and thus enhanced the damages awarded. The point is not covered by any instruction given by the court.

[3] Appellant further requested the court to instruct the jury as follows:

"If you find from the evidence in this case that the plaintiff was at any time in the year 1913 in Stellacoom asylum, I charge you that such fact shall not be considered by you in determining whether or not the plaintiff was to any extent mentally deranged in the years 1910, 1911, or 1912. You shall not allow the fact that plaintiff was in Stellacoom asylum at any time during the year 1913, if you find it to be a fact, to influence your minds in any manner whatsoever in determining the mental condition or capacity of the plaintiff in 1910, 1911, or 1912. I also charge you that the physicians' certificate or the answers to questions contained therein dated at Seattle in May, 1913, shall not be considered by you as evidence of any fact in issue in this case."

The court instructed the jury on this subject as follows:

"If insanity has once been established then the presumption is that insanity continues until the contrary is established by the preponderance of the evidence."

This instruction is proper where the allegation and the facts under the allegation show that the insanity is continuous and existing. But in this case the allegation was that the respondent was insane continuously until his discharge from the asylum. Respondent argues, however, that the complaint further alleged that since the time of the injury plaintiff's physical and mental vigor

had been destroyed by reason of said injuries, and he has been unable to do any work of any kind; that he will continue to suffer during the remainder of his life great physical and mental pain. These allegations are inconsistent and, under the instruction given by the court, would permit respondent to bring and maintain his action as a sane man and recover damages on the ground that he was insane.

[4, 5] It is contended by appellant that the introduction of the commitment papers in the insanity proceeding, which was excepted to, was erroneous. We think not. The proceedings were conformable to the law in such cases (section 5953, Rem. & Bal. Code), and were a valid adjudication of his competency at that time. The commitment papers were competent to show the existence of insanity in 1913 from May 12th or thereabouts to August 4th, and also the discharge of respondent as cured. Prior to the inquisition and adjudication of his insanity, the presumption was that he was sane up to the time, prior thereto, when he was shown to have become insane. The commitment papers include the physicians' certificate and the answers to questions contained therein under their examination, and these were competent as tending to show upon what the physicians based their certificate. All of it was for the jury to weigh. Although it was *ex parte*, it was all competent as going to the question of insanity at that time, but not at any other time. *Giles v. Hodge*, 74 Wis. 360, 43 N. W. 163; *State v. Austin*, 71 Ohio St. 317, 73 N. E. 218, 104 Am. St. Rep. 778; *Branstrator v. Crow*, 162 Ind. 362, 69 N. E. 688; *Calumet, etc., Ry. Co. v. Mable*, 66 Ill. App. 235; *State v. Welty*, 65 Wash. 244, 118 Pac. 9; 16 Am. & Eng. Ency. Law (2d Ed.) 606. The concluding sentence of the requested instruction was therefore erroneous as framed, and should have further limited the inquiry to the period of established insanity. The jury should have been instructed, in effect, as requested, that the showing made to the examining physicians in May, 1912, was not conclusive as to insanity long prior thereto, or, dating as far back as September, 1910, of chronic or permanent insanity.

[6] Appellant requested an instruction as to the effect of the statute of limitations, to the effect that, if there were any lucid interval in the mind of respondent at any time after the injury and at least up to January 12, 1911, during which lucid interval respondent was mentally capable of transacting any business, then the action would be barred under the statute and he could not recover any sum whatever; and to the further effect that the burden of proof is not on the defendant to show such mental capacity at any time during such period up to January 12, 1911, but upon the plaintiff to show such mental derangement or incapacity at all times from and including September 16, 1910, to January 11, 1911, and to establish the same not

only by a preponderance of evidence, but also by evidence clear and convincing. Instead thereof the court gave instruction numbered 5, a part of which has been hereinbefore quoted, as to the effect of the statute of limitations and the degree of proof required on behalf of respondent to avoid the operation of the statute, and continued as follows:

That "a person is presumed to be sane until he is proved to be otherwise, and that the burden is upon the person claiming insanity to prove it by clear and convincing evidence; but that when insanity of a fixed and settled nature is once established by such evidence, it is presumed to continue until it is overturned by proof of sanity. You are, therefore, instructed that, if plaintiff established that he became and was insane on the day of the alleged injury, and such insanity was of a fixed and settled nature, it would be presumed that he continued insane until proven to be sane, and the burden would be upon the defendant to establish his subsequent sanity. Even though the plaintiff may have been insane on the day when injured, if it were established that he became and was sane on any subsequent day prior to January 14, 1911, then this action would be barred by the statute of limitations."

This was consistent, and it instructed the jury that, if it was established that at any time plaintiff had been sane prior to January 14, 1911, the action would be barred. The difference in dates of two days is not erroneous and, as suit was brought on January 12, 1914, and four calendar months after September 15, 1910, would end on January 14, 1911, the time calculation of his honor was correct. The advice to the jury that "when insanity of a fixed and settled nature is once established by plaintiff by a preponderance of evidence and evidence that is clear and convincing, * * * it would be presumed that he continued insane until proven to be sane, and the burden would be upon the defendant to establish his subsequent sanity," is also a correct statement of the law. 16 Am. & Eng. Ency. Law (2d Ed.) 604; *Rogers v. Walker*, 6 Pa. 371, 47 Am. Dec. 470; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *In re Brown*, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 368, 4 Ann. Cas. 488, *State ex rel. Thompson v. Snell*, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191.

[7, 8] If insanity of a fixed and settled nature is once shown to exist in the actor, at a certain time, by evidence that is clear and convincing, it must be presumed to continue until a contrary state of sanity is made to appear by the adverse party. In the first place the presumption of sanity has been overcome and insanity established by evidence clear and convincing. Undoubtedly the only correct rule would be that that condition of insanity once established must be overcome, if at all, by the adverse party assuming the burden of showing that at any subsequent time the actor became and was sane. And rational conduct, rational acts, and business transactions at a given time may be shown to establish lucidity at such time, and, if satisfactorily shown, are as

ent to establish such lucid periods as proof habits, acts, and conduct of an irrational nature are to show insanity. It should be borne in mind that the only test is that at such times the actor was able to know and comprehend the nature and effect of his acts, and was therefore able to transact with understanding ordinary business; and that by such lucid interval is meant:

Not merely a cessation of the violent symptoms of the disorder, but a temporary restoration such as to create responsibility for acts during its continuance; restoration of the mental faculties to their original condition is not necessary; it is sufficient if there be such restoration that the person is able, beyond doubt, to comprehend and to do the act with such reason, memory, and judgment as to make it a legal act." *Am. & Eng. Ency. Law* (2d Ed.) 565.

These last principles were not requested by appellant to be given the jury for their guidance, inasmuch, probably, as it was its contention that respondent was at all times sane during the issuable period. The instruction given by his honor, so far as it went, and in the absence of further request, was correct.

Upon the question of negligence and assumed risk we think the court correctly instructed the jury under the facts. Those questions were properly submitted to the jury for their solution. There was evidence on all of respondent tending to show negligence, and his contributory fault or assumption of risk was a question of fact for the jury under proper instructions. We have examined the instructions in relation thereto and consider them proper.

[We do not agree that appellant was entitled to its requested instruction on the subject of avoiding the release. The substance and effect of the requested instruction, somewhat abridged, was given by his honor in another instruction (No. 12), but a part of the one prayed, to the effect that only the mental incapacity of plaintiff at the time must have been established by clear and convincing evidence (as was instructed), but also "that defendant had at the time knowledge or notice of such fact," omitted, of which complaint is made. We do not concur with the rule laid down in *West v. Seaboard, etc., Ry.*, 151 N. C. 65 S. E. 979; s. c. 154 N. C. 24, 69 S. E. and cases therein cited. We agree rather with the principle as stated in *Cooney v. Olson*, 21 R. I. 246, 42 Atl. 867, 79 Am. Rep. 799, as more just, to this effect: "if the plaintiff's lack of capacity at the time of making the release was so great as to render him incapable of understanding the effect of the instrument, or if his mental capacity did not go to that extent, defendant had notice of his mental condition when he procured the release." See, also, *Rhoades v. Miller*, 139 Mo. 179, 40 S. W. 760; *Orr v. Table Mtg. Co.*, 107 Ga. 490, 33 S. E.

708; *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707.

[10] We consider the verdict, however, as grossly excessive and as necessarily given under the influence of passion and prejudice. Respondent was able to work at his usual wages in December, 1910, less than two months after his injury. He was 28 or 29 years of age. The permanent injuries, which respondent under his evidence showed were an injured hand, some of the small bones of the left hand having been broken, a large gash over his left eye without any evidence of a broken bone, some injury to his ankles and knees of a temporary nature, an injury in the back of his head, and some impairment of sight in one eye, largely remediable by the use of proper glasses, and the possible, slight, temporary mental derangement, which became cured in August, 1913, do not justify any such recovery as \$24,000. It is unconscionable to the extent of more than half that sum.

Upon the whole case, for the errors in giving and refusing instructions and the excessiveness of the verdict, we are of the opinion that appellant did not have a fair trial, and that a new trial should be granted.

Reversed and remanded.

PARKER, ELLIS, and CHADWICK, JJ., concur.

FULLERTON, J. The questions of fact were for the jury. There was no error in the instructions. I am of the opinion, however, that the verdict was excessive, but the remedy for this is leave to take judgment for a lesser sum, not a reversal in toto. I therefore dissent from the judgment ordered.

MOUNT, J. The trial court should have directed a verdict for the defendant, because upon the whole evidence there can be no doubt that the plaintiff was perfectly sane when he executed the release. The testimony to the contrary, discredited as it was, is unworthy of serious consideration.

I concur upon the other points decided.

MORRIS, C. J., and MAIN, J., concur with MOUNT, J.

HARVESTER BLDG. CO. v. HARTLEY et al. (No. 20819.)

(Supreme Court of Kansas. Oct. 7, 1916. On Rehearing, Nov. 11, 1916.)

(Syllabus by the Court.)

1. TAXATION — 119 — ASSESSMENT — CORPORATE STOCK.

The statute (Gen. St. 1909, § 9229) providing that no person shall be required to list for taxation any portion of the capital stock of certain corporations, but that their agents shall list "the full amount of stock paid in and remaining as capital stock," which shall be taxed at its true value, as other personal property, a deduction being first made of the amount of

stock invested in specific property which is given to the assessors for taxation, is interpreted to mean that taxes are to be paid upon the actual value of the shares of stock outstanding, less the amounts assessed against specific property, and that this rule applies even where the corporation is engaged in no other business than in renting real estate which it has procured by the expenditure of the whole amount paid in by stockholders, and the stock is appraised at a greater value than the realty.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 215; Dec. Dig. ¶119.]

On Rehearing.

2. TAXATION ¶611(6)—ASSESSMENT—CORPORATE STOCK—EVIDENCE.

The evidence held not to support a finding of arbitrary conduct on the part of the assessor in valuing for taxation the stock of a corporation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1252; Dec. Dig. ¶611(6).]

3. OTHER CASES DISTINGUISHED.

Cases discussed bearing upon the right to require a corporation to pay taxes upon its stock, where it is also taxed upon all the tangible property it owns and does no business further than renting such property.

Appeal from District Court, Saline County.

Action by the Harvester Building Company against J. O. Hartley and others, as the Board of County Commissioners of the County of Saline, and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

L. W. Hamner, of Salina, John L. Hunt, of Topeka, S. M. Brewster, Atty. Gen., and S. N. Hawkes, Asst. Atty. Gen., for appellants. Z. C. Millikin, of Salina, for appellee.

MASON, J. The taxing officers of Saline county assessed for taxation the capital stock of the Harvester Building Company, a Kansas corporation having its principal place of business in that county, at \$14,500. This sum was arrived at by appraising the corporation's stock at \$60,000, which was the amount of its authorized and paid in capital, and deducting therefrom the assessed value of its real estate in the county, \$45,500. The company obtained a judgment enjoining the collection of the tax based on this assessment, and the county officers appeal.

[1] It was shown that the entire capital of the corporation had been used in the purchase of real estate, and that its business consisted solely in renting that property. The company contends that in paying taxes on the realty it had made its full contribution to the cost of government; that, as it owned no other property, it had nothing upon which a further tax ought to be imposed; that the additional assessment was in violation of the statute and of the rule of equality and uniformity in taxation. The statute invoked reads as follows, the phrases particularly relied on being italicized:

"That no person shall be required to include in the list of personal property any portion of the capital stock of any company or corporation

which is required to be listed by such company or corporation; but all incorporated companies, except such companies and corporations as are specially provided for by statute, shall be required to list by their designated agent in the township or state [city] where the principal office of said company is kept, *the full amount of stock paid in and remaining as capital stock*, at its true value in money, and such stock shall be taxed as other personal property: *Provided*, That such amount of stock of such companies as may be invested in real or personal property which, at the time of listing said capital stock, shall be particularly specified and given to the assessors for taxation, shall be deducted from the amount of said capital stock." Gen. Stat. 1909, § 9229.

It is urged that, as the entire amount paid in by stockholders has been expended for real estate, the deduction of the amount of stock so invested from the amount paid in will leave nothing whatever to be listed and taxed; that the statute undertakes to impose a tax upon the capital stock, which is the property of the corporation, and not upon the shares of stock, which are owned by its individual members. The argument is plausible, for this distinction between the phrases "capital stock" and "shares of stock," as used in taxation statutes, is generally recognized. 1 Words & Phrases, p. 965; 10 Cyc. 364, 365; 2 Cook on Corporations (7th Ed.) § 563; Powers v. Detroit & Grand Haven Ry., 201 U. S. 543, 559, 26 Sup. Ct. 556, 559 (50 L. Ed. 860).

As suggested, however, in the case last cited:

"The terms 'share,' 'stock,' 'capital,' 'capital stock' are of frequent and not uniform use, and we have often to turn to the context to see what is intended by its use in a particular case."

See, also, 1 Cook on Corporations (7th Ed.) § 8. The obvious purpose of the statute under consideration is, in effect, to require the corporation to list for taxation, and pay the taxes upon, the property which otherwise the shareholder would have to return and answer for. The law undertakes to reach the property of the individual through the organization. This result is ordinarily accomplished, as in the statute relating to the taxation of banks (Gen. Stat. 1909, § 9298), by providing in so many words that the assessed value of any real estate shall be deducted from the original assessment of the capital stock; but the same general purpose is evident here. The section under consideration begins by exempting individuals from including in their lists of personal property any portion of the "capital stock" of a corporation. Clearly the quoted phrase is not used with technical accuracy, since the stockholder would in any event list only his own shares, and no part of the "capital stock" of the company. The term "stock" having been used in the introductory clause in a somewhat colloquial sense, it is natural and proper to give it a like interpretation where it occurs later in the same sentence. In view of these considerations, we think the

meaning of the statute is that the corporation shall determine the value of its stock (that is, of all the shares of stock issued and outstanding, which will necessarily include the value of its possessions and rights, including franchises and good will, in view of the use made of its property and the business it does, a value corresponding to its earning capacity), and deduct therefrom the assessed value of any specific property in the company which is separately listed, returning the difference as the additional amount for which it is taxable, subject to review by the proper officers. This method of applying the statute is that used by the state tax commissioners, with the approval of the court, in *Co. v. Spaeth*, 83 Kan. 191, 109 Pac. 785. Where the entire capital stock of a corporation has been invested in a piece of real estate, and it has no other business than renting that property, it would seem that the value of its stock in the sense indicated would be nearly or exactly the same as that of its realty. The values, however, would not necessarily be precisely the same. The value of shares of the corporate stock is not as good as that for real estate, owing to a difference in market value. The advantages incident to doing business as a corporation might enable the owner to receive an income from the property larger than could otherwise be obtained, or could be expected upon the basis of its mere market value. *People's Warehouse Co. v. Yazoo*, 97 Miss. 500, 52 South. 481, and cases are cited.

Any inequality or injustice results from the interpretation adopted. The holder of stock in the corporation is the person ultimately interested in the matter. He ought in fairness to pay a tax in proportion to its actual value. The law in effect requires this, and requires more. If the corporation puts a value on its stock (that of others), and he is required to pay (through the corporation) a tax based on that amount, less the assessed value of property upon which the corporation is otherwise taxed, he can suffer no wrong thereby. If the physical property is overvalued, he is compensated by the consequent reduction in the tax on the stock; if the real property is undervalued, no hardship ensues, since he gains thereby what he loses in the increased stock assessment. Compensation is automatically provided; the result being always the same. Of a situation somewhat similar to that here presented it has been said:

Limiting the reduction to the assessed value, no possible injustice is done the bank. In taxing on the assessed value of its real estate, and in addition thereto taxes on the aggregate value of its real estate and capital, surplus and undivided profits, less the assessed value of the real estate, a bank pays taxes on more than it owns. If allowed to deduct a sum larger than the assessed value of the estate, as an actual value, it would pay

on only a part of what it owns." *State ex rel. Dillon v. Graybeal*, 60 W. Va. 357, 370, 55 S. E. 398.

See, also, *Valley Invest. Co. v. Board of Review*, 152 Iowa, 84, 131 N. W. 669.

While the statutes in these cases are not closely similar to that here involved, the decisions have a bearing upon the question of the fairness of the plan of assessment adopted.

It is true that in the present case the difference between the assessed value of the real estate (\$45,500) and the assessed value of the stock (\$60,000) seems larger than would naturally be expected, but, as already suggested, this affords no just ground of complaint unless the latter is too large. And, of course, a mere error of judgment on the part of the officers charged with the assessment cannot be remedied by the courts. The petition alleged that the assessor acted arbitrarily and in bad faith, and the plaintiff contends that his own testimony afforded a basis for a finding, which the trial court must be deemed to have made, that the allegation was true. The assessor (that is, the deputy who acted in this matter) testified that he based his valuation on statements of the treasurer of the company, who told him that dividends were paid of 6 per cent. based on the capitalization of \$60,000, and that, if any stock were sold, it would bring par. The company's treasurer testified that, "if" the real estate were worth what it was assessed (\$45,000), the stock was worth about 70 cents, because that was all the property the corporation had, that the property had cost \$60,000 two years before, and was no less valuable than when acquired, except for natural depreciation and wear, and that it was rented for \$420 a month. No special findings were made, but it seems clear that the judgment was not grounded upon the theory of bad faith on the part of the taxing officers. The court held that no tax whatever could be imposed upon the stock, excepting with regard to a small amount of money on hand, reference to which has hitherto been omitted for the sake of simplicity in statement. That conclusion seems obviously to have been based upon the interpretation of the statute which has been contended for by the plaintiff, and which this court for the reasons already stated is unable to accept.

The judgment is reversed, and the cause remanded, with directions to render judgment for the defendants. All the Justices concurring.

On Rehearing.

This court held in this case that the plaintiff corporation should pay taxes upon the actual value of its stock (that is, of its shares in the aggregate), although that exceeded the assessed value of a building which it owned, and the renting of which constituted its only business. In a petition for a rehearing it is

again argued that the stock of such a company cannot be worth more than the physical property owned; that "the right to exist as a corporation is not a taxable thing." The court reached a different conclusion, for reasons which it undertook to state in the original opinion. To what was there said may be added this expression of the Supreme Court of Iowa, in denying the contention of an investment company that it was entitled to deduct from the assessed value of its stock the amount of capital it had invested in real estate, instead of the assessed value thereof:

"There is no double taxation here. Nor is there any taxation by reason of loss on real estate. If there was a loss of \$3,000 on real estate, it did not in any manner affect the value of the stock; this for the reason, we suppose, that the real estate was valued too low, had a potential value not estimated by the assessor, or the corporation franchise in itself added value to the shares of its stock." *Valley Invest. Co. v. Board of Review*, 152 Iowa, 84, 89, 131 N. W. 669, 671.

[2] 1. In the original opinion this court said:

"It seems clear that the judgment was not grounded upon the theory of bad faith on the part of the taxing officers."

The plaintiff contends that this conclusion violates the rule that we are bound to presume any permissible finding that will support a judgment. Upon the whole record we think it quite clear that the trial court did not in fact find that the public officers acted in bad faith; but, if such a finding were shown, it would have to be set aside as not sustained by the evidence. In the original opinion it was said that the assessor testified that the treasurer of the corporation had told him that "if any stock were sold it would bring par." This was an inaccurate interpretation of the record. The exact testimony given by the assessor was as follows:

"I asked him, if any of these shares were to be sold, if he believed they would have to be sold for anything less than 100 cents on the dollar. He thought that—I asked him what the earnings of the company was, and dividends the past year on a basis of \$60,000 capital stock. He said 6 per cent.; so I based my judgment that the capital stock was worth 100 cents on the dollar, or par, earning 6 per cent., and that if they really wanted to sell any of the stock it would bring 100 cents on the dollar."

The assessor testified that he had three conversations with the treasurer, at each of which they talked about the value of the stock. The treasurer testified that he had no recollection of any conversation with the assessor, except at the time the return was made, and that at that time he did not tell him the stock was worth par. In the original opinion it was said that the treasurer testified that the property, which had cost \$60,000, was no less valuable than when it had been acquired, except for natural depreciation and wear. In the petition for a rehearing this statement is challenged, and the testimony in question is treated as referring to

the value of the property at the time of the trial, as compared with its value on March 1, 1914, the time of its assessment. On this point counsel says:

"The case was tried in June, 1915. The treasurer was asked if the property was any less valuable then (June, 1915) than on the 1st day of March, 1914. There is no room for controversy about this testimony, and the contention of the Attorney General and the assumption of the Justice delivering the opinion is erroneous. There is not a word of testimony as to the value of the property in March, 1914, as compared with its value when purchased. Not one word."

It seems to the court that the record, considered as a whole, makes it clear that the comparison was not between values at the time of the assessment and at the time of the trial, but between them at the time the property was acquired and the time it was assessed. The transcript reads:

"Q. I believe you said there was \$60,000 paid-up capital stock at the time of its organization? A. Yes, sir. Q. And that there was practically that amount placed into the building and the lots? A. Yes, sir. Q. In your opinion, Mr. Merrill, is that property any less valuable now than it was at that time?"

"Mr. Millikin [attorney for the corporation]: We object to that as not cross-examination."

"The Court: At this 1st day of June [the day of the trial]?"

"Mr. Hamner [county attorney]: No; on the 31st day of March, 1914—on the 1st day of March, 1914."

"Question read as follows: 'In your opinion, Mr. Merrill, is that property any less valuable now than it was at that time, on the 1st day of March, 1914?'"

"The Court: He may answer that."

"A. Except the natural depreciation and wear."

It is entirely clear that the county attorney explained his question by substituting "on the 1st day of March, 1914," for "now," and it seems reasonable to suppose that the witness so understood him, and answered accordingly; but the matter is of little practical moment. The details of the evidence referred to have been gone into at this length merely for the sake of accuracy of statement. The company's claim that as a matter of law it was protected from further taxation involves a question of statutory construction that is not free from doubt. But its suggestion (it can hardly be called a contention) that its shares were not in fact worth par is not supported by any substantial evidence. None of its witnesses undertook even to give an unqualified opinion that its shares were not in fact worth their face. The officers seem to us to have been unwilling to swear to any lower valuation, but whether we are right in this is immaterial, for they did not do so, and therefore have no standing to ask an injunction based on that ground. The treasurer was asked:

"Is there now, or has there been at any time within the last year and a half, any fixed value, market value, for the stock?"

He answered:

"I don't know of any sales since the 1st of January, or practically the 1st of January."

He was asked:

"Do you know what the value of the capital stock of that corporation was on the 1st day of March, 1914?"

He answered:

"No; I would have to arrive at that by what it could be sold for; that would depend on conditions greatly."

He testified that he knew of stock having been sold for less than par, but omitted to indicate when any such sale had been made. The secretary testified that the stock had no value in excess of its tangible property, but this was in the nature of a conclusion of law. He was asked on cross-examination his opinion as to the actual value of the stock on March 1, 1914. He answered:

"That would be an uncertain question. I couldn't give you a definite answer to that, because I don't know. It depends on demand what the stock would be regarded worth, etc. I couldn't answer that."

In the petition for a rehearing it is said that "it was shown to the court that the stock was selling at less than par"; but the evidence relied upon to support the statement is that of the treasurer, already referred to, to the effect that he knew of some stock having been sold for less than its face value, the time of sale not being stated, nor the number of shares sold, or the price.

[3] 2. A number of cases cited in the company's brief had more or less bearing upon the legal question referred to, but were not mentioned in the original opinion, because their application to the situation here presented was not regarded as sufficiently close to make a discussion of them desirable. We will, however, attempt a brief statement of the point involved in each, which we think is sufficient to show that these cases contain little in conflict with what we have decided.

People v. Wells, 110 App. Div. 194, 97 N. Y. Supp. 47: The whole of the capital of a corporation was invested in realty. The tax commissioners deducted from the assessed value of the stock only the assessed value of the real estate (which was less than its real value) leaving a surplus for taxation. An action was brought by the company to review the assessment. The trial court dismissed it. On appeal two of the five judges thought the corporation was entitled to relief on the ground that the taxing officers should not be permitted to fix a higher value of the realty, in determining the value of the stock for the purpose of taxation, than they had given it on the real estate tax roll. One judge concurred in reversing the decision, but for the reason that he thought the property had been fairly valued, meaning apparently that the real estate was not actually worth more than its assessed value. The other two judges dissented, on the ground that the corporation could not rightfully complain, so long as its stock was not assessed at more than what it was actually worth, saying:

"The language employed [in the statute] clearly shows a legislative intent to tax corporations

on the full value of their property, and under the rule prescribed by the statute this is accomplished, regardless of whether the assessed valuation of real estate is more or less than it should be." 110 App. Div. 198, 97 N. Y. Supp. 50.

Therefore of the six judges (including the trial judge) who passed upon the matter, only two expressed themselves as thinking that the undervaluation of the real estate as a separate item relieved the corporation from paying taxes upon the actual value of its stock.

Lewiston Water, etc., Co. v. Asotin County, 24 Wash. 871, 64 Pac. 544: Under a statute requiring a corporation to return for taxation its real and personal property, which was to be taxed as other property, an effort was made to compel a company to pay an additional tax upon its capital stock, without deduction. It was held that this amounted to an attempt at double taxation, and could not be sustained, the statute containing no provision for taxing the stock as such.

Calumet, etc., Dock Co. v. O'Connell, 265 Ill. 106, 106 N. E. 452, Ann. Cas. 1916C, 21: A corporation owned vacant and unimproved land. Its sole business was trying to dispose of it. Its tangible property was assessed at a value which exceeded the actual value as well as the market value of all the shares of stock. The taxing officers arbitrarily, "and not in the exercise of honest judgment," attempted to add to the amount for which it was liable. A pleading setting out these facts and asking an injunction was held not to be demurrable.

Hyland, Auditor, et al. v. Brazil Block Coal Co., 128 Ind. 335, 26 N. E. 672: The case is purely one of statutory construction. The assessment of the stock of a corporation, whose entire capital was invested in tangible property, which was duly listed and returned for taxation, was held to be prohibited by a statute reading:

"Where the tangible property or the capital stock of any incorporated company is listed and assessed under this act, the shares of capital stock of such incorporated companies shall not be listed and assessed."

First Trust Co. v. Lancaster County, 93 Neb. 795, 142 N. W. 542: A trust company asked that the value of real estate mortgages which it owned should be deducted from the gross value of its capital stock for purposes of taxation. The taxing officers refused this, apparently on the ground that the mortgagors had contracted to pay the tax. It was held that the deduction should be made, because of a statute providing that:

"Whenever any such bank, association or company shall have acquired real estate or other tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company."

Smith v. Stephens, 173 Ind. 564, 91 N. E. 167, 30 L. R. A. (N. S.) 704: A bank returned for assessment its capital stock of \$50,000,

a surplus of \$20,000, and undivided profits of \$2,800, making a total of \$72,800. It also reported a surplus of real estate which had cost it \$14,800, but was assessed at \$7,070. The taxing officers undertook to add to the \$72,800, on which the bank was taxable, the additional surplus of \$14,800, less the \$7,070 for which the land was assessed. It was held that no addition could be made, apparently on the theory that the \$14,800 reported as invested in real estate was a part of the \$20,000 surplus returned by the bank for taxation, the court saying:

"In making the assessment the taxing officers added to the nominal surplus of the bank, \$14,800 [of that surplus] invested in real estate, which was clearly erroneous under any theory of the law. In such a case, where the sum invested in real estate is deducted from the capital stock or surplus, before or in making the return, the assessed value of the real estate should not be deducted in fixing the value of the stock, because if it is eliminated from one side of the account it should not be included in the other." 173 Ind. 573, 91 N. E. 171, 80 L. R. A. (N. S.) 704.

Bank of Albia v. City Council, 86 Iowa, 28, 52 N. W. 334: A national bank had a capital stock of \$50,000, assumed to be worth par, and owned real estate, paid for out of its capital, costing \$13,500, and assumed to be worth that. The taxing officers at first deducted \$6,417 from the capital stock of the bank, and later \$1,083 more, and assessed the remainder to the stockholders. On their complaint the court held that the amount deducted should have been \$13,500, saying:

"Manifestly, if the \$50,000 capital stock is assessed and taxed without regard to the portion thereof thus invested in real estate, it will amount to double taxation of the stock to the extent of the \$13,500. In other words, if the appellee's theory is correct, it is lawful to tax the entire capital stock of \$50,000, and then, in addition, tax real estate which is acquired by an investment or use of \$13,500 of this same stock." 86 Iowa, 32, 52 N. W. 335.

How the taxing officers arrived at the amount to be deducted is not shown. It appears that the practice was to assess all at 60 per cent. of its cash value. Obviously, if 60 per cent. of \$13,500 (or \$8,100) had been deducted from 60 per cent. of \$50,000, and the remainder had been assessed to the stockholders, they would not have been injured; the result being the same as taking \$13,500 from \$50,000 and taxing them on 60 per cent. of the difference.

Wheeler v. Co. Commissioners, 88 Me. 174, 33 Atl. 983: Under a statute requiring the proportional part of the value of property assessed to a corporation to be deducted from the value of the shares for the purpose of taxation, the taxing officers appraised the shares of a water company on the theory that the specific property was worth more than the amount for which it had been assessed. This was held to be erroneous, the court saying:

"It must be assumed that the requirements of law were observed and that the property was assessed 'according to the just value thereof.'" 88 Me. 180, 33 Atl. 985.

The court also said, however:

"No legislation of this state has authorized municipal assessors to impose a tax upon a corporation on account of its franchise, the powers and privileges granted to it by the sovereign power of the state. The state may impose such a tax, as has been frequently done and upheld; or assessors, in placing the valuation upon the shares of a corporation, should take into account the value of the franchise, because the value of the franchise necessarily affects the value of the shares, which by statute are taxable to the owner thereof." 88 Me. 181, 33 Atl. 985.

Savings Bank v. Nashua, 46 N. H. 359: This case construes statutes as to the situs of corporate property for taxation. The scope of the decision is aptly shown by the headnotes, which read:

"Real estate belonging to a savings bank is taxable to the bank in the town or place where the real estate is situated.

"If a savings bank own stock in another corporation, the bank is not taxable for the stock in the town or place where the bank is situated."

The petition for a rehearing is denied.

BUNGER v. BUNGER. (No. 20113.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

ABATEMENT AND REVIVAL \Leftrightarrow 69—**DISMISSAL OF APPEAL—DEATH OF PARTY.**

The death of either party pending an appeal from a judgment denying a divorce abates the action, and where the record shows no property rights are involved in the action, the appeal will be dismissed.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 349-354; Dec. Dig. \Leftrightarrow 69.]

Appeal from District Court, Miami County.
Action by Joseph S. Bungler against Lena Bungler. From a judgment for defendant, plaintiff appeals. Dismissed.

Sheldon & Shively, of Paola, for appellant. B. J. Carver, of Paola, for appellee.

PORTER, J. This is an appeal from a judgment denying plaintiff a divorce. In a brief filed *amicus curiae* we are asked to dismiss the action because of the death of the plaintiff, which occurred subsequently to the appeal, and because no property rights are involved in the action.

It appears from the record that the sole purpose of the action was to dissolve the marriage relation of the parties. No property rights of the parties or other persons were involved in the controversy; in fact, nothing is involved but a mere status, and, plaintiff's cause of action being personal to himself, every right he had with respect thereto is terminated, and his death abates the ac-

tion. *Blair v. Blair*, 96 Kan. 760, 153 Pac. 544; 1 Corpus Juris, § 289.

While it is clear that the appeal must be dismissed, it is proper to say that we have examined the record, and the contention that the judgment should be reversed on the ground that the court erred in refusing a decree goes merely to the weight of the evidence, and there is no merit in the only point raised by the appeal.

It is dismissed. All the Justices concurring.

SCHAAP v. HAYES. (No. 20232.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

ASSAULT AND BATTERY \S 42 — **ACTIONS — QUESTIONS FOR JURY.**

In an action for damages for an assault and battery, the plaintiff having introduced evidence tending to show that he had been wrongfully struck by the defendant, and that he had received certain physical injuries thereby, it was not necessary in order to make a case for the jury that any witness should estimate in dollars and cents the extent of his suffering.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 56; Dec. Dig. \S 42.]

Appeal from District Court, Atchison County.

Action by William Schaap against Perry Hayes. From a judgment granting a new trial after verdict for defendant, he appeals. **Affirmed.**

J. W. Orr, of Atchison, for appellant. J. M. Challiss and W. E. Brown, both of Atchison, for appellee.

MASON, J. William Schaap brought an action against Perry Hayes to recover damages for an assault and battery alleged to have been committed upon him. The jury returned a verdict for the defendant, but the court set it aside on the ground that it was contrary to the evidence, and he appeals.

The rule is familiar that ordinarily a ruling granting a new trial because of the judge's view of the effect of the evidence is not appealable. The defendant, however, maintains that this case falls within the rule announced in *Sovereign Camp v. Thiebaud*, 65 Kan. 332, 69 Pac. 348, that an order granting a new trial because the verdict is against the evidence may be reversed where there is no substantial dispute as to the material facts, and there was no evidence at all against the findings of the jury. The defendant concedes that "the evidence is somewhat conflicting as to who was the aggressor and as to what was done," but insists that there was no basis for a verdict against him, because, although there was testimony that the plaintiff was struck in the face, knocked down, and kicked, receiving various bruises, there was no evidence whatever "tending to prove the value or extent of any damage" sustained by him;

no showing being made of the incurring of expense for medical treatment, or of the amount of suffering occasioned by his injuries. The plaintiff, having introduced evidence tending to show that he had been wrongfully struck by the defendant, the physical effect of the blows being stated, was entitled to have his case go to the jury. It was not necessary that any witness should place a money estimate upon his physical or mental suffering.

"It is unnecessary to submit any evidence as to the value of mental and physical pain and suffering and humiliation, and the amount of damages to compensate therefor, since this is a question exclusively for the jury." 8 R. C. L. 653.

See, also, 8 A. & E. Encycl. of L. 659; 1 Sedgwick on Damages (9th Ed.) § 171a; 1 Bouvier's Law Dictionary (3d Ed.) p. 751.

A question of fact having rightfully been submitted to the jury, their verdict cannot stand without the approval of the trial court.

The order granting a new trial is affirmed. All the Justices concurring.

SHELTON v. UNION TRACTION CO.

(No. 20221.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

STREET RAILROADS \S 99(13) — **OPERATION — LIABILITIES FOR INJURIES — CONTRIBUTORY NEGLIGENCE.**

The evidence examined, and held that a demurrer to the evidence of the plaintiff, an automobile driver who sustained injuries in a collision with a street car, was properly sustained, because the plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 215; Dec. Dig. \S 99(13).]

Appeal from District Court, Montgomery County.

Action by F. W. Shelton against the Union Traction Company. From a judgment for defendant, plaintiff appeals. **Affirmed.**

Hal R. Clark, of Independence, for appellant. John J. Jones, of Chanute, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained by the driver of an automobile which collided with a street car. A demurrer was sustained to the plaintiff's evidence, and he appeals.

The defendant operates an electric railway extending north and south on Tenth street, in the city of Independence. Tenth street is crossed from east to west by Chestnut street. The collision occurred about 8 o'clock in the morning. The plaintiff was driving his automobile, weighing, with the occupant, about 3,600 pounds, at the rate of about 10 miles per hour, eastward on the south side of Chestnut street. He observed two men walking north toward Chestnut street on the sidewalk on the west side of

Tenth street. Apparently the two men did not see the plaintiff, and he sounded his horn two or three times before they gave indication of seeing him. When they did see, they were just stepping off the curb into Chestnut street. The plaintiff was then about 20 feet west of the sidewalk on which the two men approached Chestnut street. Up to that time the plaintiff had been driving at intermediate speed. He then threw the lever into high gear, waived his hand at one of the men whom he knew, and then looked at the street car track. The street car, whose speed was not disclosed, was approaching from the south. The plaintiff immediately turned his car as much as he could toward the north, and applied the emergency brake, but it was too late to avoid a collision. The automobile was pushed toward the north and to the east side of the street car track. The street car stopped with the front end about 15 feet north of the automobile. As the plaintiff approached the two men on the sidewalk the motorman of the street car had a clear view of the situation, and could have seen the plaintiff when 200 feet from him. The plaintiff had the same opportunity, and could have seen the street car had he looked. Had he looked, he could have stopped his automobile before it went on the street car track. He did not look, because his attention was fixed on the two men on the sidewalk. When he did look for the street car he was about even with the curb on the west side of Tenth street.

The foregoing facts appear from the plaintiff's own narrative of what occurred, and present as bald an exhibition of contributory negligence on the part of an automobile driver as the court has been called on to consider. By a simple act which the law required of him, looking for a street car while still in a place of safety, the plaintiff could have prevented the collision. He was not excused from heeding the warning of danger to himself afforded by the street car track because he was engaged in observing two pedestrians approaching the course he desired to hold and in warning them to keep out of his way.

Before entering Tenth street the automobile was approaching at intermediate speed and was under control. The street car came from the south, in the middle of Tenth street, and the plaintiff's gaze was fixed in that general direction on two men south of him on the side of Tenth street. The motorman had no reason to suppose that his car, which was in plain sight of the plaintiff, was not observed, or to anticipate that as the automobile entered Tenth street it would be thrown into high gear and projected in front of him. Conceding that he was negligent in not sounding his gong (there was negative evidence that his gong was not heard), there was no evidence of wantonness, and no room for the

application of the doctrine of last clear chance.

The plaintiff utterly failed to establish a right to recover, the demurrer to his evidence was properly sustained, and the judgment of the district court is affirmed. All the Justices concurring.

MALOTT v. UNION PAC. R. CO.

(No. 20394.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. RAILROADS \S 356(3) — OPERATION — INJURIES TO TRESPASSERS — WAY ACROSS TRACKS.

No public way is established across a railway switchyard merely because pedestrians for many years had so frequently trespassed thereon that they had worn a beaten path across it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1230; Dec. Dig. \S 856(3).]

2. RAILROADS \S 359(1) — OPERATION — INJURIES TO TRESPASSERS — WAY ACROSS TRACKS.

One who undertakes to cross a railway switchyard of many railway tracks, where engines and cars are likely to be moving at any time in the regular course of the railway's business, is a trespasser, and does so at his peril, and the only duty of the railway company and its employes towards such trespasser is not to willfully injure him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1238; Dec. Dig. \S 359(1).]

3. RAILROADS \S 359(1) — OPERATION — INJURIES TO TRESPASSERS — WAY ACROSS TRACKS.

In a Kansas City suburb the defendant railway company has a switchyard of many tracks upon which engines and cars move to and fro frequently. For many years it has been common for people to cross the switchyard notwithstanding a warning sign, "Railroad property; no trespassing," the ever-impending danger of such hazardous crossing, and a safe public highway over a viaduct across the switchyard near by. A plain path across the tracks had been worn by such travel. When cars impeded such travel, such pedestrians would go around the cars or over or under them. The plaintiff, who was one of these pedestrians, was injured while thus crossing the switchyard. Held that, in the absence of evidence that his injuries were caused by the willful negligence of the defendant or its employes, he cannot recover from the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1238; Dec. Dig. \S 359(1).]

Appeal from District Court, Wyandotte County.

Action by A. L. Malott against the Union Pacific Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

David F. Carson, James T. Cochran, and Alex. McIntosh, all of Kansas City, for appellant. R. W. Blair, C. A. Magaw, and T. M. Lillard, all of Topeka, for appellee.

DAWSON, J. The plaintiff was injured by being struck by some moving cars while he was crossing the defendant's switchyard at

Armstrong, a suburb of Kansas City, Kan. The switchyard consists of a maze of railroad tracks running east and west; and, notwithstanding the manifest danger of crossing these tracks and the defendant's posted sign, "Railroad property; no trespassing," this plaintiff and many other people had been accustomed to cross these tracks going to and from their places of employment in the packing houses nearby. A path had been worn across the tracks by such travel. The public highway is a viaduct over the railroad tracks, but is somewhat more circuitous and less convenient than the "short cut" across the switchyard. One of plaintiff's witnesses testified:

That, when freight cars were standing on the tracks, pedestrians "would zigzag to find the openings; probably go up a car length and see an opening and get back to the pathway. * * *

Q. A little while ago you said when the path was obstructed with cars you would go around the cars? A. Certainly. Q. That is the way the people did that you saw going across there, too, was it not? A. Of course, they avoided climbing the cars, if possible. Q. If possible? How would they go if it was not possible to avoid climbing the cars? A. Then they would climb them, I suppose. Q. You have seen people climbing over cars, have you not? A. Yes, sir. Q. And seen them crawl under them? A. Yes, sir; I have seen people crawl under the cars."

Part of the plaintiff's own testimony is indicative of the circumstances:

"On the morning I was hurt I walked up to track No. 1. Near the path there is a sign saying 'Railroad property; no trespassing.' I saw that sign before the accident. * * *

Q. You saw that, and it says, 'No trespassing,' across here? A. Yes, sir. Q. You understood by that sign that you were to stay off that property, did you not? A. That would be the meaning, I suppose. Q. That is what you understood by it, but, notwithstanding that sign that was right there in that path that leads to the track, you started that morning to go across the tracks, did you? A. Yes, sir. Q. Now, when you crossed that track, were there any cars on any of those tracks? A. There were three cars on track 3. Q. Where were they with reference to this path across there? A. One of the cars projected over the pathway something like 10 or 15 feet, I would say. Q. About half? A. About half the length of the car. Q. Were there any cars on track 4? A. Directly across, there were some cars on track 4. Q. You do not know how many? A. No. Q. Where were they with reference to the path; that is, were they east or west of it? A. They stood about 3 feet to the east of the path, as I came—would be coming across. Q. Now, did you turn out of the path from track 3? A. I had to leave the path to get around the end of this car. Q. What did you do with reference to going back to the path, if anything? A. I came around the car to get back into the path, and to go direct across to my destination. Q. Was there anything directly in your way across the path at track 4 when you came up there? A. No, sir. Q. When you got on track 4, what happened? A. I started to cross the track, and as I got near the center of the track I was struck in my right side here (indicating) and knocked on my left side, with my head to the west."

A demurrer to plaintiff's evidence was sustained, and the case is brought here for review.

[1-3] The demurrer was properly sustained. On no ground except that of willful negligence could the railroad company be held liable to this plaintiff. This court has frequently said that even a lawful railroad crossing is itself a warning of danger. Much more is a network of railway tracks in a switchyard, congested with cars, and switch engines going to and fro, "kicking" cars hither and thither, as must be done in the making and breaking up of trains. The fact that many trespassers, like the plaintiff, had worn a path across the switchyard, and had persisted in trespassing for many years, swarming around or over or under the cars when the path was blocked by freight cars, did not have the effect of establishing a lawful footway across the defendant's switchyard. The case does not differ in principle from the precedents of this court, except to make the nonliability of the railway company more than ordinarily clear. *Mason v. Mo. Pac. Ry. Co.*, 27 Kan. 83, 41 Am. Rep. 405; *Tennis v. Rapid Transit Ry. Co.*, 45 Kan. 503, 25 Pac. 876; *Railroad Co. v. Holland*, 60 Kan. 209, 56 Pac. 6; *Railway Co. v. Potter*, 64 Kan. 13, 22, 67 Pac. 534; *Zirkle v. Railway Co.*, 67 Kan. 77, 72 Pac. 539; *Railway Co. v. Withers*, 69 Kan. 620, 77 Pac. 542, 78 Pac. 451; *Railway Co. v. Jenkins*, 74 Kan. 487, 488, 87 Pac. 702; *Railway Co. v. Wheeler*, 80 Kan. 187, 101 Pac. 1001; *Beech v. Railway Co.*, 85 Kan. 90, 116 Pac. 213; *Morgan v. Railroad Co.*, 91 Kan. 496, 138 Pac. 575; *Adams v. Railway Co.*, 93 Kan. 475, 144 Pac. 999.

The judgment is affirmed. All the Justices concurring.

MARION COUNTY BANK v. MYERS et al (No. 20279.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

MORTGAGES \S 414, 415(1)—RIGHTS OF PARTIES—POSSESSION BY MORTGAGEE—USE AND OCCUPATION.

While a mortgagee in possession must account for the reasonable rental value of the use and occupation of the premises, this obligation does not prevent or necessarily precede foreclosure, but is to be disposed of on final decree and distribution.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1202-1209, 1210-1218; Dec. Dig. \S 414, 415(1).]

Appeal from District Court, Marion County. Action by the Marion County Bank against Lois Myers and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Roscoe H. Wilson, of Jetmore, and Mayo Thomas, of Kansas City, Mo., for appellants. W. H. Carpenter and D. W. Wheeler, both of Marion, for appellees.

WEST, J. Lois Myers owned a hotel at Florence on which was a mortgage of \$1,275. F. C. Thomas made a verbal agreement with

Mrs. Myers through her husband to take one-half of the property for \$3,500 subject to the mortgage, and turned over certain instruments which he claims were worth \$828, but paid nothing more and received no conveyance. Mrs. Myers borrowed \$1,500 of the plaintiff bank to take up the existing mortgage and accrued interest and made a deed to the hotel property and a bill of sale of the furniture to secure the payment, taking back an instrument giving the right to a reconveyance upon payment. Later she and her husband executed a quitclaim deed to the defendant Sinclair. Thomas appears to have helped manage the property for a while, but later they all left it, and a tenant named Baker had it for a time, having been instructed by Myers to pay the rent to the plaintiff, which was done. This tenant notified the plaintiff that he intended to give up possession, and the plaintiff put a tenant in charge and, claiming the rights of a mortgagee in possession, brought this suit to foreclose. Mr. and Mrs. Myers made default. Thomas alleged a purchase of a half interest in the property, the payment of \$828, refusal of Myers to convey, possession on his part, and full notice to the bank of his rights when the \$1,500 loan was made, and prayed a decree requiring Myers to convey a half interest to him, and, in the event this could not be done, that he have a lien for the sum paid by him with interest, and foreclosure. Sinclair alleged ownership, right of possession, and wrongful entry by the bank, and prayed for possession and a judgment for the rental value of the property. The court found for the plaintiff, denied any relief to the defendants, and decreed a foreclosure.

Thomas and Sinclair assign error in refusing specific performance to the former and judgment for rents to the latter. Sinclair took his deed subject to the bank's lien, and there is nothing indicating that he ever had possession. The bank took possession about the 1st of May, 1913, and Sinclair's quitclaim was executed March 28th, and recorded July 14th; but the tenant seems to have received his instructions from Myers and not from Sinclair. It is argued that the bank took possession as owner and was bound to account to the quitclaim holder for the rents and profits; but the president testified that he was "claiming to be the mortgagee now in possession," and this is further evidenced by the bringing of this action. At any rate, Sinclair cannot complain that the mortgagee, having obtained peaceable possession, applied the rents to its debt. It appears that the bank received no rent from the property after taking possession until the last two months before the trial, when it received \$30 a month; also, that part of the rent money paid by Baker went for repairs, but just how much is not shown. There is nothing to indicate that any of the two months' rent of \$30 a month went for improvements or re-

pairs. A mortgagee in possession is chargeable with the reasonable rental value of the use and occupation of the premises (Walter, Adm'r, v. Calhoun, 88 Kan. 801, 129 Pac. 1178), and, were Sinclair attempting to redeem, the bank would have to account for the rents; but it is not precluded from proceeding with foreclosure nor required to stop every month or two to settle up a rent matter with the quitclaim holder. When the final computation and accounting shall come, all matters concerning rents, repairs, and improvements can be properly adjusted out of the surplus which the decree requires to be turned into court to await its further orders. As to Thomas he does not offer to perform his part of the alleged oral contract or to free the land from incumbrance. While he claims that the bank had notice of his interest, this is denied by the bank's president, and the decision of the court seems to have resolved the matter against Thomas. At any rate, the situation is such that he cannot in equity stand in the way of foreclosure or demand specific performance, and he does not assign error in refusing him a lien for the \$828.

Complaint is made about the cross-examination of Myers over objection of counsel, but the transcript shows that no objection whatever was made.

The decree is affirmed. All the Justices concurring.

JOHNSON STATE BANK v. RANEY et al. (No. 20320.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. DEPOSITARIES § 6—PUBLIC FUNDS—DESIGNATION OF DEPOSITARIES.

Under section 2163 of the General Statutes of 1909, only responsible banks are eligible to designation as county depositories, and if no responsible bank or banks will accept the public money or funds which come into the possession of the county treasurer and pay interest thereon, the board of county commissioners is authorized to designate other banks of the state outside of the county which will accept the money and funds, pay interest thereon, and give a bond as the statute requires.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 20; Dec. Dig. § 6.]

2. DEPOSITARIES § 6—PUBLIC FUNDS—DESIGNATION OF DEPOSITARIES.

The board of county commissioners is vested with power and discretion to determine the responsibility of banks offering to act in the capacity of depositories, but the determination of the question must be made in good faith, and never at the mere will and pleasure of the board.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 20; Dec. Dig. § 6.]

Dawson, J., dissenting in part.

Appeal from District Court, Stanton County.

Application by the Johnson State Bank for writ of mandamus to Grant Raney and others, as the Board of County Commissioners

of the County of Stanton. From a judgment granting the writ, defendants appeal. Reversed and remanded.

H. P. Jones and George Getty, both of Syracuse, for appellants. F. S. Macy, of Liberal, and Fred Robertson, of Kansas City, for appellee.

JOHNSTON, C. J. This was a mandamus proceeding to compel the board of county commissioners of Stanton county to designate the plaintiff, the Johnson State Bank, as the Stanton county depository. By agreement of the parties the cause was tried by Hon. W. H. Thompson as judge pro tem. the district judge being disqualified. From the judgment in favor of the plaintiff granting the peremptory writ of mandamus, the defendants appeal.

For a number of years the defendants had been depositing all county funds in the First National Bank of Syracuse situated in Hamilton county. On January 11, 1915, the plaintiff bank, which was legally authorized to do a general banking business, and which is the only bank in Stanton county, submitted its bid to the defendant board at the regular session offering to pay 2 per cent. interest on the average daily balances deposited in the bank, and at the same time it tendered a bond in the sum of \$22,000 conditioned as the law requires. At the same time the First National Bank of Syracuse proposed to pay 3 per cent. on the average daily balances, and it also agreed to take up outstanding warrants to the amount of \$7,600 for which provision had not been made and to pay par for these warrants when they were registered and presented for payment. It offered a bond in the sum of \$35,000 that it would account for the funds deposited with it. It was agreed between the parties that the average daily balances of Stanton county had never exceeded \$21,000, and had ranged from \$8,000 to \$21,000 during the year preceding this litigation. According to the averments in the answer of the defendants the Johnson State Bank had a capital stock of \$10,000, with deposits in the sum of \$8,241.65 when the last report was made, and the National Bank of Syracuse a capital stock of \$50,000 and a surplus of \$20,000. It was alleged by the defendants that they gave due consideration to both bids and to the responsibility of the plaintiff, that they considered and adjudged that the plaintiff was not a responsible bank as provided by law, and that it was not financially able to safely carry out the terms of its contract. The court held that the answer did not set forth a defense, and refused to receive evidence as to the responsibility of the plaintiff bank or the grounds upon which the defendants refused to designate the plaintiff as the depository. A number of preliminary and technical objections were raised at the trial, which are not deemed to be of sufficient importance to require comment.

[1] The turning point in the case is whether the question of the responsibility of the plaintiff bank was a matter for the consideration of the board of county commissioners in acting upon its offer and in designating a county depository. The question must be determined by the statute (Gen. Stat. 1909, § 2163), providing for the designation, which is as follows:

"That in all counties of this state the county treasurer shall deposit daily all the funds and monies of whatsoever kind that shall come into his possession by virtue of his office as such county treasurer, in his name as such treasurer, in one or more responsible banks located in the county and designated by the board of county commissioners as county depositories. Such bank or banks shall pay interest on the average daily balances at such rates as may be agreed upon, which rate of interest shall not be less than two per cent. per annum, and shall credit the same monthly to the account of such treasurer. Before making such deposits the said board shall take from said bank or banks a good and sufficient bond, in a sum double the largest approximate amount that may be on deposit at any one time; if a personal bond, or the bond of some surety company authorized to do business in the state of Kansas, in a sum aggregating the largest approximate amount which may be on deposit at any one time, conditioned that such deposit shall be promptly paid on the check or draft of the treasurer of said county; but in no case shall more than one-half of the amount of said bond be subscribed by the officers of said bank; and such bank or banks shall on the first Monday of each month file with the county clerk of such county a statement of the amount of money on hand at the close of business each day during the previous month and the amount of interest accrued thereon during such month: Provided, that it shall be unlawful for the board of county commissioners of any county to designate as a depository for county funds any bank in which the county treasurer or any member of the board of county commissioners shall be the owner of any stock or otherwise pecuniarily interested therein: Provided further, that if the banks in such county will not accept such money and pay interest thereon, then the board of county commissioners may designate some other bank or banks in the state of Kansas, which bank or banks shall give the bond hereinbefore provided for."

As will be seen, the power to designate county depositories devolved upon the board of county commissioners, and they are authorized to select them from the responsible banks of the county, but not those in which a member of the board has any stock or interest. The banks so selected are required to pay such rate of interest as may be agreed upon, but at a rate that is not less than 2 per cent. per annum, and are also required to give bond and make reports at stated times. It is provided at the end of the section that if the banks in the county, that is, those spoken of in the early part of the section, will not accept the money and pay interest thereon, the board may designate other banks in the state as depositories. Considering the language of the entire section, as we must in interpreting any part of it, we are of opinion that only responsible banks are eligible to designation, and that the determination of responsibility of banks is vested in the board of county commissioners. The banks refer-

red to in the last proviso of the section are manifestly banks of the class named in the first part of the section—responsible banks from which the board is authorized to make a designation. It cannot be conceived that the Legislature was authorizing boards of county commissioners to select banks which they knew or had good reason to believe were not responsible. If a bank of the county, which is responsible, will accept the funds and pay at least the minimum rate of interest, the board is not warranted in placing the funds in a bank outside of the county.

[2] While the power to determine the matter of responsibility is vested in the board, it must of course be exercised in good faith. The board cannot arbitrarily or capriciously decide that a bank is irresponsible nor send the funds outside of the county upon their mere will or pleasure. They are required to exercise fair and sound judgment, and if they have followed the forms of law and made their decision in good faith, it is not open to review.

The ruling of the trial court that no defense was stated in the answer of the defendants and in granting the peremptory writ of mandamus cannot be upheld; but the issues of fact remain for determination, including the questions whether the responsibility of the plaintiff was determined arbitrarily or in good faith, and whether the plaintiff, if responsible, had conformed to the requirements of the law.

The judgment is reversed, and the cause remanded for further proceedings.

BURCH, MASON, PORTER, WEST, and MARSHALL, JJ., concurring.

DAWSON, J. (dissenting in part). No authority is vested in the board of county commissioners to send the funds out of the county except as conferred by the statute. If a lawful bank exists in the county, and it offers the minimum rate of interest and a sufficient bond to protect the county, the authority to send the funds out of the county is wanting. This is wisely so. The local funds of a community are its commercial lifeblood, and should be kept in the community. I have no objection to so much of the majority opinion as holds that if the county board, in good faith, believes the local bank to be irresponsible, it need not and should not intrust such bank with the county moneys. But in such case the funds should be safely kept in the county treasury. The reason for this is because the board has been given no statutory power to do otherwise. If this interpretation of the law were given, I apprehend that the county board would have little difficulty in determining that the local bank, lawfully chartered, and regularly and rigidly examined by the state banking department, and further fortified

with a sufficient bond to insure its responsibility, was entirely solvent and trustworthy. If not, the situation would be likely to prompt the establishment of a solvent and responsible bank in the county or to compel such speedy reformation in the fiscal affairs of the existing bank as to banish every suspicion of its irresponsibility.

The student of this matter should not be misled by the seemingly small capital and deposits of the local bank. Stanton county has the least population of any county in the state—only 881 inhabitants. (Report of board of agriculture, October 12, 1916.) The records and files of the secretary of state and of the state bank commissioner show that the bank was organized on December 13, 1913, and checked in to commence business by the bank commissioner on November 24, 1914. Prior thereto no bank had existed in the county since the collapse of the boom 20 years ago. (Records of bank commissioner.) The local bank had only been doing business 1 month and 17 days when its bid for the county deposits was ignored and the funds sent outside the county without authority. The local bank had not been running long enough to get into bad financial condition, nor to warrant the slightest question of its solvency or responsibility, unless indeed its officers were deplorably and criminally negligent from its inception—which of course is not even intimated.

However the issuable facts touching the good faith of the county board, etc., may be determined in the further proceedings ordered by this court, I think the conditions under which the county deposits could be sent out of the county do not exist.

HAYWOOD et al. v. NICHOLS. (No. 20506.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

MARRIAGE §22, 50(1)—EVIDENCE—COMMON-LAW MARRIAGE.

The evidence examined, and held, that the presumption, no legal impediment to a second marriage existed when the marriage was contracted, was not overcome, and that persistence of the matrimonial relations after the asserted disability of one of the parties was removed, made them husband and wife under the common law.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 16, 79, 83, 88, 89; Dec. Dig. § 22, 50(1).]

Appeal from District Court, Shawnee county.

Action by Charlotte Haywood and another against Melinda Nichols. From a judgment for defendant, plaintiffs appeal. Affirmed.

Edwin D. McKeever, of Topeka, for appellants. Jamison & Jamison, of Topeka, for appellee.

BURCH, J. The action in the district court was one of ejectment, brought by the brother and sister, heirs of George Haywood, deceased, against Melinda Nichols, who claimed to have taken title by virtue of being the surviving spouse of George Haywood. The decision turned on whether or not the defendant was married to George Haywood at the time of his death. Judgment was rendered against the plaintiffs, and they appeal.

In 1881, the defendant married Richard Pool at Ft. Madison, Iowa. Afterwards Richard Pool was incarcerated in the Iowa state penitentiary, from which he was released in the year 1885. Directly following his release, he commenced an action for divorce in the district court of Lee county, Iowa, against the defendant, who was then residing in Burlington, Iowa. She signed some papers which she supposed entitled him to a divorce. The action was dismissed on January 5, 1886. The records of Lee county, Iowa, disclose no other divorce suit between the parties. Pool died in Lee county, Iowa, on October 31, 1904. The defendant did not see Pool after he was taken to the penitentiary and had no correspondence with him. She was told that Pool had a divorce, that he married again, and that he died in 1889. In 1890 she was married to George Haywood, in Lafayette county, Mo., according to the formalities prescribed by the laws of that state. She and Haywood lived and worked together as husband and wife until Haywood's death in 1906, and by their joint efforts acquired the property in controversy. They had no children. There was some conflict in portions of the evidence. The court found that the defendant was the true and lawful wife of George Haywood at the time of his death.

There was a presumption in favor of the validity of the defendant's second marriage which has been described as the strongest known to the law. *Shepard v. Carter*, 86 Kan. 125, 119 Pac. 533, 38 L. R. A. (N. S.) 568. Although it involved proving a negative, the plaintiffs were required to establish the fact that the marriage with Pool had not been legally dissolved. The proof tended somewhat in that direction. Pool lived in Lee county, Iowa, in 1885, died there in 1904, and the only divorce action appearing on the court records of that county was dismissed. There was no proof, however, that Pool continued to reside in Lee county from 1885 to 1904, and it will not be presumed that he did so, against the presumption that the defendant's second marriage was legal. The bringing of the action which Pool instituted when he walked out of the penitentiary into the divorce court shows a purpose to dissolve his relation to the defendant, who had moved away. The dismissal of the action merely showed that that action failed. Therefore, within the principles stated in the case of *Shepard v. Carter*, 86 Kan. 125, 119 Pac.

533, 38 L. R. A. (N. S.) 568, the presumption that no legal impediment to the defendant's second marriage existed was not overcome.

It was not necessary that the district court should rely on the presumption which the law, out of considerations of morality and public policy, raises. The defendant's union with Haywood appears to have been entered into in good faith, and continued to be genuinely matrimonial in every sense of the term. Persistence of the relation after the defendant's disability was removed made them husband and wife under the common law. *Schuchart v. Schuchart*, 61 Kan. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. Rep. 342.

The plaintiffs say no question of a common-law marriage was involved. The question was, whether or not the defendant was the wife of George Haywood at the time of his death, and any form of marriage which the law recognizes would defeat the plaintiffs' claim.

The judgment of the district court is affirmed. All the Justices concurring.

McCORKLE v. RED STAR MILL & ELEVATOR CO. (No. 20476.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §408—WORKMEN'S COMPENSATION ACT — CONTINUANCE — GROUNDS.

On the trial of an action under the Workmen's Compensation Law, it is not error to refuse to grant a continuance for the purpose of permitting time to elapse to ascertain whether the injuries are temporary or permanent, where more than a year has passed between the time of the injury and the time of the trial.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §408.]

2. APPEAL AND ERROR §1001(1)—REVIEW—QUESTIONS OF FACT—VERDICT.

Rule followed that verdicts based on sufficient evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. §1001(1).]

3. MASTER AND SERVANT §385(20)—WORKMEN'S COMPENSATION ACT—PROCEEDINGS — JUDGMENT.

Rule followed that, in compensation cases, the rendition of judgment in a lump sum is within the discretion of the trial court.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §385(20).]

Appeal from District Court, Sedgwick County.

Action by Earl McCorkle against the Red Star Mill & Elevator Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. A. Nottzger and George Gardner, both of Wichita, for appellant. Robert C. Foulston, of Wichita, for appellee.

MARSHALL, J. The plaintiff recovered judgment against the defendant for \$1,400, under the Workmen's Compensation Law (Laws 1911, c. 218, as amended by Laws 1913, c. 216), and the defendant appeals.

[1] 1. The plaintiff's knee was injured at the defendant's mill on September 7, 1914, and he was taken from there to a hospital, where he remained until September 15th. In November defendant offered to pay plaintiff \$65 compensation, the plaintiff to pay for an operation on his injured knee. The offer was not accepted. This action was commenced December 16, 1914. The defendant's answer, which was filed October 7, 1915, alleged that the plaintiff's injury was of 4 weeks' duration, and that he had long since recovered therefrom. On October 23, 1915, the plaintiff filed a reply, consisting of a general denial. The plaintiff's injuries were examined by a number of physicians, by some before this action was commenced, and by others afterward. On October 20, 1915, Dr. Updegraff performed an operation on the plaintiff's knee and removed a loose piece of bone. The cause was called for trial on the 26th day of October, 1915. The defendant then asked that the trial be postponed for a reasonable length of time so that it could be ascertained whether the injury to the plaintiff's knee was temporary or permanent, and offered to show by Dr. Updegraff that sufficient time had not elapsed for him to ascertain that fact. The court refused a continuance. This is assigned as error.

The defendant was advised of all the facts necessary for it to know in order to prepare its defense. At the time the case was called for trial, the action had been pending for a little more than one year. The answer had been filed almost 20 days. The reply added nothing new to the petition or the answer. The defendant knew of the plaintiff's injury and knew something of the extent of that injury. It was not necessary to postpone the trial until it could be definitely known whether or not the plaintiff's injury was temporary or permanent. It cannot be said that the court abused its discretion in refusing the defendant's application for a continuance.

[2] 2. The defendant contends that there is a grave question as to whether the injury to the plaintiff's knee was caused by the accident at the mill or by the plaintiff's slipping and falling while he was walking along the street in November, 1914. There was no question about the plaintiff's being injured at the defendant's mill. Neither was there any question about that injury extending over some period of time. Some evidence tended to show that all of the plaintiff's injury was caused by the accident at the mill, although there was evidence which tended to show that the plaintiff might have been injured when he fell on the street. The instructions to the jury were not set out in the abstract. If this question was a disputed one at the

trial, it must have been submitted to the jury, and must have been determined adversely to the claims of the defendant. The jury determined this question by its verdict, and that verdict is conclusive in this court.

[3] 3. The defendant requested the court, on the verdict returned by the jury, to make an award of weekly payments, subject to modification, review, redemption, or cancellation. This was refused, and a lump sum judgment rendered. This question has been before this court on a number of occasions, and has been determined adversely to the defendant's contention; and appeals have been dismissed where that was the only question presented. *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244; *Cain v. Zinc Co.*, 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251; *Roberts v. Packing Co.*, 95 Kan. 723, 149 Pac. 418; *McCracken v. Bridge Co.*, 96 Kan. 333, 150 Pac. 832; *Halverhout v. Milling Co.*, 97 Kan. 484, 155 Pac. 916.

The judgment is affirmed. All the justices concurring.

SLIMMER v. RICE et al. (No. 20688.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ~~Gen~~339(2) — **REVIEW — SCOPE AND EXTENT—TIME OF TAKING APPEAL.**

On appeal from a judgment dismissing an action for failure to amend after a demurrer has been sustained to the petition, the ruling sustaining the demurrer cannot be reviewed if it was made more than six months before the appeal was perfected.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1864; Dec. Dig. ~~Gen~~339(2).]

Appeal from District Court, Phillips County.

Action by D. W. Slimmer against Deans D. Rice and others. From judgment for defendants, plaintiff appeals. Dismissed.

Woodburn & Woodburn, of Holton, for appellant. R. Frank Stinson, of Phillipsburg, for appellees.

BURCH, J. The action was one for damages for breach of the covenants contained in a warranty deed. A demurrer was sustained to the petition on January 15, 1915. Leave was given to amend, and the cause was continued to the next term. At the next term, and on April 23, 1915, the action was dismissed; no amendment having been filed. On September 7, 1915, the plaintiff appealed from the judgment of April 23, 1915. Error is assigned on the ruling sustaining the demurrer.

The assignment of error cannot be considered, because the appeal was not perfected within six months from the date of the rendition of the order sustaining the demurrer. Section 565 of the Code (Gen. St. 1909, § 6160).

ides that this court may reverse an order of the district court which sustains or rules a demurrer. Therefore such an order is independently appealable. The Code provides that the appeal shall be heard within six months from the date of rendition of the order appealed from.

Code, § 572 (Gen. St. 1909, § 6167), as amended by chapter 241 of the Laws of 1913, amendment of 1913 merely reduced the time within which an appeal may be taken from one year to six months. In the case of *White v. Railway Co.*, 74 Kan. 778, 782, 106 Pac. 54, 56 (11 Ann. Cas. 550), it was said: "This court is committed to the proposition that whenever a year elapses after the making of an intermediate appealable order, without a motion in error being filed the right is lost to such order, either by a separate proceeding directed against that very ruling or in the case of an effort to procure the reversal of the judgment."

In that case involved a ruling on a demurrer to evidence. The following cases, involving rulings on demurrers to pleadings, support the quoted statement: *Blackwood v. Fisher*, 44 Kan. 273, 24 Pac. 423; *Corum v. Hubbard*, 69 Kan. 608, 77 Pac. 530; *Railway Co. v. Murphy*, 75 Kan. 707, 90 Pac. 479. *Hawkins v. Brown*, 78 Kan. 284, 97 Pac. 479. These decisions were rendered under the statute as it stood before the amendment to section 572 took effect. The change in the length of time within which an appeal may be taken does not, of course, affect the principle. No error in the judgment of dismissal, considered alone, is urged. The appeal is dismissed. All the Justices concurring.

AILEY v. WESTERN UNION TELEGRAPH CO. (two cases).
(Nos. 19815, 20078.)

Supreme Court of Kansas. Nov. 11, 1916.
Appeal from District Court, Shawnee County.

Rehearing. Former decision confirmed. For former opinion, see 97 Kan. 619, 156 Pac. 716.

Charles Blood Smith and Samuel Barnum, of Topeka, and George H. Fearons, of York City, for appellant. E. D. McFar, of Topeka, for appellee.

MR. JUSTICE RUSHALL, J. An opinion in these cases is reported in 97 Kan. 619, 156 Pac.

A rehearing was granted. Both parties have again argued the cause orally, have filed additional briefs and cited authorities. These and other authorities have been examined. We are satisfied that the conclusions reached in the original opinion. *Haskell Implement & Seed Co. v. Western Union Telegraph-Cable Co. (Me.)* 96 Atl. 219, affirmed by the Supreme Court of Maine on

December 28, 1915, supports the conclusions reached by this court.

In *Boyce v. Western Union Telegraph Co. (Va.)* 89 S. E. 106, decided June 8, 1916, a case arising over an interstate telegram containing substantially the same conditions as the telegram in the present cases, the Supreme Court of Virginia said:

"We are, however, of opinion that the weight of authority and the better reason sustain the conclusion we have reached that the defendant company is entitled to the protection afforded it by the stipulation in question, and is only liable to the plaintiff for the cost of transmitting the unrepeatable message sent by him." (89 S. E. p. 109.)

See, also, *Gardner v. Western Union Telegraph Co.*, 231 Fed. 405, 145 C. C. A. 399, decided February 28, 1916.

We adhere to and confirm our former opinion. All the Justices concurring.

EHRKE v. TUCKER et al. (ALLEN STATE BANK, Intervener). (No. 20257.)*
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES § 49(1)—REQUISITES—DESCRIPTION OF PROPERTY.

It is not necessary that the description of cattle intended to be included in a chattel mortgage shall be so definite that third parties can identify the property from that alone. It is enough if the description and the inquiries suggested by it furnish a reasonable basis for identification; but the suggestions which indicate the line of inquiry must be taken from the mortgage itself and not rest alone in the mind of the mortgagor or mortgagee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 90, 92; Dec. Dig. § 49(1).]

2. CHATTEL MORTGAGES § 49(2)—REQUISITES—DESCRIPTION OF PROPERTY.

In the present case it is held that the description of certain cattle in a mortgage, together with inquiries suggested by it, did not fairly lead to the identification of the cattle in controversy, and that as the plaintiff failed to produce substantial evidence in support of his claim, that the cattle in controversy were included in the mortgage, no error was committed in directing a verdict in favor of defendants.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 91; Dec. Dig. § 49(2).]

Appeal from District Court, Franklin County.

Action by Fred Ehrke against E. M. Tucker and another, defendants, and the Allen State Bank, Intervener. From a judgment for defendants and intervener, plaintiff appeals. Affirmed.

Platt & Marks, of Kansas City, Mo., and F. M. Harris, of Ottawa, for appellant. W. B. Pleasant, of Ottawa, for appellees.

MR. JUSTICE JOHNSTON, C. J. This action was brought to recover the possession of 69 head of cattle. In the spring of 1913, J. A. Fager bought cattle from the Knorpp Cattle Loan Company of Kansas City, and to secure notes given in payment of the cattle he ex-

ecuted two chattel mortgages, one upon 223 head of Panhandle yearlings branded M on the left hip, and the other upon 100 head of native Kansas yearlings, mostly dehorned and branded 0 on the left hip, and 80 head of red native Kansas yearlings marked with a slash on the left hip. Before the notes became due they were assigned by the cattle company to the plaintiff, Fred Ehrke, and, as the notes were not paid when they became due, Ehrke took a new note and mortgage to himself, in which the property was described as follows:

"Two hundred twenty-three (223) head of coming two year old native Panhandle steers and heifers all branded M on left side and 9 on left thigh, also one hundred (100) head of coming two year old native Kansas steers, branded thus, 0 on right hip; the above-described cattle are now on the premises of the party of the first part two miles north of St. Paul, Neosho county, Kansas, where they are to be kept until the expiration of this instrument."

Fager again applied for an extension, which Ehrke granted, and in June, 1914, a new note and mortgage were executed and filed, but before the execution of that mortgage and in February, 1914, E. M. Tucker and Harry Tucker, without personal knowledge of the existing mortgage, purchased from Fager 70 head of two year old native Kansas steers, and took them to their premises in Osage county, and no question was raised as to the validity of the transfer until the fall of 1914. About that time Fager disappeared, and Ehrke, learning of the sale of cattle to the Tuckers, claimed that the Tucker cattle were a part of those included in his mortgage, and shortly afterwards brought this action of replevin. The Tuckers defended upon the ground that the cattle purchased by them were not a part of those described in the plaintiff's mortgage, and, further, that the mortgage in existence when the purchase was made had been released. When the evidence was introduced the court ruled that the plaintiff had failed to show a right of recovery, and directed a verdict in favor of the defendant.

The question submitted here is: Can the mortgage under which the plaintiff claimed be applied to the cattle in controversy? It is not claimed that any of them are included in those described in the mortgage as 223 head of Panhandles, nor the 80 head of natives branded on the left hip with a slash, but it is contended that they are a part of those described in the mortgage as two year old native steers branded 0 on right hip. The evidence does not show that any of the Tucker cattle were branded in that way, and no brand like it was found upon them. The cattle were purchased from Fager, who executed the mortgage, but it appears that he was buying and selling cattle from time to time and had about 400 head of cattle when the sale was made to the defendants. The cattle were not kept on his premises at the place described in the mort-

gage, but were kept at a number of places where feed could be obtained for them, in the region roundabout his place. Plaintiff had not seen the cattle prior to the sale made to the defendants, and the mortgage which was taken by plaintiff about four months after the Tuckers had purchased their cattle recited that the 100 native Kansas steers branded 0 on right hip were still on Fager's premises two miles north of St. Paul, where they were to be kept until the expiration of the mortgage. It appears that in January, 1914, plaintiff sent his agent Stotts to Neosho county to inspect the mortgaged cattle, and at that time Fager pointed out certain red, roan, and brindle cattle as those included in plaintiff's mortgage, but Stotts did not find any of them branded 0 on the right hip. He did not make a close or careful examination, as he says that he did not look for or pay particular attention to brands, the principal identifying mark used in describing the cattle in the mortgage. While he stated that he saw all of the mortgaged cattle it appears that he came to that conclusion because Fager said the cattle shown him were the mortgaged cattle. At that time Fager had about 400 head of cattle and many more than 70 head of native cattle of the colors and age of those described in the mortgage. It appears that his cattle were held in bunches at a half a dozen or more places, some of which were 20 miles away from the place named in the mortgage. After plaintiff learned that cattle had been sold to Tucker he sent an expert to examine the Tucker cattle, but the expert was unable to find a brand on them that corresponded at all with the one described in the mortgage. John Fager, a son of the mortgagor, testified that the Tuckers got their cattle at the farms of the Showalters near St. Paul, and that their cattle were there when Stotts inspected them, and, further, that the cattle bought by the Tuckers were obtained from among those examined by Stotts. In that connection, however, he testified that most of the cattle were two year old natives which his father bought from a man named Stinger in the spring of 1913.

[1, 2] It devolved upon the plaintiff, of course, to prove that the cattle in Tucker's possession were those described in the mortgage. To recover he must produce substantial evidence tending to show that fact, and, if he did so, the case should have been submitted to the jury. The defendants are presumed to have had knowledge of the contents of the chattel mortgage, and if by the description there given, aided by inquiries which it would naturally suggest, the cattle could have been identified, the description would have been sufficient to bind them. *Waggoner v. Oursler*, 54 Kan. 141, 37 Pac. 973; *Rudolph v. Commission Co.*, 76 Kan. 789, 92 Pac. 1103. A partial misdescription does not invalidate the mortgage (*King v. Aultman & Co.*, 24 Kan. 246), but in deter-

mining whether a third party, aided by inquiries suggested by the mortgage, could have identified the property, the whole description is to be taken into consideration. The suggestion which indicates the line of inquiry must come from the mortgage itself, and cannot rest alone in the minds of the mortgagor and mortgagee. If the defendants had had actual knowledge of the mortgage executed by Fager and had made inquiry they would have looked first for the principal mark of identification, viz. the brand 0, and, not finding it on any of the cattle purchased, would have been reasonably well assured that the cattle which they purchased were not included in the mortgage. This assurance would have been strengthened when they noted that the cattle they had purchased were not kept at the place designated in the mortgage. It is true that the cattle were purchased from Fager who had executed the mortgage, but he had many more cattle of the color and age of those described in the mortgage. The descriptions therefore of color, age, and location in the mortgage did not furnish a basis for identification. If the Tucker cattle had been the only native Kansas two year old steers of the class named in the possession of Fager an inquiry may have led to identification, but subsequent purchasers are not required to pursue inquiries where, as here, the entire description led in a different direction and indicated so clearly that the cattle in question were not intended to be included in the mortgage. The law contemplates that mortgages, to be valid, shall be sufficiently definite in description so as to give notice to subsequent purchasers and mortgagees and afford them protection against imposition. One who seeks to obtain and hold a mortgage lien on cattle must, for the protection of third parties, give a more definite description of them than was done in this instance. In directing a verdict the evidence in favor of the plaintiff, with every reasonable inference that can be drawn from it, must be taken as true, and it is said that some evidence tends to establish identity. Verdicts cannot be based on a mere scintilla of evidence, and unless substantial proof is offered in support of the claims of the plaintiff a verdict against him may be directed.

In this case the trial court determined that no substantial evidence was produced that would furnish a basis for a verdict, and its judgment must be affirmed. All the Justices concurring.

HILL v. BOARD OF COM'RS OF REPUBLIC COUNTY. (No. 20254.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 292—ANSWER—ADMISSIONS—FAILURE TO DENY.

Under section 110 of the Civil Code (Gen. St. 1909, \S 5703), which provides that the cor-

rectness of an account duly verified shall be taken as true unless denied under oath, the failure to deny the account under oath admits only its accuracy, and not its legality.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 880; Dec. Dig. \S 292.]

2. COUNTIES \S 72—OFFICERS—RIGHT TO COMPENSATION.

Without an order from the board of county commissioners, or a contract with that board, a county officer cannot charge the county for services voluntarily performed by him which his predecessors in office had neglected to perform, and which were not within the ordinary scope of his own official duties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 116; Dec. Dig. \S 72.]

3. COUNTIES \S 73—OFFICERS—EXPENSES.

A county officer has no claim against the county for the cost of articles which he has purchased for the use of his office without the sanction of the board of county commissioners.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 114; Dec. Dig. \S 73.]

4. REGISTER OF DEEDS \S 3—EXPENSES.

The plaintiff, while register of deeds, purchased a typewriter for the use of his office without the sanction of the board of county commissioners. Held, that he cannot charge the county for the cost of the typewriter.

[Ed. Note.—For other cases, see Register of Deeds, Cent. Dig. \S 8; Dec. Dig. \S 3.]

5. REGISTER OF DEEDS \S 3—RIGHT TO COMPENSATION.

The plaintiff, while register of deeds in 1911-1912, indexed, preparatory to their destruction, several thousand old chattel mortgages which had served their purpose, and which had accumulated in his office since 1888. Held that, in the absence of an order from the county board or a contract with the board for such services, he has no legal claim against the county therefor.

[Ed. Note.—For other cases, see Register of Deeds, Cent. Dig. \S 8; Dec. Dig. \S 3.]

Appeal from District Court, Republic County.

Action by M. L. Hill against the Board of County Commissioners of the County of Republic. From a judgment for defendant, plaintiff appeals. Affirmed.

N. J. Ward, of Belleville, for appellant. H. H. Van Natta, W. D. Vance, and R. E. McTaggart, all of Belleville, for appellee.

DAWSON, J. The plaintiff was the register of deeds of Republic county for the term included in the years 1911 and 1912. During that time he purchased a typewriter for the use of his office. He also found that several thousand old chattel mortgages which had been recorded in his office, and which had accumulated since 1888, had not been indexed and destroyed by his predecessors in office as provided by statute. He indexed some 1,200 chattel mortgages, preparatory to their destruction, and presented a bill against the county for \$36 for this service. This was allowed and paid. The plaintiff also indexed, preparatory to their destruction, all the other old chattel mortgages on file, some 7,805 in number, and presented a bill against the county for this service, and likewise for the price of the typewriter. This bill was re-

jected. Whereupon plaintiff brought this action, alleging the pertinent facts. The general verdict and judgment was against the plaintiff, and he appeals.

[1] The plaintiff's petition set out a copy of his verified claim against the county. Defendant's answer was not verified. This, the plaintiff contends, entitled him to judgment under section 110 of the Civil Code (Gen. St. 1909, § 5703). We think not. The correctness of the account goes as a matter of course when not denied under oath, but not the legality of the account. The purpose of the code section is to avoid unnecessary waste of time proving the accuracy of facts not seriously in dispute. *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 829.

"Defenses like illegality * * * may be * * * proved without verifying the answer." *Jewelry Co. v. Bennett*, 75 Kan. 743, 745, 90 Pac. 246, 247.

The failure of the defendant to deny the plaintiff's account under oath had the effect of admitting that the plaintiff had indexed the number of old mortgages as set forth in his account and admitted that he had furnished one typewriter. Perhaps it also admitted that the charges for indexing and for the typewriter were fair and reasonable, although, if the statutory fees were less than those sought to be exacted, the failure to verify the defendant's answer would not charge the county with a larger sum merely because it was claimed in the account. Nothing was said in *Read v. Dodsworth*, 95 Kan. 117, 147 Pac. 799, nor in *Hayes v. Insurance Co.*, 98 Kan. 584, 158 Pac. 1107, which affects the present question.

[2, 5] The statutes (Gen. Stat. 1909, §§ 5240-5242) which provide for the return of satisfied chattel mortgages or their destruction and the destruction of all expired mortgages by the register of deeds in the presence of the board of county commissioners prescribe the duty of the register of deeds as to chattel mortgages which fall into any of these classes within his term. Those which have been satisfied should be returned to the mortgagor. Those which have been satisfied, but not returned because the mortgagor cannot be found, should be indexed and destroyed by the register in the presence of the county board. The third class, being those which have expired by reason of being on file five years, and not renewed, should likewise be timely destroyed. All these duties devolve upon the register of deeds in their time and season. If such had not been timely done by his predecessors, he cannot, of his own volition and industry, rake up all the old, outlawed, and worthless chattel mortgages which have accumulated through the official negligence of his predecessors for a generation and make a legitimate bill against the county by indexing them. The county should not be called upon to pay for such service, at least not without a definite order

of the county board or a contract with the board to that effect. Here the plaintiff contended that he had an implied contract with the board, founding it upon the board's payment of his first bill, and by his personal conversations with individual members of the board, and by their conduct. A most liberal instruction in plaintiff's favor was given to the jury covering this phase of the case, and the general verdict is conclusive that no contract existed.

[3, 4] Touching plaintiff's item for the typewriter which he purchased for the use of his office, it would never do to sanction a claim like this. If the register of deeds may buy a typewriter for his office and charge the county therewith, every county officer could likewise buy whatever he might conceive to be necessary or convenient for his office, and charge the county therewith. In such a situation the financial managers of the county's business, its county board, would be stripped of their authority, and no prudence on their part would or could control the county's expenditures.

We perceive nothing further in this case which needs discussion, and the judgment is affirmed. All the Justices concurring.

STONE v. PUGH et al. (No. 20236.) *
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨339(2)—REVIEW—SCOPE AND EXTENT—TIME OF TAKING APPEAL.

Alleged error in sustaining a motion for judgment on the pleadings and opening statement is not considered, for the reason that the appeal was not perfected within six months from the rendition of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1884; Dec. Dig. ⇨339(2).]

2. APPEAL AND ERROR ⇨935(1)—REVIEW—PRESUMPTIONS—CORRECTION OF JUDGMENT.

In a replevin action a motion for judgment in defendant's favor on the pleadings and opening statement was sustained. The stenographic notes of the proceedings recited that the court sustained the motion, and directed judgment against the plaintiff for costs. The journal entry of judgment filed the next day and approved by the court and the parties recited merely a judgment in favor of the defendant and against the plaintiff for costs. At a subsequent term the court sustained a motion of defendants to correct the journal entry of judgment to show a judgment in defendant's favor for the return of the property. *Held*, that every presumption is in favor of the regularity of the proceedings of the trial court, and it will therefore be assumed that the only purpose for ordering the journal entry corrected was that it failed to state the judgment which the court actually rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3783, 3784; Dec. Dig. ⇨935(1).]

Dawson, J., dissenting.

Appeal from District Court, Dickinson County.

tion by B. O. Stone against S. E. Pugh and others. From judgment for plaintiff, defendants appeal. Affirmed.

E. Rugh and H. L. Humphrey, both of one, for appellants. C. S. Crawford, Silene, and Dawes & Miller and George Davis, all of Clay Center, for appellee.

RTER, J. The plaintiff sold a stock implements and hardware to one of the defendants. A few days thereafter, claiming the sale had been procured by false and fraudulent representations of the defendant, he brought this action to replevin the

At the close of the opening statement the plaintiff's counsel defendants moved judgment on the pleadings and statement. The court sustained this motion. The stenographic notes of what occurred at the time that the court stated, in substance, under the well-settled rules applying to cases, the petition supplemented by the defendant disclosed that there was no cause of action. The court then used this language: "The motion for judgment upon the pleadings upon your statement may be sustained, judgment for costs rendered against the plaintiff and the jury discharged."

The first contention raised by the appellant is that the court erred in its rejection of the petition and the statement cannot be considered, for the reason the appeal was not perfected until more than six months from the rendition of the judgment.

The judgment was rendered on the 25th day of September, 1914. The journal of judgment approved by the judge and counsel for both parties was filed the following. It merely recites that the court sustained the motion of the defendants, and adjudged that:

"The defendants have and recover of and from said plaintiff judgment for costs of this action."

At the next term of court the following motion was filed:

"We now said defendants and move the court for an order modifying and correcting the journal entry of judgment heretofore entered in this cause by inserting therein a judgment, denying the said defendants to be entitled to the return of the personal property described in plaintiff's petition, and adjudging that the defendants recover said property from said plaintiff, or that they have judgment for the return thereof. These defendants represent that through inadvertence and oversight the judgment entered in said cause at the September term of court omitted the above provisions and that the journal entry should be modified and corrected as above indicated."

At the January, 1915, term of the court the motion came on to be heard, and the journal entry of the proceedings had at that time recited that the motion was "to correct the journal entry of judgment heretofore entered herein on the 25th day of September, 1914, by providing therein that the defendants have judgment for the return of the property in controversy in said action or for

the value thereof"; further that after hearing in the motion and the arguments thereon, the court finds:

"That said motion should be allowed and the original journal entry of the judgment rendered by this court on the 25th day of September, 1914, should be and is hereby amended as asked for in said motion so as to show judgment rendered for the return of the property taken by writ of replevin and delivered to plaintiff, to the defendant S. E. Keener."

The order for the amendment of the journal entry was thereupon entered. The plaintiff appealed from the order, and makes the contention that the ruling was error because it was in effect an additional judgment in favor of the defendants, and not a mere correction of the journal entry of what occurred at the original trial. It is stated in the brief that it was not claimed in the motion nor at the hearing that there had been any error, omission, or mistake of the clerk in entering the judgment, but that "by inadvertence and oversight the judgment rendered in said cause at the September term of this court omitted the above provisions." We construe the proceedings of January 21, 1915, differently. When the court found that the motion should be allowed and the original journal entry of judgment corrected and amended as asked for in the motion, "so as to show judgment rendered for the return of the property," we think the court intended thereby to determine that on the 25th day of September a judgment had been rendered for the return of the property, and that a recital thereof was inadvertently omitted from the journal entry.

The record fails to disclose what the attitude of the plaintiff was at the hearing of the motion, except that he objected to the order. He might have introduced evidence, by affidavit or otherwise, to call the attention of the court to the fact, if it were a fact, that no judgment of that kind had been entered or referred to; but apparently this was not done. Of course the court had no power at the subsequent term to amend the judgment actually rendered at the previous term. *Chapman v. Western Irr. Co.*, 75 Kan. 765, 90 Pac. 284. If the record disclosed that in fact no judgment in defendant's favor for the return of the property was rendered at the previous term, plaintiff would be right in his contention, and he would be entitled to a reversal of the ruling complained of. It has been repeatedly held that whenever the attention of the court is challenged to a mistake of the clerk or of parties who prepared the original entry of a judgment by which the judgment actually rendered is erroneously entered, or where for any reason the entry of judgment fails to speak the truth and to show the judgment rendered, the court has the power, and it becomes its duty to order the journal entry corrected so that it does speak the truth; and the court's power and duty in this respect extend beyond the term at which the original judg-

ment was rendered. *Christisen v. Bartlett*, 73 Kan. 401, 84 Pac. 530, 85 Pac. 594. Rehearing denied, 73 Kan. 404, 85 Pac. 594. And the court "upon its own knowledge of the facts, and without notice to any one, may at any time make its record speak the truth and show what had actually been done at some earlier date, even where no immediate entry was made regarding it." *Calhoun v. Anderson*, 78 Kan. 746, 747, 98 Pac. 274.

Plaintiff, however, relies wholly upon the language used by the court at the time the motion for judgment was sustained (as shown by the stenographic notes). If these correctly state all that occurred at the trial, they would seem to bear out his contention that defendants asked nothing further; and that the court granted nothing more than a judgment against the plaintiffs for costs. We must assume, however, that the court would not have ordered the journal entry amended and corrected if it spoke the truth as it read, and that the only purpose for ordering it corrected was that it failed to state the judgment which the court did render on the 25th day of September. Every presumption is in favor of the regularity of the proceedings of the trial court.

The judgment will be affirmed.

JOHNSTON, C. J., and BURCH, MASON, WEST, and MARSHALL, JJ., concurring.

DAWSON, J. (dissenting). While it is fundamental that a court has power at any time to correct the judgment record to make it speak the truth and to make it state precisely what judgment was in fact rendered, yet this does not carry with it the power to render a different or additional judgment. In this case the defendant's motion admitted in specific terms that no judgment ever had been rendered on the matters which they sought to have incorporated in it by amendment. That is not a mere correction of a judgment record, but the making of a new, different, and supplemental judgment. I therefore dissent.

SARBACH v. FIDELITY & DEPOSIT CO. OF MARYLAND. (No. 20207.)*

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. PARTNERSHIP §345—CLAIMS AGAINST ESTATES — PERSONS ENTITLED TO APPEAL — CREDITORS.

Where the individual estate of a decedent is insolvent, having no assets except what may accrue to it from the decedent's share of a partnership estate after the partnership debts are paid, a creditor of the individual estate has such interest in the accounting and settlement of the partnership estate as will entitle him to appear in the probate court and resist the allowance of questionable claims against the partnership

estate and to appeal from the decision of the probate court thereon.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 729, 819; Dec. Dig. §345.]

2. EXECUTORS AND ADMINISTRATORS §481 — ACCOUNTING—CREDITS—PAYMENT OF JUDGMENT.

In an accounting and settlement in the probate court, an administratrix is not absolutely entitled to credit for a judgment rendered against her as administratrix which she has paid; and the court may inquire whether the lawsuit on which the judgment was founded was diligently defended, whether it was prudently compromised, or whether she subjected herself to the judgment by negligence, fraud, or collusion.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2065; Dec. Dig. §481.]

3. APPEAL AND ERROR §1010(1)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

Rule followed on appeal that the trial court's findings of fact based upon tangible and sufficient evidence cannot be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3981; Dec. Dig. §1010(1).]

Appeal from District Court, Jackson County.

In the matter of the accounting of Carrie Sarbach, as administratrix of the estate of Albert Sarbach. From a judgment of the district court affirming a judgment to the probate court allowing an item of the account, the Fidelity & Deposit Company of Maryland appeals. Affirmed.

Garver & Garver, of Topeka, for appellant. A. E. Crane, of Atchison, and Chas. Hayden, I. T. Price, and Woodburn & Woodburn, all of Holton, for appellee.

DAWSON, J. This is one of a long series of lawsuits which have reached this court arising out of the financial troubles of Albert Sarbach, of Holton, deceased, and also of the partnership, L. Sarbach's Sons, of which he was a member. On his death in 1909 Carrie Sarbach was appointed administratrix of Albert's personal estate, and also of his partnership's estate. Some time later an action was commenced by the Linscott State Bank against the surviving partner of L. Sarbach's Sons, and against Carrie both as administratrix of Albert's estate and of the partnership estate, founded on certain more or less meritorious claims amounting to \$7,596.75 for which the bank prayed judgment. A separate answer was filed by Carrie as administratrix of both estates. Judgment by compromise was rendered for \$5,000 against her as administratrix of the partnership estate. She paid this judgment, and over the objection of the Fidelity & Deposit Company, a creditor of Albert's personal estate, the probate court allowed this item. This objecting creditor appealed to the district court, and the controversy there ranged about two main propositions, the right of this creditor of the personal estate

to appeal from an allowance of the \$5,000 item against the partnership estate, and whether the original judgment for \$5,000 was rendered in good faith or through collusion between the Linscott State Bank and certain attorneys for the administratrix.

The trial court made certain findings of fact and conclusions of law:

"VIII. * * * Under the circumstances of the case, and with the knowledge which could be produced by said bank proving liability of L. Sarbach's Sons for the payment of each of said two notes for \$3,000 and the fact that the trial court, in overruling defendant's motion to exclude evidence, had, after full argument of the question, decided that the amended petition in the case stated a cause of action against the defendants, the said attorneys acted for what they believed to be for the best interests of the estate of L. Sarbach's Sons in advising the compromise that was then made. They were not attorneys for said bank, and did not act for or in the interest of said bank in advising said compromise, nor were they or either of them guilty of any fraud, collusion, negligence, or other misconduct whatever. * * *

"XII. The estate of Albert Sarbach is insolvent, and probably little more will be paid creditors of the fifth class. There is a small balance in the partnership estate, after paying all partnership liabilities.

"XIII. The appellant, the Fidelity & Deposit Company of Maryland, is not a creditor of the estate of L. Sarbach's Sons, but is a creditor of the estate of Albert Sarbach, deceased. * * *

"Second. Each and all of the payments made by said Carrie Sarbach as administratrix and trustee of the estate of L. Sarbach's Sons pursuant to the said compromises mentioned in the foregoing findings of fact, and including the payment of \$5,000 made by her in satisfaction of the judgment recovered by the Linscott State Bank, were lawfully made by her, and she should be allowed credit therefor.

"Third. The Fidelity & Deposit Company of Maryland, not being a creditor of L. Sarbach's Sons, had no appealable interest or right to appeal from the order and judgment of the probate court made upon the accounting of said Carrie Sarbach, as administratrix and trustee of the estate of L. Sarbach's Sons."

Error is assigned: (a) On the decision that the \$5,000 paid to the bank in accordance with the judgment was a legal claim against the partnership estate; and (b) on the ruling that the appellant, not being a creditor of the partnership estate, had no appealable interest in the probate court's allowance of this judgment item.

[1] Considering the latter question first, we have no doubt that the appellant had an interest in the proceedings in the probate court and an appealable interest from an adverse decision. Its interest in the probate court's action was simple and easily understood. It was a creditor of Albert's personal estate. That estate was insolvent. Whatever was left of the partnership estate after its lawful debts were paid would inure to the partners individually, and Albert's estate would get his proper share as partner. When that share was distributed, the personal creditors could reach it. If personal creditors are compelled to stand aside without right to be heard while partnership assets are frittered away on trump-

ed-up claims there is a discrepancy in the law which is highly discreditable to the administration of justice and one which we would be reluctant to admit.

Authorities on this subject are not numerous, but the statute is plain. Section 3522 of the General Statutes of 1909 provides:

"The probate court shall have jurisdiction to hear and determine all demands against any estate; and a concise entry of the order of allowance shall be made on the record of the court, which shall have the force and effect of a judgment."

How is the court to hear and determine such demands? By hearing only those who advocate the demands? Shall the court limit the hearing of objections to those who have direct claims against the estate? Or in fairness and justice should not the court hear also the protest of those who are vitally interested, although indirectly, in the disposition of the assets? More broadly expressed, should not the court make the sifting of the truth, the merit of the claim, its principal concern, and hear all who may be able to throw light on the subject regardless of their interest?

Section 3587 of the General Statutes of 1909 provides that when an administrator desires to make final settlement of an estate he shall give four weeks' notice "to all creditors and all others interested in the estate." See, also, Gen. Stat. 1909, § 3490. Who can possibly be meant by the words "all others interested in the estate" if not those having claims on the residue after direct creditors are satisfied? 11 R. C. L. 185. Such claimants may not inaptly be designated and considered as interveners by an analogy to the practice in equity. Certainly the statute is not using empty and futile words when it speaks of "all others interested in the estate." One highly pertinent reason why creditors of the personal estate should be heard in the determination of claims against the partnership estate rests on the proposition that the probate court's decision thereon will go for review to the district court charged with a presumption in favor of its regularity. 18 Cyc. 1213. It will be noted also that the statute relating to appeals from the probate court (Gen. Stat. 1909, § 3624 et seq.) is very liberal, and it does not define who may be appellants. The same liberality as to appellants should be inferred as on the subject-matter of such appeals. In 18 Cyc. 1200, it is said:

"The general rule that any party aggrieved by a judgment or decree may appeal therefrom, and that in a legal sense a party is aggrieved by a judgment or decree whenever it operates on his rights of property or bears directly upon his interest, is applicable in proceedings for the settlement of administration accounts, and it follows as the converse of this general rule that it is not the privilege of a party to appeal from a judgment or order rendered in such a proceeding unless he is, either as an individual or in a representative capacity, aggrieved thereby, and that no one is in a legal sense aggrieved by such a judgment or order unless it prejudicially affects

his rights of property, or pecuniary interests, or those of others for whom he is, with relation to such proceeding, the duly constituted representative. Legatees, distributees, or creditors of the decedent, when aggrieved by such a judgment or decree, may appeal therefrom."

It seems clear, therefore, that a creditor of the personal estate who is dependent upon the personal estate's share of the residue of a partnership estate for the satisfaction of his claim has such interest in the partnership estate as will entitle him to resist the allowance of a questionable claim in the settlement of the partnership estate in the probate court, and to appeal from the decision of that court. *Davenport v. Hervey*, 30 Tex. 309.

[2, 3] Turning next to what appears to be the controlling feature of this lawsuit, the appellant's objections to the item in controversy and many others were heard by the probate court. That court rendered its judgment. Appeal was taken, and while the district court erroneously held that the appellant creditor had no appealable interest from the allowance of claims against the partnership estate, yet appellant's grievance at its allowance was heard and determined. The district court heard the evidence touching the compromise judgment entered in the bank's case against the partnership estate, heard the evidence as to the alleged collusion between the bank and certain of the attorneys for the administratrix, and made findings of fact, quoted in part above, fully exonerating counsel from any unprofessional or collusive conduct. These findings based on sufficient oral testimony conclude that phase of the case on appeal. We would not say that the judgment in the bank case was conclusive before the probate court nor in the district court on appeal from the decision of the probate court. *Pearson and Wife v. Darrington*, 32 Ala. 227 (syl. ¶ 14); *In re Yetter*, 44 App. Div. 404, 61 N. Y. Supp. 176. Doubtless this judgment was not subject to collateral attack by the parties to that judgment. But the probate court might have disallowed the item therefor in the account of the administratrix if it considered that the judgment was brought about by the fraud, collusion, or negligence of the administratrix and her attorneys. A prudent course would have prompted the administratrix to have secured the approval of the probate court before consenting to a compromise judgment. We realize, however, that situations sometimes develop rapidly in a lawsuit, and it is necessary for litigants and their counsel to act quickly, and to trust that this course will later meet the approval of those entitled to review their conduct. We are constrained to hold, however, that the judgment made a prima facie claim for allowance in the probate court. Gen. Stat. 1909, §§ 3518, 3519. Here then was an item founded on a judgment presented to

the probate court freighted with the presumption of its regularity and validity, further strengthened by its approval and allowance by the probate court, and still later its merits investigated and approved by the district court.

In such a situation the judgment must be affirmed. All the Justices concurring.

HLADKY et al. v. HLADKY et al. (No. 20438.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐1001(1)—WILLS ⇐333—REVIEW—FINDINGS AND JUDGMENT—VALIDITY OF WILL.

A judgment will not be disturbed where it is rendered on a jury's findings of fact not contradictory to each other, and where the judgment is consistent with, and supported by, the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. ⇐1001(1); Wills, Cent. Dig. §§ 788, 789; Dec. Dig. ⇐333.]

Appeal from District Court, Shawnee County.

Action by Frank J. Hladky and others against Joseph F. Hladky and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. I. Jamison and W. Herbert Jamison, both of Topeka, for appellants. Clad Hamilton and Clay Hamilton, both of Topeka, for appellees.

MARSHALL, J. In this action the plaintiffs sought to recover an undivided one-seventh interest each, in certain real property. Judgment was rendered in favor of the defendants, and the plaintiffs appeal.

Katrina Hladky owned certain real property in Shawnee county. The plaintiffs and defendant Joseph F. Hladky are her children. The defendant Joseph F. Hladky lived with Katrina Hladky on the real property at the time of, and for some time prior to, her death. Some months before she died she executed a deed conveying the real property to Joseph F. Hladky, and at the same time executed a will, by which she devised the same real property to him and made certain bequests to each of the plaintiffs. The substance of the material allegations of the petition is that at the time of making the deed and will Katrina Hladky was old and weakened by disease, and was of unsound mind; that she was dependent on Joseph F. Hladky for advice and counsel; that a confidential relation existed between Katrina Hladky and Joseph F. Hladky, and that he exercised undue influence over her in procuring the execution of the deed and will; and that he advised the making of the will and superintended its preparation.

The jury answered special questions as follows:

"(1) Was Katrina Hladky on the 11th day of October, 1914, of sound mind? Answer: Yes.

"(2) Could Katrina Hladky on the 16th day of October, 1914, talk in the English language sufficiently to make herself understood about the matters contained in the will and deed in controversy? Answer: Yes.

"(3) Did Katrina Hladky have a stroke of paralysis on and prior to the 16th day of October, 1914? Answer: Yes.

"(4) Did Joseph Hladky act as interpreter between Katrina Hladky and A. E. Moore in the conversations, leading up to the preparation of and writing of the will and deed in controversy? Answer: Yes, all that was necessary.

"(5) Did Joseph Hladky for several years prior to the death of his mother receive all of the income from the farm owned by his mother at the time of her death? Answer: Yes, and paid taxes and kept up improvements.

"(6) Was Joseph Hladky the confidential agent and advisor of his mother during the last few years of her life, and at the time of the writing and preparation of said will and deed? Answer: Yes, so far as one was necessary.

"(7) Did Joseph Hladky at the time of the writing and preparation of said will and deed occupy a position of confidence and trust to his mother? Answer: Yes.

"(8) Did Katrina Hladky have any independent advice with reference to the will in controversy other than Joseph Hladky? Answer: Yes.

"(9) If you answer No. 8 in the affirmative, then state fully who gave Katrina Hladky such independent advice in regard to the said will, what advice was given to her and when such advice was given. Answer: Mr. Zima advised her that to make a will valid, she must make a deed to the property, and such advice was given prior to October 16, 1914.

"(10) Was it the intention of Katrina Hladky on the 16th day of October, 1914, to pass the title to her farm to Joseph Hladky, and to deprive herself of the title to said premises during her lifetime? Answer: No.

"(11) Did Katrina Hladky know and understand on the 16th day of October, 1914, the provisions of the will and its contents? Answer: Yes.

"(12) If you answer question No. 11 in the affirmative, then state who, if any one, explained to Katrina Hladky the meaning, contents, and provisions of the will. Answer: Mr. Moore.

"(13) Was Katrina Hladky enfeebled by old age and sickness, and partial paralysis at the time of the execution of said will? Answer: Yes.

"(14) Was the execution of the will of Katrina Hladky procured by the exercise of undue influence? Answer: No.

"(15) Was the execution of the deed of Joseph Hladky obtained by undue influence? Answer: No.

"(16) Did Katrina Hladky express her own will and desire in making and signing the will drawn by A. E. Moore? Answer: Yes.

"(17) At the time of signing the will was Katrina Hladky under any influence amounting to coercion, compulsion, or constraint which destroyed her free agency? Answer: No.

"(18) On October 16, 1914, was Katrina Hladky in such mental condition as to be able to know and understand the business in which she was engaged, and the disposition of her property, and the manner in which she was willing and disposing of the same? Answer: Yes."

The case is presented to this court on the petition, answers, findings of the jury, and judgment of the trial court. The plaintiffs

argue that the findings show that Katrina Hladky was so advanced in age, weakened in body and mind, and dependent upon the advice, counsel, and guidance of Joseph F. Hladky that she was incapable of making the deed and will; that in making the deed and will she was advised by Joseph F. Hladky and denied the counsel and advice of any disinterested third party; that there was no consideration for the deed and will; that there was such a confidential relation between Katrina Hladky and Joseph F. Hladky that he could persuade her in all her business affairs and prevent her from exercising her own will and discretion; that Katrina Hladky did not realize, and was not aware of, the full force and effect of her acts, and did not understand the result of the same. These are questions of fact, and each one is answered by the findings of the jury, contrary to the contentions of the plaintiffs.

The findings are not contradictory to each other; they are entirely consistent with each other. They support the judgment rendered, and it is affirmed. All the Justices concurring.

WHITE v. WHITE. (No. 20502.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §331(6)—RENT—EVIDENCE.

Where a dispute arises between landlord and tenant over the amount of grain rent due on land leased for a share of the crop, the testimony of a witness who threshed the grain was not rendered incompetent merely because on cross-examination he admitted that he was not sure that all the grain was raised on the tract where the threshing was done.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1383; Dec. Dig. § 331(6).]

2. DEEDS §200 — EXECUTION — DELIVERY — EVIDENCE.

Where a father had executed deeds to certain lands to his son, and one of the chief questions arising from the father's later claims for rent thereon was whether the deeds were to be effective when executed or only at the father's death, it was competent to show the father's subsequent conduct asserting ownership of the property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.]

3. TRIAL §25(6)—COURSE AND CONDUCT—RIGHT TO OPEN AND CLOSE.

When a case involves two causes of action and the burden of the first is on the plaintiff, and the burden rests on the defendant in the second, it is not important which litigant is permitted to open and close the argument to the jury so long as each has a fair opportunity to present and argue his side of the controversy. Civ. Code, § 285 (Gen. St. 1906, § 5879).

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 49, 60-75; Dec. Dig. § 25(6).]

Appeal from District Court, Butler County.

Action by L. C. White, revived in the name of George P. Nelman, as executor, etc.,

against C. L. White. From the judgment, both parties appeal. Affirmed.

G. P. Aikman and C. L. Aikman, both of El Dorado, for appellant. T. A. Kramer, Geo. J. Benson, A. L. L. Hamilton, and B. R. Leydig, all of El Dorado, for appellee.

DAWSON, J. This was a lawsuit between father and son. The father, L. C. White, now deceased, was the owner of certain lands in Butler county. In 1890 he executed a written lease of 80 acres to his son, C. L. White, the rent to be one-third of the crop delivered at the father's residence, and the duration of the lease was to be for the lifetime of the father. Among other terms of the lease was one which provided that at the death of both parents the son was to receive a warranty deed to the premises as his full share of his parents' estate. For many years the terms of this lease were observed, but in 1914 the son withheld the rent, and this default is the basis of the plaintiff father's first cause of action. As a second cause of action, it was alleged that in 1912 the father executed a deed conveying another 80 acres of land to his son, the defendant, "which deed was delivered by plaintiff to the defendant to be held by the defendant in escrow until after the death of plaintiff; that said deed was not to be recorded until after the death of plaintiff, that as a part of the consideration * * * defendant agreed (in writing) to deliver to plaintiff * * * one-third of all the hay and grain grown on said real estate each year during the lifetime of plaintiff." It was also alleged that both parties complied with this contract during the season of 1912; but in 1913 the defendant withheld part of the rent due, and in 1914 withheld it all. Hence this lawsuit.

The gist of defendant's answer to the first cause of action was that in 1912 his father had voluntarily executed and delivered to him a deed to the land covered by the first lease, and that his father at that time told him that he would not require the payment of rent thereon after that year. A copy of this deed is shown and contains the usual recitals, stating the consideration to be \$3,000 duly received, with this addition:

"This deed not to be recorded until after the death of the grantee (grantor?)."

To the second cause of action the defendant pleaded the deed of 1912 mentioned in plaintiff's petition, and alleged that at the time the defendant paid plaintiff \$2,000 in cash and gave him two notes for \$500 each; and that some time afterwards his father (orally) offered, for an additional consideration of \$500, to release him from any further rental payments for the land covered by the second lease, and that he (the defendant) agreed thereto, and in July of the same year paid his father that sum.

In reply, the plaintiff admitted that he

signed the deed covering the land involved in the first lease, but that at the time he was 80 years old, feeble, and in ill health, and that his sight was much impaired; that as defendant was his son he relied upon and trusted in him and depended upon his advice and counsel in business affairs; "that defendant, knowing of the enfeebled condition of the plaintiff and his extreme old age, and knowing that the plaintiff relied upon him for counsel and advice and trusted him and taking advantage of his conditions of trust and confidence, said defendant requested and importuned plaintiff to sign a deed for the real estate described in said deed, and said defendant orally stated and represented to said plaintiff in substance that if he signed said deed that its only effect and purpose would be to convey to defendant the title to said real estate upon the death of plaintiff in accordance with the terms of the lease, a copy of which is attached to plaintiff's petition and marked Exhibit A; and that it would save expense to defendant, and trouble and legal proceedings after the death of plaintiff, and that said lease would be carried out in full by defendant, and that said deed should not be delivered during the lifetime of plaintiff, but during the lifetime of the plaintiff should be held in escrow by the defendant until the death of plaintiff, and that said deed should not be recorded until after the death of the plaintiff, and that this plaintiff relied upon the statements and representations made by this defendant, and trusting to his judgment and advice, signed and acknowledged said deed, and the same was taken possession of by the defendant to be held in escrow in accordance with such statements and agreements of the defendant." On these issues the case was tried, and the jury rendered a general verdict for the defendant on the first cause of action and for the plaintiff on the second. Both parties appeal.

[1] Defendant complains of the admission of incompetent testimony. It was incumbent on the plaintiff to prove the amount of the grain rent due on the land covered by the second lease. To that end, he called certain witnesses more or less acquainted with the facts, and among these was the man who had threshed the grain. By skillful cross-examination this witness was made to admit that he was not sure that all the grain was raised on that particular tract of land. But the testimony of this witness was not the only evidence offered by the plaintiff, and even if it was somewhat uncertain, it was not incompetent; and furthermore, the exact amount of grain raised was a fact peculiarly and accurately within the knowledge of the defendant, and he offered no evidence which contradicted plaintiff's showing thereon.

[2] Another error urged was the admission of testimony to the effect that when the father came to demand his rent, the son

told his father to get off the land, that he "took him by the arm and ordered him off or that he would kick him off." The plaintiff was entitled to show the conversation between the parties at the time the father came to demand the rent, and it was competent to show that he was still insisting on his rights as the owner of the property. Elsewhere similar testimony, showing in a more aggravated form the language and conduct of the son, was stricken out. It might have been better if the court had uniformly ruled out all the testimony touching the son's threats, but it was not serious, and cases are not reversed nowadays on such trivial matters as these. Civ. Code, § 581 (Gen. St. 1909, § 6176).

Another error assigned was the admission of evidence showing that the father usually paid his taxes to his local banker. Of course that is not the place where taxes are due, but it is a very common custom for people to intrust their funds to their local bankers and to depend on their bankers to pay the county treasurer. It was competent and probative to show whether the father still claimed the ownership of the property.

[3] Error is assigned because of the court's ruling that the plaintiff was entitled to open and close the argument, when the second cause of action had "more involved" and the court had ruled that "the burden" of it "was on the defendant." We perceive no error here. The order of the argument is not very important if counsel have a fair opportunity to present and argue their side of the controversy, and no showing is made here that they did not. Civ. Code, § 285 (Gen. St. 1909, § 5879).

Turning next to plaintiff's appeal: He contends that it was error to permit the jury to know that the father had other lands besides those involved in this lawsuit, and that it was likewise error to permit evidence showing improvements made on the land by the defendant. These errors are inconsequential. He also complains because the scrivener who wrote the deed from father to son testified to the "ultimate fact" of the father's capacity to understand the transaction. This last complaint, technically, but only technically, does make a point for appeal. We do not think it of any consequence here. No showing was made by plaintiff that the father did not understand what transpired at the scrivener's. There is no dispute about the fact that the son was to have a deed to the property some time, and even if the father had not understood the transaction and had never made a deed at all, the son would be entitled to a conveyance of some sort, some time, from somebody, of this property. Such was the father's written agreement made 20 years before. Counsel for plaintiff apparently did not think their client's age and infirmities were too

great for him to appear and testify in his own behalf. The scrivener's evidence as to the "ultimate fact" of the father's understanding would be more questionable if the jury had not seen the father and heard his statement of the transaction from his own lips.

The plaintiff also objects to the instructions. These we have carefully examined, and when they are all read and construed together we find them fair, precise, and comprehensive, and not subject to any serious criticism.

The judgment is affirmed. All the Justices concurring.

OLSSON v. LAWRENCE TP. OF CLOUD COUNTY et al. (No. 20244.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. BRIDGES ~~§~~37—USE FOR TRAVEL—LIABILITY FOR INJURY.

Under sections 658 and 659 of the General Statutes of 1909 in order to hold a county or township responsible for a defective bridge or for failure to maintain guard rails, such bridge must have been wholly or partially constructed by such county or township or erected by some township or road district thereof; mere assumption of responsibility for such bridge after its construction will not work such liability.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 96, 103-105, 109; Dec. Dig. ~~§~~87.]

2. FORMER DECISION MODIFIED.

The former decision herein, 93 Kan. 440, 144 Pac. 997, is modified as indicated in the preceding paragraph.

3. BRIDGES ~~§~~46(6)—USE FOR TRAVEL—LIABILITIES FOR INJURIES—EVIDENCE.

Proof that a bridge was built by a township trustee bears the fair inference that he was acting for the township.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 114½, 119; Dec. Dig. ~~§~~46(6).]

4. BRIDGES ~~§~~46(5)—USE FOR TRAVEL—LIABILITIES FOR INJURIES—EVIDENCE.

Township records of the boundaries of its road districts, showing the place of the injury to be within one of such districts, were competent for the purpose of indicating for whom the trustee was acting when he built the bridge.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 116-118; Dec. Dig. ~~§~~46(5).]

5. BRIDGES ~~§~~46(5)—USE FOR TRAVEL—LIABILITIES FOR INJURIES—EVIDENCE.

The knowledge of the county clerk as to whether Cloud county had ever contributed anything towards the building of the bridge was proper to be shown by competent evidence.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 116-118; Dec. Dig. ~~§~~46(5).]

Appeal from District Court, Cloud County.

Action by Charles E. Olsson against Lawrence Township of Cloud County and Grant Township of Republic County. From a judgment for defendants, plaintiff appeals. Modified.

See, also, 93 Kan. 440, 144 Pac. 997.

Kennett & Hunter, of Concordia, for appellant. A. L. Wilmoth, of Concordia, and W. D. Vance, of Belleville, for appellees.

WEST, J. The plaintiff sued Lawrence township of Cloud county and Grant township of Republic county to recover for the loss of a horse alleged to have died from injuries received by reason of a defective bridge in a highway between the two townships. A demurrer to the plaintiff's evidence was sustained, and the plaintiff appeals, complaining of this ruling and of the rejection of certain evidence. The bill of particulars alleged, among other things, that the bridge was of a span of over ten feet and was allowed to remain without any guard rails and in a dangerous and defective condition, and with loose and rotten planks in the floor to the knowledge of the defendants. It appears that there was a washout just east of the bridge on the north side of the approach thereto, and the plaintiff, coming west, drove to the south on account of this washout, and his horse stepped upon a portion of a plank projecting over the stringer on the south side of the bridge when the plank broke, causing the horse to fall and receive the injury from which it died. The planks extended some two feet over the stringers, and there were no barriers on either side of the bridge. There was testimony that the trustee of Lawrence township a little while after the accident said that the bridge had been in bad condition a long time, and that he knew it, but that it belonged to Republic county. The statute provides (section 658, Gen. Stat. 1909) that recovery may be had from the county for damage caused by a defective bridge constructed wholly or partially by such county when the chairman of the board of county commissioners shall have had notice of such defects for at least five days prior to the time when the damage was sustained, "and in other cases such recovery may be from the township, where the trustee of such township shall have had like notice of such defect." Section 659 makes it the duty of the trustees of each township "to cause to be placed, in a substantial manner, and maintained in good repair, on each and every bridge of a span of ten feet and over erected by any township or road district upon any public highway in their respective townships, good and sufficient guard rails on each side of any such bridge."

[3] There was testimony that this bridge was built by a road overseer of Lawrence township, and that the two townships had divided up the road for purposes of repair, Grant township taking the portion including the bridge, and that both townships had, to some extent, contributed to its maintenance or repair. While the fact that it was built by the trustee may not be proof conclusive that he was acting for his township or for any road district, the natural inference to be drawn is that he was acting for the

former, and this inference was sufficient on this point to take the case to the jury.

There was no evidence that either county or Grant township had anything to do with erecting the bridge.

The evidence as to the length of the span is somewhat conflicting, and still more confusing, but a careful examination of the entire showing upon this point leads to the conclusion that this question also should have been submitted to the jury.

Under the allegations and proof, the absence of guard rails might justifiably be deemed a contributing cause of the injury, and was for the jury to consider.

[1, 2] When the case was here before it was said to hinge upon the point whether or not the bridge was constructed wholly or partly by the counties so as to make them responsible under section 658, or whether this was one of "the other cases" from which recovery may be had from the townships. And in speaking of the bill of particulars it was said that:

"The fair inference could be drawn that the townships had built or assumed responsibility for the bridges and failed in their duty to keep them in proper condition." *Olsson v. Lawrence Township*, 93 Kan. 440, 443, 144 Pac. 987, 993.

The decision of *Horner v. City of Atchison*, 93 Kan. 557, 144 Pac. 1010, logically compels the conclusion that in view of the language of the statutes quoted it is simply a question as to who erected the bridge, and that mere assumed responsibility for it after its construction would not render a municipality liable. To this extent the former opinion is modified.

[4] A record of boundaries of road districts in Lawrence township was offered in evidence for the purpose of showing that the place of the alleged injury was included in one of its districts. This record was produced by the township clerk, and testified to as a part of the records of the township. It was also testified that the road in question had been used for many years, one witness, 37 years old, saying it had been used as long as he could remember, and we see no reason why this record was not competent for the purpose of showing that the township recognized the location of the injury as within one of its road districts, which might be somewhat indicative that the township trustee in building the bridge had acted for the township.

[5] The county clerk testified that he knew whether or not Cloud county had ever contributed anything towards the building of this bridge, but was not permitted to state what his knowledge was on the subject, nor whether he knew as to the county having designated the road in question as a county road. Whatever his knowledge was on the former subject was proper to be shown by competent evidence. *State v. Schmidt*, 34 Kan. 399, 8 Pac. 867.

A careful examination of the entire record

leads to the conclusion that plaintiff failed to make out a case against Grant township, but offered evidence sufficient to take the case to the jury as to Lawrence township, and hence the judgment is modified by sustaining the demurrer as to the former and overruling it as to the latter. All the Justices concurring.

FREDENHAGEN et al. v. NICHOLS & SHEPARD CO. et al. (No. 20393.)*
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. HOMESTEAD §162(3) — ABANDONMENT — ACTS CONSTITUTING.

A homestead is not abandoned by its owner where he, intending to return, leaves with his family and moves to a city in another county to educate his children, though later he sells the homestead and never returns.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 817; Dec. Dig. §162(3).]

2. APPEAL AND ERROR §1011(1)—REVIEW—QUESTIONS OF FACT—DEDUCTIONS FROM EVIDENCE.

The findings of the triers of fact are conclusive where different conclusions can reasonably be reached from the evidence, although the evidence is not conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. §1011(1).]

Appeal from District Court, Linn County.

Action by E. A. Fredenhagen and another against the Nichols & Shepard Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. J. Pirtle and M. B. Nicholson, both of Council Grove, and O. E. Freeman, of Topeka, for appellants. T. F. Garver, of Topeka, W. H. McCamish, of Kansas City, and John A. Hall, of Pleasanton, for appellees.

MARSHALL, J. The defendant, Nichols & Shepard Company, appeals from a judgment quieting the plaintiffs' title to certain land in Linn county. This land was a farm, and was occupied by E. S. Proctor and his family as a homestead for a long time prior to the 1st day of February, 1912. About that time he and his family left the farm and moved to Kansas City. In April following, Proctor and his wife conveyed the farm to the plaintiffs. In October, 1895, the defendant, Nichols & Shepard Company, obtained a judgment against E. S. Proctor in the district court of Linn county for the sum of \$1,095.36, with interest, which judgment has been kept alive by executions. In the present action the plaintiffs sought to quiet their title to the land as against that judgment.

[1] 1. Was the land the homestead of E. S. Proctor and his family at the time of its sale to the plaintiffs? The cause was tried by the court without a jury, and the court found that the plaintiffs were the owners in fee simple and in the actual possession of the

real property, that the judgment of Nichols & Shepard Company was not a lien upon the land, and that none of the defendants had any interest, right, title, estate, or lien in or upon the real property or any part thereof. Nichols & Shepard Company makes a strong argument to show that the land was not exempt from the lien of the judgment at the time of the sale to the plaintiffs. The argument is one of fact to be established by the evidence. That fact was determined by the trial court, and judgment was rendered. The evidence to establish that the farm was the homestead of E. S. Proctor and his family at the time of the sale to the plaintiffs, was principally that of Proctor himself, who testified, in substance, that when he left the farm he expected and intended to return to, and reside upon it; that he considered the farm the permanent home of himself and his family; that he had no intention whatever of abandoning it as his homestead; that he did not change his intention in any way until he conveyed the property to the plaintiffs; and that it was his intention to educate his children in Kansas City. Under the decision of this court, this evidence was sufficient to justify the court in finding that the farm was the homestead of E. S. Proctor at the time of the sale to the plaintiffs. *Palmer v. Parish*, 61 Kan. 311, 59 Pac. 640; *McGill v. Sutton*, 67 Kan. 234, 237, 72 Pac. 853; *Elliott v. Parlin*, 71 Kan. 665, 81 Pac. 500; *Mercantile Co. v. Blanc*, 79 Kan. 356, 99 Pac. 601; *Coal Co. v. Judd*, 6 Kan. App. 487, 50 Pac. 943; *Moses v. White*, 6 Kan. App. 558, 51 Pac. 622.

[2] 2. Evidence was introduced tending to show that the homestead had been abandoned. Although it cannot be said that the evidence was contradictory, different minds might reasonably have drawn different conclusions therefrom. If taken alone, the evidence to establish that the farm was the homestead of Proctor and his wife was such as should convince any reasonable man that the homestead had not been abandoned. The evidence to the contrary, if considered alone, was such as would convince a reasonable man that the homestead had been abandoned. This makes the findings of the trial court conclusive in this court. *O'Neal v. Bainbridge*, 94 Kan. 518, 146 Pac. 1165.

The judgment is affirmed. All the Justices concurring.

BREEN v. DAVIS et al. (No. 20392.)*
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF §139(2)—OPERATION AND EFFECT—PARTIAL PERFORMANCE.

Plaintiff pleaded an oral antenuptial agreement to marry, and care for her husband during the remainder of his life—special need for care

being set forth—and to leave her property, save her patrimony, to him should he outlive her, she to have all his property if she survived him. The proof failed to show any agreement for care, save such as might be implied from the marriage itself. *Held*, that the marriage and care for him while he lived did not remove the operation of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 335; Dec. Dig. ¶139(2).]

2. SUFFICIENCY OF EVIDENCE—FINDINGS OF FACT—CONCLUSIONS OF LAW.

The findings of fact are supported by the evidence and justify the conclusions of law in favor of the defendants.

Appeal from District Court, Clay County.

Action by Margaret Breen against Rees Davis, executor of the will and estate of Michael L. Breen, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. S. Roark, of Junction City, for appellant. Williams & Hogin, of Clay Center, for appellees.

WEST, J. The plaintiff sued the executor of the will and estate and certain devisees of her deceased husband to enforce an alleged contract by which she was to have his property at his death. The second cause of action related to his testamentary capacity, but was taken out of the case by the trial court, and need not be considered.

Michael Breen, a widower 59 years of age without children, having several thousand dollars' worth of property in Clay county, married in Clay Center in March, 1902, the plaintiff, a maiden lady 37 years of age, owning 160 acres of land, which she had preempted in Wichita county. With the exception of a few weeks' separation incident to a divorce action begun by the husband and afterwards dismissed, the parties lived together until his death in August, 1913. After their marriage he destroyed a will giving his property to his relatives in Ireland, and later made another giving one-half to them and one-half to his wife. The petition alleged, after reciting his physical condition:

"That while he was in such condition he proposed to plaintiff, who was many years his junior, that if she would marry him and care for him during the remainder of his life, he would, at his death, give to her by will all of the estate, both real and personal, of which he might die seised. It was also a part of said proposition that, if plaintiff, in the event of their marriage, should die without issue before the death of said Michael L. Breen, she would leave to him her estate, save and except such inheritance as she might obtain from her father's estate. That in consideration of said promises and of her love and affection for said Michael L. Breen plaintiff accepted said proposition, and pursuant thereto entered into said marriage relation, and during the remaining eleven years and more of the life of said Michael L. Breen lived with and cared for him in such manner as his age and enfeebled condition of health required."

The pleading further set forth her assiduous care for him, the failure of both to make a will, her reliance upon his agreement to

leave his property to her, and the fact of his making the will giving but one-half to her, without her knowledge or consent, and prayed the "specific enforcement of said agreement in such terms of equity as may be effective to set over said estate to her." After an extended trial the court made findings of fact covering all the material matters shown by the evidence, including the following:

"(22) Prior to the marriage of plaintiff and Michael Breen, there was no written agreement of any kind entered into between them concerning their property rights.

"(23) There is some evidence in this case to show that preceding the marriage of plaintiff to Michael Breen, that there were some oral negotiations between them respecting their property, but the testimony in relation thereto as to the exact nature of their agreement is unsatisfactory, uncertain, and indefinite.

"(24) There is no testimony in this case to support the allegation contained in the plaintiff's petition that it was a part of the oral negotiations of plaintiff and Michael Breen preceding their marriage, that in addition to marrying him she should 'care for him during the remainder of his life.'

"(25) That neither plaintiff nor Michael Breen at any time subsequent to their marriage and preceding the death of said Michael Breen made a will, except the will in controversy, deed or conveyance of any kind whatsoever, of their respective properties one to the other.

"(26) No antenuptial agreement of any kind was made by the plaintiff and Michael Breen, the terms of which have been performed either wholly or in part by the plaintiff, except the agreement to marry."

The conclusion of law was in favor of the defendants.

[1, 2] It is insisted that by the very fact and act of marriage the plaintiff contracted to care for her husband during his natural life, and hence a separate agreement to that effect was not essential. Plainly, the pleader did not rely upon the mere promise to marry, but upon the additional promise to care for the husband during the remainder of his life, and so alleged and also set forth special reasons why such burden would be more than ordinarily onerous to the plaintiff because of the health and condition of the husband.

We have carefully examined the entire record. There was testimony of conversations and statements before the marriage to the effect that she was to have his property if she outlived him, and he was to have hers, save her patrimony, if he survived her; also statements after the marriage indicating an intention on his part that she should have his property at his death. But the trial court was unable to find testimony establishing the contract and consideration as alleged, and while we are urged to find independently in favor of the plaintiff, we discover no evidence sufficient to substantiate error in the findings of fact or conclusion of law complained of.

Whether or not marriage can ever constitute part performance of an oral antenuptial

agreement so as to remove the operation of the statute of frauds, it could not be said to have had that effect in this case for the reason that the other principal element and consideration pleaded was not established by the proof. This renders needless any consideration of other questions presented, including those arising on cross-appeal.

The judgment is affirmed. All the Justices concurring.

BECKLEY v. BECKLEY et al. (No. 20829.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

DEEDS §208(7) — EXECUTION — DELIVERY — EVIDENCE.

The evidence examined, and held, to sustain the finding of fact that a deed was intended to be delivered, and was delivered, within the lifetime of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 630, 632; Dec. Dig. §208(7).]

Appeal from District Court, Miami County.

Action by E. C. Beckley against Fred Beckley and others. From the judgment, plaintiff and defendants Maude Trombler and others appeal. Affirmed.

J. S. R. Worley, of Osawatomie, and Charles T. Meuser, of Paola, for appellants. Sheridan & Sheridan, of Paola, for appellee.

BURCH, J. The action was one to partition real estate. The decision turned on whether or not a deed had been delivered. Judgment was rendered for the defendants, and the plaintiff appeals.

The land in controversy is a farm which at one time belonged to the wife of Daniel Beckley. Before her death she conveyed to her husband, she and her husband believing that this was a better way to dispose of property than by will. The conveyance was made with the understanding that the farm should become the property of a son, Fred Beckley, one of the defendants, at Daniel Beckley's death. After the death of his wife, Daniel Beckley expressed a purpose to carry out his wife's wishes. During an illness which proved to be his last, Daniel Beckley called a conveyancer to his house and caused two deeds to be prepared, which he executed and acknowledged on May 14, 1914. One conveyed the farm to Fred Beckley, and the other conveyed other real estate to his son, Clint Beckley, and to the children of a deceased son. After the deeds were executed Daniel Beckley gave them to the conveyancer and told him to keep them for the grantees, and when he got worse to record them. The following are some of the questions propounded to the conveyancer at the trial, and his answers:

"Q. And you say he told you to keep the deeds for these parties and to record them when he got worse? A. Yes, sir.

"Q. And you did it? A. I done so.

"Q. At the time that the deed was executed, you say that Daniel Beckley gave them to you,

gave this deed to Frederick Beckley and told you to record it if he got worse? A. Yes, sir; the two deeds.

"Q. Now, Mr. Campbell, at the time that this deed was executed, the one of Daniel Beckley to Fred Beckley, did Mr. Beckley make any explanation to you as to why he didn't want the deed recorded until he should become worse? A. All he told me was to hold those deeds, and when he got worse, record them for him.

"Q. That is, to hold them for who—did he say who to hold them for? A. For Mr. Fred and Mr. Clint and James' heirs; those two deeds.

"Q. I wish you would tell this court what Daniel Beckley said to you at that time with reference to that part of it. A. Mr. Beckley told me the reason why he had made the deed out to Mr. Fred Beckley was from the fact that he had paid two mortgages off for Mr. Clint Beckley, and had paid him some money, and he said he wanted this deed made to Fred, for it was rightly due him, and that home place.

"Q. When you say the home place, do you mean the farm? A. Yes, sir.

"Q. In his talk did he say anything why he didn't want the record made of them earlier than that? A. He said he didn't want any trouble, and he would prefer not to have them recorded until he got worse.

"The Court: I would like to have Mr. Campbell state as near as he can the language used when these deeds were delivered to you by Mr. Beckley. A. Mr. Beckley told me to take those deeds and keep them until he got worse, and when he got worse, he told me to have those deeds recorded. Those are the words of Mr. Beckley as near as I can remember, at the present time.

"By Mr. Sheridan: Q. And you did that? A. Yes, sir."

The conveyancer also testified that Daniel Beckley said nothing about the deeds being returned to him if he got better. The conveyancer inquired concerning Daniel Beckley's physical condition of a physician, who saw him sometimes several times a day, and on July 17, 1914, he recorded the deeds. Daniel Beckley died on July 29, 1914.

The court made the following finding of fact:

"I find that it was the intention of Daniel Beckley to make delivery of the deed to Fred Beckley in his lifetime by having the same recorded, and that said deed was filed for record by William Campbell according to the directions of Daniel Beckley in his lifetime."

The conclusion was that the deed to Fred Beckley was legally delivered.

The court does not regard it as open to serious dispute that the finding of fact is sustained by the evidence, that the conclusion of law is correct, and that the deeds were not testamentary in character.

Judgment of the district court is affirmed. All the Justices concurring.

C. C. JONES INV. CO. v. LOWREY.
(No. 20845.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

BROKERS §40—RIGHT TO COMPENSATION—EMPLOYMENT OF BROKER.

A letter from a brokerage company to a banker, saying that it would be glad to give

its best efforts to assist him in making a sale of his stock, and a reply stating that if satisfactory to other holders he might sell at a price named, are to be interpreted as an offer by the company of its services in the expectation of receiving compensation therefor if successful, and as a qualified acceptance by the banker amounting to an invitation to the company to produce a customer with the understanding that it was to receive a commission if a sale should be brought about by its efforts.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. ¶40.]

Appeal from District Court, Pawnee County.

Action by the C. C. Jones Investment Company against F. D. Lowrey. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed, with directions to overrule the demurrer.

F. Dumont Smith, of Hutchinson, for appellant. Charles E. Lobdell, of Great Bend, for appellee.

MASON, J. The C. C. Jones Investment Company sued F. D. Lowrey for a commission on the sale of bank stock. A demurrer to the petition was sustained, and the plaintiff appeals.

The petition alleges that a sale of the stock was made by the defendant to a customer produced by the plaintiff. The question in controversy is whether the facts set out show an employment. The defendant maintains that under the allegations of the pleading the plaintiff volunteered his services, and is for that reason entitled to no compensation. The solution of the question presented depends upon the effect given to the letters interchanged by the parties. On March 19, 1911, the plaintiff wrote to the defendant:

"At the present time we have a very strong demand for active interests in good banks, and we are now in touch with several bankers who would like to buy some stock carrying with it an official position in an institution in your territory. If for any reason you would consider making a sale of your banking interest, please let us know at once, and we will be glad to give our best efforts to assist you in making a satisfactory sale to one of these parties. You need have no hesitancy in giving us detail information in regard to your bank, as we used the most approved confidential method in handling this business."

The defendant answered on the 28th of the same month:

"Yours received. While I am not anxious to sell out, I might consider it providing it was satisfactory to the other stockholders. The price would be about \$175.00."

In January, 1912, the plaintiff sent the following letter, to which no reply was returned, the sale being made to the customer named about ten days later:

"Mr. John E. Wagner, who is an experienced banker and is looking for a proposition where he can purchase an active interest in a bank similar to yours, was in our office the other day and stated that he would be glad to take the matter up with you. We advised that he call on you at as early a date as possible. If he

enters in negotiations with you and you think we could render you further assistance by coming to Larned and helping to close a deal, let us know and we will be glad to do so. You of course understand, Mr. Lowrey, that we charge the usual commission of \$5 per share on the amount of stock sold."

We hold that these allegations show a liability on the part of the defendant. The first letter was an offer of the plaintiff's aid as a broker to find a customer for the stock, and the defendant was bound to presume that the services, if they were accepted and proved successful, were to be compensated, there being nothing whatever to suggest that a gratuity was intended. The letter in reply, indicating a willingness to sell at a price named, was fairly to be interpreted, in the absence of anything to the contrary, as a qualified acceptance of the offer—an invitation to the plaintiff to produce any probable customer it might find, in the expectation of receiving a commission if a sale should be brought about through its efforts. A somewhat similar question was presented in *Johnson v. Huber*, 80 Kan. 591, 595, 103 Pac. 99, 101. There a real estate agent wrote to a landowner, asking if he would sell, and asking for a price, including commissions. He answered, merely giving his price, and saying that the tract could not be sold without the consent of the tenants. The court said:

"We have no difficulty in determining that the first letter and the reply should be construed as a contract authorizing the plaintiff to find a purchaser for the land, the price to be \$2,000 cash, net, provided arrangements could be made with the tenant as to time possession should be given."

See, also, *Stephens v. Scott*, 43 Kan. 255, 23 Pac. 555; 4 R. C. L. 248; note, 27 L. R. A. (N. S.) 786.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer. All the Justices concurring.

KLIPP v. CITY OF HOYT. (No. 20079.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ¶821(4) —
TORTS — DEFECTIVE STREETS — ACTIONS FOR
INJURIES.

In an action against a city for personal injuries, predicated on a breach of the duty to maintain an improved street in a condition reasonably safe for public use, the court and jury are not required, as a matter of law, to give controlling weight to the judgment of the city officials in planning and constructing the improvement whenever it is so doubtful whether or not the improvement was dangerous that different minds might entertain different opinions regarding the matter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1748; Dec. Dig. ¶821(4).]

2. MUNICIPAL CORPORATIONS ¶821(4, 20) —
TORTS — DEFECTIVE STREETS — ACTIONS FOR
INJURIES.

The evidence examined, and held sufficient to warrant submitting to the jury the issues re-

specting the negligence of the city and the contributory negligence of the plaintiff.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1748, 1754; Dec. Dig. § 821(4, 20).]

Appeal from District Court, Jackson County.

Action by A. Klipp against the City of Hoyt. From a judgment for plaintiff, defendant appeals. Affirmed.

Hazen & Gaw and J. J. Schenck, all of Topeka, for appellant. D. H. Branaman, of Topeka, and Woodburn & Woodburn, of Holton, for appellee

BURCH, J. The action was one for damages for personal injuries sustained by a pedestrian while attempting to use a sidewalk on the margin of a city street. The plaintiff recovered, and the defendant appeals.

The sidewalk was constructed of cement and was in good repair. At the place where the injury occurred the surface of the sidewalk was 15½ inches above the surface of the street, and the sidewalk, which was elsewhere 8 feet wide, was narrowed by a building which projected into it a distance of nearly 3 feet.

The plaintiff is a farmer who visits the city only occasionally. He had some acquaintance with the walk and had noticed that it was high. He had not been in the city for about five months before the night of December 19, 1913, when he was injured. The night in question was very dark and rainy. The street lamps were not lighted, and there was no railing along the outer edge of the walk. The plaintiff walked slowly along the sidewalk, feeling his way, keeping the projecting building in sight as well as he could, and trying to see the edge of the sidewalk, when he fell into the street below and broke his right ankle.

With the general verdict in favor of the plaintiff, the jury returned the following findings of fact:

"Q. 1. Were the street lamps on Main street lighted at the time of the accident on December 19, 1913?"

"A. No.

"Q. 2. If you answer question No. 1 in the negative, then was the defendant city negligent in not having its street lamps lighted?"

"A. Yes.

"Q. 3. Was plaintiff injured on the night of December 19, 1913?"

"A. Yes.

"Q. 4. If you answer question No. 3 in the affirmative, then would such injury have occurred if the street lights had been lighted?"

"A. No.

"Q. 5. Was the plaintiff guilty of contributory negligence?"

"A. No.

"Q. 7. On the night of the accident were there any guards or railings on the curb side of the walk where the accident occurred to prevent persons using the walk from stepping or falling off?"

"A. No.

"Q. 8. If you answer question No. 7 in the negative, then state whether plaintiff would

have fallen off said walk if there had been guards or railings placed along the curb side of said walk.

"A. We believe it not likely."

[1] The defendant claims that as a matter of law it was not guilty of negligence. The substance of the argument is that there must of necessity be different levels in any plan of street improvement. Plans for street improvements, street lighting, and the like, are subjects committed to the judgment and discretion of the governing body of the city. When officers of a city exercise their best judgment, adopt a plan of street improvement, and following that plan, construct the improvement according to approved methods, the city is not liable at all for incidental damages, and is liable to persons using the street only in the event that the improvement is manifestly unsafe. If the plan be one which many prudent men would approve, or if it be so doubtful whether or not the improvement be dangerous for use that different minds might entertain different opinions with respect to it, the benefit of the doubt must be given to the city. Several distinct subjects are embraced in this argument.

The city could light its streets or not, at its pleasure. Having installed lamps, the city could light them on such nights and during such hours as it pleased. These are subjects to be dealt with according to the judgment and discretion of the city authorities, and whatever their action, no legal duty is violated. In this case, however, liability was not predicated on the failure of the city to light its streets. The basis of the action was breach of duty to maintain a street devoted to public use in a condition reasonably safe for the public to use.

The city had a right to plan the street improvement according to its discretion. It could improve all or only a part of the street. It could build a sidewalk or not. It could establish the grade of the street and the grade of the sidewalk at different levels. It could fix the location and width of the sidewalk, the same as it could choose the materials entering into the construction of the walk. Considering merely the subject of the nature and extent of street improvement, no one could complain, whatever the city might do or forbear doing. The city, however, rested under the positive legal duty to keep its streets and sidewalks in a condition reasonably safe for their intended use. No matter how carefully plans of improvement were considered, and no matter how faithfully the adopted plan was executed, if the result were actual peril to persons using the street with due care, the duty to make and keep the street reasonably safe for travel was not fulfilled, and an action would lie in favor of one suffering injury consequent upon the breach of duty.

Decisions of this court established and illustrating the foregoing principles are very

numerous. Among them are the following: *City of Atchison v. Challiss*, 9 Kan. 603; *Methodist Episcopal Church v. City of Wyandotte*, 31 Kan. 721, 3 Pac. 527; *Gould v. City of Topeka*, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496; *City of Emporia v. Schmilling*, 33 Kan. 485, 6 Pac. 893; *McGrew v. Kansas City*, 69 Kan. 606, 77 Pac. 698; *State v. Concordia*, 78 Kan. 250, 96 Pac. 487, 20 L. R. A. (N. S.) 1050.

The law fixes the standard of the city's duty. Streets and sidewalks must be such that public travel on them may be reasonably secure. If on the trial of a case it be doubtful under the evidence whether or not a city has measured up to that standard, if the evidence be conflicting, or furnish the basis for different inferences, the jury pronounces on the subject of liability or nonliability after having been instructed regarding the law. If there be no conflict of evidence or inference from evidence to be resolved, the situation is the same as if the entire case were stated in a petition against which a demurrer has been lodged. The jury has no function to perform, and the court applies the law and states the result. In either instance there is no presumption whatever, either for or against the propriety of the city's conduct. In the field of official discretion, the planning and construction of street improvements, all presumptions are in favor of correct official conduct. In the field of peremptory duty, to conform their work to a certain standard, no premium is placed on the judgment of city officers. The question is, have they conformed, and the court and jury determine the case precisely as they do other cases involving charges of imprudence and misconduct.

[2] The standard applied by the court, or by the jury under the direction of the court, rests in a supposed generalization of the experience of ordinarily prudent men. The fact that the generalization has not been and cannot be crystallized into perfectly definite form, as for example, that curbing shall not be more than eight inches high, does not detract from the authority of the standard (*Ellsworth v. Jarvis*, 92 Kan. 895, 141 Pac. 1135), and affords no basis for assuming that work planned and executed by the officials of a municipal corporation reaches the required standard of perfection. In the case of *Gould v. City of Topeka*, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496, it was said that the benefit of the doubt might properly be given the city when under the facts it is so doubtful whether or not the street planned by the city is dangerous that different minds might entertain different opinions about the matter. It was not said that benefit of the doubt must be given the city. No governing principle was stated. No new standard was set up—diversity of opinion instead of reasonable prudence. The issue was not shift-

ed from whether or not a sidewalk is dangerous to what different people may think about it. The statement amounted to no more than an observation on how the mind might operate when in grave doubt. In this case the question whether or not, under all the circumstances, including the encroachment of the building, the absence of light, and the absence of a railing, the sidewalk was reasonably safe if used at night by a person who exercised due care on his part, was properly submitted to the jury.

The defendant claims that as a matter of law the plaintiff was guilty of contributory negligence. Stress is laid on the plaintiff's knowledge of the condition of the walk. This court has said time and again that a pedestrian may use a defective street or sidewalk, knowing its condition, without being guilty of contributory negligence, and may do so after dark. The question always is, whether or not under all the circumstances the pedestrian exercised due care. In this case the question was properly submitted to the jury.

The cause was submitted under admirable instructions, the verdict and findings were sustained by sufficient evidence, and the judgment of the district court is affirmed. All the Justices concurring.

JACKS et al. v. MASTERSON et al.
(No. 20355.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. PLEADING — 310 — CONSTRUCTION — EXHIBIT.

In a suit for partition of real estate between the collateral heirs of a deceased person, the appellee filed a cross-petition, in which she claimed to be the owner of the real estate by virtue of the full performance on her part of a contract, which she alleged was entered into on the one part by the deceased and his wife in their lifetime, and on the other part by her father when she was a child ten months old, by which her father surrendered to them full control and custody of her, in consideration of which they agreed to take her into their family as their own child and heir. The cross-petition then alleged "that said contract so entered into was evidenced by a written instrument executed and delivered by" the parties, and set out a copy of the instrument, which showed on its face that it had been executed and delivered by her father alone, although in the handwriting of the owner of the real estate. Held, that the trial court properly construed the cross-petition in its entirety as stating a cause of action founded upon a parol agreement, and as though it had alleged the existence of the written memorandum as some evidence of the terms of such parol agreement.

[Ed. Note.—For other cases, see Pleading. Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. — 310.]

2. APPEAL AND ERROR — 1066 — REVIEW — HARMLESS ERROR—INSTRUCTIONS.

In the cross-petition mentioned in the preceding paragraph it was not alleged that there was an agreement to adopt the appellee, nor

was there any proof of a contract to adopt. There was, however, proof sufficient to sustain a finding of a parol contract by which the deceased and wife agreed that, in consideration of the father relinquishing his right to the appellee and the full discharge by her of a child's duty to them, they would take full control and custody of her as their own child and heir. The court instructed that appellee would be entitled to recover if the jury found from the evidence that there was an agreement to adopt and make her their heir. *Held*, there was no prejudicial error in the giving of the instruction, inasmuch as the rights of appellee to recover under the agreement proved were no different than they would have been under a contract to adopt and make her their heir.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066; Trial, Cent. Dig. § 558.]

Appeal from District Court, Wyandotte County.

Action by Alexander D. Jacks and others against Emily C. Masterson and others. From a judgment for defendants Otto Freeman and another, plaintiffs and defendants Emily C. Masterson and others appeal. Affirmed.

Miller & Miller and Samuel Maher, all of Kansas City, for appellants. David F. Carson and James T. Cochran, both of Kansas City, for appellees.

PORTER, J. William Jacks, a resident of Wyandotte county, died intestate on October 11, 1913, owning a farm of about 123 acres on which he had lived since 1868. He was 91 years of age at the time of his death; his wife had died in 1908 at the age of 76; and they had no children of their own. William Jacks left surviving him a number of brothers and sisters, and descendants of deceased brothers and sisters. This action was commenced as a friendly suit by two of his brothers for partition of the land among the collateral heirs. An amended petition joined as defendants Vietta Freeman and her husband. Vietta Freeman claimed to own the land in her own right, and in a cross-petition set out the facts which she claimed worked a transfer of the property to her. The case was submitted to a jury. A general verdict and special findings were returned in appellee's favor, and judgment was rendered, decreeing her to be the owner of all the property of which William Jacks died seised. The collateral heirs, some of whom are plaintiffs and some defendants, are the appellants.

Vietta Large was born December 6, 1876. Her mother died when she was less than ten months old. At the time William Jacks and Mary Jacks were past the age when they could expect children of their own. They had for some time wanted to find a suitable child to take into the family and raise as their own. They had said they desired to get a child so young that it would never know that it was not their child. An acquaintance of

theirs who knew their desires told them about Vietta Large. They took her to their home when she was ten months old. She lived with them until she was 16 years old, when she was married to Otto Freeman at the home of William Jacks. The marriage license described her as Vietta Jacks, the name she was known by during her childhood. They treated her as their child, sent her to school, and she returned to them the service, obedience, and affection of a child for parents. She assisted them in their sickness, worked about the house and occasionally in the fields. A colored woman who had formerly been a slave in the Jacks family testified that she lived with the family for 14 years during the time Vietta was there, and that the relations between Vietta and William Jacks and Mrs. Jacks were characterized by love and affection; that they always treated her as their own child. They usually called her "Hun" and she called them "Papa" and "Mamma." After her marriage she and her husband lived for about a year and a half with Mr. and Mrs. Jacks. They then moved to a house on the same farm, which Mr. Jacks built for them, and remained there about 3 years. They then moved to a farm in the neighborhood, where they remained for several years, when they returned to the Jacks farm to live. Mrs. Jacks was an invalid for about a year before her death, and required a good deal of personal attention and care. The appellant went back and forth to the Jacks home, helping with the cooking and household duties and assisting in the care of Mrs. Jacks. After the death of Mrs. Jacks the Freemans leased the farm, Mr. Jacks requiring them to sign a written lease each year. They paid a yearly rent of \$300 and in addition furnished him with board, and he lived with them, having a room of his own.

One of the principal contentions made by the appellants relates to the pleadings. In her cross-petition the appellee alleges in paragraph 2 that she became the holder of the legal and equitable title to the real estate in question "under and by virtue of a certain contract and agreement entered into with William Jacks, and M. A. Jacks, both deceased, and H. P. Large," her father, under which her father delivered over to them "full care and control and custody" of her when she was a child of ten months, her father then and there relinquishing all right to control her as his child, in consideration of which, and her discharging her duty thereafter to them as though she was their own child, they then and there agreed to take full care, control, and custody of her "as their own child and heir in every and all respects whatever to all intents and purposes," and agreed that they would give her their property at the time of their death, "and to effectuate said intents and purposes repeatedly stated that they intended to adopt"

her. The third and fourth paragraphs of the cross-petition read as follows:

"(3) That on or about the 14th day of January, A. D. 1878, the said contract so entered into by said H. P. Large of the one part and said William Jacks and M. A. Jacks of the other part was evidenced by the following written instrument executed and delivered by said H. P. Large and said William Jacks and M. A. Jacks, a true copy of which is as follows, to wit:

"(4) 'Baby Vietta Large was born near Monticello, Jackson county, Kansas, on December 6, 1876. Her mother departed life in Edwardsville, September 6, 1877, leaving her father, H. P. Large, a floating resident of Wyandotte county, Kansas, at which time the above mentioned (Vietta Large) was turned over to Wm. Jacks and M. A. Jacks, his wife, residents of the last-mentioned county and state, to have the full care, control and custody as their own child and air in every and all respects whatever to all intents and purposes and her kinsmen residing in Kansas. Julia and Baker P. Near, Connor Station. Her aunt married to Robert Baker-Kinsman in Greenup county, Kentucky, are as follows: Janey Merrill married to John W. Merrill (her aunt and uncle) on her mother's side. Mother's maiden name was (Nancy Elizabeth True Back) on the father's side in Michigan names as follows, (Joseph Large and family residents Berrian county) post office in Dowagiac, Cass Mich. One aunt in Franklin Co., Mo. 'name' Cerepta A. Pope.

"Given under my hand this the 14th day of January, A. D. 1878. H. P. Large.

"Witness: Albert X Hanyes,"
mark

Paragraph 6 states:

"It being understood in said contract that" appellee "was to be treated by said William Jacks and wife as their child," and that appellee "would through life render to them the same love, affection, obedience, and service as though she had been their own child."

In this paragraph it is further alleged that she fully complied in every particular with the contract on her part, and remained in the custody and control of her foster parents until her marriage, which was with the full knowledge and consent of her foster parents, the marriage license having been issued under the name of Vietta Jacks.

In another part of the cross-petition it is alleged that the foster parents repeatedly reaffirmed and recognized the terms of the contract by which appellee had been taken into the family, and again promised and agreed with her that if she would continue to remain with them, render to them the obedience, affection, and service of a daughter, they would fully carry out the terms of the contract, and further alleged that she rendered full obedience, service, and affection, and assisted them in all their sickness, without receiving any compensation therefor.

The memorandum set out in paragraph 4 of the cross-petition was produced at the trial, and the evidence showed that it was kept in the family from the time appellee was taken there, and that it was regarded as one of the family records. It was kept in what was known as the "Black Book." Although it was not signed either by William Jacks or his wife, it was in the handwriting

of William Jacks. It was signed by H. P. Large, the father of Vietta. William Jacks had served several terms as justice of the peace, and was in the habit of drawing conveyances and other instruments for neighbors. He had some acquaintance with legal terms, which doubtless accounts for some of the phraseology of the instrument. In their answer to the cross-petition appellants alleged that the words "and air" (heir), which were interlined in the instrument, were forgeries, and at the trial offered evidence of expert witnesses tending to show that these words were in a different handwriting. The jury by their general verdict have found there was no alteration in the instrument. They also found that William Jacks required the father of the little girl to sign the memorandum. Witnesses who had often visited the Jacks family testified to conversations with William Jacks, in which he showed them the "Black Book," and said, "This is the contract I had to write up to get our baby;" "I will show you the contract I had to draw up to get 'Hun.'" One witness testified that Mr. Jacks said he "had to make those provisions before Large would relinquish his right to her."

The answer to the cross-petition, besides a general denial, alleged that if there ever was any agreement made by William Jacks to take the appellee into his family and treat her as his own child and heir and leave her his estate at his death in consideration of her living with him and rendering services to him and his wife as if she was their own child, she had failed to keep and perform the agreement on her part, and had repudiated and abandoned it when she was 16 years old, and that she had sorely disappointed and grieved William Jacks by refusing to accept and follow his counsel and advice with regard to entering into marriage relation too early in life, and with a man objectionable to him; that she was not only an undutiful child, but that at all times after her marriage was cold and indifferent towards him. There was a conflict of evidence on all these matters, but there was sufficient evidence to sustain the verdict and judgment, unless, as appellants claim, prejudicial error was committed in the trial of the case.

[1] The principal contentions of the appellants are that the appellee was permitted to recover upon a theory neither alleged in her cross-petition nor proved. The appellants claim that confusion reigned at the trial because it was assumed by the court that the appellee claimed under a parol contract to adopt and to leave property, while they insist that in fact she expressly pleaded a written contract which said nothing whatever either about adoption or leaving property. It is urged that the court assumed without warrant that what is called paragraph 2 of the cross-petition stated an independent cause of action resting in parol, and therefore that

the court erred in submitting to the jury the question whether the evidence showed a promise that appellee would be adopted as the child of William Jacks and made his heir.

In the statement of facts contained in the brief of the appellee the theory upon which she recovered judgment is conceded to be as the appellants claim; that is, upon the theory of an oral contract between her father and William Jacks, by which she was to be taken into his family and in consideration of her giving to him and his wife the affectionate obedience of a child, they would adopt her and give her their property at their death. The court gave an instruction as follows:

"(9) Even if you find from the evidence that the writing contained in the black book marked 'Exhibit 3' was written by William Jacks in the same words and with the same interlineations as now appear therein, it would not of itself entitle said Vieta Freeman to recover a verdict herein, but it may only be considered by you, together with all the other evidence in the case, in determining whether or not the verbal or parol agreement alleged by said Vieta Freeman was in fact agreed upon and entered into by her father and said William Jacks."

Before considering the claim that there was no proof to support the theory of a contract to adopt and to leave property, we must consider and construe the cross-petition itself. The cross-petition first alleges a certain contract and agreement between appellee's father and William Jacks and wife, by virtue of which her father turned over to them the full care, control, and custody of her when she was a child, her father then and there releasing all right to consider her as his child, and delivering her to them in consideration of which and of her discharging her full duty to them as though she was their child, they agreed to take full care, control, and custody of her as if she were their own child, and "agreed that they would give her their property at the time of their death," and to effectuate said intents and purposes repeatedly stated that they intended to "adopt" her. So far nothing is said as to whether the agreement was in writing or oral, except that it is alleged that they "stated" an intention to adopt. In paragraph 3 it is alleged:

"Said contract so entered into by said H. P. Large of the one part and said William Jacks and M. A. Jacks of the other part was evidenced by the following written instrument executed and delivered by said H. P. Large and said William Jacks and M. A. Jacks."

In paragraph 6 it is said:

"It being understood in said contract that this defendant was to be treated by said William Jacks and wife as their child," and "would through life render to them the same love, affection, obedience, and service as if she had been their own child."

The cross-petition is very lengthy. In other portions of it there are allegations to the effect that the foster parents repeatedly reaffirmed and recognized "the terms of said contract" by which the appellee had been taken into the family. The appellants insist that "said contract" can only be intended to

refer to the one "evidenced" by the memorandum. If the written memorandum set out in the cross-petition had in fact been executed by both parties as alleged, the pleading would necessarily be construed as appellants contend, and all the statements as to what the contract embraced would necessarily go out of the pleading, and the pleader would be held bound by the writing. Obviously the court, when it came to examine the memorandum and saw that it had not been executed and delivered by William Jacks and his wife, or either of them as alleged, but, on the contrary had been executed and delivered solely by H. P. Large, gave a liberal construction to the language, alleging that the "said contract was evidenced" by the written instrument, and came to the conclusion that it should be construed as though the appellee had attempted to plead her evidence and to refer to the memorandum as evidence of the terms of an oral agreement. Ordinarily the rule is that where the substance of an agreement is stated, it is presumed to be in writing, in the absence of any statement to the contrary. This rule, however, should not be applied arbitrarily to one part of the pleading. When we read all the cross-petition together as one paragraph (and we see no reason for attaching any importance to the numbering of them), there is ground for construing the pleading as relying upon an oral agreement, because the writing referred to shows on its face that it was not an agreement between the parties, although it might be evidence that an agreement of some kind existed. The pleading is inartistically drawn, and contains inconsistent statements which might have furnished grounds to support a motion to make more definite and certain, or to require an election between a contract in writing and one in parol. Construing the entire pleading together, we think there was no error in admitting proof of a parol agreement.

[2] The other principal contention is that the court submitted the case to the jury on an erroneous theory, one not alleged in the cross-petition, and on which there was no proof. The court expressly charged the jury to return a verdict against the appellee unless they further found from a preponderance of the evidence that her father—

"entered into a verbal or parol contract with said William Jacks in his lifetime, on or about January 14, 1878, in substance that, in consideration of the relinquishment to said William Jacks by said H. P. Large of all his rights in and to said Vieta Freeman as her father, he, the said William Jacks, would receive, keep, and care for her as his own child to all intents and purposes and adopt her and make her his heir at law, and that said H. P. Large observed and complied with the terms and conditions of said contract on his part, and that said Vieta Freeman fully performed all the requirements and conditions imposed upon her by said contract."

This instruction, together with the one in which the court charged that the memorandum written in the black book "would not

of itself entitle" appellee to recover, must be considered the law of the case, as the appellants contend. The cross-petition does not allege an agreement to adopt. It alleges that they repeatedly "stated" an intention to adopt her, but this was obviously referring to the period after she was taken into the family. We think it is also true that there is no evidence of an agreement to adopt, and it is conceded that there was no attempt to make a legal adoption.

The question then is, Was it error for the court to submit the issue of a contract to adopt in the absence of any claim in the cross-petition that such was the contract, and with no evidence upon which the jury could find that such a contract was made? Conceding that this and other instructions in which the court likewise submitted the same issue to the jury should not have been given, because there was no proof in support of the issue, were the appellants prejudiced by the instructions? It will be observed that the court, in attempting to state the terms of the verbal contract relied upon, used the phrase, "adopt her and make her his heir at law." If the evidence was sufficient to sustain a finding of a verbal contract by which William Jacks agreed to receive the appellee into his family, keep and care for her as his own child and make her his heir, and that such contract has been fully performed on her part, her right to recover would be just the same as though the contract had been as the court stated it. If they had formally and legally adopted her, she would have sustained to them the relation of an heir, so that it is difficult to see how the instruction could have prejudiced the appellants. If, as the jury found, they agreed to take and raise the appellee as their own child and heir, and she performed her part of the agreement, her rights would be just the same as if they had agreed to adopt as well as to make her their heir. In our view of the matter no possible prejudice could have resulted from the language in the instruction, which coupled an agreement to adopt with an agreement to make appellee the heir of her foster parents.

The instruction that the written memorandum itself was not sufficient to entitle appellee to recover, but might be considered together with all the other circumstances in evidence to determine whether a parol agreement had been made, was proper. It has been held that an unsigned memorandum of a proposed contract, made prior to an instrument finally executed, may be received in evidence for the purpose of showing the relation of the parties, where that will throw light on their understanding with regard to the subsequent transaction. *Clark v. Townsend*, 96 Kan. 650, 153 Pac. 555.

Finally it is urged that no witness testified to the terms of any contract between Wil-

liam Jacks and the father of appellee. If the memorandum had been in the handwriting of H. P. Large, if it had been a letter addressed to and received and retained by William Jacks stating, in the same language, the terms upon which Large proposed to relinquish his rights to the child, it would be at least some evidence of the terms of a proposed contract; and if reinforced by proof of the subsequent action of William Jacks in taking the child into his family, his treatment of her thereafter as his own child, and his statements that the writing expressed the conditions upon which he received her, there would be sufficient circumstantial evidence to sustain the finding of the jury.

"It [the contract] may be established from such facts and circumstances as will raise an implication that it was made, and may have reinforcement from the evidence of the conduct of the parties, at the time and subsequently." (Italics ours.) *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265, cited in *Anderson v. Anderson*, 75 Kan. 117, 127, 88 Pac. 743, 9 L. R. A. (N. S.) 229.

Moreover, we have the fact that the memorandum was in the handwriting of William Jacks. It was written by him in a book, which the evidence shows was regarded as a family record; it was often referred to by William Jacks in the presence of friends and relatives of the appellee and other members of the family as setting forth the terms upon which the appellee had been surrendered when an infant by her father and had been taken into the family. Contracts of this nature may be established by circumstantial evidence. *Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396; *Smith v. Cameron*, 92 Kan. 652, 141 Pac. 596, 52 L. R. A. (N. S.) 1057, and cases cited in the opinion.

We discover no reason for setting aside the decision of the trial court, and therefore the judgment will be affirmed. All the Justices concurring.

CAPITAL IRON WORKS CO. v. MARYLAND CASUALTY CO. (No. 20250.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. MECHANICS' LIENS §317 — INDEMNITY AGAINST LIEN—ACTION ON BOND—LIMITATIONS.

The time for commencing an action under section 1 of chapter 183 of the Laws of 1909 is not fixed by section 6257 of the General Statutes of 1909 (Code Civ. Proc. § 662).

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 659; Dec. Dig. § 317.]

2. MECHANICS' LIENS §317 — INDEMNITY AGAINST LIENS—ACTION ON BOND.

An action to recover the cost of "extras" can be maintained on a building contractor's bond given to secure the faithful performance of the contract, or given to secure the payment of all claims which might become the basis of liens, and to comply with the requirements of section 5577 of the General Statutes of 1905, where the

contract provides for alterations in the plans and specifications and for increasing or decreasing the cost of construction in accordance with the changes made.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 659; Dec. Dig. ¶ 817.]

Appeal from District Court, Shawnee County.

Action by the Capital Iron Works Company against the Maryland Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ferry, Doran & Cosgrove and J. S. Dean, all of Topeka, for appellant. Garver & Garver, of Topeka, for appellee.

MARSHALL, J. The defendant appeals from a judgment against it on a surety bond. J. B. Betts contracted with the Board of Regents of the State University to erect a hospital building at Rosedale. The contract contained this provision:

"Said builder shall, before entering upon the work, execute to the owner two bonds in form and with sureties satisfactory to the owner; one bond to secure the faithful performance of this contract, and the other conditioned for the payment of all claims which might become the basis of liens, and to comply with the requirements of paragraph 5577, General Statutes of Kansas 1905; each of which bonds shall be in amount equal to the total consideration named in the contract."

Two separate bonds, exactly alike in all particulars, were executed, each in the sum of \$36,247. Each contained this provision:

"Now, therefore, if the said J. B. Betts shall well and faithfully perform said contract on his part in all particulars, and shall pay all indebtedness incurred for labor and material furnished and used in and about the said contract work, or which might become the basis of a lien, then this obligation shall be null and void; otherwise to be in full force and effect."

One bond was filed with the clerk of the district court of Douglas county and one was retained by the Board of Regents. This action was brought to recover for material furnished by the plaintiff to J. B. Betts and used in the building. The defendant filed a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The same question was raised by objection to the introduction of evidence, by demurrer to the evidence, by objection to the rendition of judgment, and by motion for a new trial. The defendant argues that the action was barred by section 6257 of the General Statutes of 1909 (Code Civ. Proc. § 662).

[1] 1. Was this action barred by any statute of limitations? The contract required J. B. Betts to give a bond under section 5577 of the General Statutes of 1905. That section is section 13 of chapter 168 of the Laws of 1889, and appears in the General Statutes of 1901 as section 5129, which was amended by section 1 of chapter 183 of the Laws of 1909. This last statute is found as a section without number between sections 6255

and 6256 of the General Statutes of 1909, and in part reads:

"The contractor or owner mentioned in section 1 of this act may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens; which bond shall be in a sum not less than the contract price and signed by a surety company authorized to do business in Kansas. * * * Such bond shall be subject to the approval of the clerk of the district court in the county in which the property is situated and shall be filed in the office of said clerk. When such bond is so approved and filed no lien shall attach under this act. * * * Suits may be brought on said bonds by any person interested."

The defendant contends that section 5577 of the General Statutes of 1905 was repealed by chapter 183 of the Laws of 1909 and has ceased to exist. Section 6255 of the General Statutes of 1909 is a part of the new Code of Civil Procedure, and is a continuation of section 5129 of the General Statutes of 1901 and of section 5577 of the General Statutes of 1905. Section 6255 of the General Statutes of 1909 (Code Civ. Proc. § 660) and section 1 of chapter 183 of the Laws of 1909 provide for the same kind of a bond to be given for the same purposes. The principal difference between the two sections concerns the sureties who sign the bond, and under the statutory rule of construction (Gen. Stat. 1909, § 9087, subd. 1) each section continues the provisions of section 5129 of the General Statutes of 1901 and of section 5577 of the General Statutes of 1905.

Two other sections of the General Statutes of 1909, 6256 and 6257 (Code Civ. Proc. §§ 661, 662), must be examined. Section 6256 reads:

"That whenever any public officer shall, under the laws of the state, enter into contract in any sum exceeding one hundred dollars, with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Kansas, in a sum not less than the sum total in the contract, conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements."

Section 6257 provides:

"That no action shall be brought on said bond [the bond prescribed in section 6256] after six months from the completion of said public improvements or public buildings."

Neither section 1 of chapter 183 of the Laws of 1909 nor section 6255 of the General Statutes of 1909 prescribes any time within which an action must be commenced on a bond therein provided for. The repealing clause of chapter 182 of the Laws of 1909, "an act concerning the Code of Civil Procedure," reads:

"Chapter 80 of the General Statutes of 1901, entitled 'An act to establish a Code of Civil Procedure,' and all acts amendatory thereof and supplemental thereto, are hereby repealed, save

and except such as are or may be passed at the session of 1909." Laws 1909, ch. 182, § 755.

Chapter 183 of the Laws of 1909 is in full force and effect, and governs the bond prescribed in the contract and filed with the clerk of the district court. Although section 5577 of the General Statutes of 1905 had been repealed and its place taken by section 1 of chapter 183 of the Laws of 1909, we cannot assume or say that the Board of Regents made a mistake in referring to section 5577 with sections 5578 and 5579 immediately following and on the same page.

The defendant argues that this bond was given under section 6256 of the General Statutes of 1909, which, with slight verbal changes, is the same statute as section 5578 of the General Statutes of 1905. It does not appear that a bond was not given under this statutory provision. It was not necessary that the contract provide that such a bond should be given. The law imposed the duty on the Board of Regents to take that bond from J. B. Betts. There was nothing in the law to prohibit the Board of Regents requiring a bond in addition to any prescribed by statute. An action on such additional bond would not be barred by the statute of limitations until five years had elapsed after the cause of action had accrued. Even if it be granted that the bond filed with the clerk of the district court was given under section 6256 of the General Statutes of 1909, the terms and conditions of the bond retained by the Board of Regents might be such as the parties thereto saw fit to make. Compliance with the terms and conditions of the bond filed with the clerk of the district court would not necessarily be a compliance with the terms and conditions of the bond retained by the Board of Regents. Whether this action was brought on the bond provided for by section 5577 of the General Statutes of 1905 (section 1 of chapter 183 of the Laws of 1909) or on another and additional bond required by the Board of Regents and not prescribed by any statute, the action was not barred by any statute of limitations, and it follows that the petition stated a cause of action.

[2] 2. On the trial, the plaintiff introduced evidence to prove that it had furnished "extras," articles not called for by the contract. These were required and used in the construction of the building to carry out changes made in the plans after the contract had been signed and the bonds had been given. To this evidence the defendant objected. We have before us a copy of the contract between J. B. Betts and the Board of Regents. That contract makes provision for alterations in the plans, drawings, specifications, and elevations of the building, and for increasing or decreasing the cost of constructing the building in accordance with the changes made. Since the bond stipulated

that "J. B. Betts shall well and faithfully perform said contract on his part," charges in the building and the materials therefor, and in the cost of construction, were contemplated. The "extras" furnished were within the terms of the contract and therefore of the bond.

The judgment is affirmed. All the Justices concurring.

RANTOUL RURAL HIGH SCHOOL DIST.
NO. 2, FRANKLIN COUNTY, v. DAVIS,
State Auditor. (No. 21069.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS—§ 42(2)—ORGANIZATION OF DISTRICT—PETITION.

A petition for an election to vote on establishing and locating a rural high school under chapter 311 of the Laws of 1915 recited that the proposed school was to be located "within or close to the village of Rantoul," and it is held that the location so designated is not so indefinite or defective as to invalidate the organization made or the bonds issued in pursuance of the vote.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 85; Dec. Dig. § 42(2).]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"CLOSE TO."

The term "close to" is defined as "near; very near; immediately adjoining."

3. WORDS AND PHRASES—"VILLAGE"—"HAMLET."

A "village" or "hamlet" in a rural community may be no more than a store, a school, a church, and two or three residences.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hamlet; Village.]

Original proceeding in mandamus by the Rantoul Rural High School District No. 2, Franklin County, against W. E. Davis, Auditor of State. Judgment for plaintiff.

J. P. Coleman, of Topeka, for plaintiff.
S. M. Brewster, Atty. Gen., for defendant.

JOHNSTON, C. J. This is a mandamus proceeding to compel the registration of rural high school bonds.

At an election held on May 28, 1916, it was determined to establish Rantoul high school No. 2 of Franklin county under the provisions of chapter 311 of the Laws of 1915, and to issue \$10,000 worth of bonds of the district for the construction of a high school building. The officers of the district executed the bonds and presented them to the state auditor for registration, but he declined to register them upon the ground that the location of the building was not definitely stated as the statute requires. In the petition for the location, which set forth the boundaries of the district and the amount of the bonds proposed to be issued, it was stated that the high school was to be located

"within or close to the village of Rantoul."

[1] Is the statement sufficient? The statute provides that an election to establish a rural high school district and to vote bonds for the construction of a school building shall be held whenever a petition otherwise sufficient is presented to the board of county commissioners requesting it "to call a special election to vote on establishing and locating a rural high school and to vote bonds for the construction of a high school building, the proposed location and the amount of the bonds proposed to be stated in the petition," etc. Laws 1915, c. 811, § 2. It is contended that the location is to be fixed by the electors, and not by the school board, and that to comply with the statute the particular spot or piece of land upon which the building is to be erected must be stated. This strict interpretation of the term location in the connection in which it is used was rejected in *Miely v. Metzger*, 97 Kan. 804, 156 Pac. 753, where the statute in question was under consideration. The view taken was that the Legislature did not intend that the precise spot on which the building was to stand should be stated in the petition, but that it would be enough if the municipality, district, neighborhood, or locality within which the building was to be erected was stated. There the location stated in the petition was "within Ozawie, Kan.," which is an unincorporated village, and it was held that the proposed location was stated with sufficient definiteness to meet the purposes of the statute. Following this view, it must be held that the bonds in question are not invalid, because the location of the high school was not properly stated in the petition. Here the location is "within or close to the village of Rantoul."

[2, 3] The term "close to" is defined as "near; very near; and immediately adjoining." If the location named for a high school building is in a rural district which has no definite boundaries, the term "within" may be inappropriate. A village or hamlet in a rural community may be no more than a store, a school, a church and two or three residences, and in such a case a statement that a high school was to be located within or close to the village would be about as definite a designation as would be practicable without naming the particular spot on which the building was to rest. In such a case to name a location close to a hill, mound, or other well-known natural object or to the intersection of certain highways within the district would be reasonably definite. Likewise to name a location as "within or close to" the group of houses constituting the village of Rantoul appears to us to meet the requirements of the statute, and it must therefore be held that there are no valid objections to the registration of the bonds. This being decided, the state audi-

tor will doubtless register the bonds, and the formal issuance of the peremptory writ will be unnecessary.

Judgment for the plaintiff. All the Justices concurring.

STATE v. COVINGTON. (No. 20611.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. RAPE \S 57(5)—ATTEMPT—QUESTIONS FOR JURY.

In a prosecution for an attempt to commit rape, the character and extent of the resistance of the woman are questions for the jury to determine.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. \S 57(5).]

2. RAPE \S 53(1)—ATTEMPT—EVIDENCE—SUFFICIENCY.

In this case it is held that there is sufficient evidence of overt acts showing an intent, coupled with an actual or apparent present ability to complete the offense.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 78; Dec. Dig. \S 53(1).]

3. OBJECTIONS TO TESTIMONY — CONCLUSION OF WITNESS.

Objections to testimony on the ground that the questions called for the conclusion of the witness held to be without merit.

4. CRIMINAL LAW \S 361(1)—EVIDENCE—INTENT.

In a prosecution for an attempt to commit rape the defendant brought out the fact that on another occasion he had visited at the house of complaining witness. Held, not prejudicial error to permit the complaining witness to state, in explanation of the circumstances of the former visit, that he came for the same purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 802, 803; Dec. Dig. \S 361(1).]

5. CRIMINAL LAW \S 369(8) — EVIDENCE — OTHER OFFENSES.

Under the circumstances stated in the opinion there was no prejudicial error in permitting the complaining witness to testify to a conversation between herself and husband which occurred prior to the alleged assault, and which referred to an alleged attempt by defendant to commit the same offense upon another woman; the court having charged the jury not to consider any statements in reference to an assault on the other woman as any evidence tending to show that such assault was in fact made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822, 823; Dec. Dig. \S 369(8).]

6. CRIMINAL LAW \S 829(1)—INSTRUCTIONS—REQUESTS.

Certain instructions requested by defendant are held to have been inapplicable in a case where the corroborating testimony was not purely circumstantial. Other requested instructions are held to have been properly refused because covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. \S 829(1).]

7. CRIMINAL LAW \S 814(18)—INSTRUCTIONS—APPLICABILITY—RAPE—ATTEMPT.

An instruction that if the complaining witness failed to make any outcry or concealed the attempt for any length of time after she had an opportunity to complain, these and like circumstances would carry a strong presumption that her testimony was false was properly refused,

on the ground that in this case there was no concealment of the attempt, and the testimony showed that the husband discovered the attempt while it was being made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1890, 1979; Dec. Dig. §§ 814(18).]

Appeal from District Court, Smith County.

A. M. Covington was convicted of an attempt to commit rape, and appeals. Affirmed.

Mahin, Mahin & Mahin, of Smith Center, for appellant. S. M. Brewster, Atty. Gen., and W. S. Rice, E. S. Rice, and Relihan & Relihan, all of Smith Center, for the State.

PORTER, J. The defendant appeals from a conviction of the charge of an attempt to commit rape.

The complaining witness, a woman 26 years old, is the wife of C. C. Lewis, the depot agent at the village of Cedar. Defendant is a single man 40 years old. The Lewis home is north of the railroad track and two or three blocks from the station. Defendant's home was about 30 yards distant from that of the complaining witness, and he was in the habit of getting water from a well at the Lewis house. Other houses in the immediate neighborhood were two blocks distant, the view from them being to some extent obscured by growing crops. Complaining witness testified that she was out in the yard about 1 o'clock in the afternoon looking for her three year old child who was down near the premises of the defendant; that defendant came over to her yard and had some conversation with her, and tried to induce her not to go to look for her child; that he kept following close to her, and that she backed away from him, but he continued following her; that she told him not to lay his hands on her and gave him a push. She said that she ran into the house and tried to shut the screen door, but he prevented her from doing so, and followed her into the house and into her bedroom, where he grabbed her and forcibly threw her on the bed. Her testimony is that she scuffled with him and made all the resistance possible, and told him that she had sent her little girl to the depot for her husband, although the little girl was at school, and that her husband would soon be there and would kill him, and that she would kill him when she got up. About this time her husband appeared at the house.

C. L. Draper who had been driving along the road, testified that he saw the defendant following Mrs. Lewis up; saw her dodge to get away from him in the yard; saw him intercept her and saw her strike several times at the defendant. Draper drove to the depot where the husband was and told him to go down to his house, that there was something wrong, and that Covington and his wife were having trouble. Lewis got on a horse and rode home immediately. Lewis testified that when he came to the door he

saw his wife struggling with the defendant on the bed, and he went upstairs to get a revolver because he was a cripple and did not feel equal to a physical encounter with the defendant. Immediately thereafter the defendant ran out of the house, leaving his hat on the floor, and Lewis shot at him from an upstairs window. Mrs. Lewis went upstairs and told him not to kill defendant, as Covington had not accomplished his purpose. He ordered his wife to go to the depot, and shortly thereafter followed her there. The defendant went to a mill a few blocks distant, and sent word to the miller that he wanted to see him, and when the miller came, endeavored to sell his hogs to him in order to get money to leave town. He was shortly thereafter arrested.

[1] It is urged that the verdict and judgment are not supported by the evidence. This claim is based to some extent upon the fact that the complaining witness admitted she did not scream or call out, but she said that she did not think of that. It is insisted that since there is no evidence that she made an outcry, the jury were not justified in finding that there was an attempt to commit a rape. She explained to the satisfaction of the jury her efforts to prevent the accomplishment of the crime of rape, and the character and extent of her resistance were questions for the jury to determine.

[2] It is argued that the evidence did not sustain the charge that there was an attempt to commit a rape because it goes no further than to show acts which were merely preparatory to the commission of a crime, and not such as would lead to its commission. Authorities are cited to the effect that:

"To constitute an attempt to rape, there must be something more than mere preparation; there must be some overt act with intent to commit the crime, coupled with an actual or apparent present ability to complete the crime." 33 Cyc. 1431.

In *Re Lloyd*, Petitioner, 51 Kan. 501, 33 Pac. 307, it was said:

"Before there can be a conviction in such a case, there must be not only the criminal intent, but overt acts toward the commission of the offense must be proven; and the attempt must progress sufficiently toward execution to clearly show the criminal intent of the defendant." Paragraph 3, Syl.

We think there was sufficient evidence of overt acts which showed an intent, coupled with an actual or apparent present ability to complete the offense. There was some evidence that an attempt to commit rape was prevented by the appearance of the husband. How long the woman's resistance might have prevented it, of course, is mere speculation. We are not impressed with the argument advanced that the evidence shows defendant did nothing more than a woman might have done toward the complaining witness.

[3, 4] The objection to some of the testimony on the ground that the questions called

for the conclusion of the witness is without merit. Another contention of the defendant is that after his counsel had asked the complaining witness whether the defendant had not been there at her house another time, the court permitted her to testify in redirect examination that he had been there about three weeks before, and that he came for the same purpose. On recross-examination the same question was asked her, and she testified to the same effect. We think the evidence was competent as some evidence of defendant's intent in following the complaining witness into the house at the time charged in the information. The defendant first brought out the fact that he had been at the house before, and it was proper to permit the complaining witness to explain the circumstances of his former visit. The court instructed the jury to disregard the answer of the witness where she stated what she supposed his purpose was in coming to the house.

[5] It is contended that there was prejudicial error in permitting the complaining witness to testify to a conversation between herself and her husband which occurred some time before the alleged assault. In cross-examining Mrs. Lewis she was asked:

"Q. Why was it you didn't tell your husband the first time? A. It was this: We had talked about him attempting to rape Mrs. —."

Here an objection was interposed to any conversation with her husband for the reason that the question asked her didn't call for any such answer. The objection was overruled, and counsel for defendant again asked her:

"Q. Tell why you didn't want to tell him the first time. A. The reason I didn't tell my husband; we had talked about him attempting to rape Mrs. —. He said that if he tried that on a woman of his, he would kill him, and for that reason I didn't tell him. I was afraid my husband would be punished. He hadn't any money to get out of it, and I had no way to support myself and children, and knew he would kill him. I don't know that anyone ever told me he tried to rape Mrs. —. Mrs. — never did. Q. So nobody up to that time had told you, and nobody has told you since that time, that he ever attempted to rape anybody? A. I don't know that they have, not in plain words."

The defendant asked the court to instruct the jury to disregard the statements of the witness as to the alleged attempt to rape the other woman, but the request was denied. At the conclusion of the testimony, however, the court charged the jury not to consider any statements of Mrs. Lewis in reference to an assault on the other woman as any evidence tending to show that such an assault was in fact made. We think there was no error within the rule declared in *State v. Marsee*, 93 Kan. 600, 144 Pac. 833. In that case a conviction was set aside because the state was permitted to introduce evidence of a collateral issue strongly tending to arouse passion against the defendant, the evidence

admitted being to the effect that the defendant had been accused by his own daughter of attempting improper liberties with her. In the present case, the defendant, after having discovered how the witness proposed to answer the question, insisted upon having her state why it was that she had not informed her husband of what occurred at defendant's previous visit. Having insisted upon getting in the evidence as to the collateral issue, the defendant ought not now to have the right to claim that he was prejudiced by the answer. Besides, the court instructed the jury not to regard it as any evidence of the former offense. For the same reasons we think there was no error in refusing instructions asked by the defendant, withdrawing from the consideration of the jury for any purpose statements with reference to an assault upon the other woman.

The defendant was a witness, and while he admitted that he had been present at the house, he denied any attempt to commit the offense charged. He admitted having the conversation with the miller at the time he tried to sell his hogs, but denied any intention of having intercourse with the complaining witness. His explanation of what occurred in the yard was that he and Mrs. Lewis were both in fun. He testified that he did not know of any reason why he followed her into the house. It is to his credit that he made no attempt to blacken the character of the complaining witness, although the inference was attempted to be left with the jury that his presence at the house was not in any way resented by her, and that their relations were entirely friendly. Mrs. Lewis admitted she made no attempt to explain to her husband at the house how the defendant came to be there; and there was some evidence that afterwards, when her husband came to the depot, he was angry with his wife and swore at her. She testified, however, that he was angry because she had not informed him of the fact that the defendant had been at the house the first time. All these matters, however, were questions for the jury. They have passed upon the evidence, and found the defendant guilty.

[6] There was no error in refusing the requested instructions. Some of them were wholly inapplicable. There was direct evidence of two others besides the complaining witness, tending to support her version of the affair, and some of the instructions requested would be applicable only in a case where the corroborating testimony was purely circumstantial. Some of the requested instructions were fully covered by those given.

[7] The court properly refused to give requested instruction No. 7 that if the complaining witness failed to make any outcry at the time, or concealed the attempt for any length of time after she had an opportunity to complain, these and like circumstances would carry a strong presumption that her

testimony was false. There was no concealment in this case of the attempt. Her husband testified that he discovered the attempt while it was being made. It would not be proper for the court, under the circumstances, to charge that her failure to make an outcry that could have been heard by others carried any such presumption.

We find no error in the record, and the judgment will be affirmed. All the Justices concurring.

FISHER et al., Board of Rural High School Dist. No. 1, Stafford County, v. BECK, County Superintendent, et al. (No. 21015.) (Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS §42(2), 110—HIGH SCHOOL DISTRICTS—TAXATION—STATUTORY PROVISIONS.

Rural high school districts created under chapter 311 of the Laws of 1915 are not within the operation of the Barnes High School Law (Laws 1905, c. 397), and are not entitled to share in the fund derived from a levy made under the Barnes Law.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 85, 261-264; Dec. Dig. §42(2), 110.]

Dawson, J., dissenting.

Original application by J. C. Fisher and others, constituting the Board of Rural High School District No. 1, Stafford County, for mandamus to Anna M. Beck, County Superintendent, and others. Denied.

Herbert J. Beals and Ray H. Beals, both St. John, for plaintiffs. Robert Garvin, of St. John, for defendants.

JOHNSTON, C. J. Is rural high school district No. 1 of Stafford county within the operation of chapter 397 of the Laws of 1905, and the amendments thereto, known as the Barnes High School Law, and entitled to share in the benefits of that law?

For several years before June 24, 1915, school district No. 40, an ordinary school district, had been in existence and included within its boundaries 13 sections of land in Stafford county. For some time it had maintained a high school in compliance with the requirements of the Barnes Law, and had participated in the funds raised under that law. After chapter 311 of the laws of 1915, known as the Rural High School Law, was enacted, and in pursuance of an election held on June 24, 1915, rural high school district No. 1 of Stafford county was organized, and it comprises 45 sections of land, 39½ of which are in Stafford county and 5½ of them in Pratt county. The 13 sections which formed school district No. 40 are included in the bounds of rural high school district No. 1. At the end of the school year 1916 the principal of the rural high school made a report to the county superintendent as to the condi-

tion of the school and the work which had been done there. This report was accepted and approved by the county superintendent, and she thereupon certified that the plaintiff district and three others had maintained high schools with courses of instruction which entitled the pupils who complied with them to entrance to the freshman class of the state university, and that they measured up to the requirements of the Barnes Law in that respect. At the same time she certified to the board of county commissioners an amount necessary for the maintenance of three high schools in Stafford county, but omitted rural high school No. 1 from the list upon the theory that it was not within the application of the Barnes Law, and was not entitled to its benefits. Accordingly the county commissioners declined to make a levy under the Barnes Law for the support of the plaintiff. This proceeding was brought to compel these officers to provide for the maintenance of the plaintiff under the Barnes Law, and the only question presented here is whether the plaintiff comes within the purpose and scope of that law.

The plaintiff was created in the manner provided by the Rural Law, is a distinct entity, and not in a class with ordinary school districts. If the electors in a prescribed territory vote to establish a rural high school, a school board is elected for the government of the schools, which has power to secure sites by donation, purchase, or condemnation. The annual meeting of such organization is held on the day preceding the day on which school districts hold their meetings, and at such meeting a levy is to be made, not exceeding four mills on the dollar of valuation upon all the taxable property in the district to pay teachers and the incidental expenses of the rural high school and to create sinking funds to meet its obligations. The levy when made is certified to the county clerk, who directly extends it upon the tax roll, and the treasurer is authorized to collect and pay over the taxes as is provided in the case of school districts. Any pupil in the district who has completed the prescribed course for district schools is eligible for admission to the high school and the rural high school board may, with the approval of the county superintendent, provide for teaching any branches in the course of study for elementary district schools. The tuition in the high school is to be free to all pupils residing in the high school district, and while nonresident pupils may be admitted on the payment of fees to be fixed by the board, they can never be admitted to the exclusion of a resident pupil. Adjacent territory may be added to the high school district, and thereafter such attached territory shall bear its full proportion of all expenses of the rural high school. The act under which the plaintiff and other rural high schools were or-

ganized was obviously intended as a substitute for township high schools. Previously the Legislature had authorized the establishment of county high schools in the manner provided in the General Statutes of 1909, section 7765 and sections immediately following. Later the Barnes Law was enacted under the statute mentioned, and still later by chapter 262 of the Laws of 1911 it provided for township high schools. The Rural Law was house bill No. 88 and was presented as an amendment of the township high school law. Its term indicated that it was not within the operation of the Barnes Law, and the title of the original bill declared that the high schools formed under it should be exempt from the operation of the Barnes Law. The bill was modified and elaborated somewhat, but after providing for the establishment of rural high schools, it repeals the two acts under which township high schools were maintained. It is clear therefore that it was intended as a substitute for the township high school law, and was changed so that the organization should not be confined to a single township, but might include the territory of several townships or parts of townships in one or more counties.

There are a number of differences between such districts and ordinary school districts to which the Barnes Law is made applicable. After forming an organization of its own as the Rural Law prescribes, it is provided that it shall hold annual meetings on a day other than the one on which annual meetings of school districts are held. The rural school board makes a levy of taxes on a fixed limit, which the county clerk is required to enter on the tax roll, while school districts do no more than to certify the amounts required for school purposes, and the duty of making the levy is vested in the county commissioners. The tax is levied on all the property within the high school district for the maintenance of the schools, while for high schools maintained under the Barnes Law it is levied on all the property within the county. If it had been the intention of the Legislature to maintain rural high schools from the funds raised under the Barnes Act, a levy on the property of the district for the same purpose was unnecessary. A rural high school district may be constituted of territory from more than one county. In such a case a levy may be made upon all the property within the district, and the money derived from it expended for the benefit of the whole district, while under the Barnes Law the fund raised is a county fund, and cannot be expended for the benefit of the people of a district outside of the county in which the fund is raised. Provision is made for ordinary joint school districts (Laws 1911, c. 272), but none is made for a rural high school district comprising territory in more than one county, one of which may be or may not be operating un-

der the Barnes Law. The tuition is to be free to all pupils resident in the rural high school district comprising the territory in two or more counties, but under the Barnes Law a pupil outside of the county raising the fund could not participate in its benefits. The provisions as to the course of study under the two laws do not coincide. Under the Rural Law the course of study shall be such as the rural high school board shall prescribe with such modifications as the state board of education may deem to be necessary to promote the usefulness and efficiency of such schools (Laws 1915, c. 311, § 9), while under the Barnes Law two courses of study are provided, both of which require four years' work, namely:

"A college preparatory course, which shall fully prepare those who complete it to enter the freshman class of the college of liberal arts and sciences of the University of Kansas, and a general course, designed for those who do not intend to continue school work beyond the high school." Gen. Stat. 1909, § 7799.

The length of the course required under the Rural Law is not prescribed. It may be one or more years as the rural board may determine, and it is not required that those who take it shall be up to the standard which will admit them to the freshman class of the Kansas University. Under the Rural Law provisions may be made and money expended for teaching any branch belonging to the course of study in elementary district schools, while under the Barnes Law it is provided that "no part of said general high school fund shall ever be used for other than high school purposes." Gen. Stat. 1909, § 7794.

School district No. 40, whose territory was included in the rural high school district, abandoned its high school and its rights to share in the benefits of the Barnes Law when the people of the district united in forming the new organization under the Rural Law. It has no right to participate in the funds provided under the Barnes Law unless it maintains a high school. This it has not done, and the fact that some of the pupils formerly attending the high school are now in attendance at the rural high school does not change the rights of the latter under the law, nor make it subject to the Barnes Law. The features mentioned—and there are still others that might be pointed out—show that the Legislature did not intend that rural high schools should be brought within the operation of the Barnes Law, nor participate in the fund provided under it.

The writ of mandamus asked for will therefore be denied.

BURCH, MASON, PORTER, WEST, and MARSHALL, JJ., concurring. DAWSON, J., dissenting.

STATE ex rel. SAYERS, Co. Atty., v.
MANNY et al. (No. 20549.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. HIGHWAYS \Leftrightarrow 47—CREATION—STATUTORY PROVISION.

An act was passed declaring a section line a highway, fixing its width at 60 feet, and providing that claims for damages should be presented within one year from the time it was actually opened to public use. The road was already in use as such, under proceedings establishing it as a highway 40 feet wide, but the travel covered approximately 60 feet. *Held*, that the statute created a 60-foot highway without further order by the road overseer.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 147-150; Dec. Dig. \Leftrightarrow 47.]

2. HIGHWAYS \Leftrightarrow 45—PROCEEDINGS TO DETERMINE LOCATION—CONCLUSIVENESS OF SURVEY.

The result of a statutory survey to fix the location of a section line is not conclusive upon the state in an action to determine the position of a highway established along such line.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 33, 137, 139; Dec. Dig. \Leftrightarrow 45.]

3. HIGHWAYS \Leftrightarrow 45—DETERMINATION OF LOCATION—QUESTION OF FACT.

The evidence *held* to make the true location of the section line a question of fact upon which the decision of the trial court is final.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 33, 137, 139; Dec. Dig. \Leftrightarrow 45.]

Appeal from District Court, Graham County.

Action by the State, on the relation of W. L. Sayers, as County Attorney, etc., against A. D. Manny and another. From a judgment for plaintiff, defendant Manny appeals. *Affirmed*.

F. D. Turck, of Hill City, and S. C. Price, of Atwood, for appellant. S. M. Brewster, Atty. Gen., and W. L. Sayers, of Hill City, for appellee.

MASON, J. An action was brought in the name of the state, on the relation of the county attorney, to enjoin A. D. Manny and another from maintaining fences in a highway. Judgment was rendered for the plaintiff, and the defendant Manny appeals.

[1] 1. The county commissioners undertook to establish the road in question in 1881. The steps taken were characterized by irregularities, but a validating act was passed in 1889. Laws 1889, c. 20. Nothing to the contrary having been specified, the width of the road resulting from these proceedings was limited to 40 feet. *Willis v. Sproule*, 13 Kan. 257. In 1887, however, the Legislature declared the section line which this road undertook to follow to be a public highway, fixing the width at 60 feet, and allowing claims for damages to be presented within one year from the time it should be actually opened to public use. Laws 1887, c. 215. No formal order was shown for the opening of the road after the enactment of this statute, but the

court found that it had been continuously in use for more than 80 years, the travel covering a width of approximately 60 feet; therefore the further finding of the existence of a public highway of that width was justified, although ordinarily an order for its opening would be necessary for the creation of a road by such a statute. *Hanselman v. Born*, 71 Kan. 578, 81 Pac. 192.

[2] 2. The persons using the road undertook to follow the section line, and any departure from that course was inadvertent, so that the problem of determining the real location of the highway is that of finding the true section line. *Shanline v. Wiltzie*, 70 Kan. 177, 78 Pac. 436, 3 Ann. Cas. 140. The road follows the west line of Manny's land. The trial court decided that the section line, as established by the government survey, lies east of its position as determined by a survey made in 1908, to which the adjoining owners were parties, the difference being 25 links at the south boundary of the tract, and 83 at the north. Manny contends that the survey is conclusive upon the public, or the state, as well as upon the adjoining owners. Although a statutory survey is made by a public officer, it is essentially an adversary proceeding between individuals. No one who is not a party is bound by it. No specific provision is made for notice to any one as representing the public with respect to its interest in a highway; the statute merely requiring the surveyor to notify interested parties. Gen. Stat. 1909, § 2254. Possibly a notice to the board of county commissioners might enable the public's interest to be litigated in such a proceeding. But, in the absence of special circumstances making the public in effect a party, the matter must be governed by the rule that the state is not bound by a judgment rendered in litigation between private persons, nor by a judgment against a public officer, except with respect to a matter concerning which he is authorized to represent the government. 23 Cyc. 1279. This rule has been applied to prevent the result of a statutory action to determine the location of the county seat from precluding an independent examination of the question at the instigation of the state. *State ex rel. v. Stock*, 38 Kan. 154, 16 Pac. 106. See, also, note 105 Am. St. Rep. 210; *Maine and New Hampshire cases* cited in note 3 Ann. Cas. 1065. Some practical inconveniences may result from the location of a section line at one place as a boundary between adjoining owners, and at another as controlling the position of a highway, but a different holding might compel a change of a highly improved road, upon which public funds had been freely expended, by reason of the result of a survey conducted to settle a private controversy.

[3] 3. The final contention of the appellant is that there was no evidence to support the finding that the section line as determined by

the court coincided with that established by the government survey. Evidence was introduced tending to show its recognition for many years as the original line, by the course of the road, and by furrows plowed and trees and fences set with regard to it. The most important single item of evidence related to a stone in the middle of the road which according to some of the witnesses had been regarded from early times as that set by the government surveyors to mark a section corner, and which had been in practically the same place for 28 years. The county surveyor testified that the field notes describe a limestone 17 by 4 inches in size. (The dimensions actually given by the field notes are 17x10x4.) He also described the stone in question as being soft sandstone, about 17½ inches by 16 by 6. The discrepancy as to the size of the stone is more difficult of reconciliation than that relating to its character. But in any event the evidence presented a fair question of fact for the trial court, and its decision must be regarded as final. Recognition and acquiescence, as well as the monuments set by the government surveyors, may be sufficient to prevail over the field notes of the original survey. *Tarpenning v. Cannon*, 28 Kan. 665.

The judgment is affirmed. All the Justices concurring.

KENDALL v. BLACK et al. (No. 20389.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

REPLEVIN \S 124(1)—REDELIVERY BOND—CONSTRUCTION.

A redelivery bond in the ordinary form, given by two defendants in a replevin action, having no other signer, is to be construed as binding each to perform any judgment rendered against either or both of them.

[Ed. Note.—For other cases, see *Replevin*, Cent.Dig. \S 487-493, 496; Dec.Dig. \S 124(1).]

Appeal from District Court, Sedgwick County.

Action by L. Kendall against E. L. Black and another. From judgment for plaintiff, W. G. Black appeals. Affirmed.

Dempster O. Potts, of Wichita, for appellant. Haymaker, Roberts & Jochems and W. P. Campbell, all of Wichita, for appellee.

MASON, J. L. Kendall brought replevin against E. L. Black and Willis G. Black. They gave a redelivery bond, signed only by themselves, reciting the taking of the property by the sheriff under an order of delivery, and continuing in these words:

"And whereas, the defendant, E. L. Black and Willis Black, desires a return of the said property to him:

"Now thereupon we, the undersigned, hereby undertake to the plaintiff, L. Kendall, in the sum of eighteen hundred dollars that the defendants, E. L. Black and Willis Black, will deliver said property to the said plaintiff if such delivery be

adjudged, and will pay all costs and damages that may be awarded against him."

A demurrer to the plaintiff's evidence was sustained as to the defendant Willis G. Black, but judgment was rendered against E. L. Black for the return of the property, or for \$500 in case a return could not be had. An execution on this judgment having been returned unsatisfied, Kendall brought an action against Willis G. Black on the bond. A demurrer to the petition was overruled, and a demurrer to the answer was sustained. A judgment followed, from which the defendant appeals, assigning error in the overruling of one demurrer and in the sustaining of the other. The petition alleged that Willis G. Black signed the redelivery bond as surety for E. L. Black. The answer denied this, and alleged that he signed it as a principal, and solely in order to protect his own possession of the property involved. The same question arises upon both specifications of error, namely: Did the redelivery bond bind Willis G. Black to perform such judgment as might be rendered against either or both of the defendants, or did it bind him merely to perform such judgment as might be rendered against himself, either alone or in conjunction with E. L. Black?

We think the trial court was correct in holding that the bond made each defendant liable for the default of the other. It is to be construed in the light of the circumstances in which it was given, so as to effectuate its purpose. 5 Cyc. 753; 4 R. C. L. 56. No special significance is to be attached to the fact that the word "defendant" is used in the singular, and the concluding word of each paragraph quoted is "him" instead of "them." The signers expressly undertook that E. L. Black and Willis Black should deliver the property to the plaintiff if such delivery should be adjudged. If the instrument should be interpreted as binding each signer merely to perform such judgment as might be rendered against himself, the taking of it would have been an empty form, since that obligation rested upon him regardless of the giving of any bond. In a somewhat similar situation it was said in *Waldrop v. Wolff & Happ*, 114 Ga. 610, 614, 40 S. E. 830, 832:

"Bryans and Waldrop need not have united in a common bond, * * * each one having the right and privilege of giving a separate bond, if he had seen proper; but, having chosen to unite in a common bond, they became subject to the general rule above referred to that joint principals in a bond are sureties for each other."

See, also, *Lutt v. Sterrett*, 26 Kan. 561; 1 Brandt Suretyship Guaranty (3d Ed.) \S 48.

The allegation of the answer as to the purpose for which the bond was signed raises no issue. The bond speaks for itself, and its legal effect is a question of law.

The judgment is affirmed. All the justices concurring.

RULL v. RAINEY. (No. 20275.)

(Supreme Court of Kansas. Nov. 11, 1916.)

*(Syllabus by the Court.)***1. LANDLORD AND TENANT — BREACH OF COVENANT—SPECIAL DAMAGES.**

In an action by a tenant against his landlord to recover for breach of a covenant in a farm lease by which the landlord agreed to remove his personal property from the leased premises, *held*:

Special damages which may be the natural and contemplated result of the breach of such a covenant may be recovered where the plaintiff pleads the facts upon which he bases his right to recover such damages.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 116; Dec. Dig. ¶48(2).]

2. LANDLORD AND TENANT — BREACH OF COVENANT — PLEADING — SPECIAL DAMAGES.

A petition which, after setting forth the covenant relied upon, alleged that defendant had wholly neglected and refused to remove certain feed in one of the silos upon the leased premises, whereby plaintiff had been deprived of its use, although he had sufficient feed to fill the same and enhance its value, on account of which plaintiff claimed damages in the sum of \$500, sufficiently alleged the facts on which to base a claim for special damages.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 115; Dec. Dig. ¶48(1).]

3. LANDLORD AND TENANT — ACTIONS — SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to sustain a verdict and judgment for special damages.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 115; Dec. Dig. ¶48(1).]

4. DAMAGES — DUTY TO LESSEN DAMAGES.

Under the facts stated in the opinion, evidence of a threat by the defendant that if plaintiff removed defendant's feed he would make trouble for the plaintiff, absolved plaintiff from any obligation to attempt to lessen his damages by removing or causing to be removed the old feed at his own expense.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 128-131; Dec. Dig. ¶62(4).]

Appeal from District Court, Saline County.

Action by G. W. Rull against J. M. Rainey. From a judgment for plaintiff, defendant appeals. Affirmed.

Ritchie & Spencer, of Salina, for appellant.
Burch & Litowich, of Salina, for appellee.

PORTER, J. The defendant leased the plaintiff a farm of 320 acres in McPherson county, for a period of one year from March 1, 1914, and agreed that he would "remove from said premises any personal property which he may have there." Alleging that the defendant had failed and neglected to remove the ensilage from a silo on the premises, the plaintiff brought this action to recover damages alleged to have been sustained by the defendant's neglect in this respect. The jury returned a verdict awarding damages to the plaintiff in the sum of \$373.75. Upon the verdict judgment was rendered, from which defendant appeals.

[1, 2] 1. It is claimed that the verdict and judgment are based upon an erroneous measure of damages. The defendant relies upon the general rule that on a breach of covenant by the landlord to make repairs, the measure of damages is the difference between the rental value of the premises as they were, and what they would have been had the premises been kept in repair, having in view the purpose for which the premises were to be used. *Miller v. Sullivan*, 77 Kan. 252, 94 Pac. 286, 16 L. R. A. (N. S.) 737, 15 Ann. Cas. 561. The defendant concedes that special damages may be the natural and contemplated result of a breach of a contract to repair or make improvements, but insists that before plaintiff can recover special damages he must plead the facts upon which he intends to rely, and that plaintiff failed to allege the facts which gave him the right to introduce evidence of damages, except under the general rule above referred to. The petition alleged that:

"The defendant has wholly neglected and refused to remove certain feed in one of the silos upon said real estate, whereby the plaintiff has been deprived of its use, and although he had sufficient feed to fill the same and enhance its value, the defendant refused to empty said silo, and threatened that he would sue the plaintiff for damages if plaintiff removed defendant's feed from said silo, on account of which the plaintiff has been damaged in the sum of \$500."

We think the plaintiff sufficiently alleged the facts upon which he based a claim for special damages. The petition alleges defendant's refusal to remove the old feed from the silo, "whereby the plaintiff has been deprived of its use." It is then alleged that plaintiff had sufficient feed to fill the silo and enhance its value, and that defendant's failure to place the silo in such condition that plaintiff could use it caused plaintiff damages in a certain sum.

[3] 2. The plaintiff's evidence as to the special damages was substantially this: The capacity of the silo was 120 tons. The defendant left it two-thirds full of old ensilage. The plaintiff had 110 acres of growing corn and expected to fill the silo to its full capacity. If he had put new ensilage on top of the old it would have spoiled the new. Testimony was offered that plaintiff's corn would yield about 30 bushels to the acre, and would have made 6 or 8 tons of ensilage to the acre. His proof showed the cost of cutting and storing, and there was evidence of the market value of such ensilage in the neighborhood at the time. This was sufficient to sustain the judgment. The defendant could hardly have been surprised by the character of the evidence, since the petition stated the amount of damages sought to be recovered, and notified him that proof would be offered to show that plaintiff had sufficient feed to fill the silo and enhance its value.

3. Over the defendant's objections the plain-

tiff was permitted to testify that he had made an agreement with a third party to feed 200 head of cattle, and had intended to use the ensilage for that purpose. It is insisted that there was nothing in the pleading to apprise defendant that plaintiff would testify to such an agreement, and, further, that it was not contemplated in the lease that plaintiff had any intention to take cattle to winter and feed on the premises. We think there was no error in the admission of this testimony for the purpose of showing that plaintiff not only had corn to fill the silo, but also that he intended to fill it and had a use for the ensilage. He neither asked nor was allowed damages for having to repudiate the agreement to feed the cattle. The evidence was admitted merely as a circumstance to show that the plaintiff had a market there for the ensilage he intended to make by the use of the silo. Nothing in the nature of speculative damages was proved or allowed.

[4] 4. The petition alleged that the reason plaintiff did not himself put the silo in condition for use was that the defendant threatened to sue the plaintiff for damages if plaintiff removed defendant's feed from the silo. The evidence was that defendant said, "Rull had better not undertake to throw the old ensilage out or he would make it a dear job for him," and that plaintiff was so informed. We think this was sufficient notice to plaintiff that he could expect trouble if he removed the old feed. We do not regard the slight variance between the proof and the allegations as material. Evidently the plaintiff construed the defendant's language as a threat to sue him for damages in case he removed the feed. The defendant was a witness and did not deny that he made the statement, nor did he attempt any explanation of his language. The dog in the manger would neither eat hay nor allow the horse to eat it. The defendant would neither remove the old feed from the silo, as he had stipulated to do, nor would he permit the plaintiff to remove it. Defendant insists that the feed in the silo was decayed and rotten; and, further, that plaintiff might have removed it at a slight cost. The defendant testified that it was placed in the silo in October, 1912; further that, when feed is placed in a silo, a mould or seal forms on the top, affording protection from the air and preserving the feed. The evidence does not support the contention that the feed in the silo belonging to the defendant was decayed and of no value. Besides defendant's threat to make trouble for plaintiff, if the latter removed it, absolved plaintiff from the duty to attempt to lessen his damages by clearing out the silo at his own expense, so that the rule that, "where one has been injured by the fault of another, he will not be permitted to recover damages which he might have averted by reasonable diligence" (Atkinson

v. Kirkpatrick, 90 Kan. 515, 135 Pac. 579) has no application to the circumstances here.

The judgment is affirmed. All the Justices concurring.

MENKE v. HAUBER. (No. 20874.)

(Supreme Court of Kansas. Nov. 11, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \S 361—WORKMEN'S COMPENSATION ACTS—"FACTORY."

Premises wherein no mechanical power is used, and wherein workmen are employed in making and repairing barrels, each workman using only his own tools, consisting of an adz and driver, or hammer and nails, is not a "factory" within the meaning of section 9, c. 218, Laws 1911, as amended by chapter 216, Laws 1913, known as the Workmen's Compensation Law, which defines "factory" as "any premises wherein power is used in manufacturing, making, altering, adapting," etc., articles for the purpose of trade or gain.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. \S 361.

For other definitions, see Words and Phrases, First and Second Series, Factory.]

(Additional Syllabus by Editorial Staff.)

2. MASTER AND SERVANT \S 361—WORKMEN'S COMPENSATION LAWS—"POWER."

The term "power," as used in Laws 1911, c. 218, \S 9(b), defining a "factory to be any premises wherein power is used for manufacturing," etc., does not include hand power, but has reference only to mechanical power, developed by machinery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. \S 361.

For other definitions, see Words and Phrases, First and Second Series, Power.]

Appeal from District Court, Wyandotte County.

Action by Henry A. Menke against Frank A. Hauber, doing business as the Kansas City Secondhand Barrel Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Sherman & Landon, of Kansas City, Mo., and McAnany & Alden, of Kansas City, Kan., for appellant. J. K. Cubbison, of Kansas City, Kan., for appellee.

PORTER, J. The plaintiff was injured while in the employ of the defendant, who was engaged in business as the Kansas City Secondhand Barrel Company. At that time the defendant had in his employ from 10 to 20 men who were engaged in the work of making and repairing barrels. No mechanical power was used in the plant. Each workman used his own tools, consisting of an adz and driver, or hammer and nails. Plaintiff's injury was caused by a barrel falling upon him. The barrels were in piles of four, one on top of the other, and the top one fell over, in some manner, and struck the plaintiff. The action was brought to recover compensation under the Workmen's Compensation Law. There was a judgment in favor of the plaintiff in the sum of \$2,088.

The sole contention of the defendant at the trial was that his business was not subject to the provisions of the Compensation Law, and the only question raised by the appeal is whether an enterprise such as defendant carried on in making and repairing barrels by hand, where no power or machinery is used, comes within the provisions of the Compensation Law. The title of the act known as the Compensation Law is:

"An act to provide compensation for workmen injured in certain hazardous industries."

Section 1, so far as applicable here, reads:

"If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act." Laws 1911, c. 218.

The title of the act shows that it is not a general law, but was to apply to certain hazardous industries. Section 1 of the act likewise indicates that the act was intended to apply only to certain employments deemed to be especially dangerous. Section 6 (as amended by Laws 1913, c. 216) reads:

"*Application of the Act.*—This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen. This act shall not apply in any case where the accident occurred before this act takes effect, and all rights which have accrued, by reason of any such accident, at the time of the publication of this act, shall be saved the remedies now existing therefor, and the court shall have the same power as to them as if this act had not been enacted. Agricultural pursuits and employments incident thereto are hereby declared to be nonhazardous and exempt from the provisions of this act."

The act was passed, as every one knows, because there was a demand for it based upon the conviction that in certain inherently dangerous employments the common-law remedies afforded an employé for injuries were inadequate.

"In the enactment of the compensation law the Legislature recognized that the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific, and unjust, and therefore a substitute was provided by which a more equitable adjustment of such loss could be made under a system which was intended largely to eliminate controversies and litigation and place the burden of accidental injuries incident to such employments upon the industries themselves, or rather upon the consumers of the products of such industries." *McRoberts v. National Zinc Co.*, 93 Kan. 366, 367, 144 Pac. 247, 248.

[1] It is quite obvious that at the place where the plaintiff was employed when he received his injury there was no extrahazardous or dangerous situation which of itself would call for an application of the compensation law. The injuries to which he was subject by his employment were those likely to be encountered by a workman employed in any place where boxes are piled one above another, as in a shoe store, grocery or dry goods store, storage house, or in a transfer business. If there were room for doubt about the question, it is settled by section 9 of the act, in which the Legislature defines a factory in these words:

"(b) 'Factory' means any premises wherein power is used in manufacturing, making, altering, adapting, ornamenting, finishing, repairing or renovating any article or articles for the purpose of trade or gain or of the business carried on therein, including expressly any brickyard, meat packing house, foundry, smelter, oil refinery, lime burning plant, steam heating plant, electric lighting plant, electric power plant and water power plant, powder plant, blast furnace, paper mill, printing plant, flour mill, glass factory, cement plant, artificial gas plant, machine or repair shop, salt plant, and chemical manufacturing plant."

[2] We think it is clear that by the word "power" the Legislature did not intend to include hand power, but had reference to mechanical power. The plaintiff makes the contention that, before the court can so determine, it must indulge in legislation. We do not think so. It is only necessary to use ordinary common sense in order to arrive at the intent of the Legislature. The context of the act shows that the word "power" must necessarily have reference to energy developed by machinery. If hand power were intended to be included the Legislature would have omitted the use of the word "power" entirely, and would have merely declared that "factory" means any premises used in "manufacturing, making, altering," etc. Besides, in this section the Legislature specifically includes the following industries:

"Any brickyard, meat packing house, foundry, smelter, oil refinery, lime burning plant, steam heating plant, electric lighting plant, electric power plant, and water power plant, powder plant, blast furnace, paper mill, printing plant, flour mill, glass factory, cement plant, artificial gas plant, machine or repair shop, salt plant, and chemical manufacturing plant."

We all know that every one of these industries uses in some manner mechanical power, or there are in operation dangerous machines such as saws, moving belts, and revolving cylinders, or there are present other conditions inherently dangerous to the life and limb of the workman.

The case of *De la Gardelle v. Hampton et al.*, 167 App. Div. 617, 153 N. Y. Supp. 162, cited in the defendant's brief, is somewhat analogous to the present case. There a person who was employed as a butcher at a hotel was fatally injured by the slipping of a knife with which he was boning a leg of mutton. A claim for compensation was

The deed to Hudson described the parcel of land conveyed in terms of the government survey, concluding thus:

"Excepting and reserving therefrom the right, title, interest, and estate therein of the said Roy Cribb, Ida Cribb, and Arthur Cribb."

This deed was recorded in November, 1885.

The plaintiffs include Roy Cribb, Ira Cribb, who is the father of Arthur Cribb, who died single, the husband and minor children of Ida, who is likewise dead, and the guardian of these minors. The plaintiffs' action was for possession as tenants in common with the defendant, for an accounting of rents and profits, and for partition.

Defendant's answer pleaded:

"Defendant further admits that some kind of deed was executed in his favor about 29 years ago by parties claiming to own the land, for which he paid for at the time of the execution of said deed, but defendant says he has not been able to find said deed since the filing of petition by plaintiff, and is therefore unable at this time to state the terms of said deed.

"Second. For a further answer to plaintiff's petition defendant says that he has been in the full, open, notorious, peaceable, continuous, and undisputed possession of each and every part thereof for more than 28 years last past, and that during all of said time he has made claim of full title and ownership of said land, openly and adversely to all others, and now claims to own said land, not only by deed, but by adverse possession; that during all of that time he has paid the taxes on said land, has had the same inclosed by fence, and has in no way been disturbed in his possession."

Certain special questions were answered by the jury, and the judgment decreed partition—

"and that there be set off to said parties their special interest therein as follows: To T. J. Hudson a $11/12$ interest therein; to Roy Cribb a $1/32$ interest therein; to Ira C. Cribb a $1/32$ interest therein; to Samuel C. Bailey a $1/72$ interest therein; to Edwin C. Bailey a $1/144$ interest therein; to Mabel R. Bailey a $1/144$ interest therein. * * * And if decided that such partition cannot be so made without manifest injury thereto, that said premises be appraised and sold, etc., * * * an attorney fee of \$50 to plaintiffs' attorneys, * * * rents and profits * * * for the year 1914 in the sum of \$100. The balance of said proceeds shall be paid to the respective parties according to their respective interest as above set forth."

The defendant appeals, and the principal errors assigned will be discussed.

[1, 2] 1. The defendant filed a motion to require the plaintiffs to make their petition more definite and certain in the following particulars:

"* * * (7) To require the plaintiffs to separately state and number his several causes of action. * * *"

This motion was overruled. Such ruling was within the court's discretion. Civ. Code, § 122 (Gen. St. 1909, § 5715). The appellant does not disclose, and it cannot be discerned, how this ruling prejudiced him. Civ. Code, § 581 (section 6176); *Hamilton v. Railway Co.*, 95 Kan. 353, 359, 148 Pac. 648. Virtually the plaintiffs' case constituted but one cause of action—partition. As to rents and profits none were awarded except for the then cur-

rent year, and the small fraction thereof accruing to plaintiffs was only a trifling incident in the case.

This motion to make more definite likewise sought to have the plaintiffs set out certain dates, ages, etc., such as the date of the death of Alice Cribb. The date of her death was of no consequence. Neither was her age; nor were the ages of her children. Defendant's deed told him they were minors; so did the petition. The age of Ira, the father of Arthur, who died in 1892, was immaterial; nor was it important whether a guardian was appointed for Ida's minor children at her death or not. A guardian for them was appointed some time, the State Bank of Evanston, Ill., and it was one of the plaintiffs in this case. Civ. Code, § 110 (section 5703).

[3] 2. Defendant assigns error because a deed dated April 3, 1900, from the claimants of the outstanding title under Alice (Edwards) Cribb was introduced in evidence as late as 1900 Hudson recognized their interests as tenants in common. Ira Cribb testified that he had offered to sell plaintiff's interest to Hudson for \$100, and that Hudson had agreed to buy at that price, and the deed was sent to the Wilson County Bank. While it does not appear that Hudson ever took up this deed, his letters written to Ira Cribb in 1901, 1902, and 1903 contained statements tending to corroborate Cribb's testimony. They read:

"June 11th, 1901.

"* * * And if farm matters turn out as prospects now indicate, I will be in shape to take up the deed to your satisfaction this fall."

"Feb'y. 24th, '02.

"* * * I contemplate selling most of my personal property about the first of May, and if I do so will take up deed."

"April 3, 1903.

"* * * I told you when here, however, that rather than have a claim hanging over me, that when I got around to it I would send one hundred dollars for the child's part which you claim I have no title to. There was no agreement on my part with you that I was indebted to any one, and I am neither under moral or legal obligations to take up and pay for the deed you sent. * * *

"Should I get ahead so that I have one hundred dollars which I am not compelled to use immediately, and I hope to be in that condition soon, I will take up the deed, but do not agree to do it now or at any time."

The findings of fact conclude this phase of the case:

"Q. No. 8. Did T. J. Hudson, the defendant, go into possession of * * * the lands in controversy on or about November 2, 1885? A. Yes. * * *

"Q. No. 1. Did the defendant T. J. Hudson recognize the interest of plaintiffs in said lands prior to April 3, 1900, and agree to pay them \$100? A. Yes.

"Q. No. 2. Did the plaintiffs send the deed for their interest in said lands to the Wilson County Bank for said defendant? A. Yes.

"Q. No. 3. Did the said defendant continue to recognize the interest of said plaintiffs in said lands until April 3, 1903? A. Yes."

tion alleged that no written notice of the injuries had been given, but that defendant had actual notice thereof a few minutes after the injury was received, and therefore was not prejudiced by plaintiff's failure to give notice. The defendant objected to the introduction of any evidence, and that was overruled. The jury returned a verdict in plaintiff's favor for \$1,257. Judgment was entered upon the verdict, and defendant appeals.

The plaintiff was injured on the afternoon of the same day he began working for defendant. He was to receive \$2 per day for 10 hours' work. He was engaged in repairing switches in an overhead tram or cage which hung suspended from a track. A switch immediately behind the cage was left open, and as the cage started back one end dropped down, and plaintiff fell a distance of about 14 feet, striking on a railroad track. He claimed that an eight-pound sledge hammer fell from the cage and struck him on the breast. He was given first-aid treatment by Dr. Johnson, defendant's house surgeon at the plant. Several weeks after his injury he went to see the superintendent of the defendant, and asked what was going to be done about his injury. The superintendent sent him to see Dr. Johnson, who had charge of such matters. The doctor explained the Workmen's Compensation Law to him, told him it did not provide payment for his injury, but that defendant would compensate him according to its terms, and meanwhile if he would go back to work as soon as he was able, he would be given employment at the same wages. He also explained to plaintiff that there was \$36 due him at the rate of \$6 per week. The plaintiff said he thought he was entitled to more than \$6 per week, and refused to take compensation under the act because he thought the law did not allow enough. He never went back to the Armour plant after that.

The first and principal complaint of the defendant is that plaintiff should not be entitled to recovery because he refused to accept payment or settlement under the Compensation Law, but demanded more than compensation for incapacity to labor. It is said that the defendant was anxious and willing to abide by the Compensation Act, and the plaintiff refused to be bound by it; that he not only refused to accept the offer to pay him what the law allowed, but brought an action to recover damages for injuries sustained by the alleged negligence of the defendant, wholly ignoring the Compensation Act, which defines the rights and obligations of both parties. In this connection defendant insists that it was carrying out in good faith its established policy to abide by the provisions of the Compensation Act, and directs our attention to the records of the state showing that it was among the first and largest employer of labor to come under the provisions of the act, and that it has never sought by litigation to defeat an employe

claiming under the law. It is insisted that the case would not have been brought if the plaintiff had been willing to abide by the law and accept compensation according to its terms.

[1] We fully agree with the contention of the defendant that one of the purposes of the Compensation Act was to do away with litigation between employer and employe in adjusting compensation for injuries received in the course of employment, and that the law fixes the scale of compensation for permanent as well as partial disability, leaving the only question to be determined, the extent of incapacity resulting from the injury. The wise provisions of the law have in many cases not been carried out, and the responsibility for the failure of the law in this respect is attributable sometimes to an unwillingness of the employer to deal fairly with the employe; sometimes to the tendency of an injured employe to exaggerate the extent to which his earning capacity has been decreased, and unfortunately it often results from the activity of persons who seek to enhance the amount of compensation and share in it. There is, however, often reasonable ground for a dispute between the employer and the employe as to the extent of his injuries and the effect it will have on his earning capacity. We do not believe that on the facts in this case the plaintiff should be barred of his right to maintain his action because of his refusal to accept the compensation which Dr. Johnson told him the company was ready to pay. It is very clear from Dr. Johnson's own testimony that he believed at the time he was talking to the plaintiff that the latter was not injured to such an extent that his earning capacity would be permanently affected. The plaintiff believed that his injuries were more serious than the doctor thought they were, and that he would be permanently incapacitated to a partial extent. Dr. Johnson did not offer to pay him anything for permanent disability. His offer was to pay plaintiff half of his wages, or \$6 per week, until he was able to come back to work, which the doctor believed would be in a short time. The plaintiff had a right to insist upon a settlement that would determine whether his disability was permanent; that is, how long it would probably continue, and the amount, if any, he was entitled to recover for such partial incapacity. Where the employer takes the position that there is no permanent disability, partial or otherwise, we see no reason why the employe may not maintain an action to have these questions determined, and at the same time refuse to accept payment offered for temporary disability. Perhaps plaintiff should have accepted the \$36, but he was not obliged to do so. If he had accepted it, and the disagreement as to the duration of his disability remained unsettled, his acceptance would not have deprived him of the right to have the other question litigated. The duration of the

incapacity of the injured employé is one of the important facts to be determined, and must be settled "as other questions of fact" are determined. *Gorrell v. Battelle*, 93 Kan. 370, 376, 144 Pac. 244. The Compensation Act expressly provides that a workman's right to compensation may, in default of agreement or arbitration, be enforced by action in any court of competent jurisdiction. *Ackerson v. Zinc Co.*, 96 Kan. 781, 153 Pac. 530; *Halverhout v. Milling Co.*, 97 Kan. 484, 155 Pac. 916. In this case there was a default of agreement or arbitration, and the reason for it is explained by the fact that Dr. Johnson, to whom the plaintiff was referred, believed he was not partially injured to an extent that would be permanent, but, on the other hand, that in a short time he would be able to return to work fully recovered. The plaintiff believed the contrary. In *Ackerson v. Zinc Co.*, supra, and in *Halverhout v. Milling Co.*, supra, it was held that an attempt and failure by plaintiff to settle by arbitration is not a condition precedent to maintain an action. It necessarily follows that under the circumstances of this case plaintiff's refusal to accept the offer of Dr. Johnson should not bar the action.

[2] The motions directed against the amended petition were well founded, and the court might have required plaintiff to recast the entire pleading. The averments as to negligence, mental pain, and anguish, medical expenses, and attorneys' fees had no appropriate place in the petition. *McRoberts v. Zinc Co.*, 93 Kan. 384, 144 Pac. 247. The case, however, was tried out as a compensation case; no evidence was admitted in proof of the extraneous matters, and the court charged the jury not to consider them.

[3, 4] Section 22 of the Compensation Law, as amended by Laws 1913, c. 216, § 6, requires that an injured employé shall present a claim for compensation within three months of the day he was injured, and expressly declares that the failure so to do shall be a bar. The evidence shows a full compliance with this provision. The claim is not required to be in writing. An oral demand is sufficient under the language of the statute. *Galley v. Manufacturing Co.*, 98 Kan. 53, 157 Pac. 431; *Knoll v. City of Salina*, 98 Kan. 428, 157 Pac. 1167. The plaintiff went to the superintendent of defendant and asked what was to be done about paying him. He was referred to Dr. Johnson, to whom he presented a claim. The difficulty arises over the failure to allege in his petition that he had presented a claim. Since that was a condition precedent he should have pleaded compliance. It would not do, however, to reverse the judgment and order a new trial merely to permit the petition to be amended so as to allege presentation of the claim. The claim was presented and defendant had every opportunity to investigate the nature of plaintiff's incapacity. We conclude that defendant was not prejudiced by the failure to sus-

tain a demurrer to the petition, and the objection to the testimony.

[5] The petition fails to disclose any facts upon which the average weekly earnings of the plaintiff could be computed. The statute provides that the average earnings are to be computed on the average rate per week which the workman was being remunerated for the 52 weeks prior to the accident, and where this becomes impracticable, by reason of the shortness of the time during which the workman has been employed, then the compensation is to be based on the average weekly amount, which, during the 12 months previous, was earned by a person in the same grade or class of employment in the district where plaintiff was employed. Plaintiff had been at work but one day when he was injured, and the petition should have alleged what were the average weekly earnings of persons in the same grade or class of employment during the previous year. All the petition stated as to his earnings was:

"That said plaintiff was, on or about the 4th day of June, 1913, in the employ of said defendant, and had been in such employ for some time prior thereto without interruption and received as compensation for his said services the sum of twelve (\$12.00) dollars per week in said employment."

This was perhaps sufficient to get past a demurrer; there was no motion to make more definite and certain, and the omission to plead the facts properly could not have prejudiced the rights of the defendant. We think the testimony of defendant's foreman as to the customary prices for labor in that kind of employment for a year or more, which he said ranged from \$1.75 to \$2 a day in the same line or class of employment, was sufficient evidence of the average wages paid in the same grade and class of employment for the previous year.

[6] There was no error in sustaining an objection to the question asked of Dr. Gray. He testified to substantially the same facts embraced in the question and the offer of proof. Over defendant's objection Dr. Faust was permitted to testify that a workman used to muscular labor would have his usefulness impaired to a certain extent by the condition he found in the bones of the plaintiff, and that there would be a limitation of action in the movement of the arms, especially in gripping in certain positions. It is complained that this was trenching on the functions of the jury as well as speculation on the part of the doctor. *Coblentz v. Puttifer*, 87 Kan. 719, 125 Pac. 30, 12 L. R. A. (N. S.) 298, is cited in support of the contention. In that case medical experts were permitted to testify from conditions embraced in a hypothetical question, that a person was of unsound mind, which was held proper; but it was ruled not competent for them to give an opinion as to whether such person had sufficient mental capacity to make a certain deed of conveyance. All that the witness in the present case testified to was that certain

physical conditions would tend to impair a workman's usefulness to a certain extent. The witness did not attempt to state his opinion as to the extent of such partial disability. We see no reason why expert evidence of physicians may not be offered in proof of the fact that partial disability exists.

At the defendant's request the court instructed the jury to find for defendant if they believed from the evidence that defendant tendered plaintiff compensation as fixed by the statute, "for the entire period for which he was incapacitated, totally or partially," and that plaintiff refused to accept. It is said that the jury disregarded this instruction, and that it was based upon uncontradicted evidence. The contention is, that the court did not intend to charge the jury that the tender should cover future incapacity, but only the period of incapacity up to the time of the tender. If such was the intention of the court, the instruction was wrong. As we have seen, plaintiff had a right to refuse the tender, if there was a disagreement between him and the defendant as to his future incapacity. We think the court and the jury understood the instruction to refer to a tender of compensation for the entire period during which he was, in fact, incapacitated, either totally or partially.

There were some verbal inaccuracies in the language of the instructions as to the method by which the jury should determine the amount of compensation, but as a whole the instructions followed substantially the provisions of the Compensation Law. Besides, the jury were not misled, since it appears they allowed the compensation at the lowest rate under the statute.

The judgment is affirmed. All the Justices concurring.

WHITE v. CITY OF BONNER SPRINGS. (No. 20608.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS §1034—ACTIONS—ISSUE AND PROOF.

During the trial leave was given to amend the petition to show that no administrator had been appointed, and this rendered competent certain evidence objected to.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1850-1854; Dec. Dig. §1034.]

2. VENUE §24—EVIDENCE—SUFFICIENCY.

Under all the circumstances the county of the plaintiff's residence was sufficiently shown.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 29; Dec. Dig. §24.]

3. SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—CIRCUMSTANCES OF INJURY.

The testimony as to contributory negligence, the location of the injury, the condition of the street, and the cause of death, was sufficient to go to the jury and to warrant the verdict.

4. MUNICIPAL CORPORATIONS §1034, 1040—ACTIONS—COSTS—PRESENTATION OF CLAIM.

In an action for unliquidated damages against a city of the third class, costs cannot be recovered unless previously presented as provided by section 1569 of the General Statutes of 1909, and unless the petition contains an averment of such presentation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2203-2205, 2213, 2214; Dec. Dig. §1034, 1040.]

Appeal from District Court, Wyandotte County.

Action by James White against the City of Bonner Springs. From a judgment for plaintiff, defendant appeals. Affirmed. From an order assessing costs, plaintiff appeals. Modified.

J. K. Cubbison, of Kansas City, for plaintiff. E. L. Eaton, of Bonner Springs, for defendant.

WEST, J. [1] The plaintiff recovered against the city a judgment for damages for the death of his wife resulting from an injury caused by a defective street. The city appeals and complains of various rulings touching the petition and the evidence thereunder. There was a failure to state that the deceased at the time of her death was a nonresident, or that no personal representative had been appointed; but this was corrected by amendment which appears to have caused no material injury to the defendant. This made competent the testimony of the probate judge that no administrator had been appointed.

[2] It is contended that a statement that the plaintiff lived two miles southwest of Bonner Springs had the effect of taking the residence beyond the boundaries of Wyandotte county. But consulting the map, as we have a right to do, we take notice therefrom that this location would be in Wyandotte county, taking the original townsite as a point of departure. It is not to be presumed that the witness spoke with scientific accuracy, and two miles in a southwesterly direction from a large portion of the city of Bonner Springs as it existed at the time of the trial would be in Leavenworth county. The point does not seem to have been pressed upon the attention of the trial court, and in view of the permission to amend and the evidence touching the appointment of an administrator in Wyandotte county, the proof must be held sufficient on the question of venue.

[3] Some fault is found with the proof touching the location of the injury and the condition of the street, but the testimony was such that the jury were warranted in the conclusion reached in respect to these matters. The same must be said touching the question of contributory negligence.

It is insisted that the testimony failed to show that the death of the plaintiff's wife was the result of the injury, but the testi-

mony on this point, while not as clear and strong as in some cases was sufficient to take the matter to the jury. Finding no material error so far as the defendant is concerned, the principal judgment is affirmed.

[4] Plaintiff appeals from an order of the trial court assessing the costs to him, and contends that a written claim for damages was properly served by leaving it at the office of the city clerk. The petition contained no allegation touching this matter, and the proof was silent thereon, but upon a motion to retax the costs showing was made as indicated.

Section 1559 of the General Statutes of 1909 provides, among other things, that:

"No costs shall ever be recovered against such city in any action brought against it for any unliquidated claim which has not been presented to the city council to be audited, nor upon claims allowed in part, unless the recovery shall be for a greater sum than the amount allowed, with the interest accrued thereon."

It was held under a similar statute in *City of Atchison v. King*, 9 Kan. 550, that costs would not be recovered unless the claim had been presented to the city council for its action, "and where there is no averment in the petition of such presentation, the plaintiff will not be allowed to prove that fact." *Syllabus* 10.

In the opinion it was said:

"It is a general rule that the proof must be justified by the allegations of the pleadings. We do not see any reason why this is an exceptional case; nor are we referred to any authorities. * * * Generally, averments and testimony that will authorize a recovery of damages will authorize a recovery of costs; but where other facts are necessary to carry costs, such facts must be alleged as well as proven. Whether defendant was liable for costs was an issuable fact, which the city had a right to contest, and was entitled to notice that such fact would be relied on; and the only appropriate place for such a notice was in the petition. Without such an averment the evidence was improperly admitted. The language of the section referred to is, that no costs shall be recovered against such city, etc., unless the claim has been presented to the city council; under this law, and under the facts as presented, there can be no costs recovered by the plaintiff against the city; and as there is no provision that the city shall recover costs in such cases, the judgment should be for the amount of the verdict for the plaintiff, and no judgment for costs in favor of either party; and the case is remanded, with directions to modify the judgment in accordance with this opinion." 9 Kan. 561.

The foregoing decision was inferentially followed in *City of Abilene v. Hendricks*, 36 Kan. 196, 201, 13 Pac. 121, referred to and substantially followed in *City of Enterprise v. Fowler*, 38 Kan. 415, 16 Pac. 703, and expressly followed in *City of Ft. Scott v. Elliott*, 68 Kan. 805, 74 Pac. 609. Except as to cities of the first class under commission form of government (Gen. Stat. 1909, § 1218), the statutes as to the cities of the three classes are substantially the same (Gen. Stat. 1909, §§ 1053, 1414, 1559). In *Beard v.*

Kansas City, 96 Kan. 102, 104, 150 Pac. 540, 541, after citing the statute, it was said:

"No attempt was made to comply with this statute, and for that reason no judgment could properly be rendered against the city for costs. *City of Atchison v. King*, 9 Kan. 550; *Ft. Scott v. Elliott*, 68 Kan. 805, 74 Pac. 609."

The analogy suggested by counsel for plaintiff of the statutes concerning the recovery of costs in insurance cases is not sufficient to impair the rule thus settled by the authorities cited.

The judgment for costs therefore must be modified as indicated in *City of Atchison v. King*. All the Justices concurring.

STATE v. WILL. (No. 20851.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(*Syllabus by the Court.*)

1. SCHOOLS AND SCHOOL DISTRICTS ~~§~~161—ATTENDANCE BY PUPIL—"TRUANT."

A child who attends a private, denominational, or parochial school is not a "truant."

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 333; Dec. Dig. ~~§~~161.]

2. SCHOOLS AND SCHOOL DISTRICTS ~~§~~4 —ATTENDANCE BY PUPILS.

The Legislature has not prescribed the courses of study in private, denominational, or parochial schools, nor concerned itself with such schools further than to prescribe that they must be taught by competent instructors.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 5; Dec. Dig. ~~§~~4.]

3. SCHOOLS AND SCHOOL DISTRICTS ~~§~~160 —ATTENDANCE BY PUPILS.

A parent who takes his child out of the public school and sends it regularly to a private, denominational, or parochial school "for such period as said school is in session" cannot be subjected to the penalties of the truancy law (Gen. St. 1909, § 7736 et seq.).

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 332; Dec. Dig. ~~§~~160.]

Appeal from District Court, Harvey County.

John Will was indicted for a violation of the Truancy Law. From a judgment quashing the indictment, the State appeals. Affirmed.

S. M. Brewster, Atty. Gen., and L. O. Kelley, of Newton, for the State. Branine & Hart, of Newton, for appellee.

DAWSON, J. The district court quashed an information which purported to charge the defendant with a violation of the truancy law. The material facts were all pleaded, and these showed that the defendant was a resident of school district No. 13, in Harvey county; that the annual school meeting had voted to have an eight-months school, beginning in September, 1915; that the defendant was the parent of a child 11 years old; that in April, 1916, while the district school was

in session, the defendant took his child out of the public school—

"and said defendant and parent placed said child, Henry Will, in a private school taught by a competent instructor, which said private school is taught in the German language, which said private school is of but two months' duration, but continuing up to and after the public school in said district No. 13 is dismissed for the year, and which said private school does not teach all of the branches of education and subjects required by law to be taught in a public school, in this, to wit, that said private German school teaches only the following subjects: German reading, German grammar, German spelling, German writing, Bible history, and a small amount of arithmetic; thereby said child, Henry Will, became and was irregular in attendance at school, and thereby he became and was absent from school three or more consecutive days, and thereby he became and was habitually truant from school."

Other recitals in the information need not be quoted.

[1-3] The state appeals, specifying error in sustaining the defendant's motion to quash. The appellant's brief states the question thus:

"The contention of the state is that a private school, in order to be recognized as a private school and come within the contemplation of the statute, must be equal in all respects to a public school, and must comply with all the statutory requirements prescribed for said public schools; that the intent of the Legislature in creating public schools and authorizing private, parochial, or denominational schools was to make education compulsory to the degree specified by law. If this contention is not correct, or substantially correct, then, perhaps, the motion to quash is good, and the trial court, perhaps, should be sustained; otherwise should be reversed."

Prior to 1903, the Truancy Act provided:

"That every parent, guardian, or other person in the state of Kansas, having control of any child or children between the ages of eight and fourteen years, shall be required to send such child or children to a public school or private school, taught by a competent instructor, for a period of at least twelve weeks in each year, six weeks of which time shall be consecutive, unless such child or children are excused from such attendance by the board of the school district, or the board of education of the city in which such parent, guardian or person having control resides, upon its being shown to their satisfaction that such parent or guardian was not able, by reason of poverty, to clothe such child properly, or that such child's bodily or mental condition has been such as to prevent his attendance at school or application to study for the period required, or that such child or children are taught at home in such branches as are usually taught in the public schools, subject to the same examination as other pupils of the district or city in which the child resides, or that he has already acquired the ordinary branches required by law, or that there is no school taught within two miles by the nearest traveled road." Gen. Stat. 1901, § 6420.

The present statute reads:

"That every parent, guardian or other person in the state of Kansas having control or charge of any child or children between the ages of eight and fifteen years, inclusive, shall be required to send such child or children to a public school, or a private, denominational or parochial school taught by a competent instructor, each school year, for such period as said school is in

session: Provided, that any child of the age of fourteen years or more who is able to read and write the English language, and who is actively and regularly employed for his own support or for the support of those dependent upon him, shall not be required to attend the aforesaid schools for a longer period or term than eight consecutive weeks in any one year: Provided, that any and all children that have received a certificate of graduation from the common schools of any county or certificate of admission to a high school in any city of the state of Kansas shall be exempt from the provisions of this act: Provided, that the children who are physically or mentally incapacitated for the work of common schools are exempt from the provisions of this act; but the school authorities shall have the right, and they are hereby authorized, when such exemption under the provision of this act is claimed by any parent, guardian, or other person in the control or charge of such child or children, to cause an examination of such child or children by a physician or physicians employed for such purpose by such authorities, and if such physician or physicians hold that such child or children are capable of doing the work in the common schools, then such child or children shall not be exempt from the provisions of this act." Gen. Stat. 1909, § 7736.

It will be noted that the earlier act, in specific terms, provided that the children excused from public school attendance, if taught at home, should be instructed "in such branches as are usually taught in the public schools, subject to the same examination as other pupils of the district or city in which the child resides," etc.

In the later act, which obviously was for the purpose of improving the truancy law and providing means for its enforcement through truancy officers, the significant language of the earlier act concerning the course of study imposed on home-taught pupils is left out. There must have been a reason for that. The act of 1903 (Gen. Stat. 1909, § 7736 et seq.) enlarges as to the kind of schools which a child may attend to excuse him from public school attendance. They may be either "private, denominational or parochial," but nothing is said as to the course of study in such schools. These schools must be taught "by a competent instructor, each school year, for such period as said school is in session." May we not assume that the Legislature knew what it was about when it provided in the earlier act that if the child were taught at home, it must be in the common school branches, and that the child should be subject to examination as other district and city pupils might be. This provision would serve a useful and almost necessary purpose to prevent a mere pretense of home instruction to avoid the consequences of the truancy law. In the later act, it will be observed that home instruction is no longer an excuse for nonattendance in school, but the number and kind of schools to which he may be sent are enlarged. They may be either private, denominational, or parochial. The Legislature may well have believed that if such schools were taught by a competent instructor, the sufficiency and scope of the

course of study would necessarily follow to fully qualify the child for his future duties as a citizen. The argument for the appellant, which we concede is supported by some most respectable authorities, virtually asks the court to rewrite into the present statute language which the Legislature struck out when it revised the law in 1903 (Laws 1903, c. 423). This we cannot do.

If the conclusion here reached discloses a defect in the law which is of serious consequence to the educational work of the state, the remedy lies with the Legislature. Presumably this defendant's child attended the public school from September until April while the public school was in session. When the private school began its term he attended it instead of the public school. In such case the child was not a truant. So long as his parent kept him regularly in attendance in the one school or the other, for such term as the school was in session, the truancy act, as it now reads, is satisfied. Since the Legislature has refrained from exercising control over the courses of study in these private, denominational, or parochial schools further than to require them to be taught by competent instructors, it is too much to ask the state's prosecuting officers or its courts to meddle with them.

The judgment is affirmed. All the Justices concurring.

GARVEY v. BROWN et al. (No. 20402.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

PARDON ~~§ 4~~—PAROLE—INDETERMINATE SENTENCE—DISCRETION OF BOARD.

Under the Indeterminate Sentence Act (Gen. St. 1909, §§ 6837-6845), the granting or withholding of a parole is a matter resting within the sound official discretion of the prison board, subject to the limitations expressed in the statute.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. ~~§ 4~~.]

Appeal from District Court, Leavenworth County.

Application by Fred Garvey for mandamus to W. L. Brown and others. Judgment quashing the writ, and relator appeals. Affirmed.

Lee Bond, of Leavenworth, for appellant. S. M. Brewster, Atty. Gen., and Preston Coleman, of Topeka, for appellees.

BURCH, J. The action was one of mandamus to compel the prison board to grant the plaintiff a parole. A motion to quash the alternative writ was sustained, and the plaintiff appeals. The question is whether or not it becomes the mandatory duty of the prison board to grant a parole if the statutory conditions have been complied with.

The plaintiff was convicted of the crime of assault with intent to kill, and was sentenced

to imprisonment for a period of from one to ten years. The substantive part of the petition follows:

"Plaintiff further alleges that during the time he had been so confined in the said penitentiary he has obeyed all rules and regulations of said institution, and that no charge of misconduct has been brought against him, and that he had never been confined in any penitentiary or convicted of any felony prior to the conviction herein mentioned; that he has served the minimum time fixed by law for the crime for which he was convicted, and that he has duly made application to the above-named defendants as a board of parole, to be paroled from said institution, and that he has produced to said board satisfactory evidence that arrangements have been made for his honorable and useful employment while upon parole in some suitable occupation, and that a proper and suitable home, free from criminal influence, has been provided for him upon his release from said penitentiary on parole, but that notwithstanding said facts the said prison board have arbitrarily and illegally refused to grant the same."

The Indeterminate Sentence Law (Gen. Stat. 1909, §§ 6837-6845) looks to the rehabilitation of persons imprisoned in the state penitentiary as law-abiding and useful members of society. To this end, the judge before whom a prisoner was tried and the county attorney are required to furnish information relating to his disposition, character, associates, surroundings, and career, and other matters tending to throw light on whether or not he is capable of again becoming a good citizen. Section 6839. The prison board is required to adopt disciplinary regulations which will conduce to the welfare of prisoners, prevent them from returning to criminal courses, secure their reformation, and make them self-sustaining. A complete physical, mental, and moral diagnosis of each prisoner is made when he enters the penitentiary, and the result is entered on a register kept for that purpose. On this register subsequent minutes are made from time to time, showing the method of treatment employed, improvement or deterioration in character, alterations affecting situation and standing, and other pertinent facts. Section 6840.

The statutory grant of authority to parole reads as follows:

The said prison board shall have power to establish rules and regulations under which prisoners within the penitentiary may be allowed to go upon parole outside the penitentiary building and inclosure, but to remain while on parole in the legal custody and under the control of the prison board, and subject at any time to be taken back within the inclosure of said penitentiary: Provided, that no parole shall be granted in any case until the minimum term fixed by law for the offense has expired. And full power to enforce such rules and regulations and to retake and reimprison any inmate so upon parole is hereby conferred upon the warden, whose order, certified by the clerk of the prison, with the seal of the penitentiary attached thereto, shall be a sufficient warrant for the officer named in it to authorize such officer to apprehend and return to actual custody any conditionally released or paroled prisoner, and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process: Provided, that no prisoner shall be

released on parole until the said prison board shall have made arrangements, or shall have satisfactory evidence that arrangements have been made, for his honorable and useful employment while upon parole in some suitable occupation, and also for a proper or suitable home, free from criminal influence." Section 6841.

Section 6842 provides that no petition or other form of application for either a parole or for final discharge shall be entertained. Section 6845 provides that all paroles shall be approved by the Governor before they become effective, and that no prisoner shall be eligible to be paroled who has already served two terms in any penitentiary. Section 6842 provides that a prisoner who, in the opinion of the warden, has served six months of his parole acceptably and given evidence of his trustworthiness, shall, if not incompatible with the welfare of society, be certified by the warden to the prison board for final discharge. The prison board considers the case, and decides whether or not final discharge shall be recommended. If made, the recommendation is made to the Governor. If he approve, he commutes the sentence, to take effect at once, or at such time as he may think best. Section 6844 provides for retaking paroled prisoners who have become delinquent.

The plaintiff's contention is that a parole is a reward which may be earned by complying with the statutory conditions. If the reward be thus earned, it cannot be denied so far as the prison board is concerned and he is entitled as a matter of absolute right to have a parole go to the Governor for his approval or disapproval. This contention is based on certain decisions of the Kentucky Court of Appeals interpreting the statute of that state (Acts 1910, c. 16) relating to the parole of convicts: *Wilson v. Commonwealth*, 141 Ky. 341, 132 S. W. 557; *Board of Prison Com'rs v. Smith*, 155 Ky. 425, 159 S. W. 960; *Board of Prison Com'rs v. De Moss*, 157 Ky. 289, 163 S. W. 183.

Section 1 of the Kentucky statute states that the board of penitentiary commissioners shall have power to parole persons confined in the penitentiary, to retake paroled prisoners under named conditions and when in the opinion of the board the welfare of the prisoner or of society demands, and to discharge finally. Section 2 reads in part as follows:

"No person so confined shall be eligible to parole, or entitled to the provisions of this act, until he shall have served the minimum term of imprisonment provided by law for the crime for which he was so committed, except prisoners committed for life, who shall have actually served five years; nor unless he shall have been obedient to the rules and regulations of the institution in which he is confined for at least nine consecutive months next preceding the date of his parole; nor until he shall have secured, or there shall have been secured for him, some respectable employment with some responsible person or concern at a compensation sufficient to render him self-sustaining." Acts 1910, c. 16.

Section 8 relates to final discharge, and contains a provision which reads as follows:

"But nothing in this act shall be construed as

entitling such paroled prisoner to such final discharge, except at the discretion of the said board."

In the decisions referred to, the court made a point of the fact that "discretion" was expressly reserved to the prison board in section 8, but not in section 2. The substantial grounds of the decision were, however, that uplift rather than punishment is the chief purpose of detention, that this purpose may be furthered by offering a reward for good conduct in the form of an enlargement of liberty, and that section 2 guaranteed to the convict his reward for good behavior.

In the case of *Wilson v. Commonwealth*, 141 Ky. 341, 132 S. W. 557, it was said:

"When the act thus provides that no person shall be eligible to parole except on certain conditions, it necessarily means that those who comply with the conditions shall be eligible to parole. The act, therefore, defines who shall be paroled and does not commit to the commissioners arbitrary power, but imposes on them the duty to parole the prisoners whom the act declares eligible to parole, and this duty the board of prison commissioners may be required in a proper state of case to perform. Manifestly the standard fixed by these sections is so unmistakable in meaning and specific in character, as to enable the convict to know what his conduct must be to entitle him to the parole or discharge, and also to enable the board to know what will entitle him to either."

With great respect for the Court of Appeals of the state of Kentucky, this court is constrained to say that it does not feel at liberty to use the method employed in reaching the foregoing conclusions. The provision of section 1 of the Kentucky statute, whereby a paroled prisoner may be rearrested and reconfined when in the opinion of the board the welfare of the prisoner or the welfare of society demands, was ignored in the discussion. While the word "discretion" was not used, as wide a latitude was allowed the board as in section 8; and the difference between discretion to parole a prisoner on one day and discretion to reimprison him on the next day does not seem very substantial. There is no express language in the act stating it to be the duty of the prison board to parole any one, and limitations on the power of the board, whereby the cases of certain prisoners are entirely withheld from consideration, do not, under any familiar rule of interpretation or of logic, constitute a positive mandate to parole others. Doubtless early release from confinement is an inducement to good conduct, but conduct merely submissive to rules of prison discipline does not, of necessity, indicate reformation of character, any more than faithful attendance at church of necessity indicates moral and religious character. Although a person sentenced to a term of from one to ten years may have broken no prison rule, it may be quite incompatible with his own welfare and with the welfare of society to parole him at the end of one year.

Besides what has been said, the scheme of the Kansas statute is quite different from

that of the Kentucky statute. In the Kansas statute, as in the Kentucky statute, there is no express direction to parole anybody, but the instances in which no parole shall be granted are not grouped and categorically stated. They are scattered throughout the act as provisos and independent prohibitions. These provisos and prohibitions are not inserted so that a prisoner may know just what he shall do to earn a parole, because the prison board is given authority to establish rules beyond those prescribed by the Legislature, under which paroles may be granted. Because the prison board is given authority to regulate the granting of paroles in all cases except those expressly reserved by the statute, the reservations were not made to enable the board to know what will entitle a prisoner to a parole. The matter of conformity to rules of prison discipline is not mentioned in the statute as a qualification for parole. A prisoner is not permitted by himself or others to bring up the subject of his parole, by petition or other form of application. After the prison board has concluded to parole, the Governor has authority to consider the case and to approve or disapprove.

The Kansas indeterminate sentence statute was enacted in 1908 (Laws 1908, c. 375) and was among the earlier laws on the subject. The need for a more flexible and beneficial system of penal sanctions was clearly grasped, but a sufficiently extensive fund of definite and classified experience in the administration of such a system had not been accumulated to warrant the Legislature in doing more than adopt the system and settle some of the more obvious details. The extreme rigidity of the old system was one of the very things to be demolished. The success or failure of the new system depended on its administration, and this was committed, except for a few directions and limitations, to the invention, good judgment, and discretion of the prison board, the warden of the penitentiary, and the Governor, all co-operating for the welfare of the delinquents and for the protection and welfare of society.

The court is already committed to the foregoing interpretation of the statute, which it still regards as sound. In the case of *In re Howard*, 72 Kan. 273, 83 Pac. 1032, it was held that under the Indeterminate Sentence Act the extreme penalty is imposed, but provision is made for its mitigation. Concerning the subject of mitigation, the court said:

"There are no provisions, in the law under which the appellant was sentenced, entitling him to any reduction of time for good behavior, as matter of right. There are provisions authorizing the prison board to establish rules and regulations under which prisoners may be allowed to go upon parole after the expiration of the minimum time for which they were sentenced, and by which they may be discharged six

months after being paroled, but these are all matters of favor to be determined by the prison board, the warden, the judge who passed sentence, and the Governor." *State v. Tyree*, 70 Kan. 203, 207, 78 Pac. 525, 3 Ann. Cas. 1020.

The expression "matters of favor" was used in opposition to the expression "matter of right." In the highest and truest sense, parole and discharge under the indeterminate sentence law are not matters of favor at all. The state penitentiary is a great character clinic maintained for the welfare of society, to be secured through the detention, correction, and development of those sentenced to confinement there because of unsocial conduct. Whenever sufficient strength and probity of character are indicated, after the minimum period of detention has elapsed, the prison bounds are enlarged by parole, not as a matter of grace or even of reward, but because the proper degree of moral progress has been achieved, and as the next stage in the treatment administered. When, after six months, such progress has been made that the paroled offender may be trusted, with safety to himself and to society, to govern his own conduct according to his own motives, the purpose of his restraint has been accomplished, and he is discharged. The law, however, does not undertake to determine definitely the time when a parole or a discharge shall be granted, or to enumerate indicia of trustworthiness which shall be sufficient to require parole and discharge. These are subjects committed to the sound official judgment and discretion of those appointed to administer the law.

Such being the meaning of the statute, as the court understands it, the plaintiff's petition stated no cause for the issuance of the alternative writ of mandamus, and the judgment of the district court quashing the writ is affirmed. All the Justices concurring.

BACON v. LEDERBRAND et al.
(No. 20300.)

(Supreme Court of Kansas. July 8, 1916.
Rehearing Denied Oct. 13, 1916.)

(Syllabus by the Court.)

VENDOR AND PURCHASER \S 230(2) — BONA FIDE PURCHASERS — NOTICE — RECITAL IN DEED.

A purchaser of real property, the recorded deed to whose grantor contains the following: "Same to be free and clear of all incumbrance except * * * a second mortgage of seventeen hundred and fifty dollars (\$1,750) due Jan. 1st, 1914, which said second party assumes and agrees to pay"—is not an innocent purchaser against such mortgage, although at the time of the conveyance to him the mortgage is not recorded and he has no actual notice thereof.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 505, 506; Dec. Dig. \S 230(2).]

Appeal from District Court, Hodgeman County.

Action by Mamie Bacon against John W. Lederbrand and others. From a judgment for plaintiff, defendant W. M. Dickson appeals. Affirmed.

Roscoe H. Wilson, of Jetmore (E. R. Otis, of counsel), for appellant. J. B. Larimer, of Topeka, for appellee.

MARSHALL, J. In this action the plaintiff recovered judgment for the foreclosure of a mortgage. W. M. Dickson, one of the defendants, appeals.

July 28, 1913, M. C. Schaeffer, being then the owner of the land in controversy, conveyed it by general warranty deed to A. R. Rhine. This deed contained the following:

"Same to be free and clear of all incumbrance except one first mortgage of twenty-five hundred dollars (\$2,500) and interest at the rate of 6% from Mch. 3rd, 1913, and a second mortgage of seventeen hundred and fifty dollars (\$1,750) due Jan. 1st, 1914 which said second party assumes and agrees to pay. The lease on the above-described land accompanies this transfer."

August 3, 1913, M. C. Schaeffer executed a mortgage on the land in controversy to W. E. Bacon for \$1,750. This mortgage was due January 3, 1914, but was not recorded until February 9, 1914. January 17, 1914, A. R. Rhine conveyed this land by general warranty deed to defendant W. M. Dickson. This deed was recorded January 20, 1914. It contained no mention of any \$1,750 mortgage. There was no evidence that W. M. Dickson had any actual notice of the existence of the \$1,750 mortgage. This mortgage was assigned to the plaintiff, and in this action she seeks to foreclose it.

Dickson in his answer denied the execution of the mortgage, and alleged that there had been no consideration therefor; that at the time of the execution of the mortgage the land was the property of W. M. Dickson; that M. C. Schaeffer was never the owner thereof; that it had been conveyed to defendant Dickson by warranty deed from A. R. Rhine and his wife on January 17, 1914; that the deed had been filed for record January 20, 1914; and that the assignment of the note and mortgage to the plaintiff was without consideration. Dickson did not allege that he was the purchaser of the real property without notice of the mortgage sought to be foreclosed.

W. M. Dickson's sole contention is that the recital in the deed from Schaeffer to Rhine is not sufficient to constitute notice to Dickson and to remove from him the protection against an unrecorded mortgage which he would have under the statute; that he stands as a bona fide purchaser of the land, for value, and without notice of this mortgage. The plaintiff, in response to this, argues that the question presented by defendant Dickson was not raised in the pleadings, and was not in issue at the trial.

We will leave the question presented by the plaintiff, and address ourselves to the one

presented by Dickson. Our recording act must be considered in the determination of this question. Section 1670 of the General Statutes of 1909 reads:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated."

Section 1671 reads:

"Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

Notice the last clause of section 1671: "All subsequent purchasers and mortgagees shall be deemed to purchase with notice." With notice of what? With notice of the contents of all the prior recorded deeds and mortgages. The deed to the grantor of defendant Dickson recited a \$1,750 mortgage, and the grantee in that deed assumed and agreed to pay that mortgage. W. M. Dickson purchased with notice of that recital. Inquiry of his grantor and at least of his grantor's grantor would have revealed this \$1,750 unrecorded mortgage.

"A purchaser of land must look to the title papers under which he purchases; and he is chargeable with notice of the facts appearing upon their face, and also with knowledge of all facts suggested therein, and which, with the exercise of reasonable prudence and diligence, he might have ascertained." *Knowles v. Williams*, 58 Kan. 221, 48 Pac. 856, syl. ¶ 2.

See, also, *Frazier v. Jeakins*, 64 Kan. 615, 617, 68 Pac. 24, 57 L. R. A. 575; *Moore v. Griffin*, 72 Kan. 164, 166, 83 Pac. 395, 4 L. R. A. (N. S.) 477; *Faris v. Finnup*, 84 Kan. 122, 125, 113 Pac. 407; *Mining Co. v. Atkinson*, 85 Kan. 357, 361, 116 Pac. 499, Ann. Cas. 1912D, 1196; *Newby v. Fox*, 90 Kan. 317, 325, 133 Pac. 890, 47 L. R. A. (N. S.) 302.

The judgment is affirmed. All the Justices concurring.

VICK ROY v. MORGAN. (No. 8719.)

(Supreme Court of Colorado. Nov. 6, 1916.)

EXECUTORS AND ADMINISTRATORS \S 85(6)—
COLLECTION OF ASSETS—INQUISITION—
SCOPE OF POWERS.

In a proceeding under the first clause of Rev. St. 1908, § 7253, wherein an heir is cited to appear for examination as to moneys due to the estate, and alleged to have been fraudulently retained or concealed, the court, on ascertaining that money has been concealed, is without power to try controverted questions as to right to recover or to order its payment to the estate, which by the second clause of such section may recover the amount in a separate action.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 323, 354; Dec. Dig. \S 85(6).]

En Banc. Error to County Court, City and County of Denver; Ira C. Rothgerber, Judge.

Proceeding by Dora Morgan, as administratrix of the estate of Miranda Eliza Vick Roy, against Joseph J. Vick Roy. To review an order therein, defendant brings error. Reversed and remanded.

Henry E. May and Rice W. Means, both of Denver, for plaintiff in error. T. J. O'Donnell, John W. Graham, and Canton O'Donnell, all of Denver, for defendant in error.

WHITE, J. Upon complaint of Dora Morgan, as administratrix of the estate of Miranda Eliza Vick Roy, deceased, Joseph J. Vick Roy was cited to appear before the county court for examination as provided by section 7253, Rev. Stat. 1908. The property of the deceased, which it was alleged had been appropriated, embezzled, concealed, or disposed of by Vick Roy, was certain money, deeds, bonds, and contracts. Upon service of the citation Vick Roy appeared and denied the allegations of the complaint. Thereafter the matter came on for hearing, and Vick Roy was examined, under oath, touching the matters set forth in the complaint. The examination, in so far as it relates to the matters here involved, disclosed that shortly before the death of the deceased she had on deposit in a bank a sum of money and signed and delivered to Vick Roy a check, payable to his order upon the bank, for the sum of \$300, and that subsequent to her death Vick Roy presented the check to the bank and received the money thereon. Thereupon the court, over the objection and exception of Vick Roy, entered an order that he forthwith turn over to the administratrix the sum of \$300 as the property of the estate. After an unsuccessful effort in the trial court to have the judgment annulled, Vick Roy brought the cause here for review on error. He questions the power of the court to enter the order.

An examination of the statute discloses that the county court is given power to cause a person alleged to have embezzled, concealed, or alienated property belonging to an estate to be brought before the court and examined upon oath touching the same; and if he refuse, after citation, to appear and submit to such examination, or to answer interrogatories propounded to him in relation to the matter, to commit him to the common jail of the county until he submits to the order, and to cause the interrogatories and answers to be made in writing and signed by the party examined and filed in the county court. It also declares that, if any person, before the granting of letters testamentary or of administration, etc., embezzles or alienates any of the moneys, goods, chattels, or effects of any deceased person, etc., he shall stand chargeable and be liable to the action of the representative of the estate "for double the value of the property so embezzled

or alienated, to be recovered for the benefit of such estate."

The statute is in two parts. The first authorizes a proceeding, inquisitorial in its nature, designed especially as an economical and efficient mode of discovering property of an estate. Thereunder no order can properly be made in regard to the property, if any, in the hands of the party examined; the object being to aid the parties interested in discovering property belonging to an estate of a deceased person, and as preliminary to the bringing of some proper action for the recovery thereof. Only the person cited to appear may be examined, and the matters involved are not to be heard as on a trial. The court or judge may not try any issue of fact as to whether the person under examination is in the wrongful possession of property of the estate or indebted thereto. This provision cannot be employed to enforce the payment of a debt or liability for the conversion of property of an estate, or to try controverted questions of the right to property as between the representative of an estate and others. *Durst v. Haenni*, 23 Colo. App. 431, 444, 130 Pac. 77; *Saddington's Estate v. Hewitt*, 70 Wis. 240, 247, 248, 249, 35 N. W. 552.

Under the facts of this case Vick Roy presented the question of ownership of the \$300, and the existence or nonexistence of a debt from him or the bank to the estate was involved, and the county court, in a summary proceeding of this character, had no right or authority to adjudicate the same.

The second clause or part of the statute gives a cause of action, when certain facts are found to exist, which may be enforced in an appropriate proceeding in a court of competent jurisdiction, but was not employed in the case at bar.

The judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

GABBERT, C. J., and BAILEY, J., not participating.

THOMAS v. GREEN et al. (No. 8669.)

(Supreme Court of Colorado. Nov. 6, 1916.)

APPEAL AND ERROR \Leftrightarrow 1002—REVIEW—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

A verdict on conflicting evidence will not be disturbed on appeal, where there is sufficient testimony to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. \Leftrightarrow 1002.]

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by Luna O. Thomas against John Green and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Allen & Webster, of Denver, for plaintiff in error. James A. Marsh and William R. Kennedy, both of Denver, for defendants in error.

GARRIGUES, J. May 17, 1914, some members of an organization known as the Pentecostal Union were holding an open air meeting at or near the corner of Champa and Sixteenth streets in Denver, where they were engaged in singing and playing musical instruments. A patrolman accosted the leader, and asked whether they had a permit to meet at that point, and, on being informed that they had not, ordered them to disperse, which they refused to do, and continued with their exercises, whereupon he telephoned to the police station for a conveyance to remove them. When the vehicle arrived, the persons taking part in the meeting were ordered into it. Plaintiff got in and was taken with the rest to the jail, where she was held in the women's quarters for about an hour, and then released. She thereafter brought this action for false arrest and imprisonment. Defendants answered, denying the arrest. A jury trial resulted in a verdict for defendants, and plaintiff brings the case here on error.

Plaintiff's testimony is to the effect that she—being accompanied by her husband—was standing across the street from where the members of the Pentecostal Union were holding a meeting near the sidewalk; that an automobile drove up in front of her, from which emerged the defendants Green and Wagner, who proceeded to arrest the members of the Union; that she went with others into the street, and was standing looking on, when she saw a drum that had been left in the gutter, which she picked up and set on the sidewalk, so that it would not be injured; that immediately thereafter defendant Green told her to get in; that she protested, and told him that she was not a member of the Union and had taken no part in their meeting; that notwithstanding her protest she was conveyed by defendants against her will to the jail, where she was "booked" and placed in the women's quarters.

Defendant Green in his testimony denied plaintiff's evidence that he arrested her, or had any conversation with her; admitting only that he accompanied the automobile with her to the city jail. He testified further that plaintiff was standing with the members of the Pentecostal Union and taking charge of their property, but that he gave no order for her arrest and made no remarks to or concerning her; that, so far as he knew, she voluntarily entered the automobile and accompanied the rest to the jail. Defendant Wagner testified that plaintiff was the mother of one of the leaders of the Pentecostal Union and the grandmother of another member; that he had not ordered

her arrest, but when the other members got into the machine she voluntarily got in with and accompanied them to the city jail.

Under our view of the case it is unnecessary to consider the various legal propositions advanced by plaintiff in error. The question presented is one of fact, upon which there is a fair conflict of testimony. The court, among other things, told the jury that if they found plaintiff, without order or word from any of the defendants, went voluntarily into the machine, and not in obedience to any act or word of the defendants, their verdict should be for the defendants. The jury resolved this question against the plaintiff. There is sufficient testimony to support the finding, and under the well-established rule in this jurisdiction we must decline to interfere with or set aside the verdict. The judgment is affirmed.

Affirmed.

WHITE and SCOTT, JJ., concur.

PEOPLE ex rel. STEWART et al. v. RAMER,
Secretary of State. (No. 9067.)

(Supreme Court of Colorado. Nov. 6, 1916.)

CONSTITUTIONAL LAW § 7—AMENDMENT TO
CONSTITUTION — ELECTION — RECOMMEN-
DATION—VETO BY GOVERNOR.

A recommendation of the General Assembly to the electors to vote at the next general election for or against a Constitutional convention made by a two-thirds vote thereof, pursuant to power conferred by Const. art. 19, § 1, is not affected by the Governor's disapproval thereof, since Const. art. 5, § 39, as to Governor's veto, does not apply to such a recommendation, but only to ordinary legislation, and the two constitutional provisions are not in pari materia, but independent of each other.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 3, 4; Dec. Dig. § 7.]

En Banc. Mandamus by the People, on the relation of Phillip B. Stewart and another, against John E. Ramer, as Secretary of State. Alternative writ made absolute.

William R. Eaton, of Denver, for petitioner. Fred Farrar, Atty. Gen., and Norton Montgomery, Asst. Atty. Gen., for defendant.

WHITE, J. The object of this proceeding is to compel the respondent, as secretary of state, to certify to the several county clerks a certain recommendation of the Twentieth General Assembly to the electors of the state to vote at the next general election, for or against a convention to revise, alter, and amend the Constitution. We issued the alternative writ of mandamus, and, upon service of the same upon respondent, he made return and answer thereto. The return admits the material allegations of the alternative writ, but attempts to justify respondent's acts in the premises upon the ground that the aforesaid recommendation of the General As-

sembly was not approved, but disapproved, by the Governor of the state, and no action thereon was subsequently taken by the General Assembly or either house thereof. To the return petitioners interposed a demurrer. It is conceded that the law (sections 2145 and 6155, Revised Statutes of 1908) imposes upon the secretary of state the duty to certify to the county clerks, for submissions to the electors of the state for popular vote at the ensuing election, the recommendation in question, unless it was nullified by the action of the Governor in the premises, and the failure of the General Assembly to pass the same over his disapproval. We are of the opinion that the Governor had no duty to perform in relation to the measure in question, and that his disapproval thereof did not affect its validity. The General Assembly, in making the recommendation, was exercising the power invested in it by section 1 of article 19 of the Constitution. The section expressly declares, *inter alia*, that:

"The General Assembly may at any time by a vote of two-thirds of the members elected to each house, recommend to the electors of the state, to vote at the next general election for or against a convention to revise, alter and amend this Constitution; and if a majority of those voting on the question shall declare in favor of such convention, the General Assembly shall, at its next session, provide for the calling thereof."

The reasons which are urged against the validity of our conclusion are drawn from the provisions of section 39, art. 5, of the Constitution.

It will be observed that article 5 relates to ordinary legislation, while article 19 prescribes a method of calling constitutional conventions and of proposing amendments to the Constitution. It is not, therefore, by the former article, but by the latter, that the act of the General Assembly, in initiating the proposal for a constitutional convention must be tested. It has been expressly so ruled. Thus in *Nesbit v. People*, 19 Colo. 441, 448, 36 Pac. 221, 223, we said:

"Article 19 is *sui generis*; it provides for revising, altering and amending the fundamental law of the state, and is not in *pari materia* with those provisions of article 5 prescribing the method of enacting ordinary statutory laws."

The act of the General Assembly in proposing an amendment to the Constitution or recommending that the electors vote on calling a constitutional convention is initiatory only. In either case the action of the General Assembly must receive the approval of a majority of the qualified electors of the state voting thereon at the proper general election to effectuate any result whatever. Moreover, section 39 of article 5 does not require every order, resolution, or vote to which the concurrence of both houses may be necessary to be presented to the Governor for his approval or disapproval, and, upon disapproval, to be repassed by two-thirds of both houses. On the contrary, those relating to "adjournment"

or "solely to the transaction of business of the two houses" are expressly excluded. The two articles of the Constitution are not inconsistent, and may be fully executed without any conflict. One relates to ordinary legislation by the General Assembly, and the other relates to the establishment of constitutions and amendments thereto. Each contains the essentials for its complete enforcement without impinging upon any function of the other. Each of these articles is of equal dignity, and neither can be used to change, alter, or overturn the other. That which the General Assembly is authorized to do by article 19, relative to initiating proceedings to amend or change the fundamental law, is its business solely, with which the executive has nothing whatever to do. Such seems to be the uniform holdings of the courts under constitutional provisions similar to ours. *Jameson on Const. Conventions*, pp. 586, 587; *Hollingsworth v. Va.*, 3 U. S. (3 Dall.) 378, 1 L. Ed. 644; *State ex rel. v. Dahl*, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97; *Commonwealth ex rel. v. Griest*, 196 Pa. 396, 46 Atl. 505, 50 L. R. A. 568; *State ex rel. v. Mason*, 43 La. Ann. 590, 647, 649, 655, 9 South. 776; *Green v. Weller*, 32 Miss. 650; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *Hatch v. Stoneman*, 66 Cal. 632, 634, 6 Pac. 734; *In re Senate File*, 31, 25 Neb. 864, 41 N. W. 981; *Warfield v. Vandiver*, 101 Md. 78, 68 Atl. 538, 4 Ann. Cas. 692; 6 R. C. L. § 21, pp. 29, 30.

It therefore follows that the alternative writ should be made absolute; and it is so ordered.

GABBERT, C. J., and BAILEY, J., not participating.

ADAMS et al. v. TOWN OF GUNNISON. (No. 8676.)

(Supreme Court of Colorado. Nov. 6, 1916.)

1. PLEADING \S 428(2)—WAIVER—RULING ON MOTION TO QUASH.

Where, on motion, petition to disconnect territory from a town was ordered quashed, because there was no process running in the name of the people, as required by Const. art. 6, § 30, amendment of the petition in accordance with the views of the court waived any error in sustaining the motion to quash.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1427; Dec. Dig. \S 428(2).]

2. TOWNS \S 9 — DISCONNECTION OF TERRITORY—MAINTENANCE OF STREETS—EVIDENCE.

On petition to disconnect territory from a town, there was conflicting evidence for respondent town that it had maintained a street on the boundary of the territory during the three years last preceding the petition, and that some money had been expended on grading the street along the tract in question. *Held*, the evidence was sufficient to sustain finding that the town had maintained a street on the boundary of the property during the three years and to sustain judgment denying disconnection.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 9-14; Dec. Dig. \S 9.]

Error to Gunnison County Court; Clifford H. Stone, Judge.

Petition by John Q. Adams and another against the Town of Gunnison. Judgment for respondent, and petitioners bring error. Affirmed.

J. M. McDougal, of Gunnison, for plaintiffs in error. George Hetherington, of Gunnison, for defendant in error.

TELLER, J. The plaintiffs in error petitioned the county court of Gunnison county for an order disconnecting a tract of 240 acres of land from the town of Gunnison. The court directed that the proceeding be set for hearing, on February 16th, following. On the same day, there was issued out of the county court a notice of the time set for hearing, which was served, together with a copy of the petition, upon the town of Gunnison. Thereupon the attorney for the town filed a motion to quash, upon the ground that there should be process running in the name of the people, and that the petition failed to designate any respondent to whom notice could be issued or on whom service could be made. This motion was sustained, and the petitioners were ordered to amend their petition. Amendment was made and filed by which the title was made to include the town of Gunnison, respondent. A hearing was duly had to the court without a jury upon the amended petition and answer thereto. The court found that the town of Gunnison had, for more than three years immediately preceding the time of the filing of the petition, maintained a street along the southern boundary of said tract of land, and denied the petition.

Plaintiffs in error urge that the court was in error in sustaining a motion to quash on the ground that the proceedings were in violation of the provisions of the Constitution (article 6, § 30), which requires all process to run in the name of the people.

[1] If this was error, the petitioners cannot rely on it now, since they waived it by amending their petition, and proceeding according to the views of the court in the matter.

[2] It is further urged that the court erred in its fifth finding to the effect that the town had maintained a street on the boundary of the property during three years last preceding the petition; that being a condition of the city's retaining the tract within its boundaries as against the right of the petitioners to have it disconnected. On this question there was a marked conflict of evidence, and while it does not appear that the town had done very much in maintaining the street, there was testimony that some money had been expended; one witness testified to \$50 spent on grading the street along the tract in question, within the three years.

In Kersey v. Ewing, 59 Colo. 239, 149 Pac.

619, this court reversed a judgment in favor of the petitioner upon the ground that there was some evidence of labor expended upon the streets which was not contradicted, and said:

"Where, as here, facts are shown which may reasonably be said to constitute maintenance of the utility within the plain meaning of the statutory provision, the extent or degree thereof is of no consequence."

We must conclude, then, that the amount of work done on this street, to which there is uncontradicted testimony, is sufficient to sustain the finding and judgment. The judgment is accordingly affirmed.

Judgment affirmed.

WHITE and HILL, JJ., concur.

ARKANSAS VALLEY RY., LIGHT & POWER CO. v. EBELING. (No. 8569.)

(Supreme Court of Colorado. Nov. 6, 1916.)

RELEASE \Leftrightarrow 57(2)—VALIDITY—MEMORY—SUFFICIENCY OF EVIDENCE.

In an action by an employé for personal injuries, evidence held not to sustain the plaintiff's burden of showing that his settlement and release were without binding effect, on the ground that he did not remember signing it.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 108; Dec. Dig. \Leftrightarrow 57(2).]

Error to District Court, Pueblo County; J. E. Rizer, Judge.

Action by Louis Ebeling against the Arkansas Valley Railway, Light & Power Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded, with directions to the lower court to dismiss the action.

William J. Miles, of Denver, for plaintiff in error. Lyman I. Henry and W. S. Palmer, both of Pueblo, for defendant in error.

GARRIGUES, J. The parties in this opinion will be denominated as in the court below, plaintiff and defendant. Plaintiff was injured by reason of coming in contact with an electric wire, carrying a high voltage current, while employed by the light company, for which injuries he brought suit, recovered judgment, and defendant brings the case here on error.

Ebeling, being employed by the light company as an assistant "trouble man," was sent to repair a light switch in a private residence July 27, 1912, where the accident occurred. A few days later he went to the office of the company, and wanted to know of its officers what they were going to do for him in the way of settlement for his injuries, and was told that they would pay his expenses incident to the accident and give him \$75. This, he said, was not enough, and then declined to accept the offer. Shortly thereafter, he went again on the same errand, which resulted as before. He made frequent

visits for a Ike purpose, and August 16, 1912, advised the company that he would accept the offer. Whereupon the following document was prepared:

"Whereas, I, Louis Ebeling, of the city of Pueblo, county of Pueblo and state of Colorado, was injured on or about the twenty-seventh day of July, 1912, while in the employ of the Arkansas Valley Railway, Light & Power Company, under circumstances which I claim render my said employers liable to me in damages; and whereas, my said employer denies any liability for said injuries; and whereas, both parties desire to compromise, and have agreed to adjust and settle the matter for the sum of seventy-five and No/100 dollars: Now, therefore, in consideration of said sum, which it is hereby acknowledged has been to me or in my behalf paid by my employer, I do hereby compromise said claim and release and forever discharge my said employer, their agents and employes from any and all liability by reason of said injuries. Employment has not been promised me as a condition of this settlement.

"Witness my hand and seal this 16th day of August, 1912, at Pueblo, Colorado.

"Louis Ebeling. [Seal.]

"F. W. Insul,

"E. F. Stone,

"Witnesses."

This instrument after being read to plaintiff, was handed to him for examination, and after having it a sufficient time for, and apparently, reading it, he signed it in the presence of two witnesses. September 9 or 10, 1912, Ebeling returned to his former work, and continued in the company's employ until the latter part of May, 1914, when he gave up his position and commenced this action July 17, 1914. He testified on the trial that he had no memory of any negotiations for a settlement, or of signing the release; that at that time his memory was a blank; that he came out of this period of lost memory in December, 1913. At the conclusion of the evidence, defendant moved for a directed verdict, which was overruled, and upon this point a reversal is asked.

The only reason given by plaintiff why he should not be bound by the settlement and release is because, as he avers, he did not remember signing it, though he does not deny his signature. He does not claim fraud, misrepresentations, improper inducements or solicitation on the part of the company; he simply says he has no recollection of the settlement or of signing the release. The evidence shows that he went to the company's office day after day, where he solicited the settlement; that he remained in the company's employ as before, for a long time thereafter, performing his labor and receiving his pay as other employes, and, aside from his statement, there is no evidence to show that he did not understand the transaction. Plaintiff resumed his old position, and worked for the company as before, for a year and a half after the accident and settlement, and made no complaint in any way, or intimated that he had not been fully compensated for his injuries. We are of the opinion that he

did not sustain the burden of showing that his settlement and release were without binding effect, and the motion for a directed verdict should have been sustained. *St. Louis Co. v. Campbell*, 85 Ark. 592, 109 S. W. 539; *St. Louis Co. v. Morgan*, 107 Ark. 202, 154 S. W. 518; *Clark v. American Bridge Co.*, 180 Ill. App. 134; *Nason v. Chicago Co.*, 149 Iowa, 608, 128 N. W. 854; *Owens v. Norwood White Coal Co.*, 157 Iowa, 389, 138 N. W. 483; *McNamara v. Boston Co.*, 197 Mass. 883, 83 N. E. 878; *Hulbert v. National Dock Co.*, 201 Mass. 239, 87 N. E. 577; *Valley v. Boston Co.*, 103 Me. 106, 68 Atl. 635; *Barratt v. Lewiston Co.*, 104 Me. 479, 72 Atl. 308; *Borden v. Sandy River Co.*, 110 Me. 327, 86 Atl. 242; *Anderson v. Meyer Bros. Drug Co.*, 149 Mo. App. 554, 130 S. W. 829; *McLaughlin v. Syracuse Co.*, 115 App. Div. 774, 101 N. Y. Supp. 196; *Shaw v. Delaware Co.*, 126 App. Div. 210, 110 N. Y. Supp. 862; *Griffith v. American Bridge Co.*, 157 App. Div. 264, 142 N. Y. Supp. 199; *West v. Seaboard Air Line Co.*, 154 N. C. 24, 69 S. E. 676; *Erickson v. Great Northern Co.*, 57 Wash. 520, 107 Pac. 365; *Schleffelbein v. Fidelity Co.*, 139 Wis. 612, 120 N. W. 398; *De Mark v. Milwaukee Co.*, 142 Wis. 624, 126 N. W. 13; *Schweikert v. Davis Co.*, 147 Wis. 242, 133 N. W. 136; *Rayborn v. Galena Co.*, 150 Wis. 164, 149 N. W. 701; *St. Louis Co. v. Bowles* (Tex. Civ. App.) 181 S. W. 1176.

The judgment is reversed, and the cause remanded, with directions to the lower court to dismiss the action.

Reversed and remanded.

WHITE and SCOTT, JJ., concur.

PRIOR v. SIMONSON. (No. 8706.)

(Supreme Court of Colorado. Nov. 6, 1916.)

BILLS AND NOTES \Leftrightarrow 402—INDORSER'S LIABILITY—PRESENTMENT TO MAKERS.

Under Mill's Ann. St. 1912, §§ 5127, 5128, providing that where there are several persons, not partners, primarily liable on a note and no place of payment is specified, presentment must be made to all, where makers of a note, which specified no place of payment, were not partners, presentment for payment on all the makers was a condition precedent to recovery from the indorser both under the statute and the general rule of law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1074-1080; Dec. Dig. \Leftrightarrow 402.]

Error to District Court, Denver County; John H. Denison, Judge.

Action by Mary A. Prior against W. G. Simonson. To review a judgment of nonsuit, plaintiff brings error. Judgment affirmed.

Grant L. Hudson and John Horne Chiles, both of Denver, for plaintiff in error. Luther M. Goddard and J. E. Simonson, both of Denver, for defendant in error.

SCOTT, J. This is an action by the plaintiff in error, against the defendant in error as an indorser of a promissory note. The note was dated January 8, 1909, in the sum of \$3,000, payable three years after date, to W. G. Simonson, defendant, and signed by Henry J. Blesse and Julia L. Blesse. The note was purchased by the plaintiff for a valuable consideration, from the Rialto Investment Company, without recourse, but bearing the following prior indorsement: "Pay the Rialto Investment Company, or order. W. G. Simonson." The action is upon this indorsement. The defense was failure of presentment for payment to the makers at maturity, denial that payment was refused by the makers, and denial of notice to the indorser of presentment and refusal to pay. At the close of plaintiff's testimony the court sustained defendant's motion for a nonsuit and rendered judgment accordingly. The testimony was conflicting as to whether or not there had been demand made for payment on Henry J. Blesse as provided by the statute. It is conceded that no such demand was made on Julia A. Blesse.

[1] There is no evidence that the makers were in any sense partners. Under section 5120, Mill's Ann. Stat. 1912, presentment for payment is necessary in order to charge the indorser upon the admitted facts in this case. Sections 5127 and 5128, Mill's Ann. Stat. 1912, provide:

"5127. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

"5128. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all."

There is nothing in the record to indicate that the makers of the note were partners; no place of payment is specified in the note; therefore the statute commands that presentment shall be made on all the makers of the note. This is a condition precedent to recovery from the indorser.

Presentment was not made on Julia L. Blesse, one of the makers and primarily liable on the note, and for such reason recovery cannot be had against Simonson, the indorser. This is not only the plain requirement of the statute, but the general rule of law as well. 7 Cyc. 1001; *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; *Benedict v. Schmieg*, 13 Wash. 476, 43 Pac. 374, 36 L. R. A. 703, 53 Am. St. Rep. 61; *Nave v. Richardson*, 86 Mo. 131. The reason for the rule is well stated in *Tayloe v. Davidson*, 2 Oranch, C. C. 434, Fed. Cas. No. 13,769, as follows:

"It seems to me that the undertaking of the defendant in the present case, as indorser of the note, was, that he would pay it if the makers of the note did not, when payment should have been properly demanded of them. If either of them

should pay it, the indorser would be discharged. He did not undertake that if either of the makers should refuse to pay it, he would; but that if all of them refused to pay it, then he would be responsible. Otherwise the greater the number of makers, the greater the risk he would run of being obliged to pay it in the first instance; for the holder might choose to demand it of the only insolvent among them. Upon general principles, then, I think that payment should have been demanded of each of the makers."

The judgment is affirmed.

WHITE and GARRIGUES, JJ., concur.

FIRST NAT. BANK OF WELLINGTON v. WICH. (No. 8714.)

(Supreme Court of Colorado. Nov. 7, 1916.)

1. CORPORATIONS §116 — SALE OF STOCK — NOTE—LIABILITY.

Where defendant deposited a note with a bank to pay for corporate stock to be furnished him under a written agreement of the bank to return it if the stock was not delivered, the bank could not recover on the note when the stock was never delivered, though several renewal notes with no consideration were given, and no interest on any notes was ever demanded or paid.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 493, 494, 496; Dec. Dig. §116.]

2. BANKS AND BANKING §113—POWERS OF CASHIER—ESTOPPEL TO DENY AGENCY.

Since a bank cashier has great inherent powers to transact usual business of the bank, where, by deception and fraud, he obtained a note, agreeing to deliver therefor certain corporation stock, which he failed to do, and secured renewals without other consideration, the bank could not recover by charging his lack of power to make the agreement, since it then would be taking advantage of its own fraud.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 273-276; Dec. Dig. §113.]

Error to District Court, Larimer County; Neil F. Graham, Judge.

Action by the First National Bank of Wellington against Gustave Wich. To review judgment for defendant, plaintiff brings error. Affirmed.

Thomas J. Leftwich and L. B. Temple, both of Ft. Collins, for plaintiff in error. Claude O. Coffin, of Ft. Collins, for defendant in error.

SCOTT, J. The plaintiff in error, plaintiff below, brought this action to recover from the defendant in error, upon a promissory note, in the sum of \$570 dated June 9, 1911, due six months after date and by its terms, payable to the plaintiff. The answer admitted the execution of the instrument, but denied that it was executed as a valid instrument, and alleges that it was given without consideration. It was further alleged that the note was signed by the defendant, and left with the plaintiff, not as plaintiff's property, but to pay for six shares of the capital stock of the North Poudre Irrigation Company, which the plaintiff was to secure for and deliver to

the defendant, and with the understanding that in case of failure to secure and deliver to defendant said capital stock, then the said note was to be returned to defendant. That the plaintiff wholly failed to deliver to the defendant said capital stock, and for such reason said promissory note is not, and never was, the property of plaintiff. The answer alleges, further, that the original transaction occurred on the 28th day of July, 1908, and that the note sued on and other intervening notes were simply renewals of the same transaction, each note given for the proposed purchase of the said stock, and to be returned in case the stock was not secured and delivered to defendant. Verdict and judgment was rendered for defendant. The only apparent error relied on is the denial by the court of plaintiff's motion for a directed verdict. The note sued on was dated June 9, 1911. The original note was dated July 28, 1908. On the same day, and as a part of the original transaction, the cashier of the bank who transacted the business for it delivered to the defendant the following memorandum:

"First National Bank, Wellington, Colorado. Capital \$25,000. P. Anderson, President. F. M. Wright, Vice President. Jno. S. Cusack, Cashier. Wellington, Colo., July 28, 1908. This is to certify that in case I fail to deliver to Gustave Wich six shares of the capital stock of the North Poudre Irrigation Company, that I will return to him his note for \$570.00 dated July 28th,—08, to run for 30 days. Jno. S. Cusack, Cashier."

[1] It is plain from this memorandum which fully corroborates the testimony of the defendant, that the original note was not the property of the bank, and not to become so unless or until he should receive the Poudre Irrigation stock for which the said note was to be in full payment. The testimony is clear that there was no other consideration for the original note, or for any renewal note. There were several renewals of this arrangement, and whereby the defendant executed a new note, and he testifies that each time the cashier said he had not yet secured the Poudre stock for defendant, but would do so; that the same understanding was had each time. Each of these notes so renewed was given in the exact amount as the first one, and no interest was ever demanded or paid. There was no attempt to dispute this state of facts.

[2] The only seeming contention of the plaintiff in error is that the cashier of the bank was without authority to do what he plainly did do in the premises. Counsel cite *First Natl. Bank v. Martin*, 27 Colo. App. 524, 150 Pac. 320. This case is not in point. Here whatever the cashier did was not for his own benefit, but, on the contrary, the bank claims that he was acting for it, and seeks the benefit of the wrong. In the case cited, Martin acted with knowledge that the cashier was dealing for himself and not for his bank. Here the defendant had no knowledge of the

intended wrong. He was plainly deceived by the plaintiff's cashier acting for the bank, and the bank now insists on receiving the benefit of the fraud.

The defendant received no consideration whatsoever for the note in this case. Its execution, possession, and use was obtained by the cashier of plaintiff by deception and fraud. The note sued on and all renewals of the original note were likewise without consideration, and obtained by misrepresentation and fraud. The note was at no time the property of the bank, for the proposed consideration never passed, and the note was not delivered to the bank as its property. There is no testimony to indicate that the defendant had knowledge that the note, or any of its renewals were ever included as a part of the assets of the bank.

The cashier of a bank has greater inherent powers than any other officer of the corporation, and is generally the active financial agent and manager of the bank. He is endowed with full power to transact all usual and general business of the bank, and it would be manifestly unjust to permit a bank to take advantage of the fraud of one whom it holds out to the public as its trusted and responsible agent, and whom the law regards as the chief agent and spokesman of the corporation. Common honesty precludes sanction of such conduct.

The judgment is affirmed.

WHITE and GARRIGUES, JJ., concur.

HUSHAW v. DUNN. (No. 8862.)

(Supreme Court of Colorado. Nov. 6, 1916.)

1. TROVER AND CONVERSION §3 — INTENT — MONEY OF JAILED PERSON.

Where one locked up by town marshal for disturbing the peace was searched and his money taken from him by the officer and returned the next day, when he pleaded guilty, the officer was not guilty of conversion, there being neither actual damage because of the taking, nor apparent wrongful intent.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 21-24; Dec. Dig. §3.

For other definitions, see *Words and Phrases*, First and Second Series, *Conversion*.]

2. FALSE IMPRISONMENT §7(5) — DEFENSE — PLEA OF GUILTY OR CONVICTION.

Where a person has pleaded guilty or has been convicted of a criminal charge or violation of municipal ordinance, he cannot recover for false imprisonment.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 52-61; Dec. Dig. §7(5).]

Error to District Court, Otero County; J. E. Rizer, Judge.

Action by Joseph Hushaw against S. H. Dunn. Judgment for defendant, and plaintiff brings error. Affirmed.

Thos. R. Hoffmire, of Pueblo, for plaintiff in error. John H. Voorhees, of Pueblo, for defendant in error.

SCOTT, J. The defendant in error, acting as town marshal, of the town of Fowler, on the 6th day of June, 1913, arrested the plaintiff in error, upon the charge of disturbing the peace, specifically, "by chasing, annoying and frightening Stella Dunn, — Beckstedt, and — Barnard." The arrest was without a warrant. The time was about 8:20 o'clock in the evening. The offense committed in the presence of the officer. The officer took the prisoner to jail, searched and took from him a pocketbook and money and locked him up. The money amounted to about \$46. The next morning the officer took his prisoner before the police magistrate, made a written complaint, to which the prisoner pleaded guilty, and was fined in the sum of \$40 and costs, amounting to \$44.60. Before plea and judgment, the marshal handed the prisoner his pocketbook, together with all the money taken from him the evening before, and out of which the prisoner paid his fine and costs. This is an action in damage by the then prisoner, plaintiff in error.

The complaint set forth two causes of action. The first for the wrongful conversion by the defendant officer, to his own use, of the plaintiff's money, and charging that in the taking, converting, and retaining the money, the defendant officer acted with wanton and reckless disregard of plaintiff's rights and feelings, and with malice toward plaintiff, and thereby willfully committed a fraud against plaintiff. The prayer was for judgment for the sum of \$46, and for \$1,000 as exemplary damages. The second cause of action was for damages for alleged false imprisonment.

After the plaintiff had offered his testimony which disclosed the facts here recited, the court upon motion of defendant directed a verdict in his favor, which is the only alleged error of which there is complaint.

[1] It is clear that there was no conversion of plaintiff's money, wrongful or otherwise, nor is there any testimony in the case which indicates that there was any intent upon the part of the officer to use, keep, or convert such money, or to do otherwise with it than he did.

Counsel simply present the abstract question as to whether or not the officer had the authority, under the circumstances, to search and take from the prisoner his money at the time. The title to this money is not involved, nor is there any question concerning any interest therein. The plaintiff lost none of it, used none of it, and it was promptly delivered to the plaintiff on the morning after it was taken. But if we concede the contention of the plaintiff in error that the officer was without authority to take the money from the prisoner, there was in this case no actual damage by reason of the taking in the manner and for the purpose for which it was taken, and there was not the slightest testi-

mony as to the act being with either a malicious or fraudulent purpose or intent.

[2] The second cause of action was for damage for false imprisonment. The plaintiff pleaded guilty to the charge against him, and the rule of law is well settled that where a person has pleaded guilty or has been convicted of a criminal charge, an action for false imprisonment will not lie. This is so universal that citation of authority is not necessary. The same rule would seem to be equally applicable where the arrest was for the violation of a municipal ordinance. Any other rule would subject arresting officers to such annoyance and injustice as to retard the proper administration of the law.

The judgment is affirmed.

WHITE and GARRIGUES, JJ., concur.

PEOPLE, for Use of BOARD OF COUNTY COM'RS OF ARAPAHOE COUNTY, v. BROWN. (No. 8841.)

(Supreme Court of Colorado. Nov. 6, 1916.)

COUNTIES \S 78(1)—COMPENSATION OF CLERK—CONSTITUTIONAL STATUTORY PROVISIONS.

Rev. St. 1908, \S 2838, as amended by Laws 1909, c. 167, \S 5, allowing county clerks 25 cents of the fee received for each hunting and fishing license issued by them as personal compensation, and providing that such fee "shall be in addition to any other salary or compensation," in so far as it attempts to allow a county clerk to retain fees collected in addition to his statutory compensation, is violative of Const. art. 14, \S 15, providing that, where salaries for county officers are provided, the same shall be payable only out of fees actually collected, where fees are prescribed, and that all fees, etc., above the amount of such salaries shall be paid into the county treasury.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 105; Dec. Dig. \S 78(1).]

Error to District Court, Arapahoe County; H. P. Burke, Judge.

Action by the People of the State of Colorado, for the use of the Board of County Commissioners of the County of Arapahoe against Robert S. Brown. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Samuel W. Johnson, of Denver (Charles E. Friend, of Denver, of counsel), for plaintiff in error. Frank McLaughlin, of Denver, for defendant in error.

GARRIGUES, J. Defendant in error, Brown, was county clerk and recorder of Arapahoe county during the years 1911 and 1912, and as such, under the statute fixing the compensation of county clerks, was entitled to, and received, the full amount of \$2,100 out of the fees of the office provided by law as his salary. In addition to this salary he collected in fees for the issuing of hunting and fishing licenses, \$457, retaining

ents of each dollar thereof, amounting to \$114.25, as his personal compensation in addition to his regular salary, claiming that he was entitled thereto under and by virtue of the provisions of section 2838 of chapter S. L. 1909, which provides:

"When a license is issued by a county clerk, the fee shall be the same as if issued by the commissioner, and 25 cents thereof shall be for personal compensation of such clerk for filing the application, issuing the license, keeping the record thereof, making a report, and all other duties connected therewith, and shall be in addition to any other salary or compensation, remaining 75 cents to be remitted to fish game commissioner."

A mandamus having been made upon him by the county to turn this amount of excess fees collected into the county treasury, and he refused, this action was brought to enforce the same. A general demurrer to the order was overruled, and, the county being allowed to plead further, judgment of dismissal was entered against it, and the case remanded on error.

We deem it unnecessary to go into all the matters pleaded in the answer. There can, in any event, be but one question involved.

Where the county clerk has received his salary fixed by statute out of the fees collected, whether that is his sole compensation, and whether any attempt by the Legislature to allow him more than this regular salary by giving him in addition, or allowing him to retain as his personal compensation, a portion of the fees collected for fishing and hunting licenses, is in violation of section 15, art. 14, of the Constitution. The Constitution provides that where salaries for county officers are provided, the same shall be payable only out of the fees actually collected in all cases where fees are prescribed, that all fees, perquisites, and emoluments above the amount of such salaries be paid into the county treasury. In *El*

County v. Shelden, 59 Colo. 499, 149 P. 616, we held that the salary of the county clerk, payable out of the fees of the office fixed by statute to a definite sum—in the present case \$2,100—and that any statute, attempting to allow him to retain any fees collected in addition to the regular salary as his personal compensation, was in violation of section 15, art. 14, of the Constitution. The compensation of the county clerk cannot be increased in this way. If the Legislature wishes to increase such salary, it must pass a statute for that purpose. We, therefore, affirm the opinion in this case that the county clerk was not entitled to keep that portion of the fees collected over and above his regular salary of \$2,100, but was required to turn all such excess fees into the county treasury, and any statute, purporting to allow him to retain such fees in addition to his regular salary of \$2,100, is unconstitutional and void.

The judgment of the lower court will be re-

versed, and the cause remanded, with directions to enter judgment for the county in the sum of \$114.25.

Reversed and remanded.

WHITE and SCOTT, JJ., concur.

NEEF BROS. BREWING CO. v. KROTTER. (No. 9008.)

(Supreme Court of Colorado. Oct. 2, 1916.)

1. MASTER AND SERVANT—§80(10)—EMPLOYMENT CONTRACT—EVIDENCE.

Evidence held to support judgment for servant who alleged contract to pay a sum certain for services while the master alleged a conditional promise.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 119; Dec. Dig. §80(10).]

2. APPEAL AND ERROR—§928(2)—SCOPE—PRESUMPTIONS.

In the absence of objections to instructions given or refused, the court on appeal must presume that all matters at issue were submitted to the jury under proper declarations of law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3750; Dec. Dig. §928(2).]

3. EVIDENCE—§116—ADMISSIBILITY.

Where the servant alleged an agreement to pay a sum certain for his services, and the master produced evidence of a 20 per cent. cut in all employé's salaries, with a collateral conditional promise to pay the servant his overdue salary if business improved, it was not error to permit the servant to show that other servants were afterwards paid in full.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 184, 185; Dec. Dig. §116.]

En Banc. Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by John J. Krotter against the Neef Bros. Brewing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William H. Dickson and Forrest L. Nicol, both of Denver, for plaintiff in error. Harry S. Silverstein, of Denver, for defendant in error.

WHITE, J. [1] The complaint sets forth a cause of action in favor of Krotter for services rendered at the special instance and request of the Neef Bros. Brewing Company, a corporation, at an agreed compensation, admits the payment of a portion of the salary, and prays judgment for the balance. The answer admits the rendition of the services, but denies the alleged agreed compensation therefor and any indebtedness whatever. There is no controversy relative to the work performed by the plaintiff, and the sums paid therefor by the defendant, but the sole question is whether the defendant agreed to pay the plaintiff for such services the sum of \$200 per month for the years 1914 and 1915. Upon the verdict of the jury, judgment was entered in favor of Krotter, and the defendant brings the cause here for review.

The sufficiency of the evidence to support the verdict and judgment is challenged, but we have read the entire record, and find it amply sufficient. In fact, there is but little conflict therein, and the judgment may not be disturbed upon the ground assigned. For over 20 years Krotter had been in the employ of the brewing company, and for a period of approximately 16 years immediately preceding February, 1914, was paid \$200 per month. In the latter part of January, 1914, or later, a conversation was had between Krotter and Rudolph Neef, one of the officers of the company, in relation to the former's salary. In regard to this Krotter testified that Neef, addressing him said, "Well, John, how do you feel in regards to the cut?" and that before he answered Neef continued, "Well, John, your salary will remain the same; but the licenses are coming due in June, and we are a little short of money, and we will give you credit for this, and then we will pay it later on," to which Krotter replied, "All right; I am satisfied," and that Neef then said, "The reason this cut is made is just to get" our present bookkeeper out. As to this conversation Mr. Neef, called by plaintiff for examination under the terms of the statute, testified as follows:

"When I came to Mr. Krotter in regard to the 20 per cent. cut, I said to him, 'John, we have all had a cut of 20 per cent.; if business gets better you will get that in June or July.' There was nothing said about anything after June or July; he would get that in June or July as back salary; I told him we all got a 20 per cent. cut."

Subsequently Mr. Neef, as a witness for the defense, testified in relation to the matter as follows:

"As near as I can remember I says, 'John, we have got to have a 20 per cent. cut here, and some time later, if business warrants it, why you will get your \$200,' or words to that effect. We have to give 20 per cent., and we will keep track of it, and some time later, when business has improved, not improved, but when business got better, he would get his \$200, and that was all that was said, and John was satisfied, and we were satisfied."

The record discloses that the bookkeeper, employed when this conversation took place, severed his relations with the company about April 1, 1914, and was succeeded by another, who was a witness for the plaintiff, and testified that on April 11, 1914, he was told by Mr. Rudolph Neef to credit Krotter's account with \$80 "difference of salary, February and March, 1914," and that thereafter to credit Krotter with \$200 per month, but he would

draw only \$160 per month, "and that the balance would be paid later." This witness further testified that on December 28, 1914 at the request of Mr. Neef, he closed Krotter's account by charging the same with the credit balance then shown, and "credited back to selling expense to which" Krotter's "salary had always been charged," and that thereafter Krotter's account was not given credit for the 20 per cent. cut. Krotter, however, was not advised, nor did he acquire any knowledge, of the aforesaid entry closing his account or discontinuance of credit for the 20 per cent. cut.

[2] Certain vouchers—"salary" for designated months—and some receipts for salary to date, signed by Krotter, were admitted in evidence, and it is claimed that they constitute satisfaction of all indebtedness to Krotter for salary and discharge of the defendant therefor. These receipts and vouchers were before the jury, and subject to consideration thereby. In the absence of objections to instructions given or refused, we are bound to presume that the issues in relation to these matters, and all of the issues involved, were submitted to the jury under proper declarations of law.

[3] Plaintiff in error further claims that the court, over its objections, erroneously admitted testimony to the effect that other employes of the company, whose salaries were also cut, and the amount thereof, were afterwards paid in full. The court stated that the evidence so admitted was for the purpose of testing the credibility of the witness in relation to his statement in reference to what the agreement or arrangement was. As witness Neef and plaintiff both testified that the former had said that, "We have all had a cut of 20 per cent.," and that, "We will keep track of it," and that later Krotter would be paid his deferred salary, and that the latter had testified that Neef had said that the sole purpose of the cut was to get rid of the bookkeeper, we are unwilling to hold that the action of the court in the premises constitutes reversible error. After carefully reading the entire record and briefs of counsel, we think the application for supersedeas should be denied, and the judgment affirmed; and it is so ordered.

Judgment affirmed.

GABBERT, C. J., and BAILEY, J., not participating.

WALLACE v. BABCOCK et ux.
(No. 13346.)

(Supreme Court of Washington. Nov. 18, 1916.)

1. EVIDENCE ~~§~~467 — PAROL EVIDENCE AFFECTING WRITINGS—WAIVER OF LEGAL TENDER.

Evidence of waiver of the right to demand a money tender under the terms of a written contract is not inadmissible as varying the terms of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1858, 2146; Dec. Dig. ~~§~~467.]

2. SALES ~~§~~383—TENDER—EVIDENCE.

Evidence held to justify the jury in finding a waiver by the seller of legal tender of the price by a buyer of grain.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. ~~§~~383.]

3. TRIAL ~~§~~133(6) — CONDUCT OF COUNSEL — ACTION OF COURT.

In an action for breach of a contract to sell wheat to plaintiff, misconduct of counsel, in making a statement as to advance in the price of wheat after delivery was demanded, is not prejudicial error, where the court, on objection, admonished counsel that the argument was improper, and instructed the jury to disregard it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. ~~§~~133(6).]

Department 2. Appeal from Superior Court, Whitman County.

Action by R. W. Wallace against F. B. Babcock and wife. From a judgment for plaintiff, defendants appeal. Modified.

Giles C. Rush, of Ewan, and R. M. Webster, of Spokane, for appellants. Samuel P. Weaver, of Sprague, for respondent.

MORRIS, C. J. Action for damages for breach of contract. Defendants answered, and by affirmative defense set up a counterclaim. The cause was tried to a jury, and a verdict rendered in favor of plaintiff. Defendants appeal from a judgment entered upon the verdict.

In July, 1914, appellants desired to sell 10,000 bushels of wheat. Respondent made an offer of 67½ cents a bushel, which offer was accepted, and on July 14th, respondent sent appellants a contract of sale. The letter inclosing this contract concluded with the following sentence:

"When you get your warehouse receipts for this wheat mail them to me and I will send you check to cover."

Appellant acknowledged receipt of this letter, but made no mention in his answer of the sentence quoted. Thereafter the contract of sale was executed. There was no further mention of payment between the parties, and on September 28th appellant wrote respondent as follows:

"Will be in Ewan 8 or 4 o'clock Sept. 30, at Mr. Rush's house. You can have knowledge of the grain by that time."

Mr. Rush was appellants' attorney. Respondent testified that he received this letter

on September 30th, the day payment and delivery were to be made in accordance with the terms of the contract. The parties met at Ewan and proceeded to the home of Mr. Rush. They discussed the amount to be paid for the wheat and other matters, and finally agreed upon the amount to be paid. Respondent offered his check in payment, which appellant refused to accept, saying that he preferred gold coin. Respondent then left the office and returned a little later with a person whom he desired to witness a tender. The check was again offered and refused. Respondent offered to procure a certified check, which was also refused. He then proposed to take appellant to Lamont, where a bank is located, obtain the money, and bring him back, but appellant refused to go.

[1] It is first contended that the court erred in admitting evidence to show that appellants had waived their right to demand a money tender from respondent, on the ground that such evidence varied the terms of the written contract. The only effect of the admission of this evidence was to show a waiver by appellants of a legal tender. It neither impeached nor destroyed the written instrument nor any of its terms. As this evidence only went to the manner of payment, it was clearly admissible under the rule announced in *Johnston v. McCart*, 24 Wash. 19, 63 Pac. 1121, where it was held that an oral agreement, affecting only the manner of payment under a written contract, was admissible and not within the objection that it varied the terms of a written instrument.

[2] The next contention is that the evidence failed to show a waiver of legal tender. In view of the facts we have heretofore recited we believe the jury was justified in so finding. While appellants' failure to reply to respondent's statement in the letter that he would tender his check may not of itself have been sufficient to show a waiver, yet taken in connection with other circumstances, it was sufficient to make the question one for the jury. The instructions of the trial court upon this point were full and complete, and not excepted to. We cannot substitute our judgment for that of the jury where there is evidence to sustain the verdict.

[3] Misconduct of counsel is predicated upon a statement made to the jury by counsel for respondent as to the advance in the price of wheat subsequent to the time delivery was demanded. Objection was made to this line of argument, and the court admonished counsel that it was improper and instructed the jury to disregard it. Under these circumstances we cannot find prejudicial error.

Appellants contend that it is admitted by respondent in his testimony that there was between \$10 and \$20 due them upon their counterclaim. No denial of this is made in respondent's brief, and upon an examination of the statement of facts we find that the

contention must be sustained. Upon examination of other points argued in the briefs we find them to be without prejudicial error.

The lower court is hereby instructed to reduce the judgment entered by deducting the sum of \$20, which is admittedly due appellants. As so modified, the judgment will be affirmed. Respondent will recover costs on appeal.

HOLCOMB, MAIN, and PARKER, JJ.,
concur.

SHOWALTER v. SPANGLE et ux.
(No. 13478.)

(Supreme Court of Washington. Nov. 13, 1916.)

1. WITNESSES \S 146—COMPETENCY—INTERESTED PARTIES.

Under Rem. & Bal. Code, \S 1211, as to competency of parties as witnesses in suits wherein they claim title through deceased persons, a husband and wife, claiming the gift of land by delivery of separate deeds of distinct properties before the donor's death, could not testify each on his or her own behalf in suit by an heir to quiet title to the land, but each was competent to testify in behalf of the other.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 644-649; Dec. Dig. \S 146.]

2. WITNESSES \S 146—COMPETENCY—INTEREST OF PARTIES.

In states where the common-law right of dower exists, the wife in a suit by an heir to quiet title as against the wife and husband of land embraced in deeds, delivery of which was disputed, is not competent to testify on behalf of the husband.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 644-649; Dec. Dig. \S 146.]

3. DEEDS \S 58(2), 65—"DELIVERY"—SUFFICIENCY.

It is essential to delivery of a deed that there be a giving by the grantor and a receipt by the grantee, with a mutual intention to pass a present title, and delivery may be made through an agent or accepted by an agent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 131, 144; Dec. Dig. \S 58(2), 65.]

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

4. DEEDS \S 61—DELIVERY—TIME OF DELIVERY.

Though a deed cannot effectually be delivered after the grantor's death, if the grantor delivers it to a third person in escrow for delivery to the grantee after the grantor's death, and retains no dominion or control, the delivery is valid, and an immediate estate vests in the grantee as of the date of the delivery in escrow, subject to the grantor's life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 140, 141; Dec. Dig. \S 61.]

5. DEEDS \S 208(1) — DELIVERY — PRESUMPTIONS.

Though the law makes stronger presumptions in favor of the delivery of a deed to the grantor's children, especially minors, than in an ordinary case, the question is still one of intention, to be determined by the attending facts and circumstances.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 625, 630; Dec. Dig. \S 208(1).]

6. DEEDS \S 56(2)—DELIVERY—SUFFICIENCY.

To constitute a delivery, it must clearly appear that it was the intention of the grantor

that the deed should pass title at the time, and that he should then lose all control over it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 118; Dec. Dig. \S 56(2).]

7. DEEDS \S 208(1) — DELIVERY — EVIDENCE—SUFFICIENCY.

Evidence of grantee's separate deed to husband and wife of distinct properties held insufficient to show delivery by the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 625, 630; Dec. Dig. \S 208(1).]

8. DEEDS \S 54—DELIVERY—SUFFICIENCY.

The fact that the grantor of a deed mistakenly thought that a delivery was not essential to a valid gift before her death cannot supply the place of delivery to create an operative instrument during her life.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 116; Dec. Dig. \S 54.]

9. EXECUTORS AND ADMINISTRATORS \S 3(1)—NECESSITY OF ADMINISTRATION.

Since by Rem. & Bal. Code, \S 1366, realty descends to heirs immediately on death of the ancestor, it need not be included in probate proceedings, unless necessary to pay debts, and an heir cannot be estopped to claim title thereto for failure to object to its omission.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 3-6; Dec. Dig. \S 3(1).]

Department 1. Appeal from Superior Court, Spokane County; H. L. Kennan, Judge.

Suit by G. W. Showalter against John F. Spangle and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Danson, Williams & Danson and George D. Lantz, all of Spokane, for appellants. Davis & Hell, of Spokane, for respondent.

ELLIS, J. Action to quiet title to real estate. The facts are as follows: Plaintiff is the son of Mrs. Sarah Jane Showalter. Mrs. Showalter and defendant, Mrs. Mary Alma Spangle, are sisters. They are the only heirs of George W. and Marcella E. Cook. About 1883 George W. Cook acquired title to 2½ lots, and Marcella E. Cook acquired title to another 2½ lots in the town of Cheney, Wash. In 1888 through the medium of trustees the property standing in his name was deeded to her, thus vesting in her the record title to all of the property. The Cooks resided upon the property the rest of their lives, he dying in 1901, she in 1912. No probate proceedings were ever had upon his estate. Her estate was probated, defendant John F. Spangle acting as administrator, but the real estate in issue was not listed as a part of the estate. On January 13, 1907, Mrs. Cook made a deed of 2½ of the lots in question to defendant Mary Alma Spangle, and another deed of the other 2½ lots to defendant John F. Spangle, but she did not then deliver either of these deeds. She kept them at all times in a tin box, which she kept part of the time in a bank and part of the time at her home. These deeds were found in the box with about \$40 in money, certain promissory notes, and her other important papers, when it was opened after her death. She died

August 6, 1912, at the Spangle home, where she had gone several weeks previously. The two deeds were placed of record by John F. Spangle on August 22, 1912; the same day of his appointment as administrator. On December 16, 1913, Sarah Jane Showalter executed a deed, conveying to plaintiff an undivided one-half interest in the 4 lots and the 2 half lots in question, plaintiff thus acquiring whatever interest she had therein as an heir of George W. and Marcella E. Cook, her parents. He brought this action to quiet his title to this undivided one-half, further claiming, in any event, an undivided one-fourth through his mother as an heir of George W. Cook. Defendants answered, claiming title to the entire property by virtue of the above-mentioned deeds from Mrs. Cook. By reply plaintiff denied delivery of those deeds. John F. Spangle testified as follows:

"Well, this was some time, two or three weeks I think, after she [Mrs. Cook] was taken sick. I went into the bedroom—always went and talked to her—she says, 'Frank,' she says, 'I am not going to get well.' I says, 'Mother, you don't want to think about that.' * * * I told her then, 'You don't want to think that way,' says I, 'You must remember you are old and cannot recover as quick as a younger person.' 'Well,' she says, 'I know I ain't going to get well,' she says, 'and I want you to straighten up my business.' And she told me the box, what the contents was, and she spoke about some insurance policies, and she says, 'There is a box in there with nearly \$40 in.' She says, 'There is two deeds there, one for you and one for Mary; and all of the papers are in there.' And just then the nurse came and she quit talking about it. Q. And then what happened? A. Well, there was nothing more said in regard to it at that time. Q. Where was the box at the time you had the talk with her and she said she wanted you to get the box? A. Right in the closet, about six feet from the bed. Q. And did she deliver it to you? A. Yes, sir. Q. And from then did you have a key also to the box? A. Yes, sir. Q. And what did she say about the deeds to you and to Mary, if anything? A. Well, she said there was two deeds in there, one for me and one for Mary. Q. Tell you to take them? A. Yes; told me to take the box."

This was objected to on the ground that it related to a transaction with a deceased person, and was inadmissible as against plaintiff, who claimed title through such person. Counsel for defendants then said:

"Your honor cannot consider this testimony in favor of Mr. Spangle, but you can consider it in favor of Mrs. Spangle."

The testimony was then admitted. On cross-examination he testified:

"A. She told me about the box, what was in the box, and her papers and about these deeds, and she told about the box containing nearly \$40. She says, 'My papers are all in there.' And just then the nurse came in, and she quit talking about it at that time. Q. She said all of her papers were in there? A. I am not sure whether she said 'all of her papers.' Q. Did you find any of her papers anywhere except in this box? A. She has a little trunk. I don't think there were any papers to amount to anything. The main papers were right in this box. * * * Q. Now, if she had wanted you to return that box at any time before her death, you would have returned it, would you not? A. If

she would have called for it, I certainly would. Q. Delivered it to her? A. Certainly. Q. Was there any one else in the room at the time that she delivered this box to you? A. No; not right at that time. The nurse came in just the time she told me to take the box. Q. Now, at the time she gave you the box, she told you that she wanted you to take care of her affairs? A. She told me to take the box; that she wanted me to straighten up her affairs or her estate. Of course, I don't remember just how it was. Anyway she wanted me to settle up her business. * * *

He did not take the box at that time, but did a few days later, as to which transaction, over the same objection, Mrs. Spangle was permitted to testify as follows:

"My mother asked Mr. Spangle if he had taken this box. Q. What did he say? A. He said no; that he had not. Q. And then what was done and said? A. After he came in the door he asked me to get the box. Q. In her presence? A. In her presence. I got the box. I gave it to him. He took it, and carried it to the post office then."

There was evidence that Mrs. Cook had told several other persons that she had made these deeds, and intended that defendants should have the property. A brother of plaintiff testified that in 1910 Mrs. Cook spoke to him of these deeds, said that she had fully determined that his father, whom she did not like, should never have the benefit of any of her property, but now that he was dead she had been "thinking it over a great deal," and, "I may change that yet."

The court found the facts substantially as we have stated them, and, concluding that the deeds in question had never been delivered, entered judgment quieting title to an undivided one-half of the lots in plaintiff, and awarded him his costs. Defendants have appealed.

Two questions are presented: (1) Were all of these lots Mrs. Cook's separate property? (2) Was there a delivery of either of the deeds sufficient to pass title to either of the appellants? The conclusion which we have reached on the second question makes it unnecessary to discuss the first. We shall proceed at once to the question of delivery.

[1, 2] Respondent contends that there was no evidence of a delivery of either of the deeds, in that the testimony of neither appellant as to transactions which it is claimed constituted the delivery was admissible under the statute (Rem. & Bal. Code, § 1211), because both of them were parties to the record and each testified touching a conversation or transaction had by the witness with the deceased under whom respondent claims. Appellants concede that neither was competent to testify in his or her own behalf, but insist that each was competent to testify in behalf of the other. The latter view seems to us the sound one. The prohibition of the statute is against a party in interest or to the record testifying "in his own behalf." Appellants claim title to distinct properties through separate deeds of gift. They might have been sued separately, in which case

unquestionably either would have been competent as a witness in behalf of the other, since the other's separate property alone would have been involved. *Foster v. Murphy*, 76 Neb. 576, 107 N. W. 848; *Hiskett v. Bozarth*, 75 Neb. 70, 105 N. W. 990; *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241. In states where the common-law right of dower exists, a wife, in such a case as this, cannot testify in behalf of her husband. *Ayres v. Short*, 142 Mich. 501, 105 N. W. 1115. But that is because her inchoate right of dower, unlike the husband's curtesy, is a present legal interest, indefeasible by any act of the husband. *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220. In the case here the interest of each spouse in the other's separate property was certainly no greater because of their being joined in the same action than if they had been sued separately. In neither case was it greater than that of a prospective heir, and we have held that, since the living have no heirs, the interest of the ancestor does not disqualify the heir apparent. In *re Sloan's Estate*, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960.

[3] Assuming, therefore, that each appellant was competent to testify on behalf of the other, but not on his or her own behalf, was the evidence sufficient to show a delivery of either deed? It is essential to the delivery of a deed that there be a giving by the grantor and a receiving by the grantee with a mutual intention to pass a present title from the one to the other. It may be made through the hands of an agent, and it may be accepted through the hands of an agent, but there must be a mutual intention presently to pass the title. This mutual intention is the cardinal requisite. *Seibel v. Higham*, 216 Mo. 121, 131, 115 S. W. 987, 129 Am. St. Rep. 502; *Peck v. Rees*, 7 Utah, 467, 27 Pac. 581, 13 L. R. A. 714, 716; *Weisinger v. Cock*, 67 Miss. 511, 7 South. 495, 19 Am. St. Rep. 320; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188.

[4] This is as essential to a deed of gift as to any other. It is elementary that a deed cannot perform the functions of a will; hence cannot be effectually delivered after the grantor's death. When, however, the grantor delivers the deed to a third person in escrow to be held until the grantor's death and then delivered to the grantee, the grantor retaining no dominion or control over it, the delivery is valid, and an immediate estate is vested in the grantee at the date of the delivery in escrow, subject to the grantor's life estate. *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756; *Loomis v. Loomis*, 178 Mich. 221, 144 N. W. 552; *Roepke v. Nutzmann*, 95 Neb. 569, 146 N. W. 939; *Huddleston v. Hardy*, 164 N. C. 210, 80 S. E. 158; *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112; *Criswell v. Criswell*, 138 Iowa, 607, 116 N. W. 713; *Griswold v. Griswold*, 148 Ala. 239, 42 South. 554, 121 Am. St. Rep. 64;

Rodemeyer v. Brown, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176.

[5, 6] While it has often been broadly stated that the law makes stronger presumptions in favor of the delivery of a deed of settlement upon children of the grantor, especially minor children, than in an ordinary case of bargain and sale, nevertheless on all authority the question is one of intention to be determined by the attending facts and circumstances.

To constitute a delivery—

"It must clearly appear that it was the intention of the grantor that the deed should pass the title at the time, and that he should lose all control over it. A deed for an interest in land must take effect upon its execution and delivery, or not at all." *Wilson v. Wilson*, 158 Ill. 567, 574, 41 N. E. 1007, 1008, 49 Am. St. Rep. 176.

"Nor is any particular form or ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative to pass the title to the land conveyed, and that the grantor loses all control over it." *Byars v. Spencer*, 101 Ill. 429, 433, 40 Am. Rep. 212.

See, also, *Shults v. Shults*, 159 Ill. 654, 660, 661, 43 N. E. 800, 50 Am. St. Rep. 188.

In every case there must be something from which it clearly appears that there was an intention to make the deed a presently operative conveyance, vesting title in the grantee within the grantor's lifetime. *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240; *Fain v. Smith*, 14 Or. 82, 12 Pac. 365, 58 Am. Rep. 231.

[7, 8] So measured, it seems to us that the evidence was wholly insufficient to show a delivery of either of these deeds. We shall consider it first as to the deed in which the wife was named as grantee. Appellant husband, though permitted, time and again, to state what deceased said at the time of the alleged delivery, did not testify that she told him to deliver the deed to the wife either then or thereafter. True, he testified that she told him one deed was "for Mary." But he did not say that she told him to give it to Mary, or to hold it for Mary, or to record it for Mary, either then or after her death. There was no act or word from which a delivery in escrow can reasonably be inferred. She expressed the belief that she was going to die. She told him, not only of the deeds, but also of the money and the other private papers in the box. The only request she made of him was that he take the box and "straighten up her affairs or her estate." She gave no direction as to the deeds apart from the other contents of the box. She merely described them as she did the money and the insurance policies and, in a general way, the other contents of the box. She did not authorize him to remove the deeds, or anything else, from the box, except for use in settling her estate. The very fact that she had held these deeds for years without any attempt to deliver them, and the further fact that at this time she gave the witness no

direction as to what should be done with them, except the implication from her language that they, with the other contents of the box, should be used in settling her estate, seem to us capable of no other construction than that she believed that these deeds, though never delivered until after her death, could then take effect for the first time in the same manner as a testamentary disposition of the land. In this she was, of course, mistaken, but that cannot supply the place of delivery as an operative instrument during the life of the grantor. *Weisinger v. Cook*, 67 Miss. 511, 7 South. 495, 19 Am. St. Rep. 320.

The case of *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 13 L. R. A. 64, 21 Am. St. Rep. 131, presents a close parallel to this on the facts. An aged woman owned two houses, in one of which she lived. Several years before her death she made deeds of one of these to P. and of the other to R. On each deed was indorsed the name of the grantee. She placed them in a box in which she kept her will, her bank books, her insurance policies, and other important papers, and in which she also had a bag containing \$1,000 in gold. The box was kept in a closet in her bedroom. During the last year of her life she told an attendant that she had deeded away the two houses. Having suffered an injury and being apprehensive of death, she told her attendant where the box was, and said:

"I put that box in your possession. My private papers are in it and the bag of gold. My will is there and the deeds of the two houses. I told you that I had deeded away these houses. On the deeds are the names of the persons who are to have them."

She then directed the attendant to take charge of the box, put it back in the closet, and told her where the key was, saying:

"I have said enough so that you will know what to do with the box in case I should die. If I live I will talk further about the contents of the box, but do not open it until after my funeral."

She died about a month later. Upon these facts the court, though recognizing the general rule that a delivery of a deed in escrow for delivery to the grantee after death is a valid present delivery, held that the facts stated showed no such intention. The superior court found that the sole purpose of the conversation with the attendant was to give her information of the existence and contents of the box. On appeal the Supreme Court said:

"The delivery of a deed includes, not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee. As we are satisfied that Mrs. Hinman never did any act by which she parted with the possession of the deeds for the benefit of the grantees, the question of her intent becomes immaterial."

Appellants lay much stress upon the assumed delivery by deceased of the key of the

box. That circumstance, however, in view of the declared purpose of the delivery of the box, is entitled to little force. Moreover, it will be noted that the witness, though testifying that he had a key, did not testify that deceased gave it to him. From the entire evidence we are satisfied that the deed was never delivered, even in escrow, with the purpose of consummating the transaction so as to make it a presently operative conveyance.

As to the delivery of the deed in which appellant husband was named as grantee, since his testimony was inadmissible in his own behalf, it cannot aid or be aided by the wife's testimony. Her testimony, to avail, must be found sufficient, standing alone, to show a delivery. But in the transaction detailed in her testimony the deed was not mentioned. She merely testified that the deceased asked the husband if he had taken the box; that he answered he had not; that he then asked the wife to get the box; and that she did so and gave it to him, and he took it to the post office. This is all, and we think it wholly insufficient to prove any intention on the part of the deceased then to deliver the deed to him as a presently operative instrument. There was no evidence that the deceased then had the deed in mind or intended her question touching the box as a delivery of the deed. This evidence merely shows an intention to make him her custodian of the box and whatever it contained. Nor is any of the evidence as to the delivery of either deed aided by the fact that the box containing the deeds and the key to it were produced by the husband after Mrs. Cook's death. She died in the Spangle home. It was admitted that she had possession of the box and of the deeds while there. Naturally on her death they would be found in the possession of the appellants, whether delivered to either of them or not. The evidence was much more compatible with her regarding him as the custodian for her than with the idea that she intended to relinquish control or dominion over the box or any of its contents. *Chambers v. McCreery*, 106 Fed. 364, 45 C. O. A. 322; *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907, 909.

Our own decisions, *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756, *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. Rep. 924, and *Thatcher v. Capeca*, 75 Wash. 249, 134 Pac. 923, cited by appellants, are readily distinguishable from the case here on the facts.

[9] We find no merit in the contention that respondent was precluded from a recovery in this case because of the fact that with his mother's knowledge this real estate was not included in the probate of Mrs. Cook's estate. Respondent claims by right of his mother's heirship. The real estate descended to the heirs immediately on Mrs. Cook's death. Rem. & Bal. Code, § 1366. Unless it was necessary to sell it to pay debts, it

was not essential that it be included in the probate proceedings. The failure to complain of the nonperformance of a useless thing can hardly work an estoppel.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, FULLERTON, and CHADWICK, JJ., concur.

CITIZENS' BANK & TRUST CO. v. LIMP-RIGHT et ux. (No. 13332.)

(Supreme Court of Washington. Nov. 17, 1916.)

1. BILLS AND NOTES ¶339 — BONA FIDE HOLDERS—DUTIES.

The taker of negotiable paper fair on its face owes the maker no active duty of inquiry, to avoid imputation of bad faith, which does not arise from mere failure to take precautions of a prudent man or from negligence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 821-823; Dec. Dig. ¶339.]

2. BILLS AND NOTES ¶525 — BONA FIDES — EVIDENCE.

Evidence held insufficient to show bad faith in the holder of a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. ¶525.]

3. BILLS AND NOTES ¶525—BONA FIDES—EVIDENCE—"DEFECTIVE."

Where the purchaser of an automobile traded his old car in at \$1,150, and gave his note for \$1,600, the price of the new car, under collateral executory written agreement to allow the \$1,150, the pledgee of the payee, before 60-day due date of the collateral agreement, for a consideration, without notice, was a bona fide holder, the purpose of the transaction being evidently to allow the payee to hypothecate the note, and his title not being "defective" within Rem. & Bal. Code, § 3446, when he negotiated it, since it was not obtained by fraud, duress, unlawful means, or for illegal consideration, nor pledged in breach of faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. ¶525.]

For other definitions, see Words and Phrases, First and Second Series, Defective.]

4. BILLS AND NOTES ¶357 — DISCOUNT — AMOUNT OF RECOVERY.

In such case, and in view of Rem. & Bal. Code, § 3418, providing that, when the holder has a lien on the instrument by contract or implication of law, he is deemed the holder for value to the extent of his lien, the pledgee having taken the note as collateral at 80 per cent. of its face value, could recover only such amount, plus legal interest, in the absence of evidence of the rate of interest its loan to the payee bore.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 909-912, 961; Dec. Dig. ¶357.]

Department 1. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by the Citizens' Bank & Trust Company against C. B. Limpwright and wife. Judgment dismissing the action, and plaintiff appeals. Reversed and remanded for judgment entry.

Sherwood & Mansfield, of Everett, for appellant. Cooley, Horan & Mulvihill, of Everett, for respondents.

ELLIS, J. Plaintiff, claiming to be a bona fide holder for value, brought this action to recover \$1,150 as a balance due upon a promissory note, together with interest, costs, and attorney's fees. The defense was that plaintiff was not a bona fide holder for value. Certain facts are not disputed. On February 21, 1914, defendant husband gave to one Pittman, doing business as Riverside Carriage & Auto Company, a negotiable promissory note for \$1,600 bearing interest at the rate of 8 per cent. per annum, and reciting: "\$1,150 due April 21, 1914, balance at rate of \$100 per month." The circumstances under which the note was given were these: Pittman, as the auto company, sold to defendant an automobile at a price of \$1,600, agreeing to take defendant's old car in part payment at a valuation of \$1,150, the balance of \$450 to be paid in four monthly payments of \$100 each, and one of \$50. The old car was at once delivered to the auto company and the new car to defendant, who received in return for his note the following memorandum of agreement:

"Everett, Wash., 2-21, 1914.

"We hereby agree to allow C. Limpwright \$1,150 for his 35 Studebaker car; same to be paid and applied on a certain note for \$1,600; this is to be applied on sixty days from date on said note of \$1,600.

"Riverside Carriage & Auto Co.,
"By L. R. Pittman."

On February 26, 1914, the note was transferred by indorsement to plaintiff as collateral to a loan of \$1,230. Defendant thereafter made payments on the note as follows: \$200 on April 4, 1914; \$100 May 5, 1914; \$100 June 3, 1914; \$50 July 7, 1914. These payments were made to the auto company, and were credited on the note by the bank. Two questions of fact are in dispute. Plaintiff's cashier, with whom the transaction was had, testified that when the note was negotiated at the bank he had no notice or knowledge of the circumstances under which the note was given nor any notice or knowledge of the collateral agreement, and did not learn of these things till about six months afterwards. Pittman testified that either at the time of the transfer or soon afterwards "I told them I had a car to sell, and the proceeds applied on the note in sixty days from the time I accepted the note." He did not testify that he showed to the cashier or any one connected with the bank the collateral agreement, or that he advised any one connected with the bank of the terms of that agreement, or even of its existence. The other disputed fact is as to when notice of the negotiation of the note was first given to defendant. Plaintiff's cashier testified that on February 26, 1914, he wrote to defendant

advising him that the bank held the note, that, while he had no independent recollection of the matter, he knew it because that date was stamped on the back of the note, and that it was his universal custom to so stamp the date on sending such notices. Defendant denied ever having received any notice of that date. On October 1, 1914, the cashier wrote defendant as follows:

"Your note to the Riverside Carriage & Auto Company, assigned to this bank, is past due as to several monthly payments of \$100 each, and we must therefore urge this matter upon your prompt attention, and oblige."

Defendant testified that this letter conveyed to him the first notice he ever received that the bank held the note. He afterwards admitted, however, that he paid the first installments to one way, an employé of the auto company, who then told him he would take the checks to the bank, and that he (defendant) then supposed the bank had the note. Pittman on May 27, 1914, sold the old car for \$749.70, took a note in payment, and sold this note to plaintiff bank for eighty per cent. of its face. There was no evidence that any one connected with the bank had any knowledge or notice that this note represented the proceeds of the old car received by Pittman from defendant. Pittman testified: "I never said a word to them about that."

The cause was tried to the court without a jury. The court found that plaintiff took the note prior to its maturity, but with full knowledge and notice of the collateral agreement between defendant and Pittman, and took it subject to that agreement, and that the note had been paid in full. Judgment was entered dismissing the action, with costs to defendants. Plaintiff appealed.

It is contended: (1) That the evidence was insufficient to charge appellant with notice or knowledge of the collateral agreement when it took the note; (2) that, the collateral agreement being still executory when the note was indorsed, knowledge of its existence could not deprive appellant of its character of bona fide indorsee in due course.

[1] The taker of negotiable paper, fair upon its face, does not owe to the party who gives it currency the duty of active inquiry in order to avoid the imputation of bad faith. His rights are to be measured "by the simple test of honesty and good faith," not by mere speculation as to his diligence or negligence. It is not enough to impeach his good faith that he may have been negligent or may have failed to take precautions that a prudent man would have taken. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903; *Gray v. Boyle*, 55 Wash. 573, 104 Pac. 828, 133 Am. St. Rep. 1042; *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

[2] As we read the evidence, the full purport of which we have set out in our statement, it falls far short of showing knowl-

edge on appellant's part when it took this note of any agreement on Pittman's part to credit upon the note \$1,150 or any other sum as the price of the old car. We shall not further discuss the evidence on this point, since, even were it conceded that appellant had full knowledge of the collateral agreement, that fact would not charge it with bad faith.

[3] If, as between the parties at the time of the delivery of the old car it was to be considered as an immediate payment of the \$1,150, the written agreement to treat it as a payment 60 days from that date would be nugatory and meaningless. That agreement was an executory agreement to apply the \$1,150 as the valuation of the old car upon the note, not immediately, but 60 days from that date. It was a contemporaneous agreement to do the thing at a future time as part of the consideration for the note. The plain purpose of the giving of the note for the full price of the new car without then crediting upon it the \$1,150 was to enable Pittman to raise money upon the note. On the face of the transaction no other purpose is conceivable. Moreover, the oral evidence conclusively so shows. Respondent, when asked why it was that he gave the note for the full price of the new car when he turned in the old car, said:

"He [Pittman] wanted 60 days to turn the old car."

Pittman, when asked why he took the note when he already had the old car, answered:

"In the first place, we had to pay cash for the cars when we received them, and we either had to pay for the cars or do without them, and we could not sell the cars unless we took paper or did something to negotiate for cash for the cars."

There is not a word of evidence that Pittman agreed not to negotiate the note or that respondent ever asked him not to negotiate it. In giving the note and taking the collateral agreement respondent clearly relied upon the financial responsibility and integrity of Pittman for the fulfillment of that agreement. *Moyes v. Bell*, 62 Wash. 534, 114 Pac. 193. Such being the necessary purport and purpose of the agreement, Pittman's title to the note was not defective within the meaning of section 55 of the Negotiable Instruments Act (Rem. Code, § 3446) when he negotiated it. He did not obtain it by fraud, duress, or other unlawful means, nor for an illegal consideration, nor did he pledge it in breach of faith, as that was the only conceivable purpose for which it was given. When he pledged it his collateral agreement to credit the maker with \$1,150 was still executory. No failure of consideration for the note had then developed. Appellant took the note as a bona fide holder in due course, regardless of any knowledge it may have had of the collateral agreement. This court, following preponderant authority, has repeatedly held that knowledge of the indorsee of a note given in consideration

of some executory contract or agreement of the payee, which the payee thereafter fails to perform, will not deprive the indorsee of his character of a bona fide holder in due course, unless prior to his taking he had notice that the breach of the executory agreement had already occurred. See *Moyses v. Bell*, supra, and the numerous decisions there cited and quoted. See, also, *German American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769, a case closely related to this on the facts.

The trial court seems to have been of the opinion that respondent was wholly without fault, and that the equities of the case were clearly with him. We cannot so read the evidence. He gave his note to Pittman without any indicia whatever that it was not to be negotiated and without any agreement that it was not to be negotiated. If the note was not to be used, the reasonable thing, the safe thing, and the thing which would have protected all parties absolutely was not to give it. By giving it and taking the collateral agreement he reposed confidence in Pittman personally and in Pittman alone. To permit that agreement to defeat the note in appellant's hands, and for which it had admittedly paid value, would place all of the care and caution touching negotiable paper upon the taker rather than upon the maker, thus reversing the law merchant and the Negotiable Instruments Act and running counter to that cardinal rule of equity that he who makes a loss possible should suffer the loss.

[4] But it does not follow that appellant is entitled to recover the full balance due on the note. The evidence is conclusive that it took the note as collateral to a loan for 80 per cent. of its face, or \$1,280. The statute (section 27 of the Negotiable Instruments Act; Rem. Code, § 3418) declares:

"Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

Appellant has a lien upon the note arising from contract. Under this statute it is to be deemed the holder for value only to the extent of that lien. Appellant failed to offer any evidence as to the rate of interest its loan to Pittman was to bear. It therefore can recover interest at the legal rate only. So computing the interest and applying the partial payments made upon the note first to the interest, and then to the principal, there remained due to appellant on July 7, 1914, the date of the last payment, a balance of \$853.45. Appellant is entitled to judgment for this amount, with interest from that date at the rate of 6 per cent. per annum and for an attorney's fee of \$50, which respondents in their answer admit to be reasonable.

The judgment is reversed, and the cause is remanded for entry of judgment for appellant and against respondent C. B. Limpricht

and the community consisting of C. B. Limpricht and Josephine Limpricht in accordance with this opinion.

MORRIS, C. J., and MOUNT, FULLERTON, and CHADWICK, JJ., concur.

FRUITLAND IRR. CO. v. THAYER et al. (No. 18550.)

(Supreme Court of Washington. Nov. 13, 1916.)

1. WATERS AND WATER COURSES ⇨258 — IRRIGATION COMPANIES — LIEN ON LAND — FORECLOSURE — COMPLAINT.

In suit by an irrigation company against a landowner and others, the complaint, aptly setting forth that defendant contracted to purchase a perpetual water right for irrigating his land, and the charge or lien on the land and water right expressly created by the contract, and praying for foreclosure of such lien, fairly disclosed that it was designed neither for specific performance nor for damages, but was drawn on the theory that the contract was a contract in the nature of a mortgage, creating a lien upon the land and the owner's water right for any sums that might be due the irrigation company under the contract, and as such it was sufficient.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. ⇨258.]

2. WATERS AND WATER COURSES ⇨258 — IRRIGATION — STATUTE — APPLICATION.

While the Carey Act (Rem. Code 1915, § 6721), providing for liens for the reclamation of arid lands, is limited in its scope to water rights under that act, and does not apply generally, irrespective of statutory authorization, it is the undoubted right of parties to agree by contract that the property of one shall be security to the other for any debt owing by the former, as that land, and a water right for irrigation, shall be subject to a lien, in favor of the irrigation company which sold the right, to secure payments to it under the owner's contract to purchase.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. ⇨258.]

3. WATERS AND WATER COURSES ⇨258 — IRRIGATION — LIEN — CREATION BY CONTRACT — ENFORCEMENT.

A contract for the sale of a perpetual water right, which expressly charged the purchase price as a lien on the land and water right, in favor of the irrigation company selling, possessed all the elements of a lien created by contract on specific property, enforceable in a court of equity by the irrigation company against the landowner for any default, even though it lacked the essential elements of a mortgage.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. ⇨258.]

4. WATERS AND WATER COURSES ⇨258 — FORECLOSURE — PROPERTY PASSING.

In an irrigation company's action against a landowner and others to foreclose its lien created by contract to purchase a perpetual water right, and providing for foreclosure and sale of the water right on enforcement of the lien, a sale under the decree directing sale of both the land and water right would pass title to the water right as against the irrigation company, though it never tendered or brought into court a deed for the water right.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. ⇨258.]

Department 2. Appeal from Superior Court, Stevens County; W. H. Jackson, Judge.

Action by the Fruitland Irrigation Company against George L. Thayer, the Farmers' & Mechanics' Bank, and others. From a decree for plaintiff, the named defendants appeal. Decree affirmed.

Smith & Mack, of Spokane, for appellants. Osce W. Noble, of Colville, for respondent.

FULLERTON, J. In December, 1900, the Fruitland Irrigation Company entered into a contract with George L. Thayer and wife, whereby it agreed to sell them a perpetual right to the use of water from the company's canal for the purpose of irrigating 84.2 acres of land owned by the Thayers in Stevens county. The purchasers agreed to pay for such water right the sum of \$2,528, in installments of \$505.20 each, on the 1st day of May in the years 1910, 1911, 1912, 1913, and 1914, with interest at the rate of 7 per cent. from May 1, 1910, on all deferred payments. The contract also provided for the payment of an annual maintenance fee of \$3 per acre in advance on the 1st day of May of each year. Among the provisions of the contract were the following:

"It is expressly understood and agreed that the purchase price of said water right and the annual maintenance fee shall be a charge and lien upon said land and the whole thereof, and in order to secure the payment thereof, the purchaser hereby mortgages said land with its appurtenances and said water right unto the company, and this mortgage may be enforced and foreclosed in any court of competent jurisdiction, according to the laws of the state of Washington; * * * and it is agreed that all overdue payments, either for the purchase price of said water right or for said maintenance fee shall draw interest from the date of maturity thereof at the rate of 8 per cent. per annum.

"It is further agreed that the company may, at its option, for default in any of the payments of the purchase price of said water right, or for default in the payment of any installment of principal or any interest payment at the time the same becomes due and payable, declare the whole amount agreed to be paid hereunder due and collectable, and may foreclose this mortgage and sell said premises with the appurtenances, including said water right, in the manner prescribed by law, and out of the money arising from said sale, after deducting the costs and expenses thereof, and such amount as the court shall adjudge reasonable attorney's fees, apply the balance to the payment of said amounts, rendering the overplus, if any, to the purchaser, and such foreclosure may be had with like proceedings, remedies and effect for default in the payment of said annual maintenance fee. * * *

It is further understood and agreed that when the purchaser shall have made full payment of the purchase price for said water right, with interest as aforesaid, the company will execute and deliver to such purchaser a conveyance of the perpetual right to the use of said water upon said lands upon the terms and conditions herein contained. * * * Time and punctuality are material and of the essence of this contract."

The contract was regularly executed and acknowledged, in accordance with the statutes governing conveyances of real property.

The Thayers made payments on May 10,

1910, October 4, 1911, and May 5, 1914, totaling \$1,577.02, leaving a balance due on the principal sum for the right and maintenance fee amounting to \$2,020.80. On the refusal to make any further payments, the Fruitland Irrigation Company began this action on July 3, 1914, to foreclose its lien upon the land covered by its contract and mortgage, making defendants George L. Thayer, the minor children of Mary E. Thayer, his wife, then deceased, and the Farmers' & Mechanics' Bank of Spokane, which held a mortgage on the land taken subsequent to the contract of the plaintiff.

The complaint alleged that plaintiff was an irrigation company engaged in the sale of water and water rights, and that prior to the execution of the contract with the Thayers, it was the owner of 160 cubic feet of water and had constructed its irrigation canals. It then set forth the contract and its breach substantially as before stated, and alleged its readiness and willingness to deliver a good and sufficient water deed, but that it had been informed by defendant George L. Thayer:

"That they were financially unable to pay the amounts due, could not pay the same, and could not carry out their part of said contract, and that a tender of a water deed as provided for in said contract would be a vain and useless act."

The prayer was that the water contract in the form of a mortgage be decreed to have been executed for the purpose of securing such contract, and that such contract and mortgage be foreclosed in pursuance of law and the property together with the water right be ordered sold by the sheriff; that plaintiff or any party to the suit may become a purchaser at such sale; that the defendants be barred and forever foreclosed of all right, lien, estate, claim, equity, or interest in such premises; and that said mortgage and water right be decreed to be a first lien upon the premises.

The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants elected to stand upon their demurrer and refused to plead further. The court, after making findings of fact and conclusions of law, entered its judgment against George L. Thayer for the sum of \$2,663.70, being the amount of principal and interest due at date of the entry of the judgment; further adjudging the contract to be a mortgage and a valid lien upon the real property described together with the water right appurtenant thereto first and superior to the claims and liens of the defendants and each of them, decreeing that the same be foreclosed and the property sold in accordance with the practice in such cases, reserving, however, to the defendants George L. Thayer and the Farmers' & Mechanics' Bank, and each of them, the right to redeem the lands and water right within one year after date of the sheriff's

sale. The defendants George L. Thayer and the Farmers' & Mechanics' Bank appeal from the decree.

[1] The appellants, proceeding upon the theory that the action is one for specific performance, contend that the complaint is insufficient as against general demurrer because of its failure to allege a tender of a deed by respondent, and to keep good the tender by bringing the deed into court. They also contend that, if the action be intended as one for damages, the complaint is insufficient because the damages have not been alleged. It is sufficient to say that the complaint fairly discloses on its face that it is designed neither for specific performance nor for damages, but has been drawn on the theory that the contract between the parties is what it assumes to be, namely, a contract in the nature of a mortgage creating a lien upon the land and upon the water right of appellant Thayer for any sums that may be due from him to respondent under the contract. The complaint is sufficient for this purpose; it aptly sets forth the charge and lien on appellant's land expressly created by the terms of the contract, and alleges the amount due and owing from Thayer to respondent; it prays for the foreclosure of such lien and for an order of sale of the property and water right and the application of the proceeds of sale to satisfy respondent's claim, attorneys' fees, and costs, and the payment of any balance over to the party found entitled thereto. That contracts of this character are legal is well settled.

"In a number of the Western States it is provided by statute to the effect that the contract amount * * * to be paid to water companies by the consumers furnished with water shall be a first lien upon the land for the irrigation of which the water is furnished and delivered. But whether this right is provided for by statute or not, we take it that a corporation has the power to make such a contract with its consumers, and that the lien so provided for may be enforced. * * * But in order to create the lien on the land the language used in the contract must be definite and specific, and must be a direct declaration that such a lien is created by its terms. * * * The usual method of procedure for enforcing such contracts where the payment of the water rates is neglected or refused is by a foreclosure and sale of the lien." 8 Kinney, Irrigation and Water Rights, § 1522.

[2-4] The only statute in this state on the subject occurs in our provisions for the reclamation of arid lands under the Carey Act (Rem. Code 1915, § 6721). While this statute is limited in its scope to water rights under the Carey Act and does not apply generally, it shows the legislative recognition of the right to create such liens and enforce them by foreclosure. But, irrespective of statutory authorization, it is the undoubted right of parties by contract to agree between themselves that the property of one shall be security to the other for any debt owing by the former. The contract here in controversy provides for the sale by respondent to appellant Thayer of a water right, and that to secure the deferred payments appellant "mortgages his land with its appurtenances and said water right" unto respondent, "and this mortgage may be enforced and foreclosed in any court of competent jurisdiction according to the laws of the state of Washington." Even if it were conceded that the instrument lacked any of the essential elements of a mortgage, it certainly possesses all the elements of a lien created by contract on specific property, enforceable for any default in a court of equity. The decree of the court directed the sale of both the land and the water right, which would pass title to the water right as against respondent, a party to the action, notwithstanding the respondent had never tendered, nor brought into court, a deed for such water right. Its contract provided for foreclosure and sale of such water right on the enforcement of its lien, and all title of respondent therein would necessarily pass to the purchaser at sheriff's sale. Appellant Thayer and all claiming under him were protected in the decree, which allowed a year for redemption of such lands and water right from the execution sale.

What we have said disposes of the other assignments of error made by the appellants, and renders their further discussion unnecessary. We find no error in the rulings of the trial court, and its decree is affirmed.

MORRIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

CYCLOHOMO AMUSEMENT CO. v. HAYWARD-LARKIN CO. (No. 13867.)

(Supreme Court of Washington, Nov. 17, 1916.)

1. LIBEL AND SLANDER §9(1)—PARTICULAR WORDS—LIBEL OF BUSINESS.

Poster in red on white, stating that theaters employing incompetent help endangered patrons' lives; that those having competent help displayed a union card, and asking, "Do you know that the A. and M. theaters cannot show" such card? —is libelous per se, as intended to injure another's business, within Rem. Code, 1915, §§ 2424, 2425, defining libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80, 90; Dec. Dig. § 9(1).]

2. LIBEL AND SLANDER §33—EVIDENCE — SPECIAL DAMAGES — WORDS LIBELOUS PER SE.

If a publication is actionable per se, plaintiff need not prove actual damage; damages in such case being presumed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 112, 277; Dec. Dig. § 33.]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by the Cyclohome Amusement Company against the Hayward-Larkin Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles P. Lund, of Spokane, for appellant. Thos. A. Scott, of Spokane, for respondent.

MOUNT, J. This action was brought to recover damages to plaintiff's business by reason of the publication of an alleged libel by the defendant. The case was tried to the court without a jury. Upon the trial the court made findings and conclusions in favor of the plaintiff, and assessed damages against the defendant in the sum of \$300. The defendant has appealed from a judgment entered upon the findings.

It appears that the plaintiff was engaged in the moving picture theater business in the city of Spokane, and was conducting the Majestic Theater. The defendant was engaged in the advertising business in said city. Prior to February 11, 1913, the defendant had some differences with the moving picture operators' union, and was not employing union men in its theater. About that date certain members of the union caused to be printed and delivered to the defendant's plant for posting a number of posters which the court held to be libelous. These posters are two feet wide by three feet long. They are printed in bright red ink upon a white sheet of paper. At the top in large letters is the word "Danger." Following this in smaller letters are these words:

"Do you know that a theater that employs incompetent operators endangers your life? Do you know that the theaters that employ competent help display this card in the box office?"

Then follows a copy of a union card. Following the card are these words:

"Do you know that the Arcade and Majestic Theaters cannot show this card?"

These posters were posted upon defendant's billboards, and were distributed about the city of Spokane. There is no dispute as to the fact of posting, but there is some dispute as to the length of time some of these posters remained posted.

Two points are made by the appellant upon this appeal: First, that the posters as published by the appellant are not libelous per se; and, second, if libelous, there was no proof to sustain a judgment of \$300.

[1] The poster upon its face very clearly states that theaters which employ incompetent help endanger the lives of the patrons of such theaters; that theaters which employ competent help display a union card, and then the poster says:

"Do you know that the Arcade and Majestic Theaters cannot show this card?"

Here is a direct and positive declaration that the Majestic Theater is a dangerous place because of incompetent help. Nothing else can be made of this poster. It is printed in red ink upon a white background, indicative of danger. There can be no doubt that the object of displaying these posters upon the billboards in the city of Spokane was to prevent people from attending the theaters named. It had no other object. The statute, at section 2424, Rem. 1915 Code, provides:

"*Libel Defined.* Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend: * * * (3) To injure any person, corporation or association of persons in his or their business or occupation, shall be a libel."

The next section provides:

"Every publication having the tendency or effect mentioned in section 2424 shall be deemed malicious unless justified or excused."

There can be no doubt that the purpose of displaying these posters in the public places of Spokane was to injure the Majestic Theater in its business. These posters were clearly libelous per se within the terms of the statute. *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774.

[2] It is next contended that there was no proof to justify a judgment of \$300. As we have seen above, the posting of these posters was libelous per se. The rule is stated in 25 Cyc. 531, as follows:

"If the publication is actionable per se plaintiff is not required to introduce evidence of actual damage to entitle him to substantial damages, since, in the absence of any evidence of damage, the law presumes damages."

And in the same volume at page 533:

"Under a general allegation of loss of business, it is competent for plaintiff to prove a general loss or decline of patronage. Moreover, where the words are actionable per se as affecting plaintiff in his business, the jury may award such substantial damages as will compensate for

the general injury to business, although no evidence whatever as to damages is offered by plaintiff."

In this case, however, the respondent offered evidence showing a decline in patronage after the publication of these posters, and if the general rule were not as above stated, we are satisfied that there is sufficient in the evidence to show that the court was very moderate in assessing damages in the sum of \$300.

We find no error in the record, and the judgment is affirmed.

MORRIS, C. J., and FULLERTON, ELLIS, and CHADWICK, JJ., concur.

COLBURN v. WINCHELL

(Supreme Court of Washington. Nov. 18, 1916.)

1. WATERS AND WATER COURSES ⇐21—APPROPRIATION OF WATER RIGHTS—EFFECT.

Under Remington's Code 1915, § 6333, enacted in 1890, authorizing any person who owns or has possessory rights in lands in the vicinity of any natural stream or lake to take water therefrom, if there be any surplus of unappropriated water in the lake or stream, the right of the United States government to control the waters flowing or standing within the boundaries of any state having been waived by acts of Congress, where an appropriation was made on government land in 1903, before title had passed out of the federal government, the subsequent grant of the land to the state for the purposes of a scientific school was subject to the vested right acquired by the appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 14; Dec. Dig. ⇐21.]

2. WATERS AND WATER COURSES ⇐133 — "APPROPRIATION OF WATER" RIGHTS—REQUISITES.

To make an "appropriation of water," there must be an intention to appropriate a certain quantity and an actual use of that quantity, or the exercise of reasonable diligence in preparing the land for its use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 146; Dec. Dig. ⇐133.]

For other definitions, see Words and Phrases, First and Second Series, Appropriation of Water.]

3. WATERS AND WATER COURSES ⇐21—APPROPRIATION OF RIGHTS—RIGHT OF WAY.

Where a landowner in 1903 appropriated water on a government section of land, Remington's Code 1915, § 6844, enacted in 1907, recognizing the right to construct a ditch over state land in aid of irrigation, is not applicable where the title, acquired by the state in 1905, passed out of the state in 1906, but under Comp. St. 1913, § 4647, the appropriator acquired the right of way for the ditch before title passed out of the federal government.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 14; Dec. Dig. ⇐21.]

Department 2. Appeal from Superior Court, Klickitat County; R. H. Back, Judge.

Action by C. L. Colburn against C. J. Winchell. From the judgment, both parties appeal. Affirmed.

Geo. F. Felts and I. N. Smith, both of Portland, Or., for appellant. Brooks & Brooks, of Goldendale, for respondent.

MAIN, J. The parties to this action are two rival claimants to the water of a non-navigable stream known as Old Logging Camp creek. The trial resulted in a judgment, giving one-half of the water to each of the parties. From this judgment both have appealed.

The facts are these: During the year 1903 the plaintiff's predecessor in interest, being the owner of the N. W. ¼ of section 13, township 4 N., range 10 E. W. M., went upon the S. E. ¼ of section 11, in the same township, dammed the creek, constructed a head-gate or intake, and diverted the water therefrom. This water was carried to the property now owned by the plaintiff by means of a ditch and flume, where it was used for irrigation. At the time the diversion was made, the S. E. ¼ of section 11 was government land. During the year 1905 this quarter, together with other lands, was granted to the state of Washington for the establishment and maintenance of a scientific school. The application by the state was made March 5, 1904. In 1906 the 160 acres mentioned was sold by the state to the defendant. This controversy arose in 1911, when the defendant refused longer to permit the plaintiff to take water from the stream.

It is claimed that since the land was granted to the state for the purpose of a scientific school, no right of appropriation exists under the provisions of the enabling act. This question, however, is not necessarily involved in the case, and therefore no opinion will be expressed upon it.

[1] The right to appropriate water for irrigation purposes arose out of the doctrine of necessity, for without such right, arid lands could not be made valuable. The right of appropriation is an impairment of the common-law doctrine that the water of a stream must continue to flow in its natural channel, undiminished in quantity and unimpaired in quality. The right to appropriate water for irrigation purposes has been recognized by the acts of Congress, and by the statutes of a number of states. The Legislature of this state during the session of 1890 passed an act, authorizing any person who owns or has possessory rights in lands in the vicinity of any natural stream or lake, not abutting on such stream or lake, to take water therefrom, if there be any surplus of unappropriated water in such lake or stream. Rem. 1915 Code, § 6333. In speaking of the act of Congress relative to the right to appropriate water for irrigation purposes, Mr. McKinney in his work on Irrigation and Water Rights, vol. 1 (2d Ed.) p. 1026, remarks:

"As far as the United States government is concerned by those various acts of Congress,

fully discussed in future portions of this work, it has waived its rights as sovereign in and to the government and control of the waters flowing or standing within the boundaries of any state, and has conferred the jurisdiction of such waters upon such state."

The state, then, when it passed the act of 1890, had the right to authorize the appropriation. Under this authority the appropriation was made during the year 1903. At this time the title to the land now owned by the defendant had not passed out of the federal government. The application for it had not then been filed by the state. The making of the appropriation was authorized by the state, and permitted by the acts of Congress. The appropriation being made under such authority, when the state received the grant of the land in section 11 for the purposes of a scientific school, it would necessarily take it subject to any previous vested right.

Some claim is made that the paper appropriation was defective. But no requirement of the statute in this regard with which the notice fails to comply is pointed out. The notice meets the requirements of the statute. While the legal evidence as to the posting of the notice as required by the statute is somewhat meager, yet we think it sufficiently appears that the plaintiff's right or title to one-half of the water in the creek is not defective for this reason. There was no evidence which would indicate that the notice had not been posted. The circumstances, so far as they bear upon the question, indicate a posting.

[2] The next point is whether the trial court correctly found the amount of water which the plaintiff was entitled to under his appropriation. In order to make an appropriation, there must be an intention to appropriate a certain quantity of water, and the actual use of this quantity, or the exercise of reasonable diligence in preparing the land for its use. *Sander v. Bull*, 76 Wash. 1, 135 Pac. 489. Without reviewing the testimony, but after having given careful consideration to the same, we are of the opinion that the judgment of the trial court in giving to the plaintiff one-half of the water of the stream is sustained by the evidence.

[3] There is some discussion in the briefs over the question whether the plaintiff had a right of way for the ditch through which the water was conducted. In support of the claim of the right to construct a ditch over state land, our attention is called to section 6844, Rem. 1915 Code. The act of which that section is a part recognizes the right to construct a ditch over the land of the state in aid of irrigation, and defines the necessary procedure. But that act was passed during the year 1907, and has no application to the facts in this case, because, as already stated, the title to section 11 passed out of the state during the year 1906, and before the act was passed. The ditch having been constructed

across section 11 before the title thereto passed out of the federal government, a right of way therefor was acquired under section 2339, Federal Statutes Annotated, vol. 7, p. 1090 (Comp. St. 1913, § 4647).

Upon this appeal neither party will recover costs. The judgment is affirmed.

MORRIS, C. J., and HOLCOMB and PARKER, JJ., concur.

VAN TASSEL v. McGRAIL et al.
(No. 13495.)

(Supreme Court of Washington. Nov. 17, 1913.)

1. BILLS AND NOTES — 369 — ACTIONS — DEFENSES.

A collateral oral agreement, limiting the liability of the maker of a note containing an unqualified promise to pay, or fixing a collateral source of payment, is no defense to an action on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 951; Dec. Dig. — 369.]

2. CORPORATIONS — 92 — SUBSCRIPTION NOTES — CONSTRUCTION — AMBIGUITY.

Where attached to a note given a corporation in payment of a stock subscription was a statement that the note should be paid from the proceeds obtained from sale of lots owned by the corporation, the qualification, being ambiguous, cannot be given effect, but the unqualified promise to pay will govern.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 366; Dec. Dig. — 92.]

3. CORPORATIONS — 92 — SUBSCRIPTION NOTES — VALIDITY — DEFENSES.

As Rem. & Bal. Code 1915, par. 3394, declares that an unqualified order or promise to pay is unconditional, though indicating a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount, a note given to a corporation in payment of subscription to its capital stock is unconditional, though declaring that payment should be made out of the proceeds of the sale of town lots owned by the corporation, and the makers were liable, though there were not sufficient proceeds to pay the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 366; Dec. Dig. — 92.]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by Ora Van Tassel against Thomas McGrail and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Dysart & Ellsbury and C. D. Cunningham, all of Centralia, for appellants. W. H. Abel, of Montesano, and Coy Burnett, of Portland, Or., for respondent.

CHADWICK, J. Plaintiff and his wife were the owners of certain property in the state of Oregon, which was deemed valuable for town-site purposes. Plaintiff, being unable to finance his endeavor, solicited the aid of the defendants. A corporation was formed. The land was conveyed to the corporation at a valuation of \$12,000. Stock was issued to all the parties in proportion to their

interests. At the time the corporation was organized, defendants subscribed for stock to the extent of \$8,000. They paid in \$3,000 in money. To meet their subscription, and to balance the stock issue, defendants executed the obligation following:

"On or before one year from date, without grace, for value received, we or either of us, promise to pay to the order of the Vanora Town-site Company, a corporation, three thousand (\$3,000) dollars, with interest from date at the rate of six per cent. per annum, until paid.

"Thos. McGrail.

"John P. Symons.

"S. A. Agnew."

Upon the same sheet of paper, the parties wrote and subscribed to the following:

"It is herein provided and agreed that the above note is to be paid from the proceeds obtained from the sale of lots in the town of Vanora, Crook county, Oregon, and that one-fourth ($\frac{1}{4}$) of the proceeds of all sales of lots in said town of Vanora are to be applied to the payment of said note and interest and until the same is paid.

Thos. McGrail.

"John P. Symons.

"S. A. Agnew.

"Vanora Town-Site Company,
"By Thos. McGrail."

The note was thereafter indorsed over to plaintiff. As lots were sold, payments were applied on the note, as provided in the collateral contract. There is also a payment of \$1,000, the source and legal effect of which is controverted, but, as we now view the law of the case, it is not material. The town-site venture was a failure, the unsold property being sold under a mortgage foreclosure proceeding. The court below made findings in favor of plaintiff, and entered judgment against defendants in the sum of \$2,061.70. Defendants have appealed.

[1, 2] The complaint is in ordinary form. Two defenses are set up: That respondent took the note with full knowledge of the collateral agreement; and that the action is premature.

That a collateral oral agreement, limiting the liability of the maker of an unqualified promise to pay, or fixing a collateral source of payment, is not available as a defense is now well settled by our own decisions. *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977; *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936, 50 Am. St. Rep. 889; *Anderson v. Mitchell*, 51 Wash. 285, 98 Pac. 751; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941; *First Nat. Life Assur. Soc. v. Farquhar*, 75 Wash. 667, 135 Pac. 619; *Post v. Tamm*, 158 Pac. 91. In the *Anderson Case*, we said:

"It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability. He is bound by the terms of his obligation."

It is also settled, by our own expressions, that where an unqualified written promise to pay in money is accompanied by a writing which conflicts or lends ambiguity to the promise, the unqualified promise will control. This principle was announced in *Lovell v. Musselman*, 81 Wash. 477, 142 Pac. 1143, where we said:

"The note is an absolute and unconditional promise to pay a fixed sum of money upon a day certain. * * * The law is that, if a note and mortgage contain conflicting provisions, the note will govern as being the principal obligation."

See, also, *Tacoma Mill Co. v. Sherwood*, *supra*.

While there is some conflict in the authorities of which appellants avail themselves, we understand the greater weight of authority, upon a like state of facts, is consistent with the rule we have heretofore declared.

[3] But if we grant the merit of appellants' contention that the two writings are to be construed together as one instrument, they are in no better position. The result is the same. We need look no further than the statute. The writing is an absolute promise to pay, negotiable in character. The statute follows:

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

"1. An indication of a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount. * * *"

Rem. & Bal. 1915 Code, par. 8394.

The best that appellants could hope for is a holding that the parties fixed a source of payment other than their personal obligation. But if it were so held, it would not be a defense for, as is shown by competent testimony and admitted by appellants, the source out of which they expected the note to be paid has failed. The agreement that the note "is to be paid from the proceeds obtained from the sale of lots in the town of Vanora" is, at best, a privilege available only as a defense in the event that respondent had in fact sold lots sufficient to satisfy the note, and had not accounted therefor. There being neither pleading nor testimony to sustain this theory, it follows that appellants are bound by their promise, unqualified by the collateral agreement, fixing a source of payment. The legal meaning of the collateral agreement is no more than that the note is to be paid pro tanto as funds become available out of the proceeds of the sale of lots. If there are no proceeds, the promise to pay remains.

Affirmed.

MORRIS, C. J., and MAIN, ELLIS, and PARKER, JJ., concur.

GROUNDWATER v. TOWN. (No. 18658.)

(Supreme Court of Washington. Nov. 17, 1916.)

PROCESS ~~§~~118—PRIVILEGE—ATTENDANCE AT COURT—REASONABLE TIME.

Where defendant, a resident of Montana, came into the state to redeem property from a foreclosure sale, but instead of redeeming arranged an exchange of his equity of redemption for lands in Montana, and who, if prepared to redeem, could have done so within six or seven days, and who showed no reason for any delay, but remained in the state for a day after the exchange was completed and the deeds delivered, was in the state a day longer than was reasonably necessary to accomplish his alleged purpose of redemption, and in view of the purpose of the rule of immunity to prevent obstructions to the administration of justice, was not privileged from the personal service of a summons and complaint in an action against him in the superior court of the state.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 146; Dec. Dig. ~~§~~118.]

Department 1. Appeal from Superior Court, Grays Harbor County; Mason Irwin, Judge.

Action by Frank Groundwater against John H. Town. Judgment for plaintiff, and defendant appeals. Affirmed.

John M. Gleeson and A. G. Gray, both of Spokane, for appellant. A. M. Abel, of Aberdeen, for respondent.

ELLIS, J. This action was brought upon a promissory note for \$1,000 in the superior court of the state of Washington for Ohehalis, now Grays Harbor, county, where plaintiff resides. The note was executed by defendant, who is a resident of the state of Montana. The summons and complaint were served upon defendant personally on March 26, 1915, at Spokane, Wash., while he was temporarily in this state. He appeared specially and moved to quash the service. The affidavits in support of his motion stated, in substance, that at the time of service he was in this state for the purpose of "settling and disposing of" an action in the superior court of the state of Washington for King county in which he was a defendant; that in 1914 that action was commenced to foreclose a mortgage upon certain lands owned by him in that county, and resulted in a sheriff's sale of the land under a decree of that court; that on March 2, 1915, he came from his home in the state of Montana to Seattle, Wash., for the purpose of making redemption from that sale and for the purpose of advising with his counsel, and, if necessary, for the purpose of testifying before the sheriff of King county or in the superior court for King county in making such redemption; that he finally succeeded in making such redemption, paying part of the sum necessary in cash and part by a trade, and was thereby relieved from the necessity of testifying

either before the sheriff or in court; that he immediately left King county and started for his home in Montana, and while in transit at the depot in Spokane on March 26, 1915, the attempted service was made upon him. His answers to interrogatories propounded by plaintiff, however, disclose the fact that he employed no counsel, gave no notice of redemption, did not appear before the sheriff or the court, did not in fact redeem the land from the sheriff's sale, and that what he calls redemption was in fact an exchange with one Peavey of his right of redemption and \$2,000 in money for certain lands in Montana owned by Peavey. The deed from defendant to Peavey was acknowledged on March 22, and was delivered to Peavey on March 23, 1915. The deed of the Montana lands from Peavey to defendant was acknowledged March 19, and was delivered to the defendant on the afternoon of March 24, 1915. Defendant did not leave Seattle until the next day between 8 and 9 o'clock in the evening. There is no showing that the King county land was ever by any one redeemed from the foreclosure sale. On the contrary, plaintiff produced an affidavit of the deputy clerk of King county to the effect that the sheriff's sale of that land was made on March 30, 1914; that the sale was confirmed on April 18, 1914; and that up to May 27, 1915, the date of the affidavit, no proceeding to redeem had ever been returned to the Superior court of King county in the case in question.

Upon this showing the trial court overruled the motion to quash. Defendant refused to plead further, and judgment upon the note was entered against him. Still preserving his special appearance, he prosecutes this appeal.

We shall assume, without so deciding, that a suitor or a witness from another state is entitled to immunity from service of process while in attendance upon court in this state and for a reasonable time in coming from and returning to the state of his domicile. This court has never so decided, but decisions from many other jurisdictions so holding have been cited. We shall also assume, without so deciding, that a proceeding to redeem from a sale on execution pursuant to section 599 of Rem. & Bal. Code, is such a proceeding as to entitle a nonresident redemptioner to immunity under the assumed general rule while actually engaged in redeeming and for a reasonable time in coming from and returning to the state of his domicile, though no decision from any jurisdiction so holding has been cited. We shall further assume, without so deciding, that the supposed immunity of a nonresident redemptioner would cover all of the time necessary to give notice of his intention to redeem as well as the actual time necessary to make

the redemption. The statute (section 599, supra) requires five days' notice. But, even assuming all of these things, appellant's showing falls far short of entitling him to the immunity which he claims. He gave no notice of an intention to redeem, he instituted no proceeding to redeem, he employed no counsel, he did not redeem. It affirmatively appears that at least during the time he was in this state there was no redemption by any one. Apparently he abandoned that purpose, and spent some twenty-four days in this state arranging a trade of his equity of redemption in the King county lands for lands in Montana. His showing no more entitles him to an immunity from service of process than if he had employed his time while in this state in negotiating for the sale of any other property or property rights which he might have possessed. Had he been prepared to redeem when he came into this state, it is obvious that he could have accomplished that purpose, including the time necessary for giving the notice, within six or seven days at the outside. He made no showing that there was any obstruction either actual or anticipated by any one to the exercise of his right to redeem or that right was ever questioned. He made no showing that for this or any other reason he was delayed in the exercise of that right. For the purpose of this decision, we have assumed the law to be more broadly in appellant's favor than it has been declared by any court to which our attention has been called, but we cannot assume facts which he has wholly failed to show. Moreover, even if we assume that his trade was a redemption, he remained in this state for a day after the trade was consummated and the deeds exchanged. His own showing indicates that the regular train from Seattle to Spokane left Seattle between 8 and 9 o'clock in the evening. No excuse is given or suggested why he did not take that train on the evening of March 24th instead of waiting until the evening of the following day. Even indulging his own theory, he was in this state for at least one whole day longer than was reasonably necessary or necessary at all to the accomplishment of the purpose which he invokes as the sole ground of immunity. It is universally held that what is a reasonable time is a question of fact dependent upon the circumstances of the given case. Appellant has admitted the delay, but has offered no excusatory facts or circumstances. The purpose of the rule of immunity wherever it prevails is to prevent obstructions to the administration of justice. It should not be so extended and perverted as in itself to be available as an obstruction to justice.

The judgment is affirmed.

MORRIS, C. J., and, MAIN, PARKER, and OHADWICK, JJ., concur.

GODEFROY v. HUPP et al. (No. 12394)

(Supreme Court of Washington. Nov. 17, 1916.)

1. BROKERS \S 88(3) — ACTION FOR COMMISSIONS — PROCURING CAUSE — QUESTION FOR JURY.

On evidence in a broker's action for services rendered in an exchange of personal property for realty, whether the plaintiff, through his employé, was the procuring cause of the exchange as finally consummated held a question for the jury.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 128, 129; Dec. Dig. \S 88(3).]

2. BROKERS \S 57(1) — PERFORMANCE OF CONTRACT — TERMS.

The fact that an exchange as finally concluded did not embrace all of the realty included in defendant's list given to the broker, and did include certain machinery, a team, harness, and wagon, not included in the list, would not defeat the action for a commission, if the contract was in writing, where the exchange was concluded along lines contemplated in the correspondence of the broker's agent with the other party, which was submitted to defendant and led to his closing the deal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 66, 67, 72; Dec. Dig. \S 57(1).]

3. BROKERS \S 43(1) — VALIDITY OF CONTRACT — DIVISIBILITY OF CONTRACT.

Under Rem. & Bal. Code, \S 5289, an oral contract for the payment of a commission for exchange of personal property for realty was void, so far as realty was concerned, and void in its entirety unless the contract was divisible.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 44; Dec. Dig. \S 43(1).]

4. BROKERS \S 88(2) — DIVISIBILITY OF CONTRACT — QUESTION FOR JURY.

Whether a contract with a broker for commissions for an exchange of property was divisible in respect to personalty and realty was a question of law depending on the terms of the contract, but what such terms were was a question of fact on the evidence.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 128, 129; Dec. Dig. \S 88(2).]

5. JUDGMENT \S 190(3) — TRIAL \S 139(1) — QUESTIONS OF FACT — JUDGMENT NON OBSTANTE VEREDICTO.

In passing upon the sufficiency of evidence challenged by a motion for nonsuit or by a motion for judgment non obstante veredicto, it is only where the court can say as a matter of law that there is neither evidence nor reasonable inference from evidence to sustain the verdict that either of such motions can be granted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 367; Dec. Dig. \S 199(3); Trial, Cent. Dig. \S 338; Dec. Dig. \S 139(1).]

6. BROKERS \S 88(2) — DIVISIBILITY OF CONTRACT — QUESTION FOR JURY.

In an action upon an oral contract for service as a broker in effecting an exchange of properties, held, on the evidence, that whether the defendant agreed to pay a commission on any sale or exchange of its property, whether of stock alone, real property alone, or of the stock and real property together, was for the jury.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 128, 129; Dec. Dig. \S 88(2).]

7. FRAUDS, STATUTE OF \S 130(1) — CONTRACT FOR SALE OF REALTY — ENTIRE OR DIVISIBLE CONTRACT.

Where the several stipulations of a several contract are so interdependent that the parties

cannot reasonably be considered to have contracted but with a view to the performance of the contract as a whole and any part of the contract violates the statute of frauds, no recovery can be had upon any part of it; but if the several stipulations are not so interdependent but that a distinct engagement as to any one stipulation may be fairly and reasonably extracted from the whole, then there may be a recovery on such distinct engagement, whenever it is clear of the statute of frauds, though the other stipulations are in violation of the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 280, 282; Dec. Dig. ¶ 130(1).]

8. CONTRACTS ¶171(2)—STATUTE OF FRAUDS—SEVERABLE CONTRACTS.

An agreement to pay a broker commission for effecting an exchange of properties, whereon the owner gave the broker a list of his properties, placing separate valuations on each, without an agreement, making the right to a commission for the exchange of stock dependent on the sale or exchange of realty, or anything to make the right dependent on the sale or exchange of the stock separate from the realty, was severable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 756; Dec. Dig. ¶171(2).]

9. EVIDENCE ¶424—PAROL EVIDENCE—BROKERS—VALUATION OF STOCK.

In a broker's action for commissions for effecting an exchange of personal property for realty, the written contract of exchange was not conclusive as to the value of the stock, so that, where it fixed no separate value on any of the properties, no commission was recoverable, since the broker, being a stranger to the contract, was not bound by it, and might prove by parol the value of the stock.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1966-1968; Dec. Dig. ¶424.]

10. BROKERS ¶88(1)—ACTION FOR COMMISSION—VALUE OF PROPERTY—QUESTION FOR JURY.

In broker's action for his commission for effecting an exchange of stock for realty, conflicting evidence, tending to show that certain mill stock was put in at \$45,000 and certain oil stock at \$15,000, was sufficient to take the valuation of such stock to the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 128, 129; Dec. Dig. ¶88(1).]

11. CUSTOMS AND USAGES ¶16—ADDING TO TERMS OF CONTRACT—COMMISSIONS—RATE.

Where an agreement to pay broker a commission for effecting an exchange of properties was silent as to rate of commission to be paid, it was implied that the rate should be such as was usually and customarily paid at that place for an exchange or sale of such stocks.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 27, 28; Dec. Dig. ¶16; *Evidence*, Cent. Dig. §§ 1945, 1946.]

12. APPEAL AND ERROR ¶1004(1)—REVIEW—SUFFICIENCY OF EVIDENCE.

In an action for a broker's commission, held on the evidence, that the appellate court would not disturb a verdict for plaintiff for insufficiency of the evidence to establish the rate of commission allowed by the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944, 3946; Dec. Dig. ¶1004(1).]

13. HUSBAND AND WIFE ¶270(10)—JUDGMENT AGAINST—ACTION FOR COMMISSION.

Where a husband contracted to pay a bro-

ker a commission for an exchange of property, a judgment, broad enough to be considered as a personal judgment against the wife individually, was erroneous.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 983; Dec. Dig. ¶270(10).]

14. APPEAL AND ERROR ¶1152—DETERMINATION OF CAUSE—MODIFICATION OF JUDGMENT.

Such error did not necessitate a reversal of the judgment, but it would be so modified as to run against the husband and the community.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4483-4496; Dec. Dig. ¶1152.]

15. ATTACHMENT ¶178—COMMUNITY PROPERTY—PARTIES.

Where an attachment was levied upon the community property alone, it was not necessary to name the wife as a party to the attachment.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 528-534; Dec. Dig. ¶178.]

16. ATTACHMENT ¶239—DISSOLUTION—MOTION.

Where no motion was made to dissolve an attachment because levied upon community property without naming the wife as a party to it, and the record showed no motion to dissolve the attachment for that reason, it was too late to seek such dissolution after it was carried into the judgment.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 822, 823, 827; Dec. Dig. ¶239.]

17. TRIAL ¶68(1)—DISCRETION OF COURT—RECEPTION OF EVIDENCE.

In a broker's action for commission on an exchange of properties, the court's action in opening the case and permitting the plaintiff to prove the community character of the stock exchanged after the evidence had been closed was not an abuse of its discretion.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 158-160; Dec. Dig. ¶68(1).]

18. TRIAL ¶45(3)—OFFER OF EVIDENCE—SUFFICIENCY.

In a broker's action for a commission on a sale of properties, defendant's offer to show whether stock was community or separate property, without any offer of specific evidence or any statement as to what the witness would testify to, or any showing that the testimony would not have been corroborative, was insufficient as a predicate for error in its rejection.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 118; Dec. Dig. ¶45(3).]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by W. D. Godefroy, transacting business as the Northern Pacific Land Exchange, against Fred R. Hupp and Ella Hupp. Judgment for plaintiff, motion for judgment non obstante verdicto and for new trial overruled, and defendants appeal. Affirmed against defendant Fred R. Hupp and the community consisting of Fred R. Hupp and Ella Hupp.

Peacock & Ludden, of Spokane, for appellants. McCarthy, Edge & Davis, of Spokane, for respondent.

ELLIS, J. Action by a broker for services rendered in an exchange of personal

property for real estate. There was evidence tending to establish the following facts: About December 1, 1913, defendants were the owners of certain real property, and also of 100 shares of the capital stock of Holland-Horr Mill Company, a corporation, as their community property. Defendant Fred R. Hupp employed plaintiff to make a sale or exchange of this property, or any part of it, agreeing to exchange any portion of it, either the stock alone or the real property alone or some of the real property and some of the stock, for other property, preferably a stock ranch or wheat farm. Hupp gave to plaintiff a list of the property, placing separate valuations on each item. The valuation placed on the Holland-Horr Mill Company stock was \$800 a share. He promised to pay plaintiff a commission for making such a sale or exchange. For a number of months thereafter plaintiff exerted himself to make a sale or exchange of this property and different parts of it. Different negotiations were had with Hupp's approval, involving prospective sales or exchanges of the stock alone. He was willing to sell or exchange the stock alone. About four months after the property was listed with him, plaintiff employed one Mulcahy as an assistant in his office, agreeing to pay him \$1 a day and divide commissions on sales or exchanges of property in which he might assist. Mulcahy immediately wrote to various persons, soliciting business. One of these, Schuler, a broker of Minneapolis, Minn., answered, returning a list of Minnesota properties, among which was the Minnesota Loan & Trust Company building in Minneapolis, owned by the Franklin Avenue Investment Company, a corporation. The value of this building was placed at \$350,000. There was a mortgage upon it for \$155,000. Mulcahy submitted this list to defendant Hupp who expressed himself as willing to exchange his property for this building. He made and delivered to Mulcahy a new list of his property, again placing a value of \$800 a share on the one hundred shares of Holland-Horr Mill Company stock, and added a block of stock of the Dakota Oil Sands Company, a corporation owning certain oil lands at Calgary, Alberta. On this stock he placed a valuation of \$5,000. Just here arises the first serious conflict in the evidence. Mulcahy testified that he then told Hupp that in case of an exchange the commission on the Holland-Horr Mill Company stock would be ten per cent. and more than ten per cent. on the Dakota Oil Sands Company stock. Hupp denied that at this time any mention was made of the commissions. After this for some time Mulcahy corresponded with Schuler, receiving from him photographs of the Minneapolis building, statements, letters, and telegrams, which Mulcahy submitted to Hupp. Among these was a letter from Schuler in part as follows:

"Minneapolis, June 5, 1914.

"Dear Geo: I have your letter in answer to my wire. The deal can be put through something like this:

Cash	\$ 40,000
H Horr Stk	50,000
Adams River	50,000
Lincoln Co.	5,000
Corbin Park	18,000
Castor Alta	8,000
Hayden Lake	5,000
St. Joe	5,000
$\frac{1}{2}$ Int. Calgary Oil Co.....	15,000

\$198,000

"He says Bradstreet can report on the properties in five days if they want to trade. " " " "

"Yours truly, Henry Schuler."

Mulcahy testified that he submitted this letter to Hupp, and that thereafter throughout the negotiations the Holland-Horr Mill Company stock was valued at \$500 a share, instead of \$800 a share, as included in Hupp's original list. About the middle of June, 1914, Hupp, without notice to plaintiff or Mulcahy, went to Minneapolis and concluded the exchange. At this point arises the second serious conflict in the evidence. Both Mulcahy and plaintiff Godefroy testified that on Hupp's return from Minneapolis he admitted to them that he had included in the exchange 90 shares of the Holland-Horr Mill Company's stock at a valuation of \$500 a share, and the oil stock at a valuation of \$15,000. Hupp denied making this statement, and testified, in substance, that when he exchanged his real estate for the Minneapolis building he threw in the stocks without placing upon them any specific values. Upon Hupp's return to Spokane after concluding the deal, plaintiff demanded from him a commission on the entire deal, including the stock and the real estate. Defendant refused to pay any commission on the ground that plaintiff had no contract in writing. This action followed. A writ of attachment was sued out and levied upon certain real estate as the property of Fred R. and Ella Hupp. At the trial defendants objected to the introduction of any evidence upon the ground that the contract pleaded was within the statute of frauds, and at the close of plaintiff's evidence moved for a nonsuit upon the same ground. The motion was denied. The jury returned a verdict for plaintiff in the sum of \$3,750. Defendant moved for judgment non obstante veredicto, and also for a new trial. Both motions were overruled. Judgment was entered upon the verdict, and defendants appealed.

Appellants contend: (1) that the contract for commissions was indivisible and, being oral, was subject to the ban of the statute of frauds because it included real estate; (2) that the judgment against defendant Ella Hupp individually was, in any event, erroneous; (3) that the court erred in carrying the attachment into the judgment; (4) that the court erred in opening the case for admission of evidence and in excluding evidence offered in rebuttal of such evidence.

[1, 2] Whether respondent, through Mulcahy, was the procuring cause of the exchange as finally consummated was plainly a question for the jury. That they produced the person ready, able, and willing to make the exchange cannot be questioned. The fact that the exchange as finally concluded did not embrace quite all of the real estate included in appellants' list as left with respondent, and did include certain machinery, a team, harness, and wagon not included in that list, is immaterial. It is clear that in the main the exchange was concluded along the lines contemplated in Mulcahy's correspondence with Schuler, which was submitted to Hupp and led to his going to Minneapolis and closing the deal. In such a case, if the contract for the commissions had been in writing, there can be no question but that respondent would have had a maintainable cause of action for commissions on the entire transaction. *Price v. Partridge*, 78 Wash. 362, 129 Pac. 34.

[3, 4] But the contract for the payment of the commissions, being oral, was void so far as the real estate was concerned. Rem. & Bal. Code, § 5289. It is also clear that if that contract was not divisible, it was subject to the ban of the statute in its entirety so as to preclude a recovery of any commission even for the exchange of the stock. In considering this question we must not confuse the two contracts. The primary question here is not whether the contract of exchange as finally consummated between Hupp and Franklin Avenue Investment Company was a divisible contract, but whether the agreement, creating the agency as between Hupp and Godefroy, and to pay the commissions, was divisible. It is the latter agreement upon which this action rests. Whether the contract was divisible is a question of law, dependent upon the terms of the contract. What those terms were is a question of fact, dependent upon the evidence.

[5] On the latter question it must be remembered in this case, as in all others, that, in passing upon the sufficiency of evidence, whether challenged by motion for a nonsuit or by motion for judgment non obstante veredicto, it is only when the court can say as a matter of law that there is neither evidence nor reasonable inference from evidence to sustain the verdict that either of such motions can be granted. *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166.

[6] In the case here there was evidence that appellant agreed to pay a commission on any sale or exchange of his property which respondent might secure, whether of the stock alone, the real property alone, or of stock and real property together. Respondent so testified, and we find little evidence to the contrary. It was for the jury to say whether in fact such was the agreement.

[7] Was this contract divisible? If the

several stipulations of a single contract are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the contract as a whole, and any part of the contract is subject to the ban of the statute of frauds, then no recovery can be had upon any part of it. But if the several stipulations are not so interdependent but that a distinct engagement as to any one stipulation may be fairly and reasonably extracted from the whole, then there may be a recovery on such distinct engagement whenever it is clear of the statute of frauds, though the other stipulations be subject to the ban of the statute. *Browne*, *Statute of Frauds* (5th Ed.) §§ 140, 143. In the following cases involving the statute of frauds this distinction is exemplified and applied: *Jenkins v. Williams*, 16 Gray (Mass.) 158; *Stansell v. Leavitt*, 51 Mich. 536, 16 N. W. 892; *Rees v. Jutte*, 153 Pa. 56, 25 Atl. 998; *Rand v. Mathew*, 11 Cush. (Mass.) 1, 59 Am. Dec. 131; *Mobile Marine, etc., Co. v. McMillan & Son*, 31 Ala. 711; *Lowman v. Sheets*, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; *Southwell v. Beezley*, 5 Or. 458.

[8, 9] Judged by this rule, it seems to us that the contract here involved was severable. There was nothing in the agreement as proved making the right to a commission for the sale or exchange of the stock dependent upon the sale or exchange of the real estate. Nor was there anything making that right dependent upon the stock being sold or exchanged separately from the real estate. The promise was as specific to pay a commission for the sale or exchange of the one as of the other, and that too whether sold or exchanged separately or in conjunction. It seems clear, therefore, that if in the exchange as finally consummated the stock was put in at a definite value, that value furnished a sufficient basis for determining the separate commission to be paid upon the exchange of the stock. On this question of the value at which the stock was traded appellants urge that the written contract of exchange was conclusive, and that, inasmuch as it fixed no separate value on any of the properties, no commission can be recovered in any event. But respondent, being a stranger to that contract, was not so bound by it that he could not prove the value at which the stock was estimated in the trade. He was not suing on that contract as one made for his benefit, nor claiming any right originating in the relation created by it. Parol evidence was therefore admissible to establish the facts. *Ransom v. Wickstrom & Co.*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588; 3 *Jones*, *Commentaries on Evidence*, p. 217, § 449; *Browne*, *Parol Evidence*, p. 31, § 28. See, also, *Union Mach. & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

[10] The evidence adduced, though in com-

dict, tended to show that the mill stock was put in at \$45,000 and the oil stock at \$15,000. It was sufficient to take this question to the jury.

[11, 12] The original contract for commissions as proved was silent as to the rate of commission to be paid. It was therefore implied that the rate should be such as was usually and customarily paid at Spokane, Wash., for an exchange or sale of such stocks. The trial court properly so instructed the jury. The evidence showed that this stock was not listed on the Spokane Stock Exchange, and that the commission usually paid on unlisted industrial stocks was from 8 to 10 per cent., and on unlisted mining stocks from 10 to 20 per cent. The jury evidently computed the commissions in this case at a lower rate than any of these, but of this the appellants cannot complain since the evidence would have justified a higher recovery than that awarded. We find no sufficient reason for disturbing the verdict for insufficiency of evidence.

[13, 14] The judgment is broad enough in its terms to be construed as a personal judgment against Ella Hupp individually. In this it is erroneous. The contract was made with Fred R. Hupp and the judgment can only bind his property and that of the community. This, however, does not necessitate a reversal of the judgment. The judgment should be so modified as to run against Fred R. Hupp and the community, consisting of Fred R. Hupp and Ella Hupp.

[15, 16] It is also urged that the attachment should not have been carried into the judgment because it ran against both Fred R. Hupp and Ella Hupp. So far as the record shows, the attachment was levied upon community property alone. It was not necessary, therefore, to name the wife as a party to the attachment at all. It only binds the property upon which it was levied in any event. The record fails to show that any motion was made to dissolve the attachment for the reason now urged, or for any other reason. It is too late to seek its dissolution now. We find no error in carrying the attachment into the judgment.

[17] It is insisted that the court erred in opening the case and permitting the respondent to prove the community character of the stock after the evidence had been closed. This was a matter resting within the discretion of the trial court. We cannot say that the discretion was abused.

[18] Finally it is urged that the court erred in refusing to permit appellants to introduce further testimony as to whether or not this stock was community property. The offer was "to show the actual fact whether it is community property or separate property." There was no offer of any specific evidence nor any statement as to what the witness would testify to. There is

nothing to show that had the witness been permitted to testify, his testimony would not have been merely corroborative of that already adduced. The offer of evidence was wholly insufficient to make a predicate for error in its rejection.

The judgment is affirmed as against Fred R. Hupp and the community consisting of Fred R. Hupp and Ella Hupp. The court is directed to modify the judgment accordingly. Appellant Ella Hupp may recover her costs.

MORRIS, C. J., and CHADWICK, FULLERTON, and MOUNT, JJ., concur.

HOWARD et al. v. PEOPLE. (No. 8845.)

(Supreme Court of Colorado. Nov. 6, 1916.)

1. INDICTMENT AND INFORMATION \S 202(5)—EXCEPTIONS—AIDED BY VERDICT.

It is too late after trial and conviction to present for the first time objections to an indictment under Laws 1907, p. 334, \S 1, in that it used the word "with" instead of alleging that defendant "for" the purpose of stealing did use an explosive, and failed to allege the incorporation of the burglarized bank.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 645; Dec. Dig. \S 202(5).]

2. BURGLARY \S 7—BURDEN OF PROOF—OWNERSHIP OF BUILDING.

If a bank actually occupied the burglarized building with its business, it is not necessary to prove ownership or legal title.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 19; Dec. Dig. \S 7.]

3. CRIMINAL LAW \S 1032(7) — APPEAL — PRESERVATION OF EXCEPTIONS.

Alleged defect in proof that a bank alleged to have been burglarized was a corporation, is not sufficiently presented for the first time, in the assignment of errors, but should have been raised in the lower court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2642; Dec. Dig. \S 1032(7).]

4. BURGLARY \S 22 — INDICTMENT — SUFFICIENCY.

Since by Banking Law 1911, p. 174, \S 9, no individual or copartnership may use the word "state" applied to a bank, an indictment charging burglary of a state bank, with reference in testimony to it as a state bank, sufficiently shows that it was a corporation.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 55-61, 66; Dec. Dig. \S 22.]

5. BURGLARY \S 3 — ELEMENTS — LARCENY — "BURGLARY WITH EXPLOSIVES."

Under Laws 1907, p. 334, \S 1, defining burglary with explosives, to constitute the crime there must be a breaking and entering with intent to commit larceny, and larceny need not in fact have been committed.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 24-27; Dec. Dig. \S 3.]

For other definitions, see Words and Phrases, First and Second Series, Burglary with Explosives.]

6. BURGLARY \S 32 — EVIDENCE — ADMISSIBILITY.

In a prosecution under such statute, the larceny may be shown for the purpose of showing intent with which the breaking was committed.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. \S 84; Dec. Dig. \S 32.]

Error to District Court, Conejos County; Jesse C. Wiley, Judge.

Frank Howard and Frank Pasco were convicted of burglary with explosives, and they bring error. Affirmed.

Defendants were convicted of the crime of burglary with explosives. About 4 o'clock a. m., October 11, 1915, the building or room occupied by the La Jara State Bank of La Jara, Colo., was forcibly broken into, the safe blown open with some high explosive, and about \$8,000 belonging to the bank stolen.

The information charges that on or about October 11, 1915, at Conejos county, Colo., defendants did then and there unlawfully, feloniously, willfully, maliciously, burglariously, and forcibly break and enter into the banking house of the La Jara State Bank, a corporation, there situated with intent then and there the personal property, goods, chattels, and money of said La Jara State Bank then being in said banking house, then and there feloniously, willfully, maliciously, and burglariously to steal, take, and carry away and did then and there with (for) the purpose of so unlawfully and feloniously stealing, taking, and carrying away the personal property, goods, chattels, and moneys use an explosive.

Fred Counselor and James D. Pilcher, both of Alamosa, and Jesse Stephenson, of Monte Vista, for plaintiffs in error. Fred Farrar, Atty. Gen., and W. B. Morgan, Asst. Atty. Gen., for the People.

GARRIGUES, J. (after stating the facts as above). [1] 1. Section 1, p. 334, Sess. Laws 1907, provides:

"Any person who, with the intent to commit any crime, breaks and enters any building and, for the purpose of committing any crime, uses or attempts to use nitroglycerine, dynamite, gun powder or any other explosive, is guilty of burglary with explosives."

It is charged that defendants, with intent to commit larceny, broke and entered the banking house of the La Jara State Bank, a corporation, and used an explosive *with* (for) the purpose of committing such crime.

Complaint is made because the pleader used the word "with" instead of "for," where the statute provides: And "for" the purpose of committing any crime uses or attempts to use an explosive. Also it is claimed the information is faulty because the corporate existence of the bank is not affirmatively alleged, but only by way of recital. Whatever merit there may be in either of these contentions, they should have been called to the attention of the lower court before verdict. It is too late after trial and conviction to raise matters of this character for the first time. Sections 1956, 1978, 1986, R. S. 1908; Poole v. People, 24 Colo. 510, 513, 52 Pac. 1025, 65 Am. St. Rep. 245; Laycock v. State, 138 Ind. 217, 36 N. E. 137.

[2] 2. We will next consider the assign-

ments of error as to the sufficiency of the evidence to support the verdict, and lack of proof as to the corporate existence of the La Jara State Bank. The evidence as to the defendants being guilty is overwhelming and will not be further considered. Also the evidence is sufficient that the La Jara State Bank owned the building broken into and the money therein contained, which was stolen from the safe, and that an explosive was used by the burglars after they entered the bank, for the purpose of committing the crime of stealing the bank's money. It was not necessary to show who held the legal title to the building. If the bank had possession of and was occupying it in conducting a banking business, it was the bank's building for all the purposes of this case, no matter who held the legal title. The evidence clearly shows that the La Jara State Bank was burglarized; that the safe belonging to the bank was blown open; that the crime was committed by the use of explosives; and that the stolen money belonged to the bank.

[3, 4] 3. The information charged that it was the banking house of the La Jara State Bank, a corporation, and it is claimed that the evidence fails to establish the corporate existence of the bank. The question regarding the alleged failure to prove the corporate capacity of the bank is raised for the first time in this court, and for that reason alone, under the doctrine announced in Perry v. People, 38 Colo. 23, 87 Pac. 796, we might refuse to consider this assignment. Counsel now claim, however, that this question of proof regarding the incorporation of the bank was raised in the court below in a motion for a new trial, and also in a motion in arrest of judgment, but an inspection of these documents shows that these motions simply stated in the most general way that the evidence did not support the verdict. There was no specific allegation in either that there had been no evidence introduced regarding the corporate capacity of the bank. The only allegation in that respect is, that the information does not state in correct form the corporate capacity of the bank, which has nothing to do with the contention that the evidence failed to show that the bank was a corporation. The alleged defect in the proof regarding the incorporation of the bank is set forth for the first time in the assignments of error, which is not sufficient. It should have been raised in the lower court. But we do not wish it to be inferred that we are of the opinion that there is not sufficient evidence in the record to import the corporate capacity of the bank. The prosecuting witness, who, it appears, was in charge of the bank, testified that he was engaged in the banking business at La Jara in connection with the La Jara State Bank, which was burglarized, and other witnesses who were upon the scene shortly after the explosion testified to its occurring in the

bank building of the La Jara State Bank. In 1911, the Legislature of Colorado passed a very comprehensive state banking law, section 9 of which provides:

"Individuals or copartners engaged in banking shall not use the word 'state' as a part of the bank or firm name."

It would seem that by reason of this banking act, the name, "the La Jara State Bank," imports corporate existence just the same as if the proof had shown that it was a national bank. The corporate existence of the bank is a mere incident to the crime charged, and we think, under the evidence and our banking act, could be lawfully inferred from the name itself.

[5, 6] 4. The breaking and entering must have been with the intent to commit the crime of larceny, and the explosive must have been used for the purpose of committing such a crime. It was sufficient if the forcible entry and the use of an explosive were with the intent to and for the purpose of committing the crime. It was not necessary that a larceny should have been in fact committed. Larceny was not the offense charged against the defendants. They might not have committed larceny at all, and yet been guilty of burglary with explosives. They might have forcibly entered the building with intent to steal the money, blown open the safe for that purpose, and have been frightened away or arrested immediately after the explosion before actually taking any property, in which event, they would not be guilty of larceny, but would clearly be guilty of burglary with explosives. If they in fact took money from the safe, this could be shown by evidence on the trial, not for the purpose of convicting them of larceny, but as tending to show their intent in breaking and entering the building and their purpose in blowing open the safe with explosives.

The judgment is affirmed.
Affirmed.

WHITE and SCOTT, JJ., concur.

WALKER et al. v. MacMILLAN. (No. 8421.)

(Supreme Court of Colorado. Nov. 6, 1916.)

1. VENDOR AND PURCHASER §122—REMEDIES—RESCISSION—ACTION FOR DAMAGES.

Where a party has been induced to contract by fraud, he has two remedies, to rescind and be reimbursed for the money expended, or, waiving his right to rescind, to have an action for damages resulting from the fraud; but an election to waive the fraud is irrevocable, and a rescission must be in toto.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 201, 220; Dec. Dig. §122.]

2. PRINCIPAL AND AGENT §23(5)—EXISTENCE OF RELATION—SUFFICIENCY OF EVIDENCE.

In replevin for an automobile given as part of the price for realty, evidence held not to jus-

tify a conclusion that a defendant was plaintiff's agent to sell the automobile.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. §23(5).]

3. VENDOR AND PURCHASER §45—QUESTION FOR JURY—FRAUD.

In an action of replevin for an automobile given as part of the purchase price of land, question of fraud practiced upon plaintiff in the transaction held for the jury under proper instructions.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 77, 78; Dec. Dig. §45.]

4. VENDOR AND PURCHASER §117—RESCISSION—RETURN OF LAND—NECESSITY.

Where plaintiff contracted to buy land for \$4,500, delivering his automobile as part payment, he could not replevin the automobile, as having been obtained by false representations, and retain the land, since, if the contract was vitiated by fraud, the entire contract must be annulled, and not only part.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 209; Dec. Dig. §117.]

5. FRAUD §59(3)—MISREPRESENTATIONS AS TO VALUE—MEASURE OF DAMAGES.

In an action for damages from misrepresentations as to the value of premises purchased, plaintiff's measure of damages is the difference between the contract price and the reasonable market value of the land.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 62; Dec. Dig. §59(3).]

6. REPLEVIN §106—MEASURE OF DAMAGE.

In replevin, the measure of damages, in the absence of specific recovery, is the value of the thing sought to be recovered.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 416-423; Dec. Dig. §106.]

Gabbert, C. J., and Hill and Garrigues, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; John H. Denison, Judge.

Replevin by Charles A. MacMillan against E. Sumner Walker and another. To review a judgment for plaintiff, defendants bring error. Reversed, with instruction to dismiss the cause.

Barnett & Campbell and Archibald A. Lee, all of Denver, for plaintiffs in error. Greeley W. Whitford and Hubert L. Shattuck, both of Denver, for defendant in error.

SCOTT, J. This is an action in replevin for the recovery of possession of an automobile. Verdict and judgment was rendered in favor of the plaintiff, defendant in error, fixing \$1,200 as the value of the property, and for \$600 as damages for the wrongful taking and detention.

The action grows out of a real estate transaction involving the purchase by the plaintiff of 4½ residence lots in the city of Denver. The following, contained in a memorandum of agreement, signed by the defendant Walker, and introduced in evidence by the plaintiff, explains the nature and character of the transaction:

"Denver, Colo., Sept. 24, 1913.

"Received of C. A. MacMillan and H. H. Quine, the sum of one hundred (\$100) dollars,

in consideration whereof it is agreed, subject to the written acceptance and ratification by the owner of the following described real estate, to wit: Lots 25, 26, 27, 28 and S. 1/2 of 29, Blk. 4, Chamberlain & Winne's Add., being the 4 1/2 lots corner of Nineteenth and Forrest Parkway, facing east and south, situate in the city and county of Denver, Colorado, that the said owner shall and will sell and convey said real estate to said C. A. MacMillan and H. H. Quine for the sum of forty-five hundred (\$4,500) dollars, payable as follows: One hundred (\$100) dollars received hereby, four hundred (\$400) dollars on acceptance of this proposition on or before September 28, 1913. Together with a 1913 model six-cylinder Premier automobile, fully equipped, now located at garage at 439 Broadway. Value (\$2,000) to apply on the purchase price of the above-described real estate as (\$2,000) cash. For the remaining two thousand (\$2,000) purchase price, C. A. MacMillan and H. H. Quine agree to execute their three notes, viz.: One for five hundred, due on or before one year, and one for five hundred on or before two years, and one for \$1,000 due on or before three years, at 6% interest, payable semiannually, and secured by first deed of trust on above-described property, and provided said purchaser shall make payments as above, on or before the respective dates fixed therefor (time being of essence hereof), said owner shall, upon the making of said final payment, deliver to said purchaser a good and sufficient warranty deed not later than October 1, 1913, conveying said real estate free and clear of all liens, incumbrances, taxes and assessments, except special assessments for sidewalk and building restrictions."

Upon the following day this was altered by the following indorsement on the instrument:

"Sept. 25th, 1913.

"The within contract is reconstructed to comply with new terms, viz.: Trust deed of \$1,800 at eight per cent. to remain on the lots and seven hundred (\$700) cash, instead of \$2,000 trust deed at 6% and five hundred dollars cash."

This agreement was afterward executed by both parties, and the real estate was duly conveyed in exchange for the cash, notes, trust deed, and automobile, set out in the memorandum of agreement, and all of which were delivered. On October 21st this action was instituted. The complaint is in the usual form, alleging the wrongful taking, possession, and detention of the automobile. The answer, aside from general and special denials, alleges the sale and delivery of the machine to the defendants, and admits possession under such sale. There were no other pleadings.

It is contended by the plaintiff in error that under the circumstances of this case replevin will not lie; that the contract constituted a single transaction, and that the plaintiff cannot elect to affirm it in part and disaffirm it in another part; that the circumstances bring it within the well-settled rule of law that the plaintiff is confined to one of two remedies—either to rescind the contract or to sue for damages on account of deceit. When we consider the memoranda in the light of the plaintiff's testimony, that "the deal was that \$4,500 was to be paid for the lots, \$4,500 the price, \$2,000 of which is represented in the automobile, and the balance was covered by the cash payment

and the notes," it is clear that the contract was for the purchase by the plaintiff of the lots, for which he was to pay \$4,500, \$2,000 of which to be represented by the automobile. It seems plain, under this state of facts, that, if there was sufficient fraud to vitiate the contract, it must of necessity apply to the entire contract. This is particularly apparent when it appears that the only claim of the plaintiff is as to the alleged misrepresentation of the value of the lots. He could have no greater right to recover the automobile as a single item of payment than the notes, which represented another item of the payment.

[1] The rule of law in this regard, in this jurisdiction, is:

"First, to rescind the contract; second, to sue for damages on account of the deceit. These remedies are inconsistent, not concurrent. Both were not open to plaintiffs, and, when once they made their election to sue for damages, they were bound thereby, and could not thereafter pursue the other remedy. In choosing, as they did to bring this action for damages, they thereby affirmed the contract, and, if they recover at all, it must be upon the case as made, and not upon some other theory. Had they elected to rescind, the contract must have been rescinded in toto; and, when they did elect to sue for damages on account of the deceit, the contract must be affirmed in toto, and not affirmed in part and disaffirmed in part." *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086.

"When a party has been induced to enter into a contract by fraud of the other party thereto he has two remedies: (1) To rescind and be reimbursed for the money expended thereunder; or (2) he may waive the right to rescind and have an action for damages resulting from the fraud. When, however, he elects to waive the fraud, such election is irrevocable, and his remedy thereafter is an action for damages. * * * It is a settled rule of law that, where a party has an election to rescind a contract, he must rescind it wholly or not at all. He cannot consider it void for one purpose and in force for another." *Gordon Tiger Mining Co. v. Brown*, 56 Colo. 301, 138 Pac. 51.

[2] But the defendant in error contends that this case is not within this rule, for the reason that Walker, the defendant, was his agent, and seeks to invoke the rule that the law does not permit an agent to purchase from his principal and resell at a profit. *Finnerty v. Fritz*, 5 Colo. 174. It appears that at the time of the transaction the lots were owned by the Boulevard Realty Company. There was no concealment of this fact, for the plaintiff and his associate were taken to the office of this company, and talked with its secretary before an agreement for the purchase was closed. It seems that the realty company had listed these lots for sale with the defendant and other real estate dealers; that, while the defendant was negotiating for the sale to plaintiff, another real estate dealer had closed a contract with the realty company for a sale of the lots to a client; and that the defendant, when so advised, secured an assignment of this contract, and thus was enabled to consummate the proposed deal with the plaintiff.

The agency claimed, as between plaintiff

and defendant, was that the defendant was the agent of plaintiff to sell the automobile. The testimony does not justify this conclusion. It does not appear that the plaintiff agreed to pay the defendant any commission, and it is admitted that neither the plaintiff nor the realty company paid the defendant any commission in the entire transaction. The memorandum of agreement and the testimony of all parties discloses that the contract, as negotiated and completed, was between the plaintiff on the one hand and the defendant on the other. It appears without question that the defendant, a real estate broker, was endeavoring to sell plaintiff a home and had taken him to look at several properties, none of which suited. The plaintiff so testifies, and says:

"About the 1st of last September, after Walker had been to see me several times about different trades, he came to me about a Premier car. I said to him that we were anxious to sell it; it was simply out there in the garage, where people could not see it. I told him it was getting along where you could not dispose of 1913 cars; if he would sell it, we would give him a commission. He wanted to know if we would consider a trade. I said, 'Yes,' if he had a good property that had prospective value, where he could turn the car in, we would do that. A few days later he came back and said there was a company in town going out of business that owned a block in Park Hill, and that he thought he could get one of the stockholders to take this car, if we would put a right value on it."

It will be seen that, while the plaintiff suggested a commission for the sale of the automobile, the defendant did not agree to it, but submitted the counter proposition to sell him a property wherein the machine might be taken in trade. At this time, and for some time prior, the defendant was trying to sell the plaintiff a property, and the whole record negatives the suggestion that the defendant was acting as the agent of plaintiff for the sale of an automobile, other than it might be included as a part of the purchase price. It appears that the automobile was owned by the Wallace Motor Company, of which the plaintiff and one Quine were equal owners. Plaintiff testifies as to the final closing of the trade as follows:

"Then I went with Mr. Walker to the office of the corporation that owned the real estate; he took me to the office—introduced me to Mr. Woodrow, the secretary of the company. I met Mr. Woodrow and talked with him about it; he being an attorney, he also examined the title, and he said to me that the title to the lots was good. I told him that I had to go back to Trinidad that night and would leave the matter to Mr. Walker to close up; that he had been acting for me in trading this car in, and I noticed the surprise in his face when he heard the word automobile. I went and signed the notes for \$1,800 that was to be paid later on. We paid \$700 cash. I told Mr. Walker I was leaving for Trinidad that night, and he could leave the deed with Mrs. MacMillan, and I would leave the trust deed and notes with her, and he could see that the deed was properly recorded. I gave him a bill of sale for the automobile that evening. I said, 'Mr. Quine has sold his interest in that machine to me personally.'"

It also appears that the realty company had listed the property with other agents, and perhaps with the defendant, for \$2,700, and that this sum, plus the sum paid to the party who had secured the contract, was the total cost to the defendant. But this fact alone does not of itself constitute fraud. The plaintiff testifies that defendant represented that the company held the property at \$4,500. The defendant testifies on the contrary, and that he fixed the price to the plaintiff at the sum, and said that it was worth it; that the improvement taxes taxed against the property were all paid, and that like adjoining and surrounding properties, with such taxes unpaid, were held at the price he was asking for the property in question. He also introduced several real estate men as witnesses for the purpose of showing the value of the property, which testimony upon objection of the plaintiff was excluded by the court. It is agreed that the plaintiff was purchasing the property for the purpose of erecting a dwelling, to be used as a home, and that the plaintiff, his wife, and his associate, Quine, had inspected it. The latter says that he and plaintiff inspected it three or four times before the purchase.

[3] Under this state of facts, and in view of the conflict of testimony as to representations alleged to constitute fraud, the question was clearly one for the jury under proper instructions. But the court instructed the jury as follows:

"The plaintiff bases his title upon the fraud and misrepresentation of defendant Walker (and incidentally claims defendant Sheldon is charged as an associate in that fraud, but this will be referred to later), and the evidence, taken as a whole, shows as a matter of law that the defendant Walker was guilty of fraud or misrepresentation, and it follows as a matter of law, as between him and plaintiff, the title to the car did not pass from plaintiff to him."

This instruction was in effect a direction to the jury to return a verdict for the plaintiff, and was of itself reversible error.

[4] The defendant in error invokes the rule that the owner of property may maintain replevin against one who obtains possession of it by means of false representations. The circumstances of this case do not bring it within that rule. Here there was a contract of sale, and it is sought to retain what the plaintiff received, and to procure a return of a part of what he has parted with in exchange. If the contract is vitiated by reason of fraud, then the entire contract must be annulled, and the plaintiff must elect as to his remedy.

[5, 6] The plaintiff claims under an allegation of misrepresentation and fraud as to the value of the premises he purchased. In such a case the question is one of compensation, and the measure of damages is the difference between the contract price and the reasonable market value of the land. In replevin the measure of damage, in the absence of specific recovery, is the value of the thing sought to be recovered. This is so in-

stent with the rule as to measure of age to be applied in a case of the character of the one at bar as to make it clear that in replevin will not lie.
former opinion withdrawn; judgment reversed, with instruction to dismiss the cause.

BBERT, C. J., and HILL and GARBES, JJ., dissent.

TH v. HALLETT et al. (S. F. 7014.)

eme Court of California. Oct. 24, 1916.)

RACTS § 337(2)—ACTION FOR BREACH—COMPLAINT.

substantial breach of the agreement of plaintiff retail liquor dealers to buy of plaintiff their beer and liquors during the life of lease, and fixing liquidated damages for its breach, is not shown by the complaint, alleging that on a certain day defendants neglected and refused to purchase all beer of plaintiff.

Note.—For other cases, see Contracts, Dig. §§ 1683, 1684, 1687-1689; Dec. Dig. § 7(2).]

Bank. Appeal from Superior Court, Clara County; W. A. Beasley, Judge. Opinion by C. J. Vath against James F. Hallett and others. Judgment for plaintiff reversed by the District Court of Appeal. Petition is made for transfer and hearing to the Supreme Court. Denied.

opinion of the District Court of Appeal as follows:

ISON, Judge pro tem. The plaintiff at this action to recover of the defendants and Hallett the sum of \$3,000 alleged to be due under the terms of a written contract. Other persons were made defendants under allegation that they refused to join with the plaintiff. Davitt and Hallett will be referred to as defendants. The defendant Davitt demurred to the complaint, and, his demurrer having been overruled, he declined to answer, and judgment was entered against him. He appeals from the judgment.

From a clear understanding of the case it seems very likely to set out in full the contract sued on as it appears in the complaint. It is as follows:

An agreement made between James J. Davitt and J. F. Hallett, of the county of Santa Clara, state of California, parties of the first part, and A. L. Brassy, C. J. Vath and George W. Vath, of the same said county and state, parties of the second part, witnesseth: That wherefore said James J. Davitt and J. F. Hallett went out to enter into partnership in the business of retailing liquor, at number 19 South Main street, in the city of San Jose, county of Santa Clara, state of California, and the said Hallett is desirous of having associated with him the said James J. Davitt, and the said Davitt in order to become associated with the said Hallett, has to raise the sum of six thousand (\$6,000.00) dollars, and whereas the said Davitt of the second part are willing to loan said Davitt the said sum of six thousand (\$6,000.00) dollars, in consideration of certain property to be given by to parties of the second part, One of which is the guaranty of parties of the first part, on their part, that they will during the entire period of the leasehold, now owned by said Hallett, pertaining to said premises,

to purchase of said parties of the second part, all steam and lager beer and liquors of every kind and character and all incidentals pertaining to the retail liquor business of and from said parties of the second part. It being impracticable and extremely difficult to fix the actual damage which may result to parties of the second part from a breach or violation of the terms hereof by parties of the first part, it is agreed that the sum of three thousand (\$3,000.00) dollars be and the same is hereby fixed as liquidated damages for which sum judgment may be taken by parties of the second part upon proof of a breach of the terms hereof by parties of the first part.

Jas. F. Hallett.
"James J. Davitt."

Additionally the complaint alleges: "That from the nature of the subject-matter of the said contract and the relation of the parties thereto, it would have been, was, and still is impracticable and extremely difficult to fix, have fixed, or to now fix the actual damage which plaintiff would sustain by reason of a breach thereof by parties of the first part." "That on or about the 29th day of May, 1913, the defendants, contrary to the terms of said agreement, and in violation of their obligation thereof, neglected and refused to purchase all lager beer of the plaintiffs as provided in said contract." "That at the time of said neglect and refusal, defendant Davitt was conducting said retail liquor business. That plaintiff at all times was ready, able, and willing to comply with all the terms of said contract on his part to be performed, and had done so. That plaintiff advanced, and defendants accepted, the \$6,000 loan provided for in said agreement. That defendants complied with the terms of said contract for a period of about two years after its date. Judgment is asked for the \$3,000 and costs."

1. We are of the opinion that the complaint does not state a cause of action, and the demurrer thereto should have been sustained. While the contract pleaded is somewhat vague, indefinite, and incomplete, it is manifest that the defendants were to buy of the plaintiff only such beer as they might need from time to time in their business of retailing liquor. There is no allegation in the complaint that they needed any beer on or about May 29, 1913, or that they bought any from any other source. For aught that appears in the complaint, they needed none at about that time. There is no averment that they ceased to buy of the plaintiff for more than one day. It is alleged that they failed and refused to buy all beer of plaintiff. This allegation would be sustained on a trial by testimony that on the day named, the defendants bought ten cases of beer from the plaintiff and only one quart from some one else. Conceding for the present that the contract is to be construed as one for liquidated damages, yet no recovery can be had unless a substantial breach thereof is alleged and proved. "This action is brought upon the theory that the sum of \$200 specified in the agreement is liquidated damages for any breach of the requirements thereof, and such is the contention of the plaintiff. For the purposes of the case, the correctness of this proposition will be conceded. In such a case, before any liability to pay the liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement, a breach that has resulted in something more than mere nominal damages to the other contracting party. This rule is so manifestly just that no discussion of it is necessary." Hathaway v. Lynn, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551.

As an application may be made to amend the complaint in the lower court, it becomes necessary to notice some other points raised by appellant.

For several reasons we are of the opinion the

contract cannot be the foundation of an action for either liquidated damages or for actual damages.

(1) It lacks certainty. There is no direct promise or agreement on the part of the defendants to buy liquor from the plaintiff. Such promise can only be inferred from the general language of the contract. The plaintiff agreed to loan defendant \$8,000 "in consideration of certain security to be given by to parties of the second part. One of which is the guaranty of parties of the first part, on their part, that they will during the entire period of the leasehold, now held by said Hallett, pertaining to said premises, to purchase of said parties of the second part, all steam and lager beer and liquors of every kind and character and all incidentals pertaining to the retail liquor business of and from said parties of the second part." Perhaps a promise on the part of defendants to buy beer, etc., from plaintiff may be inferred from this general language, but it seems unnecessary to definitely pass on the point. The contract fixes no price at which plaintiff was to furnish beer, etc., to defendant. He did not bind himself to furnish it at any agreed price. The plaintiff did not promise and bind himself to sell beer, etc., to defendant at all. He assumed no obligation to do so, and it was left entirely at his pleasure to sell defendant beer, etc., or not to sell it, and any failure to so furnish and sell would have given plaintiff no cause of action against defendant. An executory contract must have the element of mutuality. An agreement on part of defendant to buy beer of the plaintiff is not enforceable against the defendant where there is no agreement or promise on the part of the plaintiff to sell such articles to him. Hence the contract cannot be the basis for a suit for damages for not buying of the plaintiff.

The contract is not enforceable as one for liquidated damages. It will be observed that by the contract the same damage, \$3,000, is fixed as the estimated and agreed damages for a complete violation of its terms and for a partial violation. According to the terms of the contract, if the defendant failed and neglected during the entire five years to buy anything of the plaintiff, the damage would have been \$3,000. Whereas, if he bought all beer and other supplies for the saloon during all the five years except the last week of said five-year period, he would also owe plaintiff \$3,000. This shows that no good-faith valuation of the damages, which might result from the breach of the contract, was made. "A good-faith valuation of the damages which will result from the breach of a contract is generally upheld, and the amount specified recoverable." Elliott on Contracts, § 1559. And the converse is equally true, viz.: That where the contract on its face shows that no good faith estimate and valuation of the damages that might result from a breach of the contract was ever made or attempted, the amount thus arbitrarily fixed without any reference to the actual damages that may be incurred, will not be recoverable as liquidated damages. In 2 Greenleaf on Evidence, § 259, the rule is said to be that it must be "apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties."

We conclude that the demurrer to the complaint should have been sustained. That the contract is not enforceable as a contract for liquidated damages, and by reason of its lack of mutuality of obligation and uncertainty cannot be the basis of an action for actual damages.

The judgment is reversed, with direction to sustain the demurrer to the complaint.

We concur: CHIPMAN, P. J.; HART, J.

Hoefler & Morris, of San Francisco, for appellant. William H. Johnson, of San Jose, for respondents.

PER CURIAM. The petition for transfer and hearing in this court is denied. We think the judgment was properly reversed upon the first ground stated in the opinion of the District Court of Appeal, viz. that the complaint does not state facts showing a substantial breach of the agreement. We are not satisfied of the correctness of the views expressed by the District Court of Appeal on other points, and withhold the expression of any opinion on such points. Upon a new trial the superior court will not regard as decided or as the law of the case any proposition except the one which is above stated to have our approval.

JAMESON et al. v. CHANSLOR-CANFIELD MIDWAY OIL CO. (L. A. 3968.)

(Supreme Court of California. Nov. 1, 1916.)

1. APPEAL AND ERROR ⇐475—STAY OF EXECUTION—INADEQUACY OF SECURITY—RELIEF—STATUTE.

Where a surety on an undertaking to stay execution of judgment pending appeal becomes insufficient, or the undertaking is inadequate as security to the full amount specified, relief can be obtained, under Code Civ. Proc. § 954, in the court from which the appeal was taken, but not where the amount is not sufficient in event of affirmation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2244; Dec. Dig. ⇐475.]

2. EXECUTION ⇐59—AUTHORITY TO ISSUE—ENFORCEMENT.

The only way in which a judgment can be legally enforced under the law of California is through the process of the court by which the judgment is given.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 145; Dec. Dig. ⇐59.]

3. APPEAL AND ERROR ⇐475—STAY OF EXECUTION—INSUFFICIENCY OF UNDERTAKING—POWER OF SUPREME COURT—STATUTES.

In view of Code Civ. Proc. §§ 942-946, 948, and 954, relative to the stay of judgments or orders pending appeal, the Supreme Court has no power, where the trial court has fixed the amount of the undertaking on stay of execution of judgment for plaintiffs pending defendant's appeal, to require that further security be given as a condition to the maintenance of the stay of execution, on the ground that, on account of the character of the land involved in the suit, being oil land from which defendants were and are extracting petroleum, the amount of the undertaking had become inadequate, since the statutes make the order of the judge of the trial court fixing the amount of the undertaking an adjudication as to the amount of security to be given to effect a permanent stay pending appeal, while they deny any inherent power in the Supreme Court to so protect plaintiffs from loss by reason of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2244; Dec. Dig. ⇐475.]

4. APPEAL AND ERROR §475—STAY OF EXECUTION—FIXING AMOUNT OF UNDERTAKING—REVIEW OF ACTION OF TRIAL COURT.

The Supreme Court has no authority, on application by plaintiff respondents for an order requiring defendant appellant to give a further and additional undertaking as a condition to further maintenance of stay of execution pending appeal, to review the action of the trial court in fixing the amount of the undertaking to be given to stay execution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2244; Dec. Dig. §475.]

In Bank. Action by J. W. Jameson and another against the Chanslor-Canfield Midway Oil Company. From a judgment for plaintiffs, defendant appealed, and plaintiffs apply for an order requiring defendant to give a further and additional undertaking, in an amount to be fixed, as a condition to the further maintenance of the stay of execution. Application denied.

El. W. Camp, M. W. Reed, U. T. Clotfelter, all of Los Angeles, and Oscar Sutro, of San Francisco, for appellant. Waters & Goodcell, of San Bernardino, for respondents.

ANGELLOTTI, O. J. Respondents obtained a judgment against the defendant in the superior court adjudging them to be the owners and entitled to the possession of an undivided three-fourths of certain lands, and substantially directing that possession thereof be delivered to them. Defendant appealed to this court from such judgment, and the appeal is now pending herein. Desiring to stay execution of the judgment pending appeal, defendant sought in the trial court an order fixing the amount of the necessary undertaking, and, according to the affidavit of respondents filed in this application, "said superior court, upon due proceedings had thereupon made an order fixing the amount of the undertaking to be given to stay such execution in the sum of \$500,000, and thereupon said defendant gave such undertaking in said sum, and execution of said judgment has been and is thereby stayed." Respondents now seek from this court an order requiring appellant to give a further and additional undertaking in an amount to be fixed by us as a condition to the further maintenance of the stay.

[1] The claim is not that a surety or sureties on the undertaking already given has or have become insufficient or that such undertaking is inadequate as security to the full amount specified therein, a matter as to which relief could be obtained in the court from which the appeal was taken (Code Civ. Proc. § 954), but that such undertaking is in amount insufficient to protect them in the event of the affirmance of the judgment, a matter as to which relief cannot now be obtained from the lower court. It appears from such affidavit that the land consists of numerous mining claims valuable chiefly for deposits of petroleum therein, and that defendant for years prior to and ever since the

entry of the judgment has been operating on the same for the production of petroleum therefrom, and has been extracting large quantities of petroleum therefrom. It is claimed that the interest of respondents in the petroleum so extracted already far exceeds in value the amount specified in said undertaking.

[2-4] It is contended by appellant that, under such circumstances, this court has no power to require further security as a condition to the maintenance of the stay of execution of the judgment. In view of our statutory provisions relative to the matter, we are satisfied that the claim of appellant in this regard is well founded.

By certain sections of our Code of Civil Procedure (sections 942, 943, 944, and 945) it is provided that judgments or orders in various specified cases cannot be stayed by an appeal except by the giving of a stay undertaking, or the deposit with a specified officer of documents or personal property ordered assigned or delivered, or the execution and delivery to the clerk of the court of a conveyance or other instrument directed to be executed. This case, the judgment being one directing the delivery of the possession of real property, comes within the provisions of section 945, which provides that the execution of such a judgment cannot be stayed—

"unless a written undertaking be executed on the part of the appellant * * * to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered, or order made, and which must be specified in the undertaking."

By section 946 of the Code of Civil Procedure it is provided that:

"Whenever an appeal is perfected, as provided in the preceding section of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein."

Provision is made that the sureties may be required to justify before a judge of the court below on proper notice, and that, unless they so justify when required, execution of the judgment or order is no longer stayed (Code Civ. Proc. § 948), and also that the judge of the court from which the appeal is taken may require a new bond as a condition to the maintenance of the stay whenever it is made to appear "that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, or that the bond has been lost or destroyed" (Code Civ. Proc. § 954; *Mersfelder v. Spring*, 136 Cal. 619, 69 Cal. 251). The only way in

which a judgment can be legally enforced under our law is through the process of the court by which the judgment is given. It thus appears that in such a case as the one before us the law expressly declares that the execution of the judgment shall be permanently stayed pending appeal upon the giving of the undertaking prescribed by section 945, that is, an undertaking in such sum as may "be fixed by the judge of the court by which the judgment was rendered or order made," except only when there is a failure of sureties to justify as required by section 948, or an order made by such judge for a new bond under the circumstances specified in section 954. There is no room for doubt, in view of the language of the statutory provision, that it was the intention of the Legislature to provide for a permanent stay pending appeal upon the giving of such an undertaking. The judge of the court by which the judgment was given or order made was finally to fix the amount of the undertaking, such amount as in his judgment would secure the respondent against waste and loss of the value of the use and occupation of the property. His order in this respect was to be an adjudication as to the amount of security to be given to effect a permanent stay pending appeal, described in *Doudell v. Shoo*, 159 Cal. 50, 109 Pac. 615, as "the statutory stay of proceedings." The law declares, in substance, that when the security so required is once given, the status, in so far as the matter of stay pending appeal is concerned, is irrevocably settled, save as it may be affected by proceedings in the trial court under section 948 or section 954. The fact that the Legislature has made provision in section 954 for the requirement by the lower court of a new bond when a surety or sureties become insufficient, or the original bond is lost or destroyed, but emphasizes what the language of sections 945 and 946, already referred to, clearly shows in this regard. It is to be doubted whether the order of the judge fixing the amount of such undertaking is appealable. If it be conceded, as claimed by respondents, that it is not appealable, we simply have a case where the Legislature has designated that officer as a tribunal to determine that question, and has provided no mode by which his conclusion may be reviewed, thus making his decision conclusive, precisely the situation that has been held to exist with relation to the justification of the sureties when excepted to under section 948. See *Boyer v. Superior Court*, 110 Cal. 401, 42 Pac. 892; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383. Certainly there is no authority in this court to review the action of the judge in such a proceeding as the one before us.

What then is the situation here? We have an appeal from a judgment as to which the law provides that, by virtue of what has been done, the giving of a proper undertaking in an amount fixed by the judge, there shall

be a stay of execution pending the determination of the appeal. We are asked to make an order requiring further security of the applicant as a condition to the maintenance of the stay which has already been given by the law. This is asked upon the ground that the amount fixed by the judge as the amount of the undertaking is not sufficient to completely protect respondents in the event of affirmance. Admitting that there is no statutory authority for such action on the part of this court, it is urged that the court has the inherent power to so protect a respondent from loss by reason of the appeal. Learned counsel say that "there is no statutory denial of such power," and that a court's inherent power can sometimes be invoked in cases for which the Legislature has failed to make provision. We are clearly of the opinion that in the provisions of law we have already referred to there is a statutory denial of any such power. Those provisions in effect practically say that upon the giving of the undertaking in the amount prescribed by the judge of the lower court the execution of the judgment shall be stayed until the determination of the appeal, save in the instances specified in section 948 and 954, Code of Civil Procedure. The statute so providing, we necessarily have a "statutory denial of power" as to any tribunal to affect the stay given by the law. The situation in this regard is the same as in the cases covered by section 949, Code of Civil Procedure, in which no bond is essential to stay the judgment, but as to which it is provided that the mere "perfecting of an appeal . . . stays proceedings in the court below upon the judgment or order appealed from," thus expressly commanding a stay pending appeal and completely denying power in any court to order otherwise. Has an appellate court inherent power under such circumstances to require an appellant to give such security as it deems necessary to the protection of a respondent, as a condition to a maintenance of the stay thus given by the law? Over and over again this court, as to cases so covered by section 949, has regarded the statute as entirely settling the matter of stay, and granted supersedeas without requiring security, solely because the law gave that effect to the appeal, entirely regardless of the question whether respondent might suffer injury by reason of the stay. The same is true as to cases covered, as is this, by section 945 (see *Boyer v. Superior Court*, 110 Cal. 401, 42 Pac. 892; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383), cases in which the Legislature has provided for security in an amount to be fixed by a designated tribunal, viz. the judge of the court by which the judgment was given or order made. No decision of this court has been cited that can be held to sustain the proposition that, where the statutes fully cover such a matter as the one here involved, an appellate court has in-

at power to make provision contrary to statute. The whole course of our decisions is opposed to any such view, and we do not understand learned counsel for respondents to contend to the contrary; their only being that the matter is not one which is fact covered by the statute. The controlling effect of the statute in such a matter is clearly recognized by this court in such cases as *Cluness v. Bowen*, 135 Cal. 660, 87 1048. In that case it was said that the action of section 1176, Code of Civil Procedure "takes the case at bar out of the rule laid in *Hill v. Finnigan*, 54 Cal. 493, applicable to ordinary civil cases with respect to which there is no such restriction."

We are satisfied that it must be held that the matter as to which relief is sought from the court is not fully regulated by statute in this case, and that in view of our statutory provisions we have no right to require additional facts as a condition to the maintenance of the stay of execution of judgment. The application is denied.

Concur: SHAW, J.; SLOSS, J.; MEL-
J.; LORIGAN, J.; LAWLOR, J.

HOLLAND v. MCCARTHY et al. (S. F. 7107.)
Supreme Court of California. Oct. 30, 1916.
Rehearing Denied Nov. 27, 1916.)

VENDOR AND PURCHASER § 3(3) — CONTRACT TO SELL.

A writing addressed to brokers, agreeing to sell a lot for \$3,000, was not a valid contract to merely authorizing the brokers at most to find a suitable purchaser, without binding the vendor to make a contract of sale to any person.

Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 3; Dec. Dig. § 3(3).

FRAUDS, STATUTE OF § 116(5) — REALTY BROKERS—NECESSITY FOR WRITTEN AUTHORITY TO SELL.

By Civ. Code, § 1624, subd. 5, an agent's authority to make a contract to sell his principal's land is not valid, unless in writing and signed by the principal.

Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 255, 256, 260; Dec. Dig. § 6(5).

FRAUDS, STATUTE OF § 108(4) — "MEMORANDUM"—DEED.

A deed, deposited with a third person for delivery to the grantees upon their payment of the price for the land, which recited a consideration of \$10, was not a memorandum of the grantor's oral contract to sell for \$3,000 sufficient to satisfy the statute of frauds.

Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 220; Dec. Dig. § 4.

For other definitions, see *Words and Phrases*, and *Second Series, Memorandum*.]

ESCROWS § 4 — DELIVERY — DEPOSIT FOR DELIVERY ON PAYMENT.

The deposit of a deed with a third person to deliver to the grantees upon payment of the price for the land fixed by the grantor is not a

delivery in escrow, where there was no prior or contemporaneous contract of sale of the land of which the delivery of the deed was to be the consummation.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. § 7; Dec. Dig. § 4.]

DEEDS § 58(4)—DELIVERY TO THIRD PERSON FOR DELIVERY ON PAYMENT—DEATH OF GRANTOR.

Where the grantor of land delivered her deed to a third person to be held until payment of the purchase money by the grantees, prior to such payment, or part thereof, the delivery was nothing but an offer or proposal which the grantor had the legal right to withdraw, her death terminating and revoking the offer and the authority of the third person to accept payment and deliver the deed, the third party being only a voluntary agent of the grantor to hold the deed subject to her order.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 184; Dec. Dig. § 58(4).]

ESCROWS § 4—DELIVERY IN ESCROW.

Where, after the grantor of land deposited her deed with a third party for delivery to the grantees upon their payment of the price, the grantees consented that the third party might retain the deed until they were ready to pay, the deed was not converted into a valid escrow; no consideration having passed, and the grantees remaining without beneficial interest until payment.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. § 7; Dec. Dig. § 4.]

GIFTS § 18(1)—GIFT INTER VIVOS—LACK OF CONSUMMATION.

Where the owner of land, to effect a gift of money, made a deed to the land and deposited it with her prospective donee under instructions to deliver to the grantees only upon payment of \$3,000 for the land, which the donee should keep, previously to payment or tender of the money by the grantees, no right vested in the donee to the money.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 29, 30, 32, 33; Dec. Dig. § 18(1).]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action to quiet title by Patrick Holland, administrator of the estate of Mary A. Holland, deceased, against Julia McCarthy and others. From a judgment for defendants, plaintiff appeals. Reversed.

W. E. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant. William A. Kelly, of San Francisco, for respondents.

SHAW, J. The plaintiff appeals from the judgment below. The complaint states a cause of action to quiet title to a lot in San Francisco. In addition to the usual allegations it states that the defendant McCarthy has in her possession a deed signed and acknowledged by the decedent Mary A. Holland, purporting to convey the lot to the McDermotts, but that said deed had never been delivered. The prayer is for judgment quieting title, and for the delivery up of the deed for cancellation. The court gave judgment that McCarthy delivered the deed to the McDermotts, upon the payment by them to her

of \$3,000 to be kept by her for her own use, and declaring that when the money was paid and the deed so delivered the McDermotts would be the owners of the lot, and that the plaintiff has no interest in the lot, either as administrator of said estate or otherwise.

The facts relating to the title and to said deed may be briefly stated. On April 20, 1911, Mary A. Holland was the owner of the lot. On that date A. G. Sala, James W. Doherty, and the defendant Julia McCarthy called on her at her home. Doherty was a notary public. Mary A. Holland, in the presence of the other three persons, then signed the deed in controversy and acknowledged its execution before Doherty as notary public, who thereupon made and attached to the deed his official certificate to that effect. Mary A. Holland then handed the deed to Julia McCarthy, saying to her that it should be delivered by her to the McDermotts upon the payment of the sum of \$3,100, and that when she received the \$3,100 she should give \$100 to Sala for his commission and keep the \$3,000 for herself. The deed was in the usual form. It purported to convey the lot, in consideration of \$10, to James E. McDermott and Mary McDermott, husband and wife. After this disposition of the deed Mary A. Holland signed and delivered to Sala an instrument in writing as follows:

"Apr. 20, 1911.

"To Sala & Sala: I hereby agree to sell that certain lot on the west side of Capp St. 155 feet north of 18th street. Size 30x122½ feet, at the price of \$3,000. Mary A. Holland.

"Witness, A. G. Sala."

On the same day, prior to the visit to Mary A. Holland, Sala and the McDermotts had executed a contract, the material parts whereof are as follows:

"San Francisco, Cal., April 20, 1911.

"Received of Jas. and Mary McDermott the sum of three hundred and ten dollars, being deposit on account of thirty-one hundred dollars, the purchase price of the property this day sold to them and subject to the owners approval, situate * * * (then follows the description of the lot in controversy and certain provisions for sixty days time to examine title, and that the price was to be paid in cash on tender of a deed conveying good title).

Sala & Sala.

"A. G. Sala.

"I, the said Jas. and Mary McDermott, hereby agree to purchase the above-described property, and to comply with all conditions herein contained. Jas. and Mary McDermott,

"By Mary McDermott."

No money was paid as recited in said agreement, or at all, on the purchase price and sale. Neither of the McDermotts ever saw Mary A. Holland or had any agreement or communication with her, nor did they ever pay or tender the price of the lot, or any part of it, to any person. A few days after April 20, 1911, Mary McDermott called on Julia McCarthy, saw the deed in McCarthy's possession, was told by McCarthy that when the McDermotts paid the \$3,000 the deed would be delivered to them, and Mary McDermott then said that they would give her (Mc-

Carthy) the \$3,000 when she (McCarthy) gave them the deed. Nothing further was said or done then or afterward relating to the sale or to the completion thereof. Mary A. Holland died on May 7, 1911.

[1] The instrument signed by Mary A. Holland, addressed to Sala & Sala, was not a valid contract by her to sell the lot to the McDermotts, or to any other person. Sala & Sala were real estate brokers. At most, that instrument merely authorized them to find a suitable purchaser, without binding the owner to make a sale if a purchaser were found, and we do not say that it is valid for that purpose. It did not authorize Sala & Sala to make a contract of sale for Mary A. Holland to any person. *Grant v. Ede*, 85 Cal. 420, 24 Pac. 890, 20 Am. St. Rep. 237; *Swain v. Burnette*, 89 Cal. 569, 26 Pac. 1093.

[2] From the propositions last stated, it follows that the contract between Sala & Sala and the McDermotts was not binding on Mary A. Holland. It does not even purport to bind her or to be made in her behalf, or as her contract, but even if it did, it would be invalid, so far as she is concerned, for the reason that the brokers had no authority in writing to make a contract of sale for her. An agent's authority to make a contract to sell the land of his principal is not valid unless it is in writing and signed by the principal. *Civ. Code*, § 1624, subd. 5. It may be added that there is no evidence that they, or either of them, had from her even verbal authority to make such contract for her.

[3, 4] The only foundation, therefore, for the claim that the McDermotts, or Julia McCarthy, had any right or interest in the lot, or its proceeds, lies in the delivery of the deed to Julia McCarthy. This deposit, as we have seen, was not made in pursuance of any prior contract between Mary A. Holland and the McDermotts, or McCarthy, for the sale of the lot. It was not done to carry out any such contract, oral or written, for, so far as appears, none had been made. There is no evidence that any such agreement was made at the time of the deposit. The McDermotts were not present at that time, and none of those present was authorized to act or contract for them, or either of them, or assumed to do so.

The case, then, stands thus: Mary A. Holland was willing to sell the lot for cash at the price of \$3,100, and, apparently, she desired to do so and make a gift of the proceeds to Julia McCarthy. She was, as we may infer, informed that the McDermotts were willing to buy the lot at that price. Thereupon she executed this deed purporting to convey it to them and deposited it with McCarthy, with instructions to her to deliver it to the grantees on payment of \$3,100, and to keep the money for herself, except the \$100 to be paid to Sala. The promise of the McDermotts that they would

the price on delivery of the deed was to be afterwards and to the depository only. It does not appear that it was ever communicated to Mary A. Holland, the owner, or that the depository had any authority from the owner to make any contract or agreement concerning the lot except to deliver the deed on payment of the \$3,100, none of which was ever paid. In this condition of the affairs Mary A. Holland died.

The case is similar in principle to *Fitch v. Bunch*, 30 Cal. 212. Mrs. Fitch, the owner, deposited with Norton a deed to Bunch to be kept by Norton, pending negotiations for a sale of the land to her by Bunch and to be delivered to Bunch on the order of her agent, if the sale was agreed upon. She intended to make the sale, but an order was given to Norton, by her agent, for the delivery of the deed. Before that order was given she sued Norton to enjoin such delivery. Discussing the effect of the deposit of a valid delivery in escrow, the court said:

"Not only must there be sufficient parties, a proper subject-matter and a consideration, but the parties must have actually contracted."

"* The grantor must have sold and the grantee must have purchased the land. A promise to sell, or a proposal to buy, though stated in writing, will not be sufficient. The minds of the parties must have met, the terms have been agreed upon, and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered, and the grantee received, except for the agreement then made that it be delivered to a third person, to be kept until some specified condition is performed by the grantee, and thereupon to be delivered to him by such third person. The actual contract of sale on the one side, and of purchase on the other, is as essential to constitute the instrument an escrow, as that it be executed by the grantor; and until both parties have definitively assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third person, pending the proposals for sale or purchase."

A similar question arose in *Cagger v. Lansing*, 43 N. Y. 550. Speaking of the effect of a deed on deposit as a memorandum satisfying the statute of frauds, the court said:

"No one will contend that a contract for the sale of land, executed by the vendor, is binding on the purchaser, unless the contract is delivered to and accepted by the purchaser as a subsisting contract. A delivery in escrow does not bind the purchaser, although he verbally agrees to perform the condition. Until performance and acceptance by the purchaser, he is at liberty to abandon the contract."

1 *Cannon v. Handley*, 72 Cal. 144, 13 Pac.

It is said that an oral contract of sale is sufficient to make a deed deposited in pursuance thereof an escrow, and that the deed, deposited in pursuance of such oral contract, with a sufficient note or memorandum in writing subscribed by the party to be charged, satisfies the statute of frauds and renders the contract valid and enforceable. In that case there was a prior oral contract of sale. The statement that a deed so deposited was

a sufficient memorandum to satisfy the statute of frauds is supported by citations to *Cagger v. Lansing*, 57 Barb. (N. Y.) 421, and *Rutenberg v. Main*, 47 Cal. 214. The decision in *Rutenberg v. Main* does not discuss the question. The decision in *Cagger v. Lansing* was made by the New York Supreme Court, but in the Court of Appeals the case was reversed, and it was there decided, as indicated by the above quotation from 43 N. Y. 550, that the deed did not constitute a sufficient memorandum in writing to take the case out of the statute. But, however this may be in some cases, it cannot be successfully claimed that the deed involved in the present case is sufficient for that purpose. It was introduced in evidence and, as stated, it shows a consideration of only \$10. Therefore, instead of being a memorandum of the contract on which defendants rely, it is utterly inconsistent therewith. No case has been cited, and we have found none where the deposit of a deed with a third person to be delivered to the grantee only upon payment of the price fixed by the grantor, has been sustained as an escrow, where there was no prior or contemporaneous contract of sale of which the delivery of the deed was to be the consummation.

[5, 6] We are not here concerned with the case of deeds put in escrow for subsequent delivery upon the happening of a future event with regard to which the grantee has no causative function and in which the delivery is absolute, the grantor retaining no right of recall or revocation, and where the transaction is not to consummate a contract of sale, but for the purpose of effecting a gift. Such transactions are governed by a different rule, and a contract is not an essential part thereof. Here no right to revoke or recall was expressed as a condition at the time the deed was handed to Julia McCarthy. But, as no part of the consideration was paid, this was not necessary. Mary A. Holland had the right to recall the deed at any time before the grantees paid the money specified. Until that event, Julia McCarthy was nothing more than a voluntary agent of the grantor to hold the deed subject to her order. Only upon the payment of the price or some part thereof would the grantees have a beneficial interest sufficient to make delivery irrevocable. Prior to such payment the delivery was nothing but an offer or proposal which the grantor had the legal right to withdraw. Her death terminated and revoked the offer and the authority of Julia McCarthy as her agent subsequently to accept the money and deliver the deed. *Selbel v. Higham*, 216 Mo. 132, 115 S. W. 987, 129 Am. St. Rep. 502. At the time of her death she had not parted with the title nor bound herself to do so, and it at once descended to and vested in her heirs free from any claims of the defendants. The consent of the McDermotts, after its deposit, that Julia McCarthy might retain the deed

until they were ready to pay the money, did not convert the deed into a valid escrow, for no consideration passed and they remained, as before, without beneficial interest, and with nothing more than an unaccepted offer awaiting their acceptance. No interest could vest in them sufficient to make the escrow beyond recall without payment by them of some consideration.

[7] The transaction did not vest in Julia McCarthy any right to the \$3,000. It was to be paid by the McDermotts. Inasmuch as the transaction was inchoate and vested in the McDermotts no right until they paid or tendered the money, it necessarily follows that no right vested in the defendant McCarthy. There was, at best, nothing more in her favor than a mere intention on the part of the decedent to give her the money in the event that it was paid, which intent she did not carry out in her lifetime. Our conclusion is that the court erred in giving the judgment appealed from, and that, upon the facts disclosed by the evidence, the plaintiff is entitled to judgment.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

BAXTER v. BOEGE et al. (L. A. 3559.)

(Supreme Court of California. Oct. 28, 1916.
Rehearing Denied Nov. 27, 1916.)

1. APPEAL AND ERROR ¶79(1)—JUDGMENTS APPEALABLE.

Judgment, after plaintiff's refusal to amend when demurrers to the complaint were sustained, in favor of three defendants in suit to avoid a deed under which they claimed, but not affecting their mortgagee, who was made a party, is nevertheless a final judgment as to them and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 484, 486-493; Dec. Dig. ¶79(1).]

2. EXECUTORS AND ADMINISTRATORS ¶29(2)—APPOINTMENT—VALIDITY.

Bill by one heir attacking appointment of administrator is demurrable if it recites application by another heir for appointment of the appointee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 178; Dec. Dig. ¶29(2).]

3. EXECUTORS AND ADMINISTRATORS ¶29(2)—APPOINTMENT—VALIDITY.

Bill by one heir, attacking appointment of administrator, showing that deceased intestate was a nonresident, and that her husband nominated the administrator, does not reveal any right to attack that appointment collaterally by suit to avoid administrator's deed for minor irregularities in signatures to application for appointment, since it shows the jurisdiction and appointment and actual action at the court's direction, and is, as against collateral attack, conclusive as to due appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 178; Dec. Dig. ¶29(2).]

In Bank. Appeal from Superior Court, Orange County; Frank F. Oster, Judge.

Suit by Malcolm Baxter, Jr., against Charles A. Boege, wife, and others. Judgment for defendants, and plaintiff appeals, and defendants move to dismiss the appeal. Motion denied, and judgment affirmed.

A. W. Ashburn, of Los Angeles, and H. C. Head, of Santa Ana, for appellant. Williams & Rutan, R. Y. Williams, and A. W. Rutan, all of Santa Ana, and F. C. Spencer, of Anaheim, for respondents.

MELVIN, J. Plaintiff, as assignee of the heirs of Christina E. Romer, brought a suit in equity to avoid the effect of a deed by which the defendant Chester Spencer, as administrator of the said Christina E. Romer's estate, sought to convey certain real property of the said estate to one Emma M. Hunter. Respondents Charles A. and Louise Callow Boege and George Vandenberg are claimants to the title of Emma M. Hunter under subsequent conveyances. All of the said respondents demurred to plaintiff's amended complaint. Their demurrers were sustained, and, plaintiff declining to amend, judgment was entered accordingly against him and in favor of the three respondents. This judgment was that plaintiff take nothing as against respondents; that respondents be awarded costs; and that as to them the action be dismissed. The defendant Chester Spencer filed a demurrer to the amended complaint, but the record reveals no action thereon by the court. Answers were filed by German-American Bank, Frank L. Eastman, and Minnie H. Eastman. The bank asserted a lien upon the property as mortgagee of Emma M. Hunter, and the Eastmans based their claim of interest in the property upon a mortgage in their favor by the Boeges.

[1] Plaintiff has appealed from the judgment, and respondents have moved to dismiss the appeal upon the ground that no final judgment has been entered, and that therefore the attempted appeal is not from an appealable judgment. We are of the opinion that the motion to dismiss the appeal should be denied. Respondents insist that, since no judgment will be regarded as final unless all necessary issues of law and fact have been determined and the case completely disposed of (citing Freeman on Judgments [4th Ed.] § 34), plaintiff can have no right of appeal until all of the defendants shall have suffered some sort of judgment against them or in their favor. There is no question of the correctness of the rule announced by Judge Freeman, but it does not apply to this case. Appellant cites Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633, which was an action on a contract, in which defendant answered and filed a cross-complaint, which plaintiff answered. Judgment was entered upon the issues raised by the cross-complaint and the answer thereto, which were tried

first. The other issues in the case being undisposed of, this court held that the judgment upon the issues raised by the cross-complaint and the answer thereto was not an appealable final judgment. In the opinion in that case it was said:

"The judgment or decree of December 19, 1890, denying to defendant the relief demanded in what is termed its 'cross-complaint,' was not a final judgment, and the attempted separate appeal therefrom must be dismissed. There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy."

It will appear at a glance that the question there presented was not like the one before us here. In that case there were but two parties to the action, and it was, of course, necessary to determine all of the matters in litigation between them. In the case at bar the controversy between the plaintiff and the respondents was adjudicated and determined upon issues of law, and it does not necessarily follow that because the matters between plaintiff and defendants, other than these respondents, remain undetermined, respondents must therefore await trial of all issues involved between plaintiff and all other defendants before any final judgment may be entered and an appeal from it taken. In *Nolan v. Smith*, 137 Cal. 360, 70 Pac. 166, the action was against Smith, a justice of the peace, and the two sureties on his official bond. The court sustained a demurrer of the sureties to the complaint and entered a judgment in their favor for costs. The demurrer of Smith was overruled, and the action was still pending against him. The appeal of plaintiff from the judgment in favor of the two sureties was dismissed upon the ground that the judgment was not final because all of the issues of fact necessary to be adjudged had not been determined. In that case the asserted liability of the defendants was joint and several and it was held that only one final judgment might be given in the action. In other words, the rule is that any set of parties whose interests are identical must have the controversy as to them settled before any final judgment may be entered. No given set of parties may try the case piecemeal, but separate parties, if the court in its discretion so directs, may litigate their controversies separately, and may proceed to final judgment without waiting for judgments as to other parties. Section 579 of the Code of Civil Procedure is as follows:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

In *Anglo-California Bank v. Superior Court*, 153 Cal. 753, 96 Pac. 803, it appeared that the superior court had made an order that certain money held by plaintiff be paid to the receiver of the California Safe Deposit &

Trust Company. It was contended that the order was not appealable because it failed to consider the rights of certain interveners and was not, therefore, final. The court said:

"The rule invoked is the one applied in *Nolan v. Smith*, 137 Cal. 360 [70 Pac. 166], to the effect that a judgment is not a final judgment within the meaning of section 939 of the Code of Civil Procedure relative to appeals, unless it be one which finally disposes of the rights of all the parties to the action in relation to the matter in controversy, and thus, in effect, ends the proceeding in the court in which it is entered. * * * The whole controversy was regarding the present disposition of the money in the possession of plaintiff. The receiver claims that it should be forthwith delivered to him by plaintiff, the interveners claim that \$3,349.77 thereof should be paid to them by plaintiff, and sought an order requiring such payment, and the plaintiff claimed that it should not be required to deliver up the money to the receiver in the face of the adverse claim made by the interveners, until the question of ownership had been determined. The order made purported to dispose of this whole controversy by decreeing immediate payment by plaintiff of the whole amount to the receiver, and, in effect, ended in the superior court the particular proceeding under consideration. We are satisfied that it must be held to be an adjudication of the subject-matter of the controversy as to all of the parties thereto."

See, also, *Hildebrand v. Superior Court*, 159 Pac. 147.

The court has power to render a several judgment by default against one of two joint tort-feasors and allow the action to proceed against the other. *Cole v. Roebbling Construction Co.*, 156 Cal. 443, 105 Pac. 255.

The judgment in the case at bar in favor of respondents is not inextricably connected with the claims of the mortgagees, nor with the asserted delinquencies of Chester Spencer. If plaintiff has failed in his attempt to set aside the deeds to the respondents, the Boeges and Vandenberg, it makes no difference who assert rights as mortgagees of their interest. It is our opinion, therefore, that the judgment entered after default of plaintiff (who declined to amend his complaint after the sustaining of the demurrer by the court), is a final judgment from which an appeal will lie, and that the motion of respondents to dismiss the appeal herein should be denied.

[2] We now come to the discussion of the demurrers. The plaintiff's bill is very elaborate. It contains three counts, in which plaintiff as 'representative of the heirs of Christina E. Romer, deceased, attacks the validity of the title of respondents to certain land in Orange county acquired by proceedings taken in accordance with sections 1597-1607, inclusive, of the Code of Civil Procedure. It is averred that Chester Spencer, assuming to act as administrator of the estate of Romer, executed the conveyance of said property to Emma M. Hunter. In the first count the death of Mrs. Romer in New York in 1910 is pleaded. It is further averred that she left the property here in dispute, and that it was of her separate estate; that for more than two years prior to her death she had been mentally incompetent; that

plaintiff has for many years resided in New York and never has lived in California; that proceedings were had in Orange county, resulting in the making of an order by the court purporting to appoint Chester Spencer administrator of the estate of Christina E. Romer; that the proceedings and order were void because: (1) The petition for letters of administration was not signed by Spencer or his attorney; and because (2) the notice of hearing recited that William H. Romer, the husband of Christina E. Romer, had applied for the issuance of letters to himself, whereas, in truth, he had asked that letters be issued to Chester Spencer; that plaintiff and his assignors had no actual notice of the proceeding; that Chester Spencer assumed to qualify and act as administrator; that thereafter an order was made by the court, directing the administrator to convey the land to Mrs. Hunter; and that respondents claim title as successors of said grantee.

The second count contains averments of a conspiracy between Spencer, his attorney, and Emma M. Hunter to present a petition to the court, praying for an order authorizing the administrator to convey the land to said Emma M. Hunter, and that pursuant to said conspiracy Mrs. Hunter filed such a petition, setting forth certain untrue allegations, among them being a false statement that Mrs. Romer had contracted to sell the property to her. Other facts are alleged which need not be set out in detail, and it is averred that the administrator entered his appearance, waived notice, and joined in the fraudulent petition. It is alleged that plaintiff was ignorant of the conspiracy and of the fraudulent acts done and committed in furtherance thereof until a few days prior to the commencement of the action, and that he had no knowledge of the application for a conveyance until the same time, antedating the filing of his bill in equity by a few days.

The third count pleads that defendants had knowledge sufficient to put prudent persons upon inquiry regarding the correctness of the proceedings in probate and the authority of the administrator to execute the conveyance; that actual knowledge of the facts might have been acquired by defendants by the exercise of due diligence on their part; that the alleged copy of the contract of sale which was attached to Hunter's petition was of a document calculated to arouse suspicion regarding its genuineness in the mind of any person who might read it; that no original nor purported original contract was produced; that F. C. Spencer acted as attorney for both the administrator and Hunter; that no appraisal of the property was had at the time of the hearing of the petition; and that if such appraisal had been made it would have convinced the court that Mrs. Hunter obtained an unconscionable advantage by the enforcement of the supposed contract. The demurrers were properly sustained. One great fault of the bill is that it lacks equity

in this, namely, that plaintiff attacks the appointment of Spencer as administrator, but pleads that such appointment was upon the recommendation of William H. Romer, one of the heirs at law, and one of his assignors. But there are other reasons why the demurrer should have been sustained.

[3] This action is a collateral attack upon the title of respondents. It is not denied that deceased was a nonresident of California; that she died intestate; that William H. Romer was her surviving husband, who had the right to nominate an administrator of her estate; and that the court did appoint his nominee. In such an attack as this the plaintiff is in no position to take advantage of informalities in the issuance of letters. The appointment of Spencer is attacked because the petition for letters was not signed by the "applicant," but by his nominator, William H. Romer, and because the notice stated that Romer had prayed for issuance of letters to himself. But the jurisdiction is pleaded, and the issuance of letters to Chester Spencer is alleged, as well as facts showing that he acted in the capacity of administrator under the direction of the court. As against collateral attack these facts, set up by the pleading itself, are conclusive of Spencer's due authority. *Ganahl v. Soher*, 68 Cal. 85, 8 Pac. 650; *Dennis v. Bint*, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105. This court has recently held that where a guardian has possessed of letters issued under a judgment of a court of general jurisdiction, such judgment may not be collaterally attacked. *Fresno Estate Co. v. Fiske (Fiske v. Fresno Estate Co.)* 157 Pac. 1127. The same rule applies to a judgment, directing the conveyance of real property by an administrator acting under the direction of the superior court exercising its probate jurisdiction after letters have been issued to him. It has been held that the decree appointing an administrator may not be collaterally attacked even though it appear that he failed to comply with the requirements of the statute with reference to his bond. *Abrook v. Ellis*, 6 Cal. App. 451, 454, 92 Pac. 396.

In any view of the case there was not sufficient allegation of the purchase by Mr. and Mrs. Boege with knowledge, actual or constructive, of the fraud. The same may be said with reference to the averments concerning George Vandenberg. The learned judge of the superior court who tried the case, in rendering his decision, spoke of this phase of the pleading in part as follows:

"There is absolutely nothing alleged in the complaint to show that the Boeges acted in anything except the utmost good faith in this transaction, or that there was anything within their knowledge to put them upon inquiry as to the alleged fraudulent conspiracy. Presumably before purchasing they caused an examination to be made into the title of the property which

they contemplated buying; if so, they found an apparently valid decree, directing the administrator to convey this property to Emma M. Hunter in specific performance of the contract under which she claimed that right; the record disclosed absolutely nothing to indicate that there had been a fraud practiced on the court. To be sure, the record showed that Chester Spencer, as administrator, joined with Emma M. Hunter in her petition for specific performance instead of taking the attitude of an adversary, but he might with propriety have made the application himself (section 1598, C. C. P.), or, if he believed it to be for the best interest of the estate, he might with no seeming impropriety join in the petition for specific performance. If again there was no adversary position between Emma M. Hunter and the administrator in this matter, the mere fact that F. C. Spencer acted as attorney for both in what appeared to be a friendly proceeding was not indicative of any fraud, however questionable it may have been as a matter of legal ethics. In any event, an examination of the record would show that all of these matters were before the probate court at the time the petition for specific performance was heard, and the decree of that court was an adjudication of the regularity of the proceeding and all matters antecedent thereto. Under these circumstances, the Boeges must be held to be purchasers for value in good faith, and without notice of any infirmity of title of Emma M. Hunter, their grantor."

No other matters discussed in the briefs require comment.

The motion to dismiss the appeal is denied. The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

HALSTED et al. v. FIRST SAV. BANK et al. (S. F. 7728.)

(Supreme Court of California. Nov. 1, 1916.)

1. APPEAL AND ERROR \S 460(4)—STAY—STATUTE—JUDGMENT AGAINST EXECUTOR.

Under Code Civ. Proc. \S 949, providing that, in cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal stays proceedings in the court below on the judgment and order appealed from, in an action by executors against an individual and a bank to recover a savings deposit, so far as judgment for the individual against the bank for the amount of the deposit was one against the executors, proceedings thereon in the court below were stayed, by the executors' duly perfected appeal, without any stay bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2226; Dec. Dig. \S 460(4).]

2. APPEAL AND ERROR \S 460(2) — STAY — STATUTES.

The provisions of Code Civ. Proc. \S 942, 943, 944, and 945, relative to stay of proceedings below on a judgment and order appealed from by perfecting an appeal, apply only where appellant has money or other property in his possession or under his control which has been adjudged to belong to respondent, or where appellant has been directed to do some act for respondent's benefit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2223, 2224, 2246; Dec. Dig. \S 460(2).]

3. APPEAL AND ERROR \S 1224 — EFFECT — STAY OF PROCEEDINGS—UNNECESSARY STAY BOND—CONSIDERATION.

If there is no provision of law requiring a stay bond on appellants' part as a condition precedent to the stay of proceedings in the court below on the judgment appealed from, any stay bond given by them is without consideration and unenforceable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4727, 4728; Dec. Dig. \S 1224.]

4. APPEAL AND ERROR \S 460(2) — STAY — STATUTE.

In an action by executors against an individual and a bank to recover a deposit, if the bank had appealed from judgment for the individual for the amount of the deposit, it could have stayed enforcement of the judgment pending its appeal only by giving the stay bond provided by Code Civ. Proc. \S 942.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2223, 2224, 2246; Dec. Dig. \S 460(2).]

5. APPEAL AND ERROR \S 485(2) — STAY OF EXECUTION—STATUTES.

In view of the provisions of Code Civ. Proc. \S 942, 943, 944, 945, and 949, relative to stay of proceedings in the court below by appeal, in an action by executors against an individual and a bank to recover a deposit standing in the name of the individual, but alleged to belong to executors' decedent, the executors' appeal did not stay enforcement of the individual's judgment against the bank for the amount of the deposit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2268, 2270-2274; Dec. Dig. \S 485(2).]

6. APPEAL AND ERROR \S 479(1) — SUPERSEDEAS—CIRCUMSTANCES CALLING FOR ISSUANCE.

In an action by executors against an individual and a bank to recover a deposit standing in the individual's name, but alleged to belong to the executors' decedent, where the individual recovered judgment against the bank, for the deposit, and the executors appeal, applying for supersedeas, alleging that the successful defendant has no means, and if the money is collected from the bank by her they will be unable to recover it from her, should they ultimately prevail, the Supreme Court, in the exercise of its inherent power, will grant a writ of supersedeas as prayed, provided the executors file bond in double the amount of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2251, 2253-2256; Dec. Dig. \S 479(1).]

In Bank. Action by the special administrator of the estate of James D. Halsted against the First Savings Bank and Anna N. Collins, wherein James D. Halsted and John Yule, as executors of the last will and testament of decedent, were substituted as plaintiffs. There was a judgment for defendant Collins against defendant Bank, and the executors appealed, and apply for a writ of supersedeas to restrain the enforcement of the judgment pending their appeal. Writ ordered to issue as prayed on condition that the executors file a bond.

O'Neill & O'Neill and Chapman & Trefethen, all of Oakland, for appellants. Harry E. Leach and Abe P. Leach, both of Oakland, for respondent.

ANGELLOTTI, C. J. This is an application by the appellants for a writ of superseas to restrain the enforcement of a judgment in favor of defendant Anna N. Collins (respondent here) pending their appeal therefrom. This relief is sought on the ground that their duly perfected appeal ipso facto stays the enforcement of the judgment in the respect in which it is about to be enforced, without the giving by them of any bond to stay proceedings. There is no dispute as to the material facts.

The special administrator of the estate of James M. Halsted, deceased, commenced an action in the superior court of Alameda county against the defendants, alleging in his complaint that at the time of his death deceased had a large amount of money on deposit with defendant bank, in the form of a savings bank deposit, which, although standing in the name of defendant Anna N. Collins, was the property of deceased. He alleged that said Collins had wrongfully caused the deposit to be changed from the joint name of the two to her own individual name. He further alleged that said Collins was about to withdraw said deposit and appropriate the same to her own use; that she is without means, and if permitted to draw said money will depart from the state. He asked judgment against the bank for the amount; that said Collins be adjudged to have no interest in said deposit; that an order be made restraining her from withdrawing said money; and that the bank be restrained from paying the same to her. The executors of the will of deceased were subsequently substituted as plaintiffs in such action. Defendant Collins filed an answer and cross-complaint. In her cross-complaint she alleged that all of said money was her own property, and that she was entitled to the same. She asked that the temporary restraining order be dissolved; that plaintiffs take nothing by their action; that it be decreed that the property is her sole and separate property; and that the bank be ordered to pay the same to her. Plaintiffs answered this cross-complaint. The action was tried by the court, defendant bank not appearing. The findings of the court were in favor of defendant Collins, and on these findings judgment was entered that the temporary restraining order be dissolved; that said defendant "do have and recover of and from the defendant First Savings Bank the sum" of \$11,379.38, with interest; that neither plaintiffs nor the estate of James M. Halsted have any interest in said money; and that defendant Collins recover her costs from plaintiffs. Plaintiffs duly appealed from said judgment, "and from the whole" thereof, and such appeal is still pending. They gave the ordinary \$300 bond for costs, etc., which was formerly necessary to perfect an appeal, but gave no stay bond. No appeal has been taken by defendant bank. Defendant Collins is proceeding

to enforce her judgment for the recovery of the money from the bank, and has taken out a writ of execution to that end, which the sheriff of the county is about to enforce.

In brief, then, the situation is simply this: Defendant bank owes this money either to plaintiffs or defendant Collins. In an action to which all of these are parties, it has been adjudged that plaintiffs (appellants) have no interest therein; that defendant Collins (respondent) is the owner and entitled to the possession of all thereof; and that she recover all of the same from the bank. The bank is entirely neutral in the matter, and has not appealed. Plaintiffs have appealed. In view of our statutes relative to appeals, does the appeal by plaintiffs stay the enforcement of her judgment for the money by defendant Collins against the bank?

[1] By virtue of section 949, Code of Civil Procedure, which substantially provides that, except in certain specified cases of which this is not one, in cases not provided for in sections 942, 943, 944, and 945, Code of Civil Procedure, the perfecting of an appeal stays proceedings in the court below upon the judgment and order appealed from, it must be conceded that, in so far as the judgment here involved is one against the appellants, proceedings therein in the court below are stayed by the appeal duly perfected, without any stay bond. As appears from what has been said, there is no judgment for the payment by appellants of any money, appellants have no money or other property in their possession which has been adjudged to belong to respondent, and they are not directed by the judgment to do any act for the benefit of respondent, Collins.

[2. 3] It must now be taken as absolutely settled by our decisions that the provisions of sections 942, 943, 944, and 945 apply only where the appellant has money or other property in his possession or under his control which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent. See *Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696; *Pennie v. Superior Court*, 89 Cal. 33, 26 Pac. 617; *Estate of Schedel*, 69 Cal. 241, 10 Pac. 334; *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; *McCallion v. Hibernia Sav. & Loan Soc.*, 98 Cal. 442, 33 Pac. 329; *Rohrbacker v. Superior Court*, 144 Cal. 633, 78 Pac. 22. Therefore there is no provision of law requiring a stay bond on the part of appellants as a condition precedent to the staying of proceedings in the court below upon the judgment appealed from, in so far as the judgment is against them, i. e., requires them to do something or permits something to be done as to them, and the statute itself stays execution of the judgment in this regard. Any stay bond given by them under such circumstances would be without

consideration, and for that reason unenforceable. *McCallion v. Hibernia Sav. & Loan Soc.*, supra.

[4, 5] The question here, however, is whether the enforcement of that portion of the judgment which is a judgment directing the payment of money by defendant First Savings Bank to respondent Collins, a judgment for Collins against such bank for such money, is stayed by the appeal of appellants. If the bank had appealed therefrom, it could have stayed enforcement of the judgment against it pending such appeal only by giving the stay bond provided by section 942, Code of Civil Procedure. We have here, in part, a simple judgment for the payment of money to the respondent by a party other than the appellants. Said section 942 provides that, "if the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless" an undertaking be given to secure to the judgment creditor the fruits of the judgment in the event of its affirmance or the dismissal of the appeal. Of course, it is obvious that this portion of the judgment was given solely because of the determination by the trial court of the controversy between appellants and respondent in favor of respondent, a controversy in which the First Savings Bank in fact remained neutral. It may be conceded that this portion of the judgment is so plainly the result of the determination in favor of respondent against appellants that this court has the power on the appeal by the plaintiffs alone to reverse the whole judgment, including the portion against the bank, if it concludes that the appellants should prevail as against the respondent. See *Hamilton et al. v. Prescott*, 73 Tex. 565, 11 S. W. 548; *Whalen v. Smith*, 163 Cal. 360, 125 Pac. 904, Ann. Cas. 1913E, 1319. It does not follow that the mere money judgment in favor of one defendant against the other defendant is a judgment against appellants. And while we have the power, in view of all the circumstances apparent from the record, and the broad power of an appellate court in the event of substantial error in the trial court to so frame its order of reversal as to best promote the doing of substantial justice as to all the parties, to reverse the whole judgment, we are unable to see any good ground upon which it may be held that the portion of the judgment which awards to respondent a recovery against the bank is in any sense a judgment against the appellants. No enforcement of the judgment as against appellants is being sought, and, of course, none could be had pending the appeal. The stay given by the statute in the event of appeal is effectual only as to the judgment in so far as it affects the appellant, requires him to do something, or permits something to be done as to him. We are constrained to hold that, in view of the provisions of our

Code of Civil Procedure, the appeal by the plaintiffs in the action does not stay the enforcement of respondent's money judgment against the bank.

We are thus brought to the question whether the circumstances are such as to warrant us in granting a writ of supersedeas, upon proper terms, in the exercise of the inherent power of an appellate court to give such relief under certain circumstances. In this connection it was said in *Southern Pacific Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69, that:

Such power exists "in cases where the writ is necessary to preserve the status quo so that the rights involved in an appeal, when determined by the appellate court, may not be lost or prejudiced by reason of the intervening execution of the judgment or order appealed from, in cases where the statute regulating a stay of proceedings on appeal makes no provisions for such stay in the particular case."

See, also, *Hill v. Finnigan*, 54 Cal. 493.

[6] As we have seen, the statute makes no provision for a stay in such a case as this. It is said in 3 *Corpus Juris*, p. 1290, that:

"As a rule a supersedeas or stay should be granted, if the court has power to grant it, whenever it appears that * * * it is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in case of a reversal, and it does not appear that appellee or defendant in error will sustain irreparable or disproportionate injury in case of affirmance."

From what we have said it is apparent that this action was not an ordinary action for the recovery of money. So far as plaintiffs and defendant Collins were concerned, it was, in substance and effect, an equitable action between conflicting claimants as to a specific fund, a contest between them in which the depository of the fund, the bank, was entirely neutral. There is nothing in the pleadings or elsewhere to indicate that the bank was not entirely willing at any time to pay the money to the person legally entitled to it upon a proper demand, or that there was any reason for making the bank a party except that it was the depository. What we have said sufficiently indicates the real nature and character of the action. But the trial court gave a simple money judgment in favor of defendant Collins against the defendant bank, the enforcement of which, as we have seen, is not stayed by the appeal of plaintiffs. It is substantially alleged that defendant Collins has no means, and that, if this money is collected by her plaintiffs will not be able to recover the same from her in the event that they ultimately prevail. It may be that, in the event that plaintiffs ultimately prevail, they could enforce their claim against the bank, notwithstanding that defendant Collins' judgment against it had been enforced in the meantime. That, however, is something that cannot here be foretold with any degree of certainty. Having paid the money once, the bank would naturally claim that it was free from further liability. It may fairly be assumed that the

practical difficulties in the way of the recovery and enforcement of any judgment by appellants against the bank would be materially increased if, pending this appeal, the bank should be compelled to pay the amount to Collins. Instead of being confronted by a party absolutely neutral in fact and ready to pay without question either plaintiffs or Collins, as might be determined in the action, plaintiffs would find in the bank an actively hostile party, disputing their claim on every possible theory, and possibly upon some theory that would preclude a recovery altogether. We think that it may fairly be assumed that the preservation of the status quo is reasonably necessary to protect the plaintiffs from serious injury in the event of a reversal. If proper security be given defendant Collins, we can conceive of no possible way in which any of her substantial rights can be prejudiced by a stay pending appeal, and it is extremely desirable both for plaintiffs and the bank that the present status shall be preserved until the final determination of this action. We are of the opinion that we are warranted in view of the peculiar circumstances of this case, in the exercise of a reasonable discretion, in granting a writ of supersedeas upon the giving by appellants of a proper bond to secure to respondent Collins the fruits of her judgment against the bank in the event that the same be affirmed or the appeal dismissed.

It is ordered that a writ of supersedeas issue as prayed for herein, provided that within ten days the appellants file herein a good and sufficient bond in double the amount named in the judgment of defendant Collins against the bank, approved by a judge of the superior court of the county of Alameda, to the effect that, if the judgment appealed from be affirmed or the appeal dismissed, and the First Savings Bank does not forthwith pay to respondent the full amount of her judgment against the bank, the appellants and their sureties will pay to said respondent the whole amount then due on such judgment against the bank, or such portion thereof as may be necessary, in addition to such amount as may be paid by the bank, to give to said respondent the full amount then due on her judgment.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

In re BAIRD'S ESTATE. (S. F. 7789.)
(Supreme Court of California. Nov. 2, 1916.
Rehearing Denied Dec. 1, 1916.)

1. JURY \Leftrightarrow 19(7) — RIGHT TO JURY TRIAL — PROBATE PROCEEDINGS.

The right to jury trial in probate proceedings was not given by common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 110; Dec. Dig. \Leftrightarrow 19(7).]

2. JURY \Leftrightarrow 19(7) — RIGHT TO JURY TRIAL — PROBATE PROCEEDINGS.

Under Code Civ. Proc. § 1716, providing that all fact issues in probate proceedings must be tried in accordance with the provisions of sections 1312–1318, inclusive, and section 1312, providing for jury trial as to fact issues in will contests, in any probate proceeding in which section 1312 authorizes formation of issues either party, at his option, is entitled to jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 110; Dec. Dig. \Leftrightarrow 19(7).]

3. JURY \Leftrightarrow 19(7) — RIGHT TO JURY TRIAL — PROBATE PROCEEDINGS.

Code Civ. Proc. § 1716, provides that all issues of fact in probate proceedings must be tried in conformity with requirements of sections 1312–1318, inclusive, which relate to jury trial of fact issues as to validity of wills. Section 1658 provides that interested persons may apply for partial distribution. Section 1639 provides for notice thereof to all interested persons, and section 1660 provides for contest of application. *Held*, that formation of issues on trial of application for partial distribution is authorized, so that either party may, on demand, have jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 110; Dec. Dig. \Leftrightarrow 19(7).]

4. BASTARDS \Leftrightarrow 13—PARENTAGE—EVIDENCE—ADMISSIBILITY.

In determining the right to a distributive share in a decedent's estate, a physician attendant on birth of illegitimate child should have been permitted to testify that, just after birth, while he was filling out the certificate, deceased admitted the child to be his.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. \Leftrightarrow 13.]

5. BASTARDS \Leftrightarrow 13—PARENTAGE—EVIDENCE—ADMISSIBILITY.

Statements of deceased that he was the father of applicant for partial distribution, made to servants at the home of the mother, are admissible to show acknowledgment of parentage.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. \Leftrightarrow 13.]

6. APPEAL AND ERROR \Leftrightarrow 1046(1)—SCOPE.

Where error is so grave as the unauthorized substitution of the court for a jury, the court on appeal cannot, as a general rule, deny that justice miscarried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128, 4131; Dec. Dig. \Leftrightarrow 1046(1).]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Application by David J. Baird, Jr., for partial distribution of the estate of David J. Baird. From a judgment denying the application, he appeals. Reversed.

C. M. Fickert and E. A. Cunha, both of San Francisco, for appellant. Mastick & Partridge and Karl C. Partridge, all of San Francisco, for respondent.

SHAW, J. The appellant, David J. Baird, Jr., claiming to be the legitimate and only child of the decedent and his only heir, applied for partial distribution to him of the estate. His application was denied. He appeals from the judgment.

The petition avers that the applicant, who

a minor, was the illegitimate child of said decedent and one Lydia M. Valencia, to whom decedent was never married, and that the decedent, who was unmarried, adopted said child as his own lawful issue in the manner specified in section 230 of the Civil Code. Opposition to this claim was made by the other, brothers, and sister of the decedent, who denied all the facts relating to such option. The court made findings declaring: (1) That the decedent was not the father of the applicant; (2) that the decedent did not publicly acknowledge the said applicant as his own child; and (3) that the decedent did not receive the applicant into his family, nor otherwise treat the applicant as if it were his legitimate child. In due time the appellant, in writing, regularly demanded a trial by jury. This demand the court below refused. This, it is claimed, was a fatal error. The basis of the claim that the appellant was entitled, as a matter of right, to a jury trial is found in sections 1716 and 1717 of the Code of Civil Procedure. The provision of section 1716 is that:

"All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article two, chapter two, of this title."

That of section 1717 is:

"If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, * * * together with the evidence of each party, to the jury, on which they must render a verdict."

[1, 2] It will be observed that section 1717 does not grant the right to demand a trial by jury, but merely prescribes the procedure when such right exists and is exercised, or, in any case when a jury is allowed on such demand, whether of right or of grace. The right to demand a trial by jury in probate proceedings was not given by the common law. *Estate of Moore*, 72 Cal. 338, 13 Pac. 60. It exists in this state only where it is given by some statute. *Estate of Dolbeer*, 3 Cal. 657, 96 Pac. 266, 15 Ann. Cas. 207. The right, in cases of the class here involved, if it exists, is given by section 1716 above quoted, referring to article 2, chapter 2, title 1, Code of Civil Procedure. The said article consists of sections 1312 to 1318, inclusive, and relates to pleadings and practice in will contests. Section 1312, after certain requirements relating to the pleadings in such cases provides for the trial as follows:

"Any issues of fact thus raised, involving: 1. The competency of the decedent to make a last will and testament; 2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence; 3. The due execution and attestation of the will by the decedent or subscribing witness, or, 4. Any other questions substantially affecting the validity of the will: must, on request of either party in writing (filed at least ten days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined."

The question of the right to a jury trial in probate proceedings, in cases other than will contests, under sections 1716 and 1312, has been considered by this court in several cases. Many proceedings are authorized by the title of the Code relating to administration of estates. The question whether or not a jury trial is a matter of right in any of them depends upon the nature of the proceeding. In *Estate of Moore*, supra, it was held by Department 1 that these sections did not confer the right to a jury trial of issues arising upon the settlement of an account. In *Estate of Sanderson*, 74 Cal. 190, 15 Pac. 753, the court, in banc, was unanimous in the same conclusion. The *Dolbeer* Case, above cited, was a proceeding to contest a will instituted after it had been admitted to probate upon a regular contest thereof. It was, in substance, decided that the language of section 1330 of the Code of Civil Procedure, providing that in such cases if the original probate had been granted without a contest, either party could demand a jury for the trial of the second contest, was, in effect and by implication, a declaration that, if there had been a contest upon which the original probate was granted, there should be no right to a jury trial upon a contest after such probate, and, accordingly, that in that case the right did not exist. In *Estate of Land*, 106 Cal. 541, 137 Pac. 246, the court below, before proceeding with the trial of the merits of the original contest of the will of Land, had required the contestant to make preliminary proof that he had an interest in the matter sufficient to entitle him to maintain such contest, and had denied his demand for a jury to try the question of his interest. This court decided that the right to a jury trial, under section 1312, extended only to the issues therein specifically described, that is, to those affecting the execution or validity of the will, and that, as the description therein did not include the question whether or not the contestant was a "person interested," the right to a jury trial of that question was not given by the section, and therefore did not exist. In giving its reasons for denying the right of trial by jury upon a contested account, the court, in *Estate of Moore*, supra, said:

"We think the courts would have little difficulty in confining the operation of these sections to those cases in which the Code has expressly authorized issues of fact to be framed. Without such a provision, under the decisions, parties to a contest in the probate court would never be entitled to a jury trial." 72 Cal. 340, 13 Pac. 883.

In *Estate of Sanderson*, supra, the court further said that if there are proceedings, other than will contests, in which, under the aforesaid section, issues of fact must be submitted to a jury on due demand, "it would seem that they must be such, the verdict whereon would be determinative of an order or judgment to be entered by the court, and not merely determinative of subordinate

facts which may be considered by the court in connection with other facts in making its order or judgment." 74 Cal. 209, 15 Pac. 758. The court there pointed out that in the superior court the exceptions to the account need not embrace all the matters into which the court below must inquire, that it has power to investigate any and all matters involved in the account of its own motion, and therefore that the issues framed upon exceptions would not cover all the matters which the trial court could determine, and also the well-known fact that the settlement of an account is not a matter which a jury can ordinarily intelligently determine. These statements point out the rule to be followed in determining whether or not, in any particular probate proceeding, the right to a jury trial is given by these sections. The test stated in *Estate of Sanderson* would authorize a jury in the present case. The issues necessary to be determined, upon the question of the right of the applicant to inherit the estate of the decedent, are those specifically mentioned in the foregoing statement of findings made by the court. If these issues were all decided in favor of the applicant, the judgment of the court, declaring him entitled, would necessarily follow. They were such as would be "determinative of an order or judgment to be entered by the court." More recent decisions, however, put more stress upon the rule above quoted from the *Estate of Moore*. In *Carter v. Waste*, 159 Cal. 23, 112 Pac. 727, the question arose whether the right to move for a new trial was given in a proceeding for final distribution of the decedent's estate under these sections, particularly the clause of section 1717, giving the right to move for a new trial after a trial of the issues joined in a probate proceeding, in connection with the clause of section 1716, providing that issues of fact joined "must be tried in conformity with the requirements of article 2" of that title. The provisions relating to the right to move for a new trial and those upon the right to a trial by jury, under these sections, are similar; the two propositions are cognate, and are governed by the same general principles. In the case last cited the court said that a careful consideration of the California cases on the subject led to the conclusion that the true test for determining whether a motion for a new trial would lie in any particular probate proceeding, under these sections, "is this, viz.: Does the law expressly authorize issues of fact to be framed in such proceeding? If the answer be, 'yes,' the issues must be tried in the manner provided by these sections to which we have referred, and the motion for new trial is expressly authorized." Among the California cases considered were the *Moore*, the *Sanderson*, and the *Dolbeer* Cases, above mentioned. We think it must be taken as established by the decisions that in any probate proceedings in which the statute

authorizes the formation of issues of fact, either party is, under sections 1716 and 1312, entitled to a jury trial, at his option. The question remaining for decision on this point, therefore, is whether or not the statute authorizes the formation of issues upon a proceeding for partial distribution. We think there can be no doubt that it so provides.

[3] Such proceeding is authorized, and the practice therein prescribed, by sections 1658 to 1662, inclusive, of the Code of Civil Procedure. Section 1658 provides that any person, after four months from the issuance of letters, may present his petition for partial distribution. Section 1659 provides for notice to all persons interested in the estate. Section 1660 provides that "any person interested in the estate may appear at the time named and resist the application." The other sections provide the form of the order to be made, and of the bond to be given by the applicant. Respecting this proceeding, and discussing its nature, the court, in *Estate of Ryer*, 110 Cal. 561, 42 Pac. 1082, stated that such a proceeding "is in the nature of a collateral inquiry, or episode, injected into the proceedings for the administration of the estate, in which there are pleadings, process, trial, findings, and a judgment, thus presenting all the elements of a civil action." In *Carter v. Waste*, supra, the court had under consideration a proceeding for final distribution, and declared that section 1663 provided for issues in that proceeding, and that it was one class of cases in which the framing of issues of fact is expressly authorized by the Code. Section 1668, on this subject, is not substantially different from section 1660. It is clear, therefore, from these decisions and from these provisions of the Code, that a proceeding for partial distribution is one in which the Code authorizes the framing of issues of fact and, under the rule stated, sections 1716 and 1312 must be construed to give to either party thereto the right to demand a trial by jury of the issues of fact joined therein. It follows, therefore, that the court below erred in refusing the demand for a jury trial in this case.

The record shows that many other errors were committed by the court below in the course of the trial. In view of the possibility of another trial, we deem it advisable to notice some of them.

[4] The physician who attended the mother when the applicant was born was called as a witness for the applicant, and testified that he was requested to attend at the birth by the decedent Baird; that Baird was at the house on that night; that the birth took place at 5 o'clock in the morning; and that immediately afterwards on that day he made out and signed a certificate of birth, which was afterwards filed in the proper public office. This certificate was read in evidence. It stated that David Jennings Baird, the decedent, was the father of the child, and

that Lydia Marguerita Valencia was its mother. By appropriate questions the applicant's counsel sought to elicit from the witness testimony that Baird, at the time the witness made and filled out the certificate, informed him of the facts stated therein, and then declared that he, Baird, was the father of the child, and that Baird read the certificate after it was prepared and signed. This testimony the court refused to allow. The ruling was clearly erroneous. No evidence as to the paternity of the child could be much more satisfactory and convincing than the statements of the reputed father declaring his paternity, made at the time of its birth and under the circumstances stated. The court not only rejected the evidence, but, in the face of many other admissions by Baird that he was the father of the child, allowed as proof of public acknowledgment of the fact by him, found that Baird was not the father, and that he did not publicly acknowledge the child as his own. The testimony sought from the physician was competent evidence of the fact. No confidential relation rendered it a privileged communication. The respondent does not even attempt to justify the ruling.

[5] Other witnesses were prevented from testifying to acknowledgments made by Baird that he was the father of the child. The reason for the rejection in many cases was that the acknowledgment was not made in public. On this ground all statements to that effect made by the decedent at the home of the child's mother to the servants were excluded. We know of no rule by which such rulings can be supported.

[6] The only argument made by the respondent in regard to these errors is that it is immaterial whether they were erroneous or not because, as they claim, the applicant should never have prevailed in any event. This argument is based upon the theory that whatever may be the fact as to the paternity of the child and public acknowledgment thereof by the decedent, the proof showed beyond controversy and without conflict that the decedent did not receive the child into his family as his own, and did not treat it otherwise as if it were a legitimate child. If the errors were confined solely to the admission of evidence on the other issues proposed, this claim would be more plausible. But where the error is so grave as the unauthorized substitution of the court for a jury as the tribunal to hear the evidence and determine the facts, we cannot, as a general rule, say that the scheme in force in this state for the administration of justice has not miscarried. See *People v. O'Bryan*, 185 Cal. 65, 130 Pac. 1042. Doubtless there may be cases so devoid of merit, or so wanting in proof of some essential fact, that the judgment of the lower court to that effect should be upheld even in the face of

such an error. Decisions affirming judgments of nonsuit are familiar examples. But here the court denied a motion for nonsuit, made in part upon the ground that the evidence did not show the two facts last mentioned. Evidence offered by the appellant in support of these facts was also improperly excluded by the rulings of the court. Upon the whole record it appears so probable that the appellant was prevented from fairly presenting his case by improper and adverse rulings that we deem it advisable to remand the cause for a new trial. Nothing we have said is to be taken as an expression of opinion on our part regarding the sufficiency of the evidence to prove that the decedent received the child into his family and treated it as if it were a legitimate child.

The judgment appealed from is reversed.

I concur: SLOSS, J.

I concur in the judgment of reversal on the ground that the court erred in refusing the demand for a jury trial: LAWLOR, J.

WATERS v. NEVIS. (Civ. 1790.)

(District Court of Appeal, First District, California. Sept. 25, 1916. Rehearing Denied Oct. 25, 1916; Denied by Supreme Court Nov. 23, 1916.)

1. BANKS AND BANKING \Leftrightarrow 129—JOINT DEPOSIT—WITHDRAWAL.

Where two parties made a joint bank deposit, providing for the right of survivorship, the withdrawal of the deposit by one of the parties, without the other's consent, did not change the status of the parties.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. \Leftrightarrow 129.]

2. APPEAL AND ERROR \Leftrightarrow 1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

The findings of the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3988; Dec. Dig. \Leftrightarrow 1011(1).]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mary L. Waters, Administratrix, etc., against J. C. Nevis. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Shinn & Hart, of Sacramento, and L. A. Kottinger and Milton Shepardson, both of Oakland, for appellant. Elliott & Atkinson, of Sacramento, for respondent.

RICHARDS, J. This is an action brought by the plaintiff, as administratrix of the estate of Antone H. Waters, deceased, to recover the sum of \$1,240, alleged to be money had and received by the defendant Nevis from Antone H. Waters, under the circumstances detailed in the complaint, and when, it is alleged, that said Waters was incom-

petent to conduct any transaction. The complaint was unverified. The answer was a general denial. The evidence was quite voluminous. The court found the facts in the defendant's favor, and rendered judgment accordingly. The plaintiff prosecutes this appeal.

The facts of the case, concerning which there is little, if any, dispute, show that Antone H. Waters was a man of Portuguese extraction who had accumulated some considerable property, but who during the closing years of his life had become afflicted with various physical ailments, and, having also become estranged to some extent from his family, had, in about the year 1913, gone to live at the home of the defendant, Nevis, whom he had known for a number of years. While living there and in the month of February, 1914, said Waters and Nevis went together to the National Bank of D. O. Mills & Co. in Sacramento, and there deposited the sum of \$1,240 in a joint account, and under a written agreement, which contained the following words:

"The money now deposited and also money which shall at any time be deposited by us or either of us with the National Bank of D. O. Mills & Co. in this account No. 8340, will be so deposited by us and is to and will be received and held by it with the understanding and upon the condition that the same and all dividends and interest thereon and all accumulations thereof are payable to and shall be collectible by us or either of us during our joint lives, and then belong absolutely to and be the sole and absolute property of the survivor of us, or the heirs, administrators or assigns of such survivor, without reference to or consideration of the original or previous ownership of such moneys or any part of the same."

The money remained on deposit at said bank until May 22, 1914, when it was withdrawn by Nevis. Waters died on December 21, 1914. It is the contention of the appellant that for a considerable period prior to the transaction at the bank, and for all the rest of his life thereafter, Waters was mentally incompetent to conduct a business transaction, and particularly to comprehend the nature and effect of the particular transaction by which the defendant, Nevis, became a party to the deposit of the money in question and the alleged owner thereof after the death of Waters.

[1] It is not seriously insisted by the appellant that the defendant Nevis would not have become the joint owner of the money deposited in the bank under the foregoing agreement, with the right of survivorship thereto upon the death of Waters, had the latter been capable of making, and had made, the deposit of his money in that form. The construction of deposit agreements of the kind shown here has been practically settled since the decision of the case of Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, which has been upheld in the following cases: Carr v. Carr, 15 Cal. App.

480, 115 Pac. 261; Drinkhouse v. German Sav. & L. Soc., 17 Cal. App. 162, 118 Pac. 953; Denigan v. Hibernia Sav. & L. Soc., 127 Cal. 137, 59 Pac. 389; Estate of Hall, 154 Cal. 527, 98 Pac. 269. The appellant's contention that Nevis' withdrawal of the money in question in May, 1914, was an act of bad faith towards Waters which operated to terminate his rights to any portion thereof, and destroy the trust relation created by the bank deposit cannot avail against the finding of the court upon sufficient evidence that the withdrawal of said money was accomplished with Waters' consent; and, even were it otherwise, the status of the parties would not be changed by such withdrawal. Sprague v. Walton, 145 Cal. 228, 78 Pac. 645.

[2] This brings us to the main and, in fact, only contention upon which the appellant relied in the trial court, viz., that of Waters' mental incompetency during the period including the date of the deposit agreement and continuing up to the time of his death. The testimony upon this subject was, as we have seen, quite voluminous and very conflicting. The trial court having heard all of said testimony, and having observed both parties and the witnesses in the case, made its findings in the defendant's favor upon the question of the mental competency of the decedent during the period in question. This being so, and a careful examination of the record showing that a real and substantial conflict exists, it follows that under the well-settled rule of this court the findings of the trial court will not be disturbed.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

DANIEL v. CALKINS et al. (Civ. 1711.)

(District Court of Appeal, First District, California. Sept. 26, 1916.)

1. APPEAL AND ERROR ⇨1011(1)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

The finding of the trial court on substantially conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988; Dec. Dig. ⇨1011(1).]

2. CONTRACTS ⇨153 — CONSTRUCTION — EFFECTING OBJECT.

Contracts between real estate agents and owners of real estate by which the former are given authority to engage in activities, having for their object the sale of the latter's property, are entered into for the mutual, material benefit of the parties, and are to be so construed as not to defeat such objects, when such construction is reasonably deducible from their terms.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. ⇨153.]

3. EVIDENCE ⇨442(4)—PAROL EVIDENCE AFFECTING WRITING.

Where the written authorization to sell of a realty broker read that the owner authorized the broker to sell for \$11,700 net and agreed

"to pay you no per cent. as a commission on said sale when made," the court properly permitted the broker, suing for commission, to introduce evidence of the oral agreement between the parties that he was to receive all over the net sum stated in the writing as the price of the property, since the oral agreement did not vary the terms of the writing, but only amplified it to effectuate the material interests of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1884; Dec. Dig. § 442(4).]

4. BROKERS § 57(2)—REALTY BROKER—RIGHT TO COMMISSION.

Realty broker, authorized to sell for \$11,700 net, any excess to be his commission, was entitled to commission where he found a purchaser ready, able, and willing to buy for \$12,000, which the latter did from the owner herself, though the lowest price quoted to the purchaser by the broker was \$12,250.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57(2).]

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by W. C. Daniel against Sadie B. Calkins and others. From a judgment for plaintiff, and an order denying defendants' motion for new trial, they appeal. Judgment and order affirmed.

Owen D. Richardson, of San Jose, for appellants. Earl Lamb and R. J. Glendenning, both of San Jose, for respondent.

RICHARDS, J. This is an appeal from a judgment and order denying the defendants' motion for a new trial.

The action was brought to recover the sum of \$550 alleged to be due as the commission of a real estate agent in securing a purchaser for the property of the defendant Sadie B. Calkins, pursuant to a written contract of authorization and also an alleged oral agreement as to the amount of commission to be received in the event of a sale. The evidence in the case discloses that the plaintiff was a real estate agent residing and doing business as such at Sunnyvale in the county of Santa Clara in the year 1912; that during the month of July of that year the defendant Sadie B. Calkins was in possession of a piece of real estate of which she was shortly to become the owner, and that in that month and at her request the plaintiff took a Mr. Deckman (who subsequently became the purchaser of the property) out to see it with a view to buying it; that the price of \$12,500 was quoted to him at that time by plaintiff, and he said he would take the property at that figure; but when the plaintiff reported these facts to Mrs. Calkins she said that she had decided not to sell, but later, in the meantime having received title to the property, she requested the plaintiff to reopen negotiations with Mr. Deckman. It was at or about this time that the following writing was executed between the parties:

"Sunnyvale, Cal., August 23, 1912.

"W. C. Daniel: I hereby authorize you solely to sell for me and my account the following described real estate * * * for the sum or

price of \$11,700.00 net; and I agree to pay you no per cent. as a commission on said sale when made. I further agree to furnish a complete abstract of title to date of transfer. This authorization to remain in full force and effect for thirty days, after which notice must be given in writing to terminate this contract.

"[Signed] Sadie B. Calkins.
[Signed] W. C. Daniel."

"Witness:

At the time of the execution of the foregoing writing the plaintiff testifies, and the court finds, that an oral agreement was made between the parties to the effect that in the event of his success in securing a purchaser for the premises the plaintiff was to receive as his compensation a sum equal to the difference between the net price specified in said writing and such price as the property should be sold for. In the meantime the plaintiff corresponded by telegrams and letters with Mr. Deckman, who was at the time in the East, but who later and during the life of the plaintiff's written contract came to California, re-examined the property, and finally purchased it directly from the owner for the sum of \$12,000. After the consummation of such sale the plaintiff demanded as his commission a sum equal to the difference between the amount named in the written authorization as the net sum to be received by the owner and the sum actually paid by the purchaser of the property, to wit, the sum of \$300. The trial court rendered judgment in plaintiff's favor for said sum, and from said judgment and from the order denying a new trial the defendants prosecute this appeal.

[1] The first contention of the defendants is that the evidence is insufficient to sustain the finding that the plaintiff procured Deckman as a purchaser of the property. In respect to this issue there is a substantial conflict in the evidence, and this being so the finding of the trial court will not be disturbed.

[2, 3] The next and chief contention of the appellants is that the court erred in permitting the plaintiff to introduce evidence of the oral agreement between the parties to the effect that the plaintiff was to receive all over the net sum stated in the writing as the purchase price of the property. In making this contention it is apparently conceded by the appellants that when an agent's authorization is written the amount of his compensation in the event of a sale may be agreed upon orally. This concession is doubtless made in the light of the authorities sustaining this view. *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130; *Kennedy v. Merickel*, 8 Cal. App. 381, 97 Pac. 81; *Baird v. Loescher*, 9 Cal. App. 65, 98 Pac. 49; *Naylor v. Adams*, 15 Cal. App. 354, 114 Pac. 997. The appellants, however, insist that the oral agreement between the parties as to the sum to be received or retained as the agent's compensation is void, for the reason that it undertakes

to vary the terms of a written instrument by parol, and that the ruling of the trial court in admitting evidence of such oral agreement was error. The clause in the writing which it is argued is varied and in fact abrogated by the oral agreement, according to the appellants' contention, reads as follows:

"I agree to pay you no per cent. as a commission on the amount of said sale when made."

This clause standing alone might support the appellants' contention; but it is to be interpreted in connection with the entire writing, with the nature and object of the contract, and with the circumstances attending its creation. Contracts between real estate agents and owners of real estate by which the former are given authority to engage in activities having for their object the sale of the latter's property, are entered into for the mutual material benefit of the parties to such contracts, and are to be so construed as not to defeat these objects when such construction is reasonably deducible from their terms. The foregoing clause in the written authorization of the plaintiff is to be read in the light of the preceding clause in such writing with which it is connected in the conjunctive, and which designates the net amount which the owner is to receive upon the sale of the property; and it is upon said "amount of said sale" that "no percentage as a commission" is to be paid. The use of the term "net," and specifying the amount which the owner is to receive, carries the plain implication that the selling price of the property is to be some larger sum, the excess of which is undisposed of by the terms of the written agreement. This being so, the oral agreement of the parties to the effect that the agent should retain such extra sum as the compensation for his services in the premises does not vary the terms of the writing, but only amplifies it so as to effectuate the mutual material interests of the parties in entering into it. The court, therefore, did not err in admitting the evidence of such oral agreement, nor in its finding predicated upon such evidence.

[4] The final contention of the appellants is that the plaintiff never in fact produced a purchaser ready and able and willing to purchase the property in question for the price at which the agent offered it to such purchaser. This argument is predicated upon the evidence in the case showing that the lowest price quoted to the prospective purchaser by the plaintiff was the sum of \$12,250, which sum the purchaser was never shown to be willing to pay. The views above expressed as to the construction to be placed upon the plaintiff's written authorization to the effect that he was to endeavor to make a sale of the property for such sum in excess of the net amount which the owner was to receive, necessarily implies that in his offers of the prop-

erty to prospective purchasers he was to fix a larger sum than said net amount as the lowest purchase price of the property; and if he found a purchaser who was ready and willing and able to buy the property for any sum up to or in excess of the net amount specified in his written authorization he would be fulfilling its terms and also the terms of the oral understanding of the parties supplementing their written agreement; and if such purchaser when found saw fit to deal directly with the owner, and the owner with him, within the life of the plaintiff's agency, and to consummate a sale of the property for a sum equal to or in excess of the owner's net figure, the agent would be none the less the procuring cause of such sale, and would under the authorities be entitled to his reward. *Briggs v. Hall*, 24 Cal. App. 588, 141 Pac. 1067.

This disposes of every material contention of the appellants in the case.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

BAXTER v. OHICO CONST. CO. (Civ. 1546)
(District Court of Appeal, Third District, California. Sept. 20, 1918.)

1. FRAUDS, STATUTE OF §32—DISCHARGE OF ORIGINAL DEBTOR—"NOVATION."

Where a storekeeper released a subcontractor on his indebtedness, upon the contractor's assuming his bill, and thereafter looked only to the contractor, agreeing, as consideration of such assumption, to furnish the subcontractor necessary supplies for the work, this was a "novation" within statute of frauds (Civ. Code, § 2794, subd. 3), which excludes therefrom a case "where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor," etc.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 49; Dec. Dig. § 32.

For other definitions, see *Words and Phrases*, First and Second Series, *Novation*.]

2. EVIDENCE §471(28)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

Plaintiff, suing on an alleged assumption of a debt to him, could testify that he did cancel the antecedent obligation and accept the new promise of defendant, these being questions of fact, and no one better qualified than he to testify of them.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2173; Dec. Dig. § 471(28); *Witnesses*, Cent. Dig. § 835.]

3. CORPORATIONS §432(12) — AUTHORITY OF AGENT—EVIDENCE.

In an action against contractor corporation on its alleged assumption of subcontractor's store account, evidence of authority of foreman of defendant to supervise construction, etc., and buy supplies, and that, immediately after telephoning the corporation's president, he made the alleged assumption contract, held sufficient to show his authority to make the contract.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1737, 1743, 1762; Dec. Dig. § 432(12).]

Appeal from Superior Court, Yuba County; Judge P. McDaniel, Judge.

Action by E. S. Baxter against the Chico Construction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jury R. Kennedy, of Chico, and J. D. Peters, for appellant. W. H. Carlin, of Marysville, for respondent.

BURNETT, J. We think a rational conclusion from evidence disclosed by the record found in the following statement of facts claimed by respondent: Defendant had contract for constructing within a given time a concrete dam for the impounding of water for irrigation. It was sublet to one James Kirby by the work of hauling the necessary gravel to the dam site. Defendant's headquarters were at Chico, Butte county, and the dam was being constructed some 40 or 50 miles away in the foothills of Yuba county. Plaintiff was conducting a general merchandise store a few miles from the site. The work was begun, and while hauling the gravel, Kirby incurred a bill at the store for a sum of \$298.20 for supplies of various kinds, including groceries and a considerable quantity of beer and whisky. Up to about October 17, 1913, defendant had been represented at this place by its superintendent foreman, a Mr. Cuddeback, and he was succeeded by a Mr. Jack McGeehan, each of them having authority to hire and discharge men, buy necessary supplies, incur expenses in connection therewith, and represent defendant in the prosecution of the work. At that date, Mr. Kirby had a large amount of gravel on the way near plaintiff's store and plaintiff demanded the payment of his bill, and used to extend any further credit to the contractor, and was about to commence to load and attach the gravel. This was communicated to Foreman Cuddeback, and his successor, Mr. McGeehan, took up the matter and informed plaintiff that he would communicate with the president of defendant by telephone. To plaintiff's knowledge, he did not have such communication with the president, who was then at Chico; went direct to plaintiff's store; assisted plaintiff and his clerk in figuring up the amount due and unpaid; ascertained it to be \$298.20; told plaintiff that in his talk with the president of defendant over the phone, the president had stated that defendant would pay the bill, and that McGeehan further declared that he, the foreman would O. K. the bill; had a statement of the bill made out, which he, in fact, dictated and sent to defendant at Chico; dictated to plaintiff that defendant desired him to continue giving credit to Kirby, and that defendant would pay for all necessary articles furnished to him thereafter. Plaintiff thereupon accepted defendant's promise thus made to Kirby, and the then existing bill of \$298.20; released Kirby from all claim in connection therewith; stopped the proceedings to at-

tach, or at least abstained from any action, and looked solely thereafter to defendant for payment; and, further carrying out his promise, furnished additional merchandise to Kirby in the sum of \$81.20, looking to defendant alone for payment therefor. The foregoing are the most favorable inferences in favor of the judgment that can be drawn from the evidence, but that, of course, is no objection here, if they are substantially supported at all. The following quotation from plaintiff's testimony would seem to disclose said support:

"My store is a little less than a mile from the dam. James Kirby had a subcontract from the defendant for the hauling of gravel for the construction of the dam. In doing that work, he ran a bill with me for general merchandise. Ed. Fleming was on the ground representing Mr. Kirby, and at first Pete Cuddeback was the foreman and representative of defendant and he was succeeded by Jack McGeehan. On October 20, 1913, James Kirby owed me \$298.20, and I told his foreman, Mr. Fleming, that I wouldn't furnish any more supplies unless it was fixed up. Mr. Fleming went to Oroville, came back in a couple of days, and said Pete Cuddeback, who went to the phone and talked with Mr. Polk, the engineer for defendant in charge of the work, and after talking with him, told me to fix up the amount owed me by Kirby and send it to the defendant, and that it would be paid and defendant would be responsible for it. Then Mr. Fleming and Jack McGeehan, who was then foreman and representative of the defendant, took my books, added up the account, which came to \$298.20, and made out the statement introduced in evidence themselves, and Jack McGeehan took it, saying that he would O. K. it and send it to the defendant. I then and there accepted this promise on behalf of defendant, and I released James Kirby, canceled his indebtedness, and from this time on looked to the defendant alone for the payment of this bill. As a further inducement and consideration to defendant for assuming this bill, I promised Jack McGeehan that I would go ahead and let Kirby have thereafter anything that was necessary to complete the contract, which Mr. McGeehan, for defendant, asked me to do and stated the defendant would pay the same. Had not defendant assumed the prior account, I would not have done this, as I was going to attach, but having obtained this promise from the company, I released Mr. Kirby, and then furnished additional supplies to Mr. Kirby thereafter in accordance with the direction obtained from Mr. McGeehan, amounting to \$81.20."

[1] There is thus shown a novation, and it is excepted from the operation of the statute of frauds by virtue of subdivision 3 of section 2794 of the Civil Code, excluding the case—

"where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor," etc.

[2] We can see no valid objection to the course permitting plaintiff to testify that he did cancel the antecedent obligation and accepted the new promise. These were facts, and no one was better qualified than plaintiff to testify concerning them. The court would not be bound by his declaration to that effect, but they constituted evidence which we cannot say was insufficient to support the court's finding.

[3] We think also that there was sufficient showing that the foreman or superintendent had authority to bind the company in the promise to pay for the supplies.

There is no dispute that Cuddeback and McGeehan had the same authority, and the former testified that:

"My authority was to go ahead with the construction of the dam; hire men; discharge them; buy what supplies were needed for the work."

Mr. Fleming also testified that Mr. McGeehan was general foreman for the Chico Construction Company; that "he hired and discharged laborers and supervised the work and ordered supplies."

There is also strong circumstantial evidence in the fact that McGeehan, immediately after telephoning to the president of said company, made said agreement with plaintiff. He would quite naturally repeat to plaintiff what was said to him by his superior. It is altogether improbable that he would immediately make a contract entirely different from his instructions. It is true that there is a difference between the testimony of plaintiff and McGeehan as to this, but we must accept the version of the former.

The proposition involved in the case seems simple, and, as we cannot say that the conclusion drawn from the evidence by the trial judge is unreasonable or unsupported, we think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

VALENCIA v. MILLIKEN. (Civ. 2001.)

(District Court of Appeal, Second District, California. Sept. 27, 1916.)

1. RAPE §57(1)—WEIGHT OF EVIDENCE.

The weight to be given testimony in criminal prosecutions for rape, even if uncorroborated, is for the jury, unless it is inherently improbable.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. §57(1).]

2. RAPE §66—CIVIL LIABILITY—SUFFICIENCY OF EVIDENCE.

In a civil action for rape, a less stringent rule relative to the sufficiency of evidence is applicable than in a criminal prosecution, since in a civil action a preponderance of the evidence is all that is required to establish a fact.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. §66.]

3. RAPE §66—CIVIL LIABILITY—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

In a civil action for rape, the weight to be given conflicting evidence relative to the commission of the act held for the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. §66.]

4. APPEAL AND ERROR §1002—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

In a civil action for rape, the jury's conclusion on conflicting evidence in favor of plaintiff

and against defendant's alibi is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. §1002.]

5. RAPE §66—CIVIL LIABILITY—EVIDENCE.

In a civil action for rape, where there was no controversy as to the birth of plaintiff's child, it was competent for plaintiff to testify that defendant was its father.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. §66.]

6. RAPE §66—CIVIL LIABILITY—CHILD AS EVIDENCE—QUESTION FOR TRIAL COURT.

In a civil action for rape, the question whether the jury could be asked to compare plaintiff's child with defendant was peculiarly within the trial court's province to determine.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. §66.]

7. APPEAL AND ERROR §1032(1)—BURDEN TO SHOW PREJUDICIAL ERROR.

The burden is on appellant to affirmatively show prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047, 4051; Dec. Dig. §1032(1).]

8. RAPE §66—CIVIL LIABILITY—EVIDENCE—CHASTITY.

In a civil action for rape, evidence as to the chastity of plaintiff was not only material on question of the measure of damages, but as tending to show the probability or nonprobability of resistance on the part of plaintiff.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. §66.]

9. APPEAL AND ERROR §1047(1)—HARMLESS ERROR—INSTRUCTION.

In a civil action for rape, where the defense, being an alibi, was not based on the fact that plaintiff had consented, error in limiting the purpose for which evidence as to the chastity of plaintiff could be considered to the question of damages was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146, 4150-4152; Dec. Dig. §1047(1).]

10. RAPE §66—CIVIL LIABILITY—INSTRUCTION—DAMAGES.

In a civil action for rape, the instruction that compensatory damages should be given in such amount as would fairly compensate plaintiff for the injury she received by reason of the act complained of, considering her physical suffering and disability during pregnancy, if the jury found the pregnancy was the result of defendant's act, also her mental suffering, shame, and disgrace, and loss of social standing, and all other harm suffered as the natural result of the wrong, was not improper, in connection with the other instructions, as invading the right of the jury by telling that damages should be awarded plaintiff regardless of whether she consented or not; as the jury were told to compensate for the act complained of, the rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. §66.]

11. RAPE §66—CIVIL LIABILITY—EVIDENCE—CAPACITY FOR RESISTANCE.

In a civil action for rape, the questions to plaintiff: "Did you become unconscious at any time while you were struggling with defendant? Did he say anything while he was doing this? Were you or were you not unconscious at the time he set you up? Before this assault were you as large physically as you are now?"—were proper, not only as tending to show damages, but as bearing on the question of plaintiff's power to resist.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. §66.]

RAPE \Leftrightarrow 66—**CIVIL LIABILITY—EVIDENCE.** In a civil action for rape, plaintiff's testimony that she weighed 140 to 145 pounds when act was committed, whereas at the time of she weighed 215 pounds, was proper, where defendant claimed that, as he weighed only 155 pounds, it was improbable that he could forcibly rape a woman weighing 215 pounds.

Ed. Note.—For other cases, see Rape, Cent. §§ 107-111; Dec. Dig. \Leftrightarrow 66.]

RAPE \Leftrightarrow 66—**CIVIL LIABILITY—EVIDENCE MATERIALITY.**

In a civil action for rape, the question to plaintiff why she remained on friendly terms with defendant after he raped her, to which answered that defendant always promised to marry her, was material, and the evidence admissible.

Ed. Note.—For other cases, see Rape, Cent. §§ 107-111; Dec. Dig. \Leftrightarrow 66.]

APPEAL AND ERROR \Leftrightarrow 1060(1)—**HARMLESS ERROR—EVIDENCE.**

In a civil action for rape, the admission of physician's testimony as to the period of gestation was harmless, even if the period was a matter of common knowledge, and not one requiring expert testimony.

Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. \Leftrightarrow 1060(1).]

RAPE \Leftrightarrow 66—**CIVIL LIABILITY—IMMATERIALITY—TESTIMONY.**

In a civil action for rape, the court properly took from the testimony of a witness for the use his statement that last summer he saw an and plaintiff at "Urbita Springs," as the was immaterial.

Ed. Note.—For other cases, see Rape, Cent. §§ 107-111; Dec. Dig. \Leftrightarrow 66.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Alvina Valencia against Philipp Milliken. From a judgment for plaintiff an order denying defendant's motion for a new trial, he appeals. Judgment and order affirmed.

Ignacio Estudillo, of Riverside, for appellant. Richard L. North, of Riverside, A. La, of Los Angeles, and V. Rapp, of El Centro, for respondent.

HAW, J. As appears from the complaint, defendant on or about December 19, 1911, by force and violence, made an indecent assault upon plaintiff, who at the time was a chaste and virtuous single woman over age of 21 years, and then and there, without her consent, debauched and carnally abused her, as a result of which she became pregnant, and on September 17, 1912, gave birth to a child, to her damage in the sum of \$4,000; all of which allegations were by defendant denied.

The case was tried before a jury, which returned a verdict in favor of plaintiff for the sum of \$4,000. Defendant moved for a new trial upon the ground of insufficiency of the evidence, errors in law occurring at the trial, and irregularities in the proceedings of plaintiff and the attorneys for plaintiff, which motion was overruled. Appeal is from the judgment and an or-

der of court denying defendant's motion for a new trial.

[1-4] Appellant devotes a large part of his brief in support of his contention that the evidence is insufficient to justify the verdict of the jury. No purpose could be subserved in quoting at length the detailed acts of defendant in accomplishing his purpose, as related by plaintiff. Her statement, if true, clearly shows that she was, on December 19, 1911, against her will, ravished and debauched by defendant, as a result of which she gave birth to a child on September 17, 1912. As declared in criminal cases, the weight to be given testimony in prosecutions for rape, even if uncorroborated, is a matter solely for the consideration of the jury, unless it is inherently improbable (*People v. Ah Lung*, 2 Cal. App. 278, 83 Pac. 296; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540); and a less stringent rule is applicable here, since it is a civil action wherein a preponderance of the evidence is all that is required to establish a fact. Not only do we find nothing improbable in plaintiff's story when all the circumstances are considered, but her testimony is strongly corroborated by that of her father and mother, to the effect that defendant did, on the afternoon of the day named, accompanied by plaintiff, leave their house in a buggy for a ride, from which trip he returned with her that evening, when plaintiff immediately, in the presence of defendant, informed her parents of the fact that the defendant had so abused her; that he then admitted the fact, as stated by plaintiff, and promised the father that he would marry his daughter within two weeks; that the clothing of plaintiff was torn and blood-stained; that the father, accompanied by plaintiff, visited the isolated place where the latter stated defendant had pulled her from the buggy, and found evidence of the struggle which plaintiff testified she had with defendant in an effort to protect her virtue. Defendant denied in toto the testimony of plaintiff; denied that he made any admissions or had any conversation with the father and mother; denied that he had gone riding with plaintiff or had seen her or her parents at all on the day referred to; and asserted that at the time when the offense is alleged to have been committed he was elsewhere, and a part of the time at the house of his brother, where he remained during the night, in which claim he was corroborated by his brother and one other person. The weight to be given this conflicting evidence was clearly a matter for the determination of the jury, and its conclusion thereon in favor of plaintiff and against the alibi which defendant sought to establish, must, so far as this court is concerned, be deemed conclusive. Appellant cites the case of *Lind v. Closs*, 88 Cal. 6, 25 Pac. 972, to the effect that, where in proce-

cutions for rape the circumstances tend to throw discredit upon the uncorroborated testimony of the prosecuting witness, the court in reviewing such testimony should be liberal in granting a new trial, to the end that justice may be done. For the reasons stated, however, the rule announced in that case is not applicable to the facts in the case at bar.

[5-7] It appears that the child, nearly a year old at the time, was produced in court, and in addressing the jury plaintiff's attorney said:

"I call your attention, gentlemen, to the child in question, and ask you to compare it with the defendant."

Defendant objected to the use of this language in argument to the jury, on the ground there was no evidence that the child was that of the defendant, and asked the court to instruct the jury to disregard the remarks of counsel. The testimony of plaintiff was that the child to which she gave birth nine months after the alleged act of intercourse with her by defendant was that of the defendant. The record is silent as to whether or not it bore any resemblance to defendant. For aught that appears to the contrary, its lack of resemblance might have constituted strong evidence in his favor. If, on the other hand, it resembled the alleged father, it would be convincing evidence, not of the alleged violence, but of the act of intercourse with him which it was necessary for plaintiff to establish. There existed no controversy as to the birth of the child, and it was competent for plaintiff to testify that defendant was the father thereof. *State v. Miller*, 71 Kan. 200, 80 Pac. 51, 6 Ann. Cas. 58. And it has also been held that a child may be exhibited to the jury in order that they may consider and determine whether or not there may be any resemblance to the defendant. *State v. Danforth*, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600, 6 Ann. Cas. 557. In *State v. Danforth*, supra, it is said:

"All of the authorities concede, in effect, that there may be cases in which the maturity of the child, or the character of the peculiarities relied upon as a ground of resemblance or dissimilarity, render the child competent evidence on the issue of paternity. The objections urged to the competency of the evidence go rather to its weight than to its relevancy."

In 1 Wigmore on Evidence, § 166, it is said:

"The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications."

In our opinion, since the child is not before us, the matter complained of was a question peculiarly within the province of the trial court to determine. At all events, it devolves upon appellant to affirmatively show prejudicial error, and there is nothing in the record here presented upon which we can assume, even if the court erred, that defendant was prejudiced by the ruling.

[8, 9] Complaint is made that the court erroneously instructed the jury as follows:

"Whether or not plaintiff was chaste and virtuous prior to the alleged assault is not material to the maintenance of this action, and, should you find from the evidence that she was not, that alone would not justify you in finding for the defendant. Whether or not she was chaste prior to the alleged assault is only material for the purpose of showing the damages which she may have suffered by reason of the alleged assault."

The chastity of plaintiff prior to the assault was made an issue in the trial, and there was conflicting evidence touching the question. In our opinion, evidence as to the chastity of plaintiff was not only material touching the question as to the measure of damages, as stated by the court, but likewise material as tending to show the probability or nonprobability of resistance on the part of the prosecutrix; "for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed." *People v. Johnson*, 106 Cal. 289, 39 Pac. 622. Conceding, however, that the court erred in thus limiting the purpose for which such evidence was to be considered by the jury, it is nevertheless impossible to perceive how defendant could have been prejudiced thereby, since his defense, being an alibi, was not based upon the fact that plaintiff had consented to the act. Hence, conceding the error, defendant's substantial rights could not have been prejudiced by reason thereof.

[10] The court instructed the jury that:

"Compensatory damages should be given in such amount as in your judgment will fairly compensate her for the injury she has received by reason of the act complained of, taking into consideration her physical suffering and disability during pregnancy and in child birth, if you find the pregnancy was the result of the defendant's act, also her mental suffering, shame, and disgrace, and her loss of social standing, and all other harm you find she suffered as the natural result of the wrong."

Objection is made to this instruction upon the ground that it invades the right of the jury, telling it that damages should be awarded to plaintiff regardless of whether she gave her consent or not. We do not so construe it. Read in connection with other instructions, and also as stated therein, they are to compensate her for the wrong by reason of the act complained of. "The act complained of" was the rape alleged to have been committed upon plaintiff by defendant.

[11-15] Numerous assignments of error are predicated upon rulings of the court in admitting and rejecting evidence. Conceding some of the questions calculated to elicit immaterial testimony, we are unable to perceive that any prejudice could have resulted therefrom. The questions: "Did you become unconscious at any time while you were struggling with him?" "Did he say anything while he was doing this?" "Were you or were you not unconscious at the time he set you up?" "Before this assault were you as large physically as you are now?"—were all

per, not only as tending to show damage, for the further reason that they bore on the question of her power to resist the defendant. In response to the last question Intiff replied that she weighed 140 to 145 pounds at the time the act was committed, whereas at the time of the trial she weighed 155 pounds. This testimony was certainly per, since defendant claims that, as he weighed only 155 pounds, it was improbable that he could forcibly rape a woman weighing 215 pounds. It was made to appear that on the commission of the act plaintiff remained on friendly terms with defendant, she was asked the reason for such continued relations. Her answer to the effect that he always "promised Papa that he would get married, and we expected that he would keep his word," shows the materiality of the question. It is also claimed that the court erred in admitting the testimony of a physician as to the period of gestation. Ground of this objection is that such period is a matter of common knowledge, and one requiring expert testimony. Conceding this to be true, how could defendant have been prejudiced by the answer? It is also claimed that the court erred in striking out following testimony given by witnessdez for the defense:

Last summer I saw Frank Truhillo and Al Valencia at Urbita Springs. It was last I saw them."

It is impossible to perceive how such fact could be material to any issue involved in the case. There were numerous other objections in character as trivial and unimportant as those to which we have adverted. Purpose could be subserved by a more extended reference thereto. Suffice it to say we find no error which in any event could have resulted in a miscarriage of justice. Section 4½, art. 6, Constitution. The judgment and order are affirmed.

Concur: CONREY, P. J.; JAMES, J.

AINSWORTH et ux. v. MORRILL. (Civ. 1922.)

District Court of Appeal, First District, California. Sept. 22, 1916. Rehearing Denied by Supreme Court Nov. 20, 1916.)

HOMESTEAD §118(5) — INCUMBRANCE — INDEX OF HUSBAND AND WIFE.

Under Civ. Code, § 1242, providing that the husband of a married woman cannot be co-owner or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by the husband and wife, a joint offer, accepted in writing, made and signed by only the husband, for an exchange of property of the wife upon which a homestead had been declared by her, was invalid and unenforceable by the husband and wife.

1. Note.—For other cases, see Homestead, Civ. Dig. §§ 216, 217; Dec. Dig. §118(5).]

2. SPECIFIC PERFORMANCE §32(1)—MUTUALITY.

Where defendant in suit for specific performance would not be entitled to have the contract reformed and enforced against plaintiffs, it cannot be reformed and enforced by them against him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89, 90, 99; Dec. Dig. §32(1).]

3. REFORMATION OF INSTRUMENTS §7—VOID CONTRACT.

A void agreement has no standing in law and cannot be reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 20; Dec. Dig. §7.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by A. G. Ainsworth and wife against Enoch Morrill. From judgment for defendant, plaintiffs appeal. Affirmed.

Lindley & Elckhoff and Russell T. Ainsworth, all of San Francisco, for appellants. Redmond C. Staats, of Berkeley, and James M. Koford, of Oakland, for respondent.

PER CURIAM. In this action the plaintiffs sought to have reformed and then specifically enforced a written contract executed by and between the plaintiff A. G. Ainsworth and the defendant Morrill, for an exchange of certain real property. The defendant's general and special demurrer to the plaintiffs' fourth amended complaint was sustained, and the plaintiffs declining to further amend, judgment was entered for the defendant, from which the plaintiffs have appealed.

The facts pleaded and relied upon for a cause of action are substantially these: The plaintiffs are and at all times mentioned in the complaint were husband and wife and living together as such in the county of Napa. The plaintiff Minerva L. Ainsworth was the owner of certain real property situate in the county of Napa, and the defendant Morrill was the owner of certain real property situate in the county of Alameda. Both properties were at the time of the making of the contract incumbered with mortgages, and the property of the plaintiff Minerva L. Ainsworth was further incumbered with a right of way and a homestead declared by her. The contract in controversy consisted of a written offer made and signed only by the plaintiff A. G. Ainsworth, which was accepted in writing by the defendant Morrill.

[1-3] In our opinion the plaintiffs' complaint does not and cannot be made to state a cause of action, and therefore the defendant's demurrer was rightfully sustained upon that ground alone. It affirmatively appears from the allegations of the complaint that the contract in suit was not signed and acknowledged by the plaintiff Minerva L. Ainsworth; and we have no doubt that its effect if valid and enforceable would be an incumbrance upon the homestead previously

declared by her within the meaning of section 1242 of the Civil Code, which provides that:

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Although the contract was signed only by the plaintiff A. G. Ainsworth and was executory in its nature, nevertheless its tendency was to cast a cloud upon the property involved, and to that extent at least constituted an incumbrance upon the existing homestead. The policy and purpose of section 1242 of the Civil Code is to prevent the destruction or incumbrance of a homestead by either spouse acting alone; and it is well settled that a purported conveyance or incumbrance of the homestead by either spouse not made in strict compliance with the requirements of that section is invalid and inoperative for any purpose. *Freiermuth v. Steigleman*, 130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138. Clearly under the pleaded and admitted facts of the present case the defendant would not be entitled to have the contract in controversy reformed and enforced as against either or both of the plaintiffs; and conversely it must be true that the plaintiffs can have no rights under the contract superior to those accorded by the law to the defendant. It is elementary that a void agreement has no standing in the law, and consequently it can neither be reformed nor enforced.

The judgment appealed from is affirmed.

PEOPLE v. PRECIADO. (Cr. 351.)

(District Court of Appeal, Third District, California. Sept. 26, 1916. Rehearing Denied by Supreme Court Nov. 23, 1916.)

1. CRIMINAL LAW §1104(6) — APPEAL AND ERROR—STATING "GROUNDS" AND "POINTS"—STATUTE.

Under Pen. Code, § 1247, requiring that appellant's application to the trial court for a transcription of the stenographer's notes state in general terms the grounds of the appeal and the points on which appellant relies, by stating in his application in general terms the grounds but not the points for his appeal from conviction of embezzlement, appellant complied with the statute sufficiently to entitle his appeal to be heard, since the term "points" was used in the statute as embracing "grounds" as well as "points."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2776; Dec. Dig. §1104(6).]

For other definitions, see Words and Phrases, First and Second Series, Ground; Point.]

2. CRIMINAL LAW §778(7)—TRIAL—INSTRUCTION.

In a prosecution for embezzlement, defended on the ground of insanity, where the trial court instructed that for insanity to be available as a defense defendant must establish it by a preponderance of the evidence, defining a preponderance as meaning the greater weight of the evidence, but in three or four other instructions stated that the defense must be "clearly proved,"

"clearly established," and "satisfactorily established," there was error, as the charge as a whole was likely to influence the jury to require establishment of the defense of insanity by too clear a degree of proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1848, 1851, 1960, 1967; Dec. Dig. §778(7).]

3. CRIMINAL LAW §570(2)—INSANITY—EVIDENCE—WEIGHT.

The defense of insanity may be established by a mere preponderance of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1286; Dec. Dig. §570(2).]

4. CRIMINAL LAW §1159(5) — APPEAL — REVIEW—VERDICT ON CONFLICTING EVIDENCE.

On appeal from a conviction of crime, the reviewing court, under the settled rule, will not interfere with the verdict, whichever way the jury may have decided the issue of insanity, where expert and nonexpert testimony was introduced for and against the defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3078, 3079; Dec. Dig. §1159(5).]

5. CRIMINAL LAW §161—FORMER JEOPARDY.

Once in jeopardy and former acquittal are favored pleas, and the right not to be put in jeopardy the second time is guarded by the common law and the constitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290-303; Dec. Dig. §161.]

6. CRIMINAL LAW §200(1)—IDENTITY OF OFFENSES—EMBEZZLEMENT.

Defendant tax collector, acquitted of embezzling, on December 1, 1913, funds paid him by H., could not be convicted of embezzling, on November 1, 1913, funds paid him by M., if the money embezzled December 1st included in part both the H. and M. moneys, since, where the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution of the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 386; Dec. Dig. §200(1).]

7. CRIMINAL LAW §295—FORMER JEOPARDY — PROOF OF PLEA.

In a prosecution for embezzlement, the information alleging that it was committed November 1, 1913, while defendant tax collector had been acquitted of a like charge as of December 1, 1913, it was error to confine defendant, in the proof in support of his plea of former jeopardy, to the face of the information on which he was acquitted, though the two informations showed two different offenses committed at two different times, the one charging the offense as of November 1, 1913, having been purposely amended to that date from December 1, 1913, since defendant had a right to show that the taking of the money in both instances was one and the same transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 674-678; Dec. Dig. §295.]

Appeal from Superior Court, Madera County; Charles O. Busick, Judge.

Charles F. Preciado was convicted of embezzlement, and from the judgment, and an order denying his motion for new trial, he appeals. Judgment and order reversed.

See, also, 158 Pac. 1063.

Lee D. Windrem, of Port Richmond, R. R. Fowler, of Turlock, and Joseph Barcroft and H. I. Maxim, both of Madera, for appellant. U. S. Webb, Atty. Gen. and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of the county of Madera for the crime of embezzlement. He was tried and convicted, and thereafter moved for a new trial which was denied. He thereupon appealed from the judgment and the order denying his motion for a new trial.

[1] 1. The Attorney General has made a motion to dismiss the appeal principally upon the ground that defendant in his application for an appeal under section 1247, Penal Code, failed to file or present to the trial judge an application containing a statement of the grounds and points on which he relies. The contention is that defendant should have stated in his application not only the *grounds* of his appeal, but should also have specified the *points* on which he relied; that the statute is mandatory in its requirement that the application contain a statement of "grounds and points." Section 1247 provides that:

Upon an appeal taken from any judgment or order of the superior court, in any criminal action, where such appeal is allowed, "the defendant * * * must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken."

The section also provides that the court shall, within two days after such application is made, direct the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the court "may be necessary to fairly and fully present the points relied upon by the appellant." It will be observed that while the terms "grounds and points" are conjunctively stated in the earlier part of the section, the direction as to the portion of the reporter's notes necessary to have transcribed is that the transcription shall be such as "to fairly present the points relied upon," and further along in the section it is made the duty of the court "after such application is made," to direct the reporter to transcribe such portion of his notes as may be necessary to present "the points relied upon by the appellant." The term "points" as above shown, it seems to us, was used as embracing "grounds" as well as "points" and, as there used, indicates that the Legislature did not intend that an appellant should lose his appeal as "wholly ineffectual" unless in his application he specifically and separately states therein that his reasons for the ap-

peal are to be deemed both the "grounds" and "points" upon which "appellant relies."

The application was entitled: "Settlement of Grounds on Appeal under Sec. 1247, P. C." Then follows title and cause. The application recites the proceedings, the trial, verdict, motion for new trial, order denying motion, judgment and notice of appeal from the judgment and order. It then states: "That said appeal is taken upon the following general grounds," and the grounds (briefly stated) were as follows: (1) Once in jeopardy; (2) errors in rulings with reference to the allowance of challenges for cause; (3) misconduct of district attorney; (4) errors of the court in its rulings upon evidence; (5) errors of the court in the interrogation of witnesses; (6) the verdict is contrary to law; (7) the verdict is contrary to evidence. The application specifically mentioned portions of the record called for and also for "the entire transcript of the testimony taken in said action."

With this application before the court, it made an order directing the phonographic reporter "to transcribe the following portions of the testimony and proceedings given and had in the above-entitled cause." Then follow in the order the portions of the testimony and proceedings specifically called for in the application, including "all the testimony given at the trial, and all objections, rulings and exceptions, made and taken at the trial." This order was complied with and the entire record is now here for review and appears to be in authentic form.

The statute only requires that the application state "in general terms the grounds of the appeal and the points upon which the appellant relies." The grounds stated in the present case were specific enough to indicate upon what errors defendant would rely, and he designated the portions of the reporter's notes which were deemed "necessary to have transcribed to fairly present the points relied upon." Section 1248 of the Penal Code provides that: "If the appeal is irregular in any substantial particular, but not otherwise, the Appellate Court may, * * * order it to be dismissed."

It was said in *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772:

"The right of appeal is conferred by the Constitution, and statutes and rules of procedure for its exercise are to be liberally construed; and no appeal will be dismissed on technical grounds, where there has been no violation or disregard of any express rule of procedure."

Unless we can say that the failure of defendant to state in his application that the "grounds," therein set forth were also the "points" on which he relied, is a fatal "violation or disregard" of the provisions of section 1247, the motion, in our opinion, must be denied. We cannot so hold. We fail to appreciate respondent's argument that there is, in contemplation of the statute, a substantial distinction intended in the use of the terms

"grounds" and "points." By stating "in general terms the grounds" we think the defendant complied with the statute sufficiently to entitle his appeal to be heard.

[2-4] 2. The principal defense made in the case was that defendant, at the time of the taking of the money, was not responsible because he was incapable of understanding the nature and quality of the act on account of his then insanity. The court gave the following instructions:

"You are instructed that in prosecution for crimes the defense of insanity is often interposed and thereby becomes a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice and the welfare of society no less than mercy to the accused requires that it should be thoroughly and carefully weighed. It is a plea sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete than it is a humane defense when satisfactorily established, yet it should be examined into with great care lest an ingenious counterfeit of the malady furnish protection to guilt.

"Insanity as used in this sense means such a diseased and deranged condition of the mental faculties as to render a person incapable of distinguishing between right and wrong in relation to the act with which he is charged, and to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reasoning from disease of the mind as to not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing wrong.

"Hence you are instructed that in order for insanity to be available as a defense in this case the defendant herein must establish by a preponderance of evidence that he was so diseased and deranged in mind as to render him incapable of distinguishing between right and wrong, and it must appear from such preponderance of evidence that he was so incapable of distinguishing between right and wrong in relation to the particular offense charged in the information, and it must appear further by such preponderance of evidence that he was in such a mental condition as to be incapable of distinguishing between right and wrong in relation to the act with which he is charged in the information upon the particular date so charged and designated in the information.

"You are instructed that the law of this state does not recognize the defense of insanity based upon claims that a defendant committed the crime while laboring under an uncontrollable or irresistible influence, nor does it recognize that form of insanity commonly known as emotional insanity beginning on the eve of the criminal act and ending with its consummation. Such forms of insanity have no legal standing in this state as a defense to crime. It is necessary that insanity, in order to be a defense, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason and from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."

In *People v. Wreden*, 59 Cal. 392, the defense was insanity, and among the instructions was the following:

"I charge you that when insanity is relied upon as a defense, the burden of proof is with the defendant, and the proof must be such in amount

that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane, or, in other words, that *insanity must be clearly established by satisfactory proof*; it is not sufficient that you should entertain a reasonable doubt as to his sanity, but the proof must be satisfactory and the fact of insanity *clearly established*." Italics the court's.

The court referred to the rule as previously well settled that "insanity, in order to constitute a defense in a criminal action, need not be proved beyond a reasonable doubt, but that it might be established 'by mere preponderating evidence.'" Referring to the instruction, the court said:

"Is not the expression '*clearly established by satisfactory proof*' the full equivalent of 'established by satisfactory proof beyond a reasonable doubt?' How can a fact be said to be clearly established so long as there is a reasonable doubt whether it has been established at all. There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof."

After giving the definition of "clearly" according to Webster and after stating the definition of reasonable doubt as defined by Chief Justice Shaw, the court, said:

"A juror would have no excuse for saying that he did not 'feel an abiding conviction to a moral certainty' of the truth of a fact which had been '*clearly established by satisfactory proof*.' Such proof, if any could, would convince and direct the understanding, and satisfy the reason and judgment of a conscientious juror. Under the instruction given it was the duty of the jury to require that the defense of insanity should at least be proved beyond a reasonable doubt. This was error."

In *People v. Wells*, 145 Cal. 138, 78 Pac. 470, the instruction was, as the court stated, "almost in the exact language of the one condemned in *People v. Wreden*." Said the court, after quoting what is above taken from the opinion in that case:

"We have not been referred to a case, nor do we know of one in this court, overruling or modifying the decision in *People v. Wreden*, 59 Cal. 392. On the contrary, in *People v. Allender*, 117 Cal. 81 [48 Pac. 1014], the court instructed the jury that the burden rested upon the defendant of proving his insanity by a preponderance of evidence merely."

And the court referred to the fact that such had been the rule in this state for a period of 30 years.

The latest discussion of the question by the Supreme Court is found in *People v. Miller*, 171 Cal. 649, 154 Pac. 468. In that case the trial court instructed the jury correctly as to the rule that a preponderance of the evidence is sufficient where insanity is pleaded, but it gave a further instruction as to what was meant by the term "preponderance of the evidence," as follows:

"Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds."

Chief Justice Angellotti, speaking for the court, shows quite clearly that the definition thus given was substantially the same as

that of proof beyond a reasonable doubt and therefore violated the rule that insanity may be established by a preponderance of the evidence merely. The court said:

"That such is the effect of the instruction given is shown by what is said in *People v. Wreden*, 59 Cal. 393, and *People v. Wells*, 145 Cal. 142 [78 Pac. 470], where it is held that an instruction declaring that insanity 'must be clearly established by satisfactory proof' is the full equivalent of one making it incumbent on a defendant to establish insanity beyond a reasonable doubt."

As we understand this reference to the case of *People v. Wreden*, the court intended to give its approval of what was there said, and because of such approval it followed that the instruction in the *Miller* Case was error. That is, that in the *Wreden* Case the instruction called for proof equivalent to the proof called for in the *Miller* Case, or, in other words, both instructions meant the same thing and both were erroneous.

In the present case the only instruction given defining what is meant by preponderance of the evidence was as follows: "By a preponderance of the evidence is meant the greater weight of the evidence—that which is the more convincing of its truth. It is not necessarily determined by the number of witnesses for or against a proposition." Notwithstanding this definition, the jury were told that the defense of insanity is to be received as "a humane defense when satisfactorily established"; again, in another instruction, "to establish the defense of insanity it must be clearly proved"; again, in another instruction, "It is necessary that insanity, in order to be a defense, it must be clearly proved," etc. How else could the jury have understood the instruction that insanity may be established by a preponderance of the evidence than that this preponderance must be "satisfactorily established" and "clearly proved"?

In the case of *Beach v. Clark*, 51 Conn. 200, the action was on a promissory note on which defendant was indorser as an accommodation to plaintiff and as security therefor he held certain personal property conveyed to him by plaintiff. The trial court instructed the jury that "if the defendant held the property in question as collateral security, the burden of proof is on him to clearly prove his authority to sell." This was held error, the Supreme Court of Errors saying:

"The use of that word (clearly) required the defendant to assume a heavier burden than the law imposed upon him. The law only required him to prove by a preponderance of proof the material fact on which he relied. The charge required him to do more than that; to prove it clearly, without uncertainty, free from doubt or question. It required him to prove it with substantially the same amount of proof that is required to substantiate a criminal charge; and that is not the law. * * * For this reason there must be a new trial."

In *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. 710, the action related to the sale of certain personal property. The instruction giv-

en was that the sale "should be clearly and fairly proven." Said the court:

"'Clearly and fairly proven' imports more than a mere preponderance of evidence. In the case of *West v. Druff*, 55 Iowa, 335 [7 N. W. 636], an instruction was held to be erroneous which required 'clear and satisfactory evidence' to satisfy the jury of an issuable fact. That instrument (instruction?) cannot be distinguished from the one now under consideration."

In *French v. Day*, 89 Me. 441, 36 Atl. 909, the action was trespass and the court instructed the jury:

"* * * It is incumbent on the defendants to show, by a clear preponderance of the evidence and by convincing proof, their right to do it in order to prevent a verdict against them."

In discussing the instruction, the court said:

"'Preponderance' means to outweigh; to weigh more. A 'clear preponderance' may mean that which may be seen, is discernible, and may be appreciated and understood. In this sense, the expression might be unobjectionable; but it may convey the idea, under emphasis, of certainty, beyond doubt, and very likely would do so to the common mind. At any rate, the expression is equivocal and mischievous. 'Convincing proof' may be said to mean that degree of certainty required to sustain a given postulate. But that view assumes that the hearer knows the rule that governs such case, which jurors are not supposed to know, but of which they should be informed. The two expressions, coupled, must have conveyed to the jury an erroneous basis for their verdict. Exceptions sustained."

In *McEvony v. Rowland*, 43 Neb. 97, 61 N. W. 124, the instruction required that the transaction "must be clearly established." The court said that:

The party "is not required to satisfy the jury in such case, beyond question, that the sale is an honest one. A preponderance of the evidence is all that is required" (citing *Stevens v. Carson*, 30 Neb. 544 [46 N. W. 655, 9 L. R. A. 523]). * * * The word 'clearly' means without uncertainty."

Some of the qualifying terms which have been held to import a higher degree of proof than is meant by a preponderance of evidence are stated in 17 Cyc. pp. 763, 764, namely: "an abiding conviction," a "clear conviction," "convinces," "clearly," "fully," "clearly and satisfactorily," etc.

The rule in some other jurisdictions is not the same as our Supreme Court in an early day declared it. But where the rule has been followed that the defense of insanity may be established by a preponderance of the evidence, the appellate courts have held that no higher degree of proof should be required and that it is error to charge the jury by language importing any higher degree of evidence to be necessary to establish such defense.

The Attorney General cites *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651, as an instance where the Supreme Court inferentially approved of the rule that this defense must be clearly proved. In that case the quotation from the opinion of Chief Justice Tindal was used to illustrate what constituted insanity such as would be accepted as a defense, and

not the character of proof necessary to establish it. This will at once be seen by reading the instruction which was under discussion. The court was composed of the same members when the case cited was before the court as when the case of *People v. Wreden* was decided, and it is not to be supposed that if the court had changed its opinion upon so important a rule, it would have failed to mention its decision in the *Wreden* Case. Whatever may be found in decisions, the rule is firmly established that the defense of insanity may be established by a preponderance of the evidence merely, and that being the rule, trial courts are not allowed to qualify it by requiring a higher degree of proof.

In the instant case nothing appears in the record to lead to a suspicion that the plea of insanity was a subterfuge and put forward as a means of escaping punishment. Expert and non-expert testimony was introduced for and against this defense, sufficient in quantity and forcefulness to have prevented the reviewing court, under the settled rule, from interfering with the verdict whichever way the jury may have decided the issue.

It is contended by the Attorney General that the trial court having so clearly instructed the jury that the defense of insanity may be established by a preponderance of the evidence, the jury could not have been misled by the instruction to which complaint is made. The same contention was urged in *People v. Miller*, supra, where "the jury," as the Supreme Court points out, "were explicitly and correctly instructed that it was not necessary for defendant to show his insanity beyond all reasonable doubt, but only by a preponderance of evidence, as in civil cases * * * that, in other words, insanity may be established by a preponderance of evidence merely." In the *Miller* Case the error arose in the definition which the trial court gave to what constitutes preponderance of evidence. In the present case, the error arose from the fact that the learned trial court in three or four different instructions on the subject instructed the jury that the defense must be "clearly proved," "clearly established," "satisfactorily established," and these expressions were so closely related to the instructions as to the preponderance of evidence being sufficient that we do not feel at liberty to say the jury were not influenced by them.

Whether the judgment should be affirmed notwithstanding such error, under the provision of section 4½, article 6 of the Constitution, as was said in the *Miller* Case: "We are satisfied that the evidence was of such a nature that such a conclusion may not fairly be reached." We do not wish to be understood as holding that there was not sufficient evidence to warrant the verdict or that the insanity of the defendant was not shown by a preponderance of the evidence.

What we mean to say is that upon this issue the record discloses a condition of facts presented by the defendant from which, under the rule of preponderance of the evidence, the jury might reasonably have found in favor of the theory of insanity.

[5-7] 3. A plea of once in jeopardy was interposed, and defendant claims that upon the evidence he was entitled to a verdict of acquittal. It appeared that defendant was put upon his trial for having embezzled certain funds from the county paid to defendant as tax collector by Carrie M. Hammel, such embezzlement having been committed on the 1st day of December, 1913. Upon this charge defendant was acquitted. Thereafter a complaint was filed in the justice's court charging him with the embezzlement of certain funds on the 1st day of December, 1913, paid in to him as tax collector by Seth Mann and Myrtle Mann. On his arraignment, after having been held to answer, he pleaded former acquittal. Later and when he was brought to trial, by leave of court, the district attorney amended the information by changing the date of the alleged embezzlement to November 1, 1913. The trial resulted in a disagreement of the jury, and upon his retrial defendant was convicted, and from that conviction the present appeal is taken. It appeared that defendant received a check for the amount alleged to have been embezzled on October 29, 1913, and that the check was cashed on November 3, 1913. It also appeared that defendant made his verified return in due form of all moneys received by him as such tax collector from October 1st to November 1, 1913. The claim of defendant is that the money received from this check, on November 3, 1913, was not due to the county until after his settlement with the treasurer on the 1st day of December, 1913, and hence falls within the same time as the charge upon which he was tried and acquitted, that is, of having on December 1, 1913, embezzled certain moneys paid in to him as tax collector by Carrie M. Hammel. Section 3753 of the Political Code requires the tax collector, on the first Monday in each month to—"settle with the auditor for all moneys collected for the state and county, and pay the same to the county treasurer, and on the same day must deliver to and file in the office of the auditor a statement, under oath, showing: (1) An account of all his transactions and receipts since his last settlement; (2) that all money collected by him as tax collector has been paid."

The charge is that defendant embezzled certain money on November 1st, whereas the evidence was that the money alleged to have been embezzled was the proceeds of a check which, while it was received October 29th, was not cashed until November 3d and the proceeds became part of the funds for which defendant was to account at the end of the latter month. It is contended that having been embraced in his return for November, this money was included in the return of the

money paid in by Seth Mann and Myrtle Mann for the alleged embezzlement of which he was tried and acquitted; that, hence, the only question is, "Are the two offenses a part of the same criminal act?"

It was held in *People v. Meseros*, 16 Cal. App. 277, 116 Pac. 679, that:

"Proof of the embezzlement or larceny of checks, in the county of the venue, will not support a charge of embezzlement or larceny of money therein. The contention that checks are money is without support." Syllabus.

Once, in jeopardy and former acquittal are favored pleas (12 Cyc. 364), and "the right not to be put in jeopardy the second time is as sacred as the right of trial by jury, and is guarded with as much care by the common law and by the Constitution" (Black, C. J., in *Dinkey v. Commonwealth*, 17 Pa. 126, 55 Am. Dec. 542). It seems to be a well-settled rule that where the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution of the other. In *People v. Stephens*, 79 Cal. 428, 21 Pac. 856, 4 L. R. A. 845, the prosecution was for libel and the question was whether there may be as many prosecutions for libel maintained upon a single article published in a single issue of a newspaper as there are false and defamatory statements concerning a single individual in such article. "The second prosecution," said the court, "is for a libel contained in the same article and published in the same issue of the same newspaper as the first. The words alleged to be defamatory are not the same in both informations. If they were, the case would be a plain one. But the publication in both cases was one and the same act. * * * In *Regina v. Erlington*, 9 Cox. C. C. 86, Cockburn, C. J., said: 'it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.' Cases are cited to the rule that 'the state cannot split up one crime and prosecute it in parts.' See the rule discussed in *People v. McDaniels*, 137 Cal. 192, 69 Pac. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81. An elaborate and illuminating note is found in 92 Am. St. Reports, upon the identity of offenses in a plea of former jeopardy. The note is very full upon the "carving" or "splitting" of offenses. The general rule is there stated:

"The instance above given, of the larceny of several articles at one time and place by one act of theft, is one of frequent occurrence. In such a case, by the great weight of authority, there is but one offense. The state may, if it sees fit, prosecute the theft of all the articles at once, or it may select what it wishes and prosecute for the larceny of that part, but it cannot split the single larceny into as many charges as there are articles stolen and make of such charges the basis of successive prosecu-

tions. The second and subsequent prosecutions are, then, for the same offense."

It is unnecessary to cite further authority.

At the trial the defendant, in proof of his plea, offered in evidence the transcript and proceedings at the trial when he was acquitted. The court sustained the objection offered by the district attorney that the evidence was irrelevant and immaterial, remarking: "I think the proper evidence is the indictment or information on file." And as to this—the only evidence allowed by the court except the verdict of acquittal—the court said:

"It appears on the face of the indictment there are two separate and distinct offenses charged, and the acquittal on the former trial on information No. 323 is not the same offense charged in the information No. 341, and the motion to dismiss the information No. 341 and dismiss the case against the defendant is denied."

Of course, the two informations show two different offenses committed at two different times. The second one was amended purposely to so show. But this would not preclude the defendant from showing as matter of fact that both sums of money alleged to have been embezzled were taken at the same time, or rather, it was the duty of the prosecution to show that the embezzlement was committed as alleged in the information.

We think it was error to confine defendant, in the proof in support of his plea, to the face of the information on which he was acquitted. We do not mean to hold that the defendant could not be convicted of embezzling the money received November 3d in payment by Seth and Myrtle Mann, of their taxes, if as a fact, he did appropriate it on that day to his own use. That question does not arise. It is claimed that the money embezzled was shown by a shortage in his accounts at the end of November, and that this shortage arose from his having at that time, December 1st, failed to account for both the Hammel and Mann money, and that in both instances the taking was at the same time out of the combined funds received during that month. Whatever the fact was, defendant had a right to show that the taking of the money in both instances was one and the same transaction. In other words, if the money embezzled on December 1st included in part both the Hammel and Mann moneys, the offense could not be split into two charges and he be convicted of both.

As there must be a new trial, we have thought it proper to consider the point raised on the plea of once in jeopardy. Other errors are claimed, but we do not find it necessary to consider them.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

MACK v. EUMMELEN. (Civ. 2002.)

(District Court of Appeal, Second District, California. Sept. 21, 1916. Rehearing Denied by Supreme Court Nov. 20, 1916.)

PARTIES **42**—**INTERVENTION**—**TIME**.

In view of Code Civ. Proc. § 387, permitting intervention of an interested party "at any time before trial," a pledgee of stock in litigation, with full knowledge of the pendency of the litigation and of its purposes, may not stand by in silence until the case has been decided and judgment rendered against his representative in interest, and then by intervention compel a retrial of the case.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 69; Dec. Dig. **42**.]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by A. F. Mack against Henry Eummelen, in which, after judgment, Citizens' Savings Bank filed petition to set aside and vacate the judgment and be admitted as a defendant, with leave to answer. From denial of its motion or petition, the Bank appeals. Affirmed.

Andrews & Lee, of San Diego, for appellant. Doolittle & Morrison, of San Diego, for respondent.

CONREY, P. J. In this action it appears that the plaintiff and the defendant Eummelen purchased from one W. H. Bentley 840 shares of stock of a corporation known as the Bentley Ostrich Farm. Eummelen acted for himself and Mack in the negotiations, and represented to Mack that the price was \$50,000, of which each of the two purchasers was to pay one-half. Mack paid \$25,000. Eummelen paid only \$5,000, and each of them received from Bentley 420 shares. The court found facts establishing fraud in the transaction, as charged by the plaintiff, and held the defendant as trustee for the plaintiff of 280 shares of the stock, which had been transferred by Bentley to the defendant. The defendant was ordered to indorse and transfer those 280 shares to the plaintiff, and it was further ordered that in default of his so doing before the 15th day of August, 1913, the judgment should operate as a transfer to plaintiff of all of the defendant's right, title, and interest therein. The facts constituting the fraud were not discovered by the plaintiff until March, 1912. The action was commenced on August 12, 1912, and the judgment was entered on August 4, 1913.

On August 14, 1913, the appellant, Citizens' Savings Bank, filed a petition, asking the superior court to set aside and vacate the judgment and admit petitioner as a defendant, with leave to answer; and in that application and accompanying affidavits it was set forth that on June 20, 1912, Eummelen pledged to the plaintiff, as security for a loan of \$24,000, the said 420 shares of stock of the Bentley Ostrich Farm standing in his name; that at the time of filing the petition the bank was still the pledgee of those shares

of stock for that indebtedness; that the bank had no notice or knowledge of the pendency or termination of the action until August 11, 1913. Counter affidavits were filed, showing that the president of the bank was acquainted with the fact of the pendency of this action and understood the nature thereof long prior to the time when it came on for trial, and during that period of time discussed the case with the plaintiff; that in that conversation in November, 1912, Mr. Irwin, president of the bank, told the plaintiff that he had the entire matters of Eummelen in his hands, and suggested that the case be settled out of court. It was further stated in plaintiff's affidavit that in January, 1913, he had another conversation with Mr. Irwin, in which that gentleman stated that he had discussed the case with defendant Eummelen, and had advised the latter that he had nothing to fear therein. It is shown in the affidavit of Bentley that on April 21, 1913, which was the day before the trial of this action, Mr. Irwin stated to Bentley that plaintiff had no chance of winning this case. The motion or petition of the bank was presented upon these affidavits, and by order of court was denied. From that order the Citizens' Savings Bank presents this appeal.

Counsel for appellant in their argument have urged sundry errors, which they claim were committed by the court in the trial of the case, and on account of which they think the judgment should be reversed. If the court was justified in overruling the motion to vacate and set aside the judgment for the reasons stated in the petition, it follows that appellant has no rights as a party to the action, and on this appeal it is not necessary to consider any alleged errors committed at the trial. The order denying the application is based upon implied findings in favor of the plaintiff with respect to the issues raised by the petition and covered by the affidavits. We must therefore assume that with full knowledge of the pendency of this action and of its purposes the bank silently stood by until the case had been tried and until judgment had been rendered against the defendant. This being so, the court was justified in denying the petition and in refusing to recognize petitioner's belated assertion of a right to intervene in the action. "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. * * *" Code Civ. Proc. § 387. The law does not contemplate that a person thus interested may willfully omit to intervene, and then compel a retrial of the case because it has gone against his interests. *Hibernia, etc., Society v. Churchill*, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

**TIDEWATER SOUTHERN RY. CO. v.
VANCE. (Civ. 1804.)**

(District Court of Appeal, First District, California, Sept. 21, 1916. Rehearing Denied by Supreme Court Nov. 20, 1916.)

**CORPORATIONS §82—STOCK SUBSCRIPTION—
COLLATERAL AGREEMENT AS TO NOTE.**

Where a stock subscription contract was executed in duplicate, the subscriber retaining one copy on which the corporation's agent indorsed an agreement to return the subscriber's note for his subscription if he were dissatisfied, and the corporation, within that time, before any stock was issued to him, refused to return the note upon being requested, the note was not enforceable against the subscriber by another party with notice of these facts, notwithstanding the agent had not indorsed the agreement on the original subscription contract, filed with the company, the corporation having been fully organized before this subscription was made, and it not appearing that there was any later subscriber who could have been defrauded by reliance upon this subscription, or that there was any subsequent creditor of the corporation who relied on it in dealing with the corporation, or that this subscriber connived at or contemplated any secrecy in making the collateral agreement permitting cancellation, or that he knew the corporation's agent failed to indorse the agreement upon the original subscription retained for the corporation files, whatever secrecy there was about the agreement being imparted to it by the corporation through its agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. §82.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Tidewater Southern Railway Company against Carey M. Vance. From judgment for defendant, plaintiff appeals. Affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant. Johnston & Jones, of Fresno, and W. B. Good, of Selma, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action brought to recover the sum of \$625 alleged to be due upon a promissory note executed and delivered by the defendant to the Tidewater & Southern Railroad Company and by it assigned and transferred to the plaintiff herein.

The facts of the case are undisputed. On December 14, 1911, the defendant executed a subscription for 500 shares of the capital stock of the Tidewater & Southern Railroad Company, for which he agreed to pay \$625 on or before ten months after date, giving his promissory note for that amount. The authorized agent of the corporation who solicited and received the subscription had two copies thereof, one marked "Original" and the other "Duplicate," both of which were signed by the defendant and the agent on behalf of the corporation, the original being retained by him for the company and the duplicate being delivered to the defendant. On the back of the duplicate the following memorandum was written:

"Dec. 4, '11. Ten months after date if holder of this contract is for any reason dissatisfied we agree to return note or cash equivalent. H. C. Coffin, Tidewater & Southern Railroad Co."

This writing was not indorsed on the back of the original subscription retained by the agent for the company. Within ten months of the date of his subscription the defendant requested the return of his note, which request the corporation refused to comply with, but on the contrary transferred the note to the plaintiff herein, who brought this suit.

The defendant pleaded the foregoing facts by way of defense to the action, and upon proof of the same judgment went in his favor. Wherefore the plaintiff prosecutes this appeal.

The only material point, involved in this appeal relates to the validity of the agreement indorsed upon the defendant's duplicate copy of his subscription which purported to entitle him to recall his note. The appellant contends that this collateral agreement not having been indorsed upon the original stock agreement and filed with the company, and thus brought to the knowledge of other stockholders and subscribers for stock and to the creditors of the corporation, is void. In support of this contention the appellant relies chiefly upon the case of Quartz Glass Mfg. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648. In that case, however, the question involved was the validity of a stock subscription agreement by the terms of which the promissory note given for the purchase price of the stock was to be paid out of dividends to be thereafter declared by the corporation. The court held that this practically amounted to a gift of the stock in violation of the provision of section 359 of the Civil Code, and that the said agreement of the parties having that effect was therefore void. It is true that the court in that case also adverted to the quite well recognized rule that secret collateral agreements as to stock subscriptions by which the subscriber gains an advantage over other subscribers are void for the reason that such secret advantages are in the nature of a fraud upon subsequent subscribers and upon persons who afterward become creditors of the corporation. The authorities cited in that case and amplified by the appellant herein refer in the main to subscriptions for the stock of corporations prior to the incorporation of the company or during the initial stages of its life when sales of its stock are being promoted, and when subsequent subscribers have relied upon the integrity upon their face of prior subscriptions. This, however, is not the situation presented in the instant case. The Tidewater & Southern Railroad Company had been fully organized before the respondent's subscription to its stock was made, and it does not appear that there was any later subscriber who could have been defrauded by his reliance upon the respondent's sub-

scription; nor does it appear that there was any subsequent creditor of said corporation who could or did rely thereon in dealing with said corporation; nor is it shown that there was any secrecy contemplated or connived at by the respondent in the making of the collateral agreement by which he was permitted within ten months thereafter to cancel his subscription by recalling his note; nor that he had any knowledge of the fact that the authorized agent of the corporation failed to also indorse such agreement upon the original subscription which said agent retained on behalf of the corporation. Whatever secrecy there was in respect to this agreement was imparted entirely by the corporation itself through the act or neglect of its authorized agent; and this being so, and no rights of subsequent subscribers or creditors being involved in the case, it would be a manifest fraud upon the defendant to permit the corporation to take advantage of its own wrong by repudiating its agreement while enforcing the defendant's note which was evidently given only because of the reservation in said agreement permitting its recall.

This case is in many respects similar to the case of *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, wherein the court made use of the following apt language applicable to the instant case:

"The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to be paid, is not to be viewed as a new undertaking, arising after the plaintiff has assumed the relation of stockholder. * * * The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms." *Schulte v. Boulevard Gardens Land Co.*, supra.

The case at bar presents an even stronger instance for the application of the rule above laid down, for the respondent herein never in fact became a stockholder of the corporation, since no stock was to be issued to him until his note was paid.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

RECLAMATION DIST. NO. 730 v. INGLIN.
(Civ. 1542.)

(District Court of Appeal, Third District, California. Sept. 20, 1916.)

1. EVIDENCE §543(3)—OPINION—QUALIFICATION OF WITNESS TO TESTIFY AS TO REAL ESTATE VALUES.

A witness, by declaring he had for many years been engaged in buying and selling real

estate for himself and others, and that he had seen and was acquainted with the land in controversy, sufficiently qualified himself to testify upon the question of its value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2357; Dec. Dig. §543(3).]

2. EMINENT DOMAIN §134—COMPENSATION—"ACTUAL VALUE" OF LAND.

Under Code Civ. Proc. § 1249, providing that the owner is entitled to the "actual value" of land sought to be condemned at the date of the issuance of summons in condemnation action, the owner is entitled to the market value of the land for the most valuable uses of which it is capable.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 856; Dec. Dig. §134.

For other definitions, see Words and Phrases, First and Second Series, Actual Value.]

3. EVIDENCE §142(1)—VALUE OF REAL ESTATE—SALES OF OTHER LAND SIMILARLY SITUATED.

Under such statute, the prices at which other lands of like quality and adaptation and similarly situated may have been sold cannot reasonably be accepted as a just criterion for measuring and finally ascertaining the actual value of the land sought to be taken, since an owner of such other tract may have been obliged to make a forced sale, or may have made a poor bargain through want of good judgment or other causes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416, 417, 423; Dec. Dig. §142(1).]

4. EVIDENCE §558(7, 8)—OPINIONS—CROSS-EXAMINATION—SCOPE—VALUE OF PROPERTY—OTHER SALES.

Cross-examination of a witness as to value of land by questioning him as to the fact of other sales of lands in the same district and the prices at which they were made is proper, not to fix the value of land in dispute, but to test his knowledge and impeach his opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2379; Dec. Dig. §558(7, 8); Witnesses, Cent. Dig. § 932.]

5. EVIDENCE §558(12)—OPINIONS—EXAMINATION OF WITNESS—VALUE OF REAL ESTATE—SALES OF OTHER LANDS.

Cross-examination of a witness as to value, by questioning him as to other sales of lands, does not justify redirect examination as to sales of other lands and prices paid thereon, since redirect examination often amounts, in effect, to examination in chief, and the reason of the rule permitting such inquiry on cross-examination ceases with the cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2379; Dec. Dig. §558(12).]

6. EVIDENCE §555—OPINIONS—EXAMINATION OF WITNESS.

While witnesses may, upon their examination in chief, give the reasons upon which they base their opinions, they should never be allowed to go into details of particular sales or transactions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. §555.]

7. APPEAL AND ERROR §1052(6)—HARMLESS ERROR—INCOMPETENT TESTIMONY AS TO VALUE OF LAND.

In condemnation proceeding, error in admitting incompetent evidence that the value of land condemned was \$50 an acre was not prejudicial, where the verdict assessed its value at \$265.52 an acre, since the jury obviously did not accept the incompetent testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4176; Dec. Dig. §1052(6).]

8. APPEAL AND ERROR \S 926(1) — **REVIEW — PRESUMPTIONS—OPINION EVIDENCE.**

Where the record does not disclose the basis of witnesses' estimate of value of land, it must be assumed that they adopted a proper criterion for estimating its value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1279, 8735-8738, 8741, 8743; Dec. Dig. \S 926(1).]

9. APPEAL AND ERROR \S 1051(1) — **HARMLESS ERROR—INCOMPETENT EVIDENCE.**

Where there was a pronounced conflict on the question whether the remainder of defendant's land would be damaged by the severance of the land condemned, several competent witnesses testifying that it would not be damaged, admission of incompetent evidence to the same effect was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4161, 4162, 4165, 4166; Dec. Dig. \S 1051(1).]

10. APPEAL AND ERROR \S 1068(5) — **HARMLESS ERROR—REFUSING INSTRUCTION—EFFECT OF VERDICT.**

Refusal of requested instruction by defendant owner in condemnation proceedings to disregard testimony as to value of land sought to be condemned because based on prices paid for other lands was not prejudicial, where the verdict assessed the value at five times the value so testified to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4230; Dec. Dig. \S 1068(5); Trial, Cent. Dig. \S 475.]

11. APPEAL AND ERROR \S 1170(7) — **REVERSAL — MISCARriage OF JUSTICE.**

Under Const. art. 6, \S 4 $\frac{1}{2}$, forbidding reversal for error not resulting in miscarriage of justice, a judgment in condemnation proceeding was not reversible for error in admitting or refusing to strike out testimony, valuing the land sought to be taken at \$50 an acre, based on prices paid for other lands, where the verdict assessed the value of the land at \$265.52 an acre, and there was other competent evidence fixing the value at \$50 an acre.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4068, 4543; Dec. Dig. \S 1170(7).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Reclamation District No. 730 against M. Inglin. From judgment for plaintiff, defendant appeals. Affirmed.

Hudson Grant, of Woodland, and George Clark, of San Francisco, for appellant. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondent.

HART, J. This action is in eminent domain, and the appeal is by the defendant from the judgment in condemnation entered upon the jury's verdict.

The plaintiff is a reclamation district, entirely situated in Yolo county, organized as such under the laws of this state, the object for which it was organized being, as its name naturally implies, "to reclaim from overflow, flood and seepage waters all the lands lying within the boundaries of said district."

The defendant is the owner of a tract of land situated within the boundaries of said district, and it is alleged in the complaint that a certain specifically described strip of

said land, consisting of 9.8 acres, is necessary as a "right of way * * * to excavate, build, construct, repair and maintain canals, drains, levees, embankments, and other works necessary for the reclamation of the lands in said district, and also to obtain material for the construction, maintenance and repair thereof, and for the purpose of reclaiming the lands within said district from overflow and seepage waters." The strip of land sought to be taken by this action, and which was by the verdict and the judgment condemned for the purposes above indicated, constitutes a portion of the entire tract of land, situated in said district, owned by the defendant. The answer alleges that upon the strip of land sought to be condemned are located the defendant's house, barn, and fences, and also a large, carefully constructed levee, and that all of said improvements "are to be taken or damaged by said plaintiff," that the value of the house, barn, and fences is the sum of \$9,655.65, the value of the land itself is in excess of the sum of \$3,430.00, and that the value of the said levee is the sum of \$2,725.65. It is further alleged that the said house, barn, and fences cannot be used by defendant, if left upon said right of way, and that to make any convenient use of the same, upon the taking of said right of way and the construction of said proposed improvements, it will be necessary to move said buildings and fences from said land, and that the placing and setting of the buildings on new foundations and the rebuilding of said fences, will be at an expense and to the damage of the defendant in the sum of \$1,000; that the total damages suffered by the defendant by reason of the taking of said right of way and the construction of said proposed improvements, exclusive of the damage that will be suffered by the land not taken, "of which the part taken is a part, is the sum of \$8,680.65"; that the damage which will accrue to the portion of the land not sought to be condemned will, by reason of the severance therefrom of the portion condemned and the construction of the improvements in the manner proposed by the plaintiff, amount to the sum of \$1,000. The jury assessed and fixed the aggregate damages suffered by the defendant by reason of the taking of the strip of land at the sum of \$2,862.95, the several items of said damages being found as follows:

Value of the land taken.....	\$2,422 95
Cost of removal and relocation of structures upon said land.....	400 00
Cost of removal of hay from barn....	40 00

The jury found that no damage whatever will accrue to the land not condemned by reason of the severance therefrom of the strip taken.

The points urged by the defendant against the legal integrity of the judgment involve alleged errors of the trial court in permitting

certain testimony to be given, and in disallowing a certain instruction proposed by him, and bearing upon the testimony referred to.

The witnesses for the defendant estimated the value of the land sought to be condemned, variously, at \$400, \$375, \$350, \$325, and \$300 per acre. The plaintiff's witnesses expressed the opinion that it was worth no more than \$50 per acre. One of the witnesses for the plaintiff testified that the particular strip involved here could be used, if it remained the property of the defendant, for the purposes of a levee only; that "it is useless for anything else."

The testimony to which objection was made by the defendant at the trial was that of W. S. Kendall, one of the trustees of the plaintiff. On direct examination, he stated it to be his opinion that the market value of the strip of land involved in this action was \$50 per acre. On cross-examination, he was asked whether he knew that several other tracts of land situated in said district, belonging to other parties, and which were adapted and had been devoted to the raising of alfalfa, had been sold at prices ranging from \$130 to \$150 per acre in near proximity to the time at which the summons in this action was issued. His replies to the questions so propounded were that he had heard of such sales. On redirect, counsel for the plaintiff thus questioned the witness:

"Mr. Huston: Explain to the jury why you placed the valuation of \$50 an acre on this tract of land?"

"Witness: Because it is what everybody in the district got."

This answer was, on motion of the defendant, stricken out. Thereupon counsel for the plaintiff, naming six different owners of land in said district, asked the witness if he knew of the sales by said owners of their said lands, to which an affirmative reply was returned.

"Mr. Huston: What did you hear was the sale price of these several tracts of land?"

"Witness: Fifty dollars an acre."

The witness then proceeded to say, on redirect, that the lands sold by the other parties named were, in all respects, similar in quality and in productive capacity to the land of the defendant, and from which the strip in question was proposed to be taken. All this testimony was duly and regularly objected to by the defendant, and the objections overruled. On cross-examination, the witness was questioned:

"Are you judging of the value of the Inglin lands by what these lands will produce? A. No, sir. Q. Are you endeavoring to fix the value on these lands simply by the standard of valuation which prevailed in the transfers to the district which were mentioned and enumerated by Mr. H. L. Huston in his questions to you? A. Yea."

Upon the conclusion of the witness' testimony, and before he left the witness stand, counsel for the defendant moved to strike out all of said testimony on the ground that the basis of the witness' estimate of the value

of the land in dispute was the prices at which other lands in the district had been sold, and that such prices do not constitute the legal criterion for estimating or determining value in a case of this character. The motion was denied.

[1-3] Although the witness, we think, sufficiently qualified himself to give testimony upon the question of value by declaring that he had, for many years, been engaged in buying and selling real estate for himself and others, and that he had seen and was acquainted with the land in controversy, it is very clear that his testimony plainly, and indeed conclusively, showed that his opinion upon the value of the land in question was based entirely upon what other lands in said district of a similar character as to quality had been sold for to said district. The law provides that the owner is entitled to the actual value of the land sought to be condemned at the date of the issuance of summons in the action to condemn (section 1249, Code Civ. Proc.), and the standard adopted by the witness is not the proper one for the estimation, and, finally, the ascertainment of such value. The owner of the land is entitled to the actual market value of the land for the most valuable use, or uses, to which it is adapted or may be put, and the prices at which other lands of like quality and adaptation and similarly situated may have been sold cannot reasonably be accepted as a just criterion for measuring and, finally, ascertaining the actual value of the land sought to be taken. The reasons for this are obvious and hardly need be stated, although, it may be suggested that, in looking for such reasons, it may readily be conceived how a person might, through force of circumstances beyond his control, sell his land at a price far below its actual value, or how he might make such a sale through improvidence or for want of good judgment.

[4-8] It is true that counsel for the defendant, in the cross-examination of Kendall, first brought out the fact of other sales of lands in the district and the prices at which they were made. As cross-examination, the questions and answers were proper, not, however, for the purpose of fixing the value of the land in dispute, but only "for the purpose of testing the witness' knowledge and impeaching his opinion." Estate of Ross, 171 Cal. 64, 66, 151 Pac. 1138. See, also, Central Pac. R. Co. v. Pearson, 35 Cal. 262; Clark v. Willett, 35 Cal. 534, 544; Santa Ana v. Harlin, 99 Cal. 538, 544, 34 Pac. 224; Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 532, 28 Pac. 681; De Freitas v. Sulsum City, 170 Cal. 263, 149 Pac. 553. But such cross-examination does not justify the plaintiff on redirect examination, which often amounts in practical effect to an examination in chief, to take up the question of sales of other lands and thus show by the witness the prices paid by purchasers of such other lands; for the reason

of the rule, permitting the fact of the sales of other lands to be gone into on cross-examination, ceases with the cross-examination. While in all cases witnesses may, upon their examination in chief, give the reasons upon which they base their opinions, they should never be allowed to go into details of particular sales or transactions. 2 Lewis on Em. Domain (3d Ed.) § 654. It follows, of course, that the court not only erred in allowing the question of sales of other lands and the prices paid for such lands to be gone into on the re-direct examination of the witness Kendall, but erred in refusing to grant the motion to strike out the testimony of said witness; it having been made clearly to appear from said testimony that the witness had based his opinion upon the question of value wholly upon incompetent matters. *San Diego Land, etc., Co. v. Neale*, 88 Cal. 63, 25 Pac. 977, 11 L. R. A. 604; *Pelerson v. Boston Elevated Railway*, 191 Mass. 228, 233, 234, 77 N. E. 769.

[7] But we think the errors thus considered were not prejudicial, for it is obvious from the verdict that the jury did not accept the testimony or opinion of the witness Kendall, upon the question of the value of the property proposed to be taken. As seen, the strip to condemn which this action was brought consisted of a fraction of over nine acres of the defendant's land, the total value of which, together with the improvements, the jury assessed at \$2,422.95, or, approximately, if not precisely, at \$265.52 per acre.

[8, 9] But it seems to be the theory of counsel for the defendant that but for the testimony of Kendall the jury might have found that the defendant suffered some damage from deterioration in the value of his land by reason of the severance therefrom of the strip in question. No such assumption is justified on the record as it is presented here. We have already stated that other witnesses testified that the land of the defendant was not damaged by reason of the severance of the strip in dispute therefrom. These same witnesses further testified that the land in question was of no greater value than \$50 per acre. There is a mere brief recital in the transcript of the testimony of these witnesses, and the record before us does not disclose the basis of their estimate of the value of the land in controversy, or the reasons, if any they gave, for the opinion that the actual value of said land does not exceed the sum of \$50 per acre. We must therefore assume that the testimony of the witnesses referred to was in all respects competent, and that they adopted a proper criterion for estimating the value of the land. There is therefore a pronounced conflict in the evidence, both

upon the question of value and the question whether the remainder of the defendant's land would be damaged by reason of the severance therefrom of the strip in dispute.

Thus viewing the record as it appears before us, in so far as it concerns the evidence, it is plainly manifest that the jury were afforded a very wide latitude within which to exercise their judgment as to the actual value of the land sought to be taken, viz. from the sum of \$50 to the sum of \$400 per acre, and there is nothing appearing upon the face of the record which would warrant us in declaring that the actual value of the land was in excess of the amount at which it was fixed by the jury.

[10] For the same reason for which we hold the errors in admitting the above-considered testimony to be without prejudice to the rights of the defendant, the action of the court in refusing to give a certain one of the instructions proffered by the defendant, while erroneous, was without prejudice. The substance of the said instruction was:

"During the progress of this case some reference has been made in the testimony and in the argument to prices paid to others than defendant for the land constituting a part of the right of way for the river front levee of reclamation district No. 730. You are instructed that the prices which may have been paid for rights of way to other persons for the levees along the river front constitute no test for the fixing of the value of the defendant's lands in this cause. * * * And you will, accordingly, disregard, in determining the value of the defendant's land, any reference, either in the testimony or in the argument, to payments made to others for rights of way."

[11] As before declared, it is obvious that the jury were not governed, in the determination of the question of value, by the testimony of those witnesses who expressed the opinion that the value of the land in dispute did not exceed the sum of \$50 per acre, although, as suggested, so far as the record here shows, they would have been justified in predicated their verdict upon the testimony so given, other than that by the witness Kendall. The total value fixed by the jury, however, as is obvious, was over five times the sum of \$50 per acre, or, approximately, \$34.40 less than \$300, the minimum amount at which the value of the land was estimated by the defendant's witnesses.

There was neither prejudice to the defendant nor a miscarriage of justice by reason of the errors complained of (Const. § 4½, art. 6; *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238), and the judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

WATTERS v. TREASURE MINING & REDUCTION CO. et al. (No. 1821.)*

(Supreme Court of New Mexico. Aug. 28, 1916.)

*(Syllabus by the Court.)***REVIEW—QUESTIONS OF FACT.**

This case is decided entirely upon the facts, and involves no contested legal proposition.

Appeal from District Court, Socorro County; M. C. Mechem, Judge.

Action by Thomas E. Watters, as trustee, against the Treasure Mining & Reduction Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 153 Pac. 615.

Barnes & Royall, of Silver City, and Mann & Nicholas, of Socorro, for appellants. James G. Fitch, of Socorro, and A. A. Goddard, of Topeka, Kan., for appellees.

PARKER, J. This is an action for the foreclosure of the equity of redemption under a trust deed. The deed secured bonds to the amount of \$250,000. Default was made in the payment of the principal and interest due on the said bonds, and in the payment of taxes, and the trustee, at the request of the majority of the bondholders, brought the action.

The mortgagor, together with two other defendants, the Clear Creek Power Company and the Glendale Power Company, filed a joint answer in which they admit the execution of the trust deed and the issuance of mortgagor's bonds in the sum of \$57,000, but denied the issuance of the remaining bonds in the sum of \$193,000, except conditionally as set forth in defendants' special defense. In this special defense they allege that the W. H. McCrum Investment Company was an association or corporation doing business in Kansas City, Mo., and that it was entirely owned, held, directed, and dominated by W. H. McCrum, Theodore Gary, and A. A. Godard; that the defendant mortgagor, in January, 1913, entered into negotiations with the said W. H. McCrum Investment Company, acting by and through the said Theodore Gary, and the mortgagor, acting by and through one R. T. Root, whereby the said W. H. McCrum Investment Company became obligated to purchase bonds of the mortgagor of the par value of \$150,000 at 65 per cent. of the par value thereof; that as a part of said negotiations, and as a part of the consideration for the purchase of said bonds by the said W. H. McCrum Investment Company, it was further and contemporaneously agreed between the said W. H. McCrum Investment Company and the mortgagor that there should be organized a power company, to be known as the Clear Creek Power Company, with an authorized capital of \$650,000, and an authorized bond issue of \$650,000, all as outlined in what is known as the "McCrum Prospectus," which was attached to and made a part of said contract in writing;

that there should be caused to be conveyed to said power company all the right, title, and interest of the mortgagor in and to its power rights on Clear creek subject only to the lien of the said trust deed securing the said \$250,000 bond issue; that there should also be transferred to said Clear Creek Power Company all of the water rights on Clear creek owned by the said R. T. Root; that it was further and contemporaneously contracted between the parties to said contract, both by statements in said contract in writing and by verbal representations and agreements between the parties thereto, and forming a part of the consideration for the purchase of said bonds, that said W. H. McCrum Investment Company should market and sell the \$650,000 bond issue of said Clear Creek Power Company for such price and in such manner and at such time as should enable the mortgagor to pay off and discharge the \$250,000 issue of its bonds, and discharge the lien of the deed of trust being foreclosed in this action, and prevent a foreclosure of the same; that the mortgagor relied upon said contract in writing and said verbal representations, and thereupon did deliver and sell to said W. H. McCrum Investment Company, at 65 per cent. of their par value, not only \$150,000 of its first mortgage bonds, but upon the demand of said investment company a further sum of \$43,000 of said first mortgage bonds, making a total of \$193,000; that such delivery and sale was not complete and absolute, but was so made in trust and subject to the conditions aforesaid; that thereafter a corporation was organized known as the Glendale Power Company, a defendant herein, having a capitalization of \$650,000, and that it took over by good and sufficient conveyance all the water rights owned by the mortgagor and which authorized an issuance of \$650,000 of its first mortgage bonds thereon; that about the same time the defendant the Clear Creek Power Company was organized and for a valuable consideration acquired all the water rights owned by the said R. T. Root, and did authorize an issuance of \$650,000 of its first mortgage bonds secured by the pledge of the said property, so by it acquired as aforesaid, and by the pledge of the property of the defendant the Glendale Power Company; that the organization of the said water company and the issuance of said bonds were in furtherance of the said agreement and with the knowledge and consent of the said W. H. McCrum Investment Company and as a full compliance with the terms of the said agreement; that the said W. H. McCrum Investment Company was informed and advised of all steps taken for the organization of the said two water companies, and the issuance of the said bonds to the Clear Creek Power Company in accordance with the said agreements of the parties, and that a trust deed was executed by the said Clear Creek Power

*Rehearing denied November 23, 1916.

Company and the said Glendale Power Company to one Tyson S. Dineas, trustee, securing the payment of the said bond issue of that company by pledging all the properties of the said two water companies; that the said bonds were delivered to the said W. H. McCrum Investment Company and by it accepted for sale, but that the said W. H. McCrum Investment Company and the said W. H. McCrum, Theodore Gary, and A. A. Godard, wrongfully conspiring together and intending to deceive and defraud the mortgagor and to cause it to sacrifice and lose the said \$193,000 par value of its bonds so delivered to the W. H. McCrum Investment Company in trust as aforesaid, and to unlawfully cause the mining properties, mill, water rights, power plant, pipe line, and appurtenances described in the said trust deed to be sold at judicial sale at a price greatly under its actual value so that the said parties could buy in and acquire said property at a price greatly under its true value, wrongfully caused the said \$193,000 par value of said bonds to be assigned and delivered to the said A. A. Godard, as defendants are informed and believe, and wrongfully failed and refused to sell the said bond issue of \$650,000 of the Clear Creek Power Company or any part thereof, at or before maturity of the said \$250,000 par value of bonds of the mortgagee, and wrongfully and fraudulently notified the mortgagor and the defendant the Clear Creek Power Company that the said W. H. McCrum Investment Company would make no attempt to sell the said \$650,000 bond issue or any part thereof, and wrongfully and fraudulently demand of the mortgagor the payment of the said \$193,000 of said bonds, together with interest thereon, and did wrongfully and fraudulently institute this action for the foreclosure of said deed of trust.

An examination of the contract mentioned in the special defense discloses that it is in the form of a proposal and an acceptance. The proposal is signed by R. T. Root, personally, and is addressed to Theodore Gary, personally. It is a proposal to sell \$150,000 par value of the bonds of the mortgagor at 65 cents on the dollar, the payment therefor to be made in certain payments specified in the proposal. It is therein proposed that the said Root should organize the Clear Creek Power Company with an authorized capital of \$650,000 and the authorized bond issue of \$650,000, all as outlined in the McCrum prospectus attached to said proposal, and convey all of the said Root's water rights on Clear creek to said Clear Creek Power Company, and to cause the mortgagor to transfer all of its interest and power rights on said Clear creek to said Clear Creek Power Company, subject only to a first mortgage securing the \$250,000 bond issue of the mortgagor. The acceptance is by Theodore Gary, personally, and is without exception or reservation of any kind. The prospectus at-

tached to the proposal contains a statement of the amount of capital stock and authorized bond issue of the Clear Creek Power Company, the disposition to be made of its bonds, the description of the property securing said bonds, the estimate of earnings of the company, and the market for electrical current to be manufactured by the company. In neither the proposal, acceptance, nor prospectus is there any reference whatever to any undertaking on the part of the W. H. McCrum Investment Company to market the bonds of the Clear Creek Power Company. At the conclusion of the trial the court rendered final decree of foreclosure, making findings of fact and conclusions of law which amply support the decree.

At the beginning of the trial and again at the conclusion of the testimony for the plaintiff, the defendants made a motion for a continuance. The motion is based upon an affidavit of one of the counsel for the defendants. This affidavit is to the effect that the principal stockholder and owner of the mortgagor company is the said R. T. Root, whose residence is in the city of Denver, but who was at the time in the city of Chicago; that the books, records, and papers of the mortgagor and of the two other corporations, defendants, are kept in the city of Denver and have never been within the jurisdiction of the court since the beginning of the action; that the said R. T. Root is the principal owner in both said power companies, and that he is the agent for and represents all of the stockholders of each of these corporations; that ever since the filing of the complaint in the cause the said Root has been absent from the state of New Mexico and has been in Chicago and other Eastern cities, with the exception of occasional visits to New Mexico; that the said Root is the only person who is cognizant of all the facts connected with the alleged issue and transfer of the bonds referred to in plaintiff's complaint, and that without his presence at the trial the defendants cannot safely proceed to trial, nor can they intelligently examine the witnesses for the plaintiff, nor offer the proof necessary to establish the defense set out in their answer; that it is impossible to procure the attendance of the said Root at the trial of the cause at this time for the reason that the defendants were served with notice that the plaintiff would take the deposition of certain witnesses in Kansas City, Mo., and that counsel for the defendants, relying upon such notice, so notified the said R. T. Root that such depositions would be taken before the trial of this cause; that the said Root was notified that notice of the desire to be present at the taking of depositions had been given and was notified by counsel that the order of the court to that effect extended the time of taking depositions for 30 days at least, and that he would have such time to prepare for trial of this cause; that counsel for defend-

ants were not notified until the afternoon of the 14th day of November, 1914, when they were notified in a conversation with counsel for the plaintiff that he intended to produce upon the hearing, beginning the 16th of November, 1914, the witnesses, or some of them, whose names had been mentioned in the commission to take depositions; that the testimony of the witnesses named in the commission to take depositions is material to the issues in the cause and is vital to the defendants' case, and that it is impossible for the defendants or their attorneys to be ready to examine said witnesses or to proceed with the trial on the 16th of November, 1914, for the reasons above set out; that defendants and their counsel are taken by surprise by the action of the plaintiffs in failing to take said depositions; that the defendants, believing that they had 30 days' time, fully intended to apply to the court to take the depositions of several witnesses whose names are unknown to the affiant, and are known only to the said Root, with the exception of W. H. McCrum; that affiant could not intelligently examine the said McCrum if present without presence of the said Root, and without the presence of the corporate record; that affiant is informed and believes, the information coming from said Root, that the plaintiff informed one of the managers of one of the defendant companies that while this case was set for trial on the 16th of November, 1914, that it would not be tried at that time; that the testimony which would be taken and developed in the deposition of the witnesses, Theodore Gary, H. L. Gary, A. F. Adams, and W. H. McCrum, is and would be material to the proof of the issues raised by the pleadings; that said R. T. Root and his counsel relied upon the conduct of this case by the plaintiff in taking out a commission to take the deposition of such witnesses, and for that reason made no preparations to examine the witnesses or to enter upon the trial of the issues of the cause on the 16th day of November, 1914, that the change of plan by counsel for the plaintiff in regard to producing the two Garys, Adams, and McCrum on the 16th of November, 1914, was announced at so late a period to counsel for defendants that it was impossible to produce the said R. T. Root at said hearing or to be properly advised as to the examination and cross-examination of the said witnesses or to produce their witnesses for the defense upon other issues in the cause.

At the close of the testimony for the plaintiff, the defendants renewed their motion for a continuance based upon the facts stated in the affidavit heretofore mentioned, and asked the court for a reasonable time within which to present their evidence in support of their answer. The court overruled both of these motions, and the defendants assign error here upon the action of the court in that particular.

1. Counsel for defendants admit that the granting or refusal of the motion for a continuance rests in the sound judicial discretion of the court, citing our own cases of *Territory v. Watson*, 12 N. M. 419, 78 Pac. 504; *Territory v. Walker*, 16 N. M. 607, 120 Pac. 336. They argue, however, that there was an abuse of discretion in this case authorizing and requiring a review of the trial court's action.

An examination of the application shows no such abuse of discretion. In the first place, the answer goes into great detail and is verified by one of the counsel for defendants. The motion for continuance runs counter to this verification in that it alleges lack of knowledge on the part of counsel to sufficiently and intelligently examine plaintiffs' witnesses. The motion sets out that said R. T. Root was the principal owner of the three defendant corporations and was in Chicago. Counsel were advised two days before the trial that some of the witnesses whose depositions were to be taken would not be present, and that the depositions had not been taken by reason of the fact that defendants' counsel had asserted a right to be present at the taking of the same, and was entitled to 30 days' notice of the time. This defeated the taking of the depositions as the case had been peremptorily set by the court 30 days prior to November 16, 1914, and a commission to take the depositions was at once taken out by plaintiff. Two of the members of the syndicate which purchased the bonds, and who are charged with the conspiracy to defraud the mortgagor, were present and testified in the case, and yet defendants refused to examine them as to matters pertaining to merits of the defense. There was no deceit practiced by counsel for plaintiff as to taking of the depositions. As said before, R. T. Root, the principal owner of the defendant corporations, and in possession of their records and papers, was in Chicago and had plenty of time to go to Denver where the records were and come to Socorro with them in time for the trial if he had so desired, yet no effort was made by counsel to secure his attendance. The record bears written evidence over the signature of said Root that the mortgagor did not sell the bonds at all, but that said Root owned and sold them. The motion for a continuance contains no statement whatever of the facts which the witnesses would prove, except that their evidence would be material to the issue raised by the answer. The bill was filed on May 14, 1914, the answer on September 30, 1914, and on October 16, 1914, a continuance, at the instance of defendants, was granted to November 16, 1914, at which time the case was peremptorily set for trial. Under such circumstances there was certainly no abuse of discretion in refusing a further continuance.

2. Counsel for defendants complain of the refusal of the court to require the production of a report upon the property of the mort-

gagor made by the witness Adams, and an engineer by the name of Roberts. It appears from the transcript that this Mr. Adams visited the property of the mortgagor and made an examination of the same and made a report to the syndicate which purchased these bonds, and recommended their purchase. It further appears that a Mr. Roberts also made a report on the property. The relevancy or materiality of this testimony is doubtful. The syndicate bought the bonds after an investigation by their agents and engineers. Just what the agent or engineer reported to them is of no materiality whatever, and can have no bearing upon the issues in this case, so far as we can see.

3. Counsel complain of the court's action in allowing the introduction in evidence of certain opinions of lawyers as to the title to the property of mortgagor. Just why these opinions were introduced it is somewhat difficult to understand unless they were introduced by way of corroboration of the testimony of the witness Adams, which was to the effect that at the time he made the investigation of the property the said Root, the then president of the mortgagor, represented that the mortgagor owned all of the water in White Water creek. This testimony was at most only remotely connected with the merits of this case. The question in the case was whether the holders of these bonds of the mortgagor rightfully owned them and were entitled to this foreclosure proceeding. We can see no harm in the introduction of these legal opinions, the case having been tried before the court, and immaterial or irrelevant testimony presumably was not considered by it.

4. Various exceptions to the form of the decree were taken by the defendants. The first one mentioned in the brief is an objection to the decree which allows a certain judgment creditor a lien upon the property of equal dignity with the lien of the plaintiff, with right to share pro rata with the bondholders in proceeds of sale under the decree. The basis of this objection is that the decree in this regard was entered upon a stipulation between counsel for the plaintiff and counsel for the judgment creditor. Just how the mortgagor could be injured by this part of the decree we are unable to understand. The stipulation amounts to a consent that the judgment of the judgment creditor of the mortgagor should be elevated to the dignity of a concurrent lien with that of the trust deed, and amounts simply to a waiver of a priority which the plaintiff in this case clearly had over the judgment creditor. In case the property is sold under the decree it is immaterial to the mortgagor whether the money is paid to the plaintiff or to the judgment creditor, because if the property should bring more than the amount of the

trust deed, then the residue would be payable to the judgment creditor anyway.

5. Counsel for defendants urge that after the case had been closed it was reopened, and the court, without their knowledge or presence, heard testimony as to the expenses incurred by the trustee in prosecuting this action. The record, however, contradicts this contention. So far as appears from the record the taking of this testimony immediately followed the announcement of the court that he would render judgment as prayed for in the complaint. If the attorneys for the defendants were not present it was their own fault.

6. Counsel for defendants have based an argument upon a misunderstanding of the record, to the effect that the court erred in charging interest on the allowances to the plaintiff's attorney and the trustee at the rate of 6 per cent. per annum. No such allowance was made by the decree.

7. Counsel for the defendants erroneously assume that the court attempted to determine the rights of the various individual bondholders, and that there was no sufficient evidence upon which to base this finding. This is an erroneous assumption. The court merely took proof as to the total amount of the bonds outstanding, and the question as to who owned them was not in issue in the case.

8. Counsel for defendants further object to the provision of the decree whereby it is ordered that the entire mortgaged premises and property be sold en masse or as an entirety. It was alleged in the complaint and found by the court that all the property, consisting of mining claims, mill sites, mill, reduction, and power plants thereon situated and erected for the treatment and reduction of ore in said mining claims constituted a single property, and that the water power, pipe line, etc., were appurtenant thereto, and the court found that it was for the best interests of all parties that the entire property be sold en masse. The uncontradicted evidence was ample to sustain such findings. It thus appears that there is no merit in the contention made.

9. The last objection is based upon an erroneous assumption that the court found that the defendant Tyson S. Dines, trustee for the Clear Creek Power Company and the Glendale Power Company, was in default. The decree, as originally entered, did so recite, but upon affidavits the decree was amended so as to show that the said Dines appeared by his attorney at the trial. There is therefore no merit in this contention.

For the reasons stated, the judgment and decree of the court below should be affirmed, and the cause remanded, with directions to enforce the decree; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

NORTHWEST LIGHT & WATER CO. v. ALEXANDER, Governor, et al.

(Supreme Court of Idaho. Nov. 2, 1916. On Rehearing, Dec. 1, 1916.)

1. CERTIORARI ¶22—WRIT OF REVIEW—PROCEEDINGS REVIEWABLE—ACTS OF STATE OFFICERS.

Where state elective officers are invested with a certain discretion involving the exercise of judgment in the performance of their official duties, courts have no jurisdiction by writ of review to interfere with the exercise of such discretion.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 35; Dec. Dig. ¶22.]

2. TAXATION ¶493(1)—ASSESSMENT—STATE BOARD OF EQUALIZATION—REVIEW BY COURTS.

The State Board of Equalization is a constitutional board, clothed by statute with quasi judicial functions with regard to the assessment of certain classes of property. It is required to value and assess the properties of public utilities, and is given the exclusive power to do so. It has the right to exercise a fair discretion in using its judgment as to the valuation of such property, and when it has once acted, and there is no fraud or abuse of discretion shown in its judgment, its action is not subject to review by the courts.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 876; Dec. Dig. ¶493(1); *Appeal and Error*, Cent. Dig. § 141.]

3. TAXATION ¶485(2)—ASSESSMENT—STATE BOARD OF EQUALIZATION.

Under our statute (section 66, Laws 1913, pp. 290, 291), it is provided that the findings of the Public Utilities Commission with regard to the valuation of property "shall be admissible in evidence in any action, proceeding or hearing, before the commission or any court, in which the commission, the state," etc., may be interested. This provision has no application to the State Board of Equalization, as that board is not a court.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 862; Dec. Dig. ¶485(2).]

4. TAXATION ¶485(2)—ASSESSMENT—STATE BOARD OF EQUALIZATION.

Under the law of this state, conferring a limited jurisdiction upon the Public Utilities Commission for the purpose of placing a valuation upon all property used or useful in conducting the business of public utilities, there is no provision, either by express terms or by implication, to the effect that the findings as to value made by that commission shall be binding and conclusive on the State Board of Equalization, but, upon a hearing had before said board upon application made for the reduction of the assessment of a public utility for purposes of taxation, such findings are admissible in evidence and may be regarded by said board as *prima facie* just, reasonable, and correct.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 862; Dec. Dig. ¶485(2).]

5. TAXATION ¶466—ASSESSMENT—STATE BOARD OF EQUALIZATION.

The bases of valuation for the purposes of taxation and for rate-making purposes are not necessarily identical, and the record in this case shows as a matter of fact that the commission, in valuing the property of the plaintiff for rate-making purposes, did not take into consideration certain property which was assessed by the State Board of Equalization for purposes of taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 829, 830; Dec. Dig. ¶466.]

6. PUBLIC SERVICE COMMISSIONS ¶29—PROCEEDINGS—REVIEW.

If the value of plaintiff's property, as found by the Public Utilities Commission, was not in fact its cash value, either for rate-making purposes or for purposes of taxation, an appeal is provided by statute from the findings of said commission.

[Ed. Note.—For other cases, see *Public Service Commissions*, Dec. Dig. ¶29.]

Original application by the Northwest Light & Water Company for writ of review to Moses Alexander, Governor, and others, as the State Board of Equalization. Writ quashed, and proceedings dismissed.

J. F. Allshie and J. Ward Arney, both of Coeur d'Alene, for plaintiff. J. H. Peterson, Atty. Gen., and Herbert Wing and D. A. Dunning, Asst. Attys. Gen., for defendants.

BUDGE, J. This is an original application, brought against the State Board of Equalization, for a writ of review, requiring said board to certify to this court for review all of their proceedings had and done with reference to the assessment and equalization of the property of the plaintiff corporation.

The allegations in the complaint, briefly stated, are as follows: The plaintiff is a corporation organized under the laws of the state of Nevada. It has complied with the Constitution and laws of this state. It is doing, and is entitled to do, business in this state. It is the owner of an electric light and power plant and electric current transmission lines located in Shoshone county, where it supplies light and power to the city of Wallace and its inhabitants. During the year 1915, upon the application of the mayor of the city of Wallace to the Public Utilities Commission, in which it was alleged that the plaintiff corporation was charging unjust and unreasonable rates for its electricity, a hearing was ordered to be had before such commission, whereupon evidence was introduced by both of the parties to said proceeding and submitted to the commission. Thereafter the value of plaintiff's property, used and useful in furnishing light and power to the city of Wallace and its inhabitants, was found and fixed by said commission at \$107,500 for rate-making purposes. The commission thereupon established new rates to be charged by plaintiff company, which rates it required to be put into operation and effect on the 1st day of December, 1915. The plaintiff corporation had acquired no additional property and had made no improvements upon, or extensions of, its property since the hearing had before the Public Utilities Commission and prior to the second Monday in January, 1916; and alleges that on the convening of the defendant board as a State Board of Equalization the actual cash value of its property was \$107,500, as found by the Public Utilities Commission.

It further appears that plaintiff's property

was assessed by the State Board of Equalization for the year 1915 at \$180,000. For the purpose of having its property assessed by the State Board of Equalization at the same valuation as found by the Public Utilities Commission, plaintiff corporation, by its counsel, appeared before the State Board of Equalization on August 28, 1916, to make application for a reduction of the valuation of its property to the amount found by the Public Utilities Commission, and in support of its application it introduced the findings and order made thereon by the Public Utilities Commission wherein the valuation of its property for rate-making purposes was found and the new schedule of rates fixed by the commission, and two certificates by its secretary, one showing plaintiff's net earnings for the first six months under the new rate schedule fixed by the Public Utilities Commission, and the other showing in detail the items of property making up the valuation found by the Public Utilities Commission, which, together with the reports made by plaintiff to said board upon blanks furnished to plaintiff by the secretary of said board, and a report made to said board in the year 1914, by the now defunct Tax Commission, was the sole and only proof and evidence before said State Board of Equalization; and it is alleged that said board at the conclusion of the hearing, in violation of its power, authority, and jurisdiction, arbitrarily assessed plaintiff's property for the sum of \$135,000, and erroneously, arbitrarily, and contrary to the true facts did value the said property for the purpose of taxation at said sum. Plaintiff alleges that it has no right of appeal from the action of said board, nor any plain, speedy, and adequate remedy at law, and that it will suffer great and irreparable injury and damage if the action of said board is not reviewed, vacated, and set aside. Wherefore the plaintiff prayed that a writ of review issue out of this court, directing and requiring the defendant board to certify up to this court the record of its proceedings that the same might be examined and reviewed, vacated, and set aside, and that the actual cash value of its property be entered upon the proper assessment and tax rolls, in all respects the same as if it had been so entered by the defendant board at the time of said hearing.

Thereupon an alternative writ of review was issued, directing the defendant board to certify to this court on September 20, 1916, a transcript of the record and proceedings had by it touching the matter of the assessment of plaintiff's property.

To the complaint of the plaintiff, the State Board of Equalization appeared and filed its motion to quash and set aside the writ of review theretofore issued, upon the ground and for the reason that the petition upon which it was based did not state facts sufficient to entitle the plaintiff corporation to the relief therein demanded, or to any relief

as against the supposed grievances in said writ and petition averred. At the same time the defendant board, by its secretary, duly made its return to the writ, wherein it set forth, *inter alia*, that on August 28, 1916, all members of said State Board of Equalization being present and counsel appearing for the plaintiff corporation, it was moved by the treasurer of said board to reduce the assessment upon the property of the plaintiff company 25 per cent., which motion was carried; that the assessment of said Northwest Light & Water Company for the year 1915 was \$180,000; that by virtue of the 25 per cent. reduction for the year 1916, as fixed and determined by said State Board of Equalization, as hereinbefore stated, the assessment of the property was fixed at \$135,000; and that, in assessing plaintiff's property, the board had before it the papers referred to in plaintiff's complaint herein as "Exhibits A and B," the annual report made to the board by plaintiff on June 21, 1916 (which report is herewith certified up to this honorable court and marked defendant's Exhibit A and hereto attached), and a report made to said board in 1914 by the now defunct Tax Commission, in which the value of said property was fixed at \$180,000.

It appears that plaintiff's contention is that the actual value of its property is \$107,500, as found by the Public Utilities Commission; that it has no other or greater value for taxation purposes; that the State Board of Equalization in fixing the value of plaintiff's property at \$135,000 did so in violation of its power, authority, and jurisdiction; and that said action of the State Board of Equalization in so far as it increased the actual value of plaintiff's property from \$107,500 to \$135,000 was in excess of its jurisdiction and void. In other words, it is contended that, when the state through one instrumentality has conducted an exhaustive inquiry into the valuation of the operating plant of a public utility for the purpose of regulating the rates to be charged thereby, and has fixed a valuation which binds the public utility in its charges and rates to consumers, such finding or decree fixes the maximum valuation which the state can place upon that utility for the purpose of taxation.

The first question for our determination is raised upon the motion to quash the writ. If the State Board of Equalization had jurisdiction to assess the property of the plaintiff and in so doing was within that jurisdiction, under the provisions of sections 4962 and 4968, Rev. Codes, the writ will not lie.

Section 4962, *supra*, provides that:

"A writ of review may be granted by any court, * * * when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy."

Section 4968, supra, provides that:

"The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer."

[2] In view of the provisions of article 7, § 12, of the state Constitution, and section 86, c. 58, Sess. Laws 1913, p. 199, it cannot be successfully contended that the State Board of Equalization is not the proper tribunal to assess the property of the plaintiff corporation for taxation.

Section 12 of article 7, supra, provides that:

"There shall be a State Board of Equalization, consisting of the Governor, Secretary of State, Attorney General, State Auditor, and State Treasurer, whose duties shall be prescribed by law. * * *

Section 86, c. 58, Sess. Laws 1913, supra, provides:

"The operating property of all railroads, telegraph, telephone and electric current transmission lines, and the franchises of all persons owning or operating as lessees, or constructing any telegraph, telephone or electric current transmission line, or railroads, wholly or partly within this state, shall be assessed for taxation for state, county, city, town, village, school district and other purposes, exclusively by the State Board of Equalization."

We are limited in our inquiry in determining the question of jurisdiction of the State Board of Equalization by the record sent up to this court in response to the alternative writ of review served upon the State Board of Equalization, and should that record disclose the fact that the board, having jurisdiction, did not exceed its jurisdiction in assessing plaintiff's property, we are not permitted to go further. *McConnell v. State Board of Equalization*, 11 Idaho, 652, 83 Pac. 494; *Murphy v. Board of Equalization*, 6 Idaho, 745, 59 Pac. 715; *Hannibal & St. Joe R. R. Co. v. State Board of Equalization*, 64 Mo. 294.

[3] It will be remembered that plaintiff made a part of its complaint Exhibit A, the findings made by the Public Utilities Commission from the evidence introduced upon the hearing had before said commission on October 17, 1915, in the city of Wallace. The commission in its findings, among other things, found the value of the property of the plaintiff corporation, "both tangible and intangible, used and useful in the business of furnishing electric energy to the city of Wallace and the inhabitants thereof on the 14th day of May, 1915, as the sum of \$107,500," and expressly enumerated and eliminated from its consideration other property owned by the plaintiff of approximately the value of \$60,000, which in their opinion was not used or useful in the business of furnishing electric energy. In other words, the Public Utilities Commission in fixing the actual value of the property of the plaintiff company took into consideration only such property as in their opinion was used or useful in the operation of the plaintiff's power plant

and distributing system, and found the value of such property to be \$107,500.

It is therefore quite evident, from the findings of the Public Utilities Commission, that, in fixing the value of plaintiff's property, it did not take into consideration the same property as did the State Board of Equalization. That being true, the findings of the Public Utilities Commission were admissible before the State Board of Equalization only as an evidentiary fact tending to prove the value of the property taken into consideration by the board.

It is contended by counsel for plaintiff that, in reaching a determination as to the value of the property as found by it, the Public Utilities Commission proceeded in a judicial capacity, and that the resultant findings are conclusive in the absence of proof of subsequent additions to the plant and operating property of the public utility valued, inasmuch as the Legislature in creating the Public Utilities Commission expressly provided that:

"* * * The findings and conclusions of the commission on questions of fact shall be regarded as prima facie just, reasonable and correct; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination." Sess. Laws 1913, § 63a, c. 61, p. 286.

And touching the judicial character of the proceedings before the commission, and their judicial finality, the Legislature provided that:

"* * * The findings of the commission so made and filed, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing before the commission or any court, in which the commission, the state or any officer, department or institution thereof or any county, city and county, municipality or other body politic and the public utility affected may be interested whether arising under the provisions of this act or otherwise, and such findings, when so introduced, shall be prima facie evidence of the facts therein stated as to the date therein stated under conditions then existing, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined." Sess. Laws 1913, § 66, c. 61, pp. 290, 291.

[4] It is insisted that the foregoing statutory provisions provide for findings to be made by the Public Utilities Commission of the actual cash value of public utilities, and that such findings are conclusive upon the State Board of Equalization in determining the value of property of public utilities for the purpose of taxation.

In this connection we might call attention to the fact that the statutes of this state confer a limited jurisdiction upon the Public Utilities Commission over certain kinds and classes of property for a specific purpose, namely, to place a valuation upon all property, tangible and intangible, used or useful in conducting the business of public utilities. But these statutory provisions do not in our opinion, in express terms or by implication, provide that the findings of value

made by the Public Utilities Commission shall be binding and conclusive upon the State Board of Equalization. The most that can be said in support of the findings of the Public Utilities Commission on questions of fact, in so far as such findings affect the State Board of Equalization, is that they may be regarded by said board as *prima facie* just, reasonable, and correct, and for such purpose only are such findings admissible in evidence upon a hearing had before said board, upon application made for reduction of the assessment of a public utility.

The Public Utilities Commission, in its investigations for the purpose of determining the value of any public utility, is expressly limited to property used and useful in the operation of that particular public utility, and from the findings of the commission an appeal lies. *Murray v. Public Utilities Commission*, 27 Idaho, 603, 150 Pac. 47.

The State Board of Equalization is a constitutional board, clothed by statutory authority with quasi judicial powers in regard to the assessment of certain classes and kinds of property. It is given the power exclusively, and is required to value and assess the properties of public utilities. It has the right to exercise a fair discretion in expressing its judgment as to the valuation of such property, and when it has once acted, and there is no fraud shown in its judgment, its action is not subject to review. *General Custer Mining Co. v. Van Camp*, 2 Idaho (Hasb.) 40, 3 Pac. 22; *Feltham v. Board of Com'rs*, 10 Idaho, 182, 77 Pac. 332; *Humbird Lumber Co. v. Morgan*, Judge, 10 Idaho, 327, 77 Pac. 433.

[1] We think the rule to be well settled that where state elective officers are invested with certain discretion, involving the exercise of judgment in the performance of their official duties, no court has the right by writ of certiorari to interpose its judgment or influence their action. To do so would be usurpation. If a court is not permitted to usurp the duties and functions of an elective officer or constitutional board clothed with express statutory authority, we can see no reason for the rule, as contended by counsel for appellant, that would make the findings of a statutory board, with restricted jurisdiction and power, conclusively binding upon the action of such constitutional board, thereby depriving it of its legal right to exercise a fair discretion in expressing its judgment as to the valuation of the particular property that by statute it is made its mandatory duty to value for taxation purposes. *Northern P. R. Co. v. County of Clearwater*, 26 Idaho, 455, 144 Pac. 1; *State v. Kendall*, 15 Neb. 262, 18 N. W. 85; *State v. Savage*, 65 Neb. 714, 91 N. W. 716; *United States v. Seaman*, 17 How. 225, 15 L. Ed. 226; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *Pittsburgh, C., C. & St. L. R. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031;

Maish v. Arizona, 164 U. S. 599, 17 Sup. Ct. 193, 41 L. Ed. 567.

Counsel for appellant, in support of his contention that the findings of the Public Utilities Commission of the value of appellant's property is conclusive and binding upon the State Board of Equalization in the absence of proof of acquired or additional property, improvements or extensions of its property, subsequent to the hearing had before the Public Utilities Commission and prior to the second Monday in January, 1916, cites the Washington Session Laws 1911, c. 117, p. 604, which, it is insisted, is similar to section 66, c. 61, pp. 290, 291, Idaho Sess. Laws 1913. Upon an examination of these statutes it will be found that there is a marked similarity. However, with respect to the admissibility of the commission's findings as evidence the Washington statute provides that such findings shall be admissible in evidence in any action, proceeding, or hearing in which the state, etc., is interested; while the Idaho law provides that "such findings shall be admissible in evidence in any action, proceeding or hearing, before the commission or any court, in which the commission, the state," etc., may be interested. In other words, there is a limitation upon the admission of the findings of the commission to proceedings or hearings had before the commission or any court. The State Board of Equalization is not a court within the meaning of section 66, c. 61, *supra*.

In Idaho, the findings, having been admitted in evidence, under a reasonable construction of the statute, are but *prima facie* evidence of the facts therein stated; in Washington, they are conclusive evidence of the facts stated; and, while it was true that in Washington the findings could only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined, a reasonable construction of our statute makes any findings of the Public Utilities Commission binding upon the commission, but otherwise only *prima facie* evidence of the facts found.

The Washington statute also contained the following provision, not contained in the Idaho statute:

"When the commission shall have valued the property of any public service company, as provided for in this section, nothing less than the market value so found by the commission shall be taken as the true value of the property of such company used for the public convenience for the purposes of * * * taxation."

With reference to this latter provision the Supreme Court of Washington, in the case of *Spokane & I. E. R. Co. v. Spokane County et al.*, 75 Wash. 72, 134 Pac. 688, held that the statute above quoted, having been enacted into the law at a later date, made the findings of the commission no more conclusive than they had been under the Washington statute first above mentioned. The Supreme Court of the state of Washington evidently took the position that findings made

by the Public Utilities Commission of that state of the value of the properties of public utilities for rate-making purposes were conclusive evidence of the facts so found and could not be controverted in any court or before any board, and must be accepted as the true value, not only for rate-making purposes, but for assessment purposes as well.

In the case of *State ex rel. Oregon R. & N. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7, it appears that the Railroad Commission was directed by statute to "ascertain the total market value of railroad property so as to make up a reasonable schedule of rates." It was also provided that its findings should be conclusive of the facts therein stated. The commission found the property of the Oregon Railroad & Navigation Company worth \$19,500,000. The tax Commission assessed the Oregon Railroad & Navigation Company at \$27,520,771, which assessment was confirmed by the State Board of Equalization. It was held that the findings of the Railroad Commission were conclusive as to the value of the property. This case, however, differs from the one at bar in that the Idaho Public Utilities Commission, first, is limited in its findings to the value of the property used and useful, and, second, that the commission in the case at bar did not place a valuation upon certain property which in its findings is expressly eliminated, and which was taken into consideration by the State Board of Equalization in determining the value of its property for taxation purposes.

Evidently, however, the Legislature of Washington was not pleased with the foregoing decisions of the Supreme Court of that state, as it amended and re-enacted, in section 8626-92, Remington's 1915 Code and Statutes of Washington, the following provision:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission shall be admissible in evidence in any action, proceeding or hearing, except with respect to matters of assessment and taxation," etc.

In view of the foregoing amendment, the statutes of the state of Washington as well as the decisions cited by counsel have no weight as a precedent to be followed by this court in reaching its conclusion.

[5] But even should we have a case where the Public Utilities Commission fixed the value of the property used and useful at a stipulated sum and the State Board of Equalization reached a conclusion that the property was of a greater or lesser value for the purposes of taxation, construing the foregoing sections of the statute as we understand them, under the decisions of this court the action of the State Board of Equalization would not be subject to review. The different bases of valuation for the purposes of taxation and for rate-making purposes have been uniformly recognized, not only by our

own court, but by the appellate courts of other states as well. *Knott v. Chicago, B. & Q. R.*, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034.

It may be that we may at some future date reach a condition where a single valuation of public service property could be made to answer all governmental purposes. We have not yet reached that condition. In no case, so far as we are informed, has the tax appraisalment been accepted by the Public Utilities Commission as sufficient evidence of the value upon which to base rates. There are many public utilities operating in this state whose property for rate-making purposes has never been ascertained by the Public Utilities Commission, and the Legislature has not yet felt disposed by express enactment (conceding for the purposes of this case that it has the power so to do) to take away from the State Board of Equalization the authority to fix the value of public utilities for taxation purposes, independent of the value found by the Public Utilities Commission.

It will be recalled that section 86, c. 58, Sess. Laws 1913, p. 199, in express terms requires the State Board of Equalization to assess the operating property, transmission lines, and franchises of public utilities, wholly or partly within the state, for taxation for state, county, city, town, village, school district, and other purposes. The board performs the same duties with reference to such property as do county assessors in the assessment of other property within their respective counties, and in making such assessment they are invested with certain discretion involving the exercise of judgment in the performance of their duties, which is not subject to review.

This court, in the case of *Blomquist v. Board of County Commissioners*, 25 Idaho, 284, 137 Pac. 174, as we understand that decision, supported the foregoing proposition, where the court held that, an assessment having been made by the county assessor, it was not subject to change or modification as a result of the findings of the Tax Commission, and refused to require by writ of mandate the county board of equalization to cancel the assessment made by the county assessor and substitute in lieu thereof the findings of the Tax Commission. In the course of its opinion this court said:

"We are not inclined to follow any decisions which hold that the Legislature has power or authority to set aside the system or scheme for assessing, equalizing, and taxing property established by the Constitution and enact one of its own. * * * The Legislature did not intend to create an appointive board composed of three members who might review and set at naught all actions of the assessors and boards of equalization provided by the Constitution. * * * It was clearly the manifest intention of the Legislature of Idaho to limit the Idaho tax commission to a certain field."

It is clear to our minds that if this court should hold that the power to assess public utilities in this state is vested in the Public Utilities Commission, and the power to place a value thereon for assessment purposes is taken away from the State Board of Equalization, either in whole or in part, that board would be deprived of its judgment and discretion in the matter of the assessment of the public utilities of this state, and, in lieu of being the board with power to assess and equalize the properties of public utilities, it would become a listing board only. Such a holding would be in direct conflict with the law as announced by this court in the Blomquist Case, supra, wherein it held that the Legislature cannot assess property, nor can an appointive board assess property for taxation under the Constitution and laws of this state. In the latter case the duties of the assessor and county board of equalization as against the power of the State Tax Commission were in issue; while here is involved the power of the State Board of Equalization, sitting as a taxing and equalization board, as against the power of the Public Utilities Commission to make assessments. The county assessor and the board of county commissioners, the latter constituting the county board of equalization, is composed of elective officers; the tax commissioners were appointive officers; the State Board of Equalization is made up of elective officers; the Public Utilities Commission is made up of appointive officers.

It therefore follows that, if the findings of the Public Utilities Commission of the value of a public utility are conclusive upon the State Board of Equalization, the property of the public utility will be assessed by an appointive board. While it might be argued that these findings are conclusive only to the extent that the State Board of Equalization cannot find a greater value, that it may find a lesser value, or the value of additions, improvements, and extensions of the property of a public utility, yet in any event its right to find the value of the entire property for taxation purposes is taken away from it, and replaced by the findings of the Public Utilities Commission to the extent that the findings of the commission are conclusive and binding upon the board in determining the value of a public utility, which would result, either in whole or in part, in the property of public utilities being assessed by an appointive board—in conflict with our general scheme and system of taxation in this state.

It is stated in Cooley on Taxation (3d Ed.) p. 778, that a board to review assessments, having power to make changes, is in effect a board of assessors, and, if by the law assessors must be elected by the people, the members of such board must be so chosen.

[8] If the value of plaintiff's property, as found by the Public Utilities Commission,

was not in truth and in fact its cash value, either for rate-making purposes or for taxation, an appeal is provided from the findings of such commission, and would result in a correction of its findings; but it is not within the power of this court by writ of review to substitute the findings of the Public Utilities Commission in lieu of the judgment of the State Board of Equalization.

It appears therefore that this is not a proper case for granting a writ of certiorari. The writ will be quashed, and the proceedings dismissed, and it is so ordered. Costs are awarded to defendant.

SULLIVAN, C. J., and MORGAN, J., concur.

On Rehearing.

BUDGE, J. Counsel for plaintiff have filed a petition for a rehearing in which they insist that this court was not fully advised as to the terms of the statute with reference to the power of the State Board of Equalization to assess the property owned by the plaintiff, a public utility, and that counsel had failed to make plain to this court the exact point at which the authority and power of the county assessor cease and that of the State Board of Equalization begin, and they urge very strenuously that the property owned by their client, the Northwest Light & Water Company, was wrongfully assessed by the State Board of Equalization, for the reason that the Public Utilities Commission, in its findings, found that a portion of the property assessed by the State Board of Equalization was not used or useful in the successful operation of the public utility, and in the absence of any showing to the contrary that such property had been theretofore assessed, or was subject to assessment, by the county assessor of Shoshone county.

They base their contention, as we understand them, upon the findings made by the Public Utilities Commission that property worth approximately \$60,000 was not considered by the commission in determining the value of the property of the public utility for rate-making purposes, as property used and useful in the successful operation of such public utility, and that, the same having been excluded by the Public Utilities Commission, the State Board of Equalization had no authority to assess it, and in doing so exceeded its jurisdiction.

There is no showing in the record before us that this property was assessed by the county assessor, and we cannot agree with counsel that it must be conclusively presumed by this court that this property was assessed by the county assessor; neither are we in harmony with counsel in their contention that because the Public Utilities Commission, in their opinion, excluded property of the value of \$60,000 as property not used or useful in the operation of a public utility, that such finding is conclusive upon the State

Board of Equalization; but we are forced to the contrary view that such findings are not conclusive upon the board.

We are not inclined to the view that the findings of an appointive commission of the value of a public utility must be accepted by the State Board of Equalization for the purposes of assessment, neither are we persuaded that the findings of the Public Utilities Commission shall determine the exact point where the authority and power of the State Board of Equalization cease and the power and authority of the county assessor begin.

To hold that the Public Utilities Commission, by its findings, may conclusively determine what property owned by a public utility is subject to assessment by the State Board of Equalization, and what property is subject to assessment by the county assessor, would in effect deprive a constitutional board and a constitutional officer of authority expressly conferred upon them by the Constitution and statutes of this state to determine what property is subject to assessment, and by whom, and vest that power in an appointive board, without either authority to classify property for assessment by the State Board of Equalization or by the county assessor for the purposes of assessment.

Section 86, Sess. Laws 1913, p. 199, provides:—

"The operating property of all * * * electric * * * lines * * * shall be assessed for taxation * * * purposes, exclusively by the State Board of Equalization."

To confer upon the State Board of Equalization the power to assess certain property for taxation purposes, and to deprive it of the right to determine what property is subject to assessment, and confer that power upon an appointive body, namely, the Public Utilities Commission, would be directly in conflict with the provisions of the statute. It is for the board to determine what property is operating property of a public utility, and what is reasonably necessary for the maintenance and successful operation of such a public utility, and all property used or to be used by such public utility, including their franchises, is subject to assessment exclusively by the State Board of Equalization. It is not within the power of the Public Utilities Commission, under the statutes now in force, to determine for the State Board of Equalization, or the county assessor, what particular property of any public utility is liable for assessment either by the State Board of Equalization or by the county assessor; and although the Public Utilities Commission may say that, in its opinion, \$107,500 is the value of the property of a public utility for rate-making purposes, it does not necessarily follow that \$107,500 is the actual value of the property of a public utility, subject to assessment by the State Board of Equalization.

If a public utility is not satisfied with the value fixed on its property, for rate-making purposes, by the Public Utilities Commission, it has its remedy by review.

As was stated in the original opinion, the different bases of valuation for the purposes of taxation and for rate-making purposes have been uniformly recognized. The State Board of Equalization is not conclusively bound by the findings of the Public Utilities Commission of the value of a public utility for rate-making purposes, as the value of such public utility for taxation purposes; neither is the board bound to take into consideration only such property as was considered by the Public Utilities Commission for rate-making purposes.

The sovereign power does not seek to take an undue advantage of the public utility, but, upon the contrary, affords it a review from the findings of the Public Utilities Commission, and if the value of its property is found by such commission, for rate-making purposes, to be less than its actual cash value for the purposes of taxation, it has a plain, adequate, and complete remedy by review. While this remedy exists, there is no merit in the contention that the property of the public utility will be taken without due process of law, and that private property will be taken for public use without just compensation, in contravention of article 5 of the articles amendatory to the Constitution of the United States of America, known as the Fifth Amendment to the Constitution of the United States.

We have reached the conclusion that the questions involved in the petition for rehearing were correctly decided in the original opinion in this case, which is, accordingly, adhered to.

SULLIVAN, C. J., and MORGAN, J., concur.

VEATCH v. GIBSON, Mayor, et al.

(Supreme Court of Idaho. Nov. 18, 1916.)

1. MUNICIPAL CORPORATIONS—270—PUBLIC IMPROVEMENTS—SEWERAGE DISPOSAL WORKS—"REPAIRING"—"MAINTAINING."

Where it becomes necessary to construct a new system of sewerage disposal works, the provisions of subdivision 4 of section 2353, Rev. Codes, as amended by Laws 1911, p. 256, do not apply, as said provisions were not intended to apply to the construction of a new sewerage disposal plant, as it provides only for repairing and maintaining an existing plant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 725; Dec. Dig. 270.]

For other definitions, see Words and Phrases, First and Second Series, Repair; Maintain.]

2. PROCEEDINGS FOR PUBLIC IMPROVEMENT—SEWERAGE DISPOSAL PLANT.

It is declared by Ordinance No. 429 to be the intention of the city to construct an entirely new sewerage disposal plant, and said ordinance creates a sewerage district bounded by the cor-

porate limits of said city for that purpose, and it is proposed to assess the real property within such district to pay the cost and expense of such new plant according to the benefits received by each tract, as provided by subdivision 3 of said section 2353.

3. MUNICIPAL CORPORATIONS — 511(1) — PUBLIC IMPROVEMENTS — ASSESSMENTS — HEARING.

After such assessments are made, the property owner is given opportunity to be heard in regard to the matter, and the decision of the city council upon such hearing is subject to appeal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1183; Dec. Dig. 511(1).]

4. MUNICIPAL CORPORATIONS — 451 — PUBLIC IMPROVEMENTS — ASSESSMENTS — HEARING.

The assessing board is the proper tribunal to first determine what property is assessable so far as benefits are concerned, subject to protest to the council, and the right to appeal is given from the decision of the council to the courts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1075; Dec. Dig. 451.]

5. MUNICIPAL CORPORATIONS — 450(2) — PUBLIC IMPROVEMENTS — ASSESSMENTS — CREATION OF ASSESSMENT DISTRICT.

Held, that the ordinance of intention is sufficiently specific as to the boundaries of said sewerage district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1073; Dec. Dig. 450(2).]

6. MUNICIPAL CORPORATIONS — 303(1) — PUBLIC IMPROVEMENTS — ASSESSMENTS — DESCRIPTION OF PROPERTY.

The ordinance ordering the improvements to be made and the assessment of lots and tracts of land within such district to be assessed must be described by the proper subdivisions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 808, 821; Dec. Dig. 303(1).]

7. MUNICIPAL CORPORATIONS — 270 — PUBLIC IMPROVEMENTS — POWER TO MAKE ASSESSMENT.

Held, under the provisions of section 2238, Rev. Codes, as amended by Laws 1915, p. 221, that general authority is given to cities and villages to construct sewers as well as other improvements, and with that power is included the power to construct all of the necessary and incidental works for a complete sewerage system, including sufficient outlets and disposal works of proper capacity to make such system effective and complete.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 725; Dec. Dig. 270.]

8. MUNICIPAL CORPORATIONS — 283 — PUBLIC IMPROVEMENTS — PROCEDURE.

Held, that there are two methods provided by statute for the construction of a sewer system, one under the provisions of chapter 14 of the Political Code, commencing with section 2342, and the other under the provisions of section 2238, Rev. Codes, as amended by Sess. Laws 1915, p. 221, and the city may follow either of said procedures in the construction of a sewerage system; and if the procedure first mentioned is adopted, a sewer committee must be appointed; if the latter is followed, a sewer committee need not be appointed, and a writ

would not issue to prohibit the city from adopting either method of procedure.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 753, 755; Dec. Dig. 283.]

9. MUNICIPAL CORPORATIONS — 283 — PUBLIC IMPROVEMENTS — PROCEDURE.

Held, that if the city mayor and council desire, they may legally proceed in the construction of a sewer system without the appointment of a sewer committee.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 753, 755; Dec. Dig. 283.]

Original application by Fred Veatch for writ of prohibition to J. C. Gibson, Mayor of the City of Moscow, and others. Alternative writ quashed, and peremptory writ denied.

G. G. Pickett, of Moscow, for plaintiff. Orland & Lee, of Moscow, for defendants.

SULLIVAN, C. J. This is an original application to this court for a writ of prohibition to the mayor and city council of the city of Moscow to prohibit them from further proceedings under an ordinance of intention, No. 429, of said city, for the erection and construction of proposed sewerage disposal works.

It appears from the application for the writ that the city of Moscow in 1904 constructed a trunk line sewerage system, and at the same time lateral sewers. The trunk line system was established and the city of Moscow was constituted a single trunk line district. The trunk line system included sewerage disposal works, usually called a septic disposal plant. For the expense of said trunk line system and disposal plant the entire lots and land contained within said city were assessed. During the succeeding 12 years other lateral sewerage districts have been formed and others will no doubt be formed, all of which connect with the original trunk line and empty into said disposal works. Since the establishment of said system and works, the number of inhabitants tributary to the same has largely increased until the present works are inadequate for the proper disposal of the sewerage; also the disposal plant was constructed of wood and has become decayed and unfit for the purpose intended, and by reason thereof has become dangerous to the health and welfare of the citizens.

Application was made to, and an injunction granted by, the district court of Latah county, which injunction takes effect January 1, 1917, prohibiting the flow of said sewerage from the said disposal works in its present condition, into a small creek, that being the only drain tributary to said city.

With those conditions confronting the city, Ordinance No. 429 was passed, which ordinance recites the inadequacy of the present sewerage works of the city, and recites the intention of the mayor and city council to

construct a general sewerage disposal works "on account of the sewerage disposal works of the city of Moscow not properly liquifying and purifying the sewerage, and thereby creating noxious gases and offensive odors; and on account of the city of Moscow having been enjoined from creating a nuisance by and on account of the defective working of the present sewerage disposal works of the city of Moscow." The ordinance declares the intention of the city to construct the proper disposal works and connect same with the general sewer line system now existing in said city, and defines the general character of said disposal works and the boundaries of the proposed sewerage district, which includes said entire city, and gives the estimated cost and expense of the construction of said works, and provides for the proper notice required by law to be given, and declares that the cost and expense incurred in the construction of such works shall be and become a lien upon all the lots, tracts, and parcels of land connected with the general sewerage system of the city of Moscow, and fixes a time in which protest or protests may be made against the proposed construction, and declares:

"Whereas, the public interest, convenience, and health, requires that such sewerage disposal works be built, connecting with the present sewer system of the city of Moscow, and all extensions which may hereafter be made, for the purpose of purifying such sewerage, and preventing the same to be and become noxious and offensive, and being or becoming a nuisance, now, therefore: [Here follows the details of the ordinance which it is not necessary to quote.]"

Section 11 of said ordinance is as follows:

"That for the purpose of carrying the provisions of this ordinance into effect, the mayor of the city of Moscow shall appoint three substantial taxpayers and bona fide residents of the city of Moscow, who shall be styled collectively the 'sewer committee,' and shall have all such powers as provided by the laws of the state of Idaho, and shall receive such compensation as shall be fixed by the council of the city of Moscow."

Counsel for the plaintiff states that the object of this proceeding is to have the questions determined whether the city has the right to proceed to erect and construct an additional or new septic tank or sewerage disposal works for the use of said city, and to extend, if necessary, the present sewerage trunk line system from the present septic tank system to the proposed new sewerage disposal works, and whether the proper procedure has been followed in this case by the city, and whether or not the subsequent proposed procedure, as indicated by the provisions of said ordinance, is in accordance with the laws of the state, and whether the assessments proposed to be levied for the purpose of paying the cost and expense of the proposed works will be legal, and whether if bonds are issued in pursuance of such assessment on account of delinquencies they will be a valid and subsisting lien upon all

of the property included within the proposed district.

[1] It is conceded that the present sewerage disposal works of said city are insufficient in size and capacity to properly dispose of the sewerage from said city, and that the city has been enjoined from further using said works. The question then is directly presented whether under our laws, after the property of the city has once been assessed for a sewerage system or disposal works, can the same property be again assessed for the purpose of building a new system or new sewerage disposal works.

Subdivision 4 of section 2353, Rev. Codes, as amended by Laws 1911, p. 256, provides as follows:

"The expense of repairing and maintaining such sewerage system or sewerage disposal works, when completed, shall be paid or borne by the city or village."

That provision of the statute was not intended to apply to the construction of new disposal works. It provides for the "repairing and maintaining" of the existing works; but where entirely new disposal works are made necessary on account of the wearing out or inadequacy of the existing works, and the city being enjoined from using such works, and on account of the growth of the city and from other causes which may render the repairing and maintaining of such works inadequate for the needs of the city, the provisions of said section do not apply.

It certainly will not be contended that after an improvement district, including all the real estate in a city, has once built such works that the city must at all hazards keep them in repair and maintain them, regardless of their decay or inadequacy on account of the increase of population of the city, or for any other valid reason, and cannot construct other disposal works at the expense of the property within such city by the levy of special assessments.

It is conceded that said disposal works, at its present location, could not be repaired so as to meet the demands of the people of the city. The terms "repairing" and "maintaining," as used in said section, mean not to make a new thing, but to refit, to make good or restore an existing thing. Those terms do not include the construction of a new plant in a different location. By said ordinance it is declared that it is the intention of the city to construct an entirely new disposal plant; also that the entire city shall consist of one district for that purpose, and it is proposed to assess the real property within such proposed district to pay the cost and expense of such new plant.

Under the facts of this case and the law, the city has the authority to construct the proposed works and to assess the real property within the proposed district to pay the cost and expense of such construction.

[2] It is contended by the plaintiff that by the ordinance of intention, all of the lots and

tracts of land within the corporate limits of the city are not benefited by said sewer system, for the reason that they are either not attached or cannot attach to the sewer system without great expense, and that there may be lots and tracts of land which cannot, on account of their elevation, use the sewer at all.

It may be true that the plaintiff will not be able to connect his land with the sewer without considerable expense, and that such expense may be prohibitory. However, the question of benefits to each parcel of land is to be determined by the assessing board, and if the lots of plaintiff will not be benefited in any way the assessing board would certainly take that fact into consideration in making assessments.

In subdivision 3 of section 2353, Rev. Codes, as amended by Laws 1911, p. 256, the following language is used:

"That the costs of the same are to be assessed against all of the property included within such sewerage district."

This, of course, contemplates that such assessments shall be made in accordance with the benefits received by each tract of land.

As bearing upon the question, see *McGillvery v. City of Lewiston*, 13 Idaho, 338, 350, 90 Pac. 348, and cases there cited; *Blackwell v. Village of Cœur d'Alene*, 13 Idaho, 357, 90 Pac. 353; *Beckett v. City of Portland*, 53 Or. 169, 99 Pac. 659; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255.

Of course, if lots within said sewerage district receive no benefit whatever, they ought not to be assessed for benefits.

[3, 4] Under the provisions of subdivisions 5 and 7 of said section 2353, provision is made for notice to property owners, and they are given opportunity to file objections to any assessments made or any portion thereof, and the city council should hear such objections and grant or overrule them in accordance with the facts shown at the hearing, and the decision of the council in such matters is subject to appeal. Upon such hearing, if the city council should conclude that certain tracts of land receive no benefit whatever, and are not subject to assessment, or if an error was made by the council in that matter, and its decision was reversed on appeal, it would affect only the assessment upon the particular lot involved, and would not affect the assessment upon the balance of the land. The assessing board is the proper tribunal to determine what property is assessable in this case, subject to a protest to the council, and with the right to appeal from the decision of the council to the courts. As touching upon this question, see 1 *Abbott on Municipal Corps.* p. 834.

[5] Plaintiff also contends that the ordinance of intention to construct such sewerage disposal works is not specific in its boundaries, and insists that the ordinance should describe each and every tract of land to be assessed. There is nothing in this conten-

tion, since subdivision 3 of said section 2353, as amended (p. 257), contains, among others, the following provisions:

"And stating in such resolution or ordinance the specific boundaries of the proposed sewerage district, which boundary lines shall be plainly and distinctly stated so that it may be plainly determined therefrom what property or properties are to be included in said proposed district."

The boundary lines given in said ordinance are the boundary lines of the city of Moscow, and are sufficient.

[6] In the ordinance ordering improvements made and the assessment, lots, and tracts of land to be assessed must be described by their subdivisions and present ownership, but this is not required in the ordinance of intention. See *O. S. L. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho, 578, 102 Pac. 904.

[7] Plaintiff raises the question as to whether the mayor and council of a city, organized under the general laws of the state, can construct sewers or sewerage disposal works without a committee, as provided for by section 2353, *supra*.

Under the act of 1915, amending section 2238, Rev. Codes, Sess. Laws, p. 221, general authority is given to cities and villages of the state to construct sewers as well as other public improvements. With that power is included the power to construct all of the necessary and incidental works for a complete sewerage system, including sufficient outlets and disposal works of capacity sufficient for carrying the sewage. It was clearly the intention of the Legislature to grant to cities and villages the power to construct a complete sewerage system. The power to construct sewers in general, and where power or authority is given to municipalities, it carries with it by implication the doing of those things necessary to make such system effective and complete; and also a discretion as to the manner in which the power is to be carried out, if not specifically provided. 1 *Dillon on Municipal Corp.* (5th Ed.) § 242. Said act of 1915 provides for the construction of sewers, and has no immediate connection with, and is independent of, the provisions of section 2353, *supra*.

[8] There are thus two methods provided by statute for the construction of a sewerage system: One under the provisions of chapter 14 of the Political Code, commencing at section 2342, and the other under the provisions of section 2238, Rev. Codes, as amended by Sess. Laws 1915, p. 221, and the city may follow either of said procedures in the construction of a sewer system. If the former procedure is adopted, a sewer committee must be appointed; if the latter, a sewer committee need not be appointed, and a writ would not issue to prohibit the city from adopting either method of procedure.

[9] It is conceded by respective counsel that it would be more expensive to the city to appoint a sewer committee than for the city officers to look after the matter them-

selves. If the city desires, it may legally proceed under the provisions of section 2238, supra, in the construction of such sewer system, and thus avoid the appointment of a sewer committee.

We therefore hold that the city has the authority to construct said disposal works as proposed by said ordinance of intention, and that the proper procedure has been followed by the city, and the assessments proposed to be levied for the purpose of paying the cost and expense of the proposed works will be legal and valid, and that the bonds proposed to be issued in pursuance with such assessments will be a valid and subsisting lien upon the property assessed included within the proposed district.

The alternative writ heretofore issued is quashed, and the peremptory writ denied. Costs awarded to the defendants.

BUDGE and MORGAN, JJ., concur.

HILL et al. v. HILL et al. (No. 5884.)

(Supreme Court of Oklahoma. July 25, 1916.
Rehearing Denied Nov. 21, 1916.)

(Syllabus by the Court.)

INDIANS § 18—LANDS—DESCENT AND DISTRIBUTION.

Where an allottee, a Choctaw Indian, duly enrolled as such, died January 29, 1913, intestate, after receiving his allotment, leaving him surviving no father nor mother, but brothers and sisters of the whole blood and a brother and sister of the half blood, Rev. Laws 1910, §§ 8417, 8418, 8427, construed, and held that he died seised of an ancestral estate, and that the brothers and sisters of the whole blood are entitled to take the allotment to the exclusion of a brother and sister of the half blood.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.]

Thacker and Sharp, JJ., dissenting.

Error from District Court, Garvin County; R. McMillan, Judge.

Action by James A. Hill and others against John Edgar Hill and others. From the judgment, defendants John Edgar Hill and others bring error. Reversed, with directions.

Alvin F. Pyeatt, of Pauls Valley, for plaintiffs in error. Blanton & Andrews, George I. Jordan, and Thompson, Patterson & Hampton, all of Pauls Valley, for defendants in error.

TURNER, J. On March 11, 1913, James A. Hill, one of the defendants in error, in the district court of Garvin County, sued John and William Hill and Uda Polk, adults, and Harry and Susie Hill, minors, by their guardian, William Hill, and Ruth Hill, by her guardian, Mattie Hill. The object of the suit was to establish plaintiffs' interest in the land described in the petition to be one-seventh and for partition of the tract. The case was

tried on an agreed statement of facts, which are: That prior to the bringing of the suit, John T. Hill, a noncitizen of the Choctaw Nation, the father of plaintiff, married a white woman, also a noncitizen of the Choctaw Nation, who died, leaving her surviving as her only heir at law plaintiff James A. Hill, the issue of said marriage; that thereafter John T. Hill married one Susan Walmer, a Choctaw Indian by blood, who died, leaving her surviving as the issue of said marriage, said John, William, Harry, and Susie Hill, and Uda Polk; that thereafter he married and died, leaving him surviving said Mattie Hill, his third wife, and Ruth Hill, the sole issue of that marriage, and who is not a member of any tribe or nation of Indians; that Thomas J. Hill, a child of the marriage by Susie and the father of plaintiff, after receiving his allotment in the Choctaw Nation, to wit, on January 29, 1913, died intestate at the age of nine years, without father or mother, leaving him surviving as his only heirs at law plaintiff and Ruth Hill, a brother and sister of the half blood, and the other defendants, brother and sister of the whole blood.

The inquiry arising upon the state of facts is, Did the brother and sister of the half blood inherit equally with the brothers and sisters of the full blood? The court held they did, but the court was wrong. Rev. Laws 1910 read:

"Sec. 8417. The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control. * * *

"Sec. 8418. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner: * * *

"Third. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent * * *"

—which, standing alone, means that the brothers and sisters of the half blood inherit equally with the brothers and sisters of the whole blood. For it is said in the Estate of Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 858, that the expression "brothers and sisters of decedent," used in subdivision 2 of this same section, includes those of the half blood, as well as those of the whole blood. And that, too, whether, as we said in Jefferson v. Cook, 155 Pac. 852 (not yet officially reported), the estate is ancestral or a new acquisition. But, as section 8427, Id., is also a part of the governing statute, the question is: Does that section change the devolution provided for in the preceding section? It does. It reads:

"Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

Which means that brothers and sisters of the half blood may inherit equally with those of the whole blood in the same degree, unless the estate is ancestral.

Section 8418 is substantially the same as section 1886 of Civil Code of California, and section 8427, *supra*, identical with section 1394 of that Code. In *re* Pearsons, 110 Cal. 524, 42 Pac. 960, speaking of the Code, the court said:

"Our Code has no allusion to 'the blood of the first purchaser,' and makes no attempt at any distinction founded upon the sources from which the estate of a decedent may have been derived, except in the single instance of kindred of the 'half blood'."

—and, speaking to section 1394 (section 8427, *supra*), said:

"The section simply means that kindred of the half blood shall inherit equally with those of the whole blood, except in a certain case, and, in that case, kindred of the half blood shall not inherit. * * * We think the plain grammatical construction of the clauses under consideration is that the kindred of the intestate of the half blood shall inherit equally with those of the whole blood, except that if the estate is ancestral only, such kindred of the half blood as are of the blood of the ancestor from whom the estate came shall inherit."

See, also, *Estate of Smith*, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 358; *Estate of Lynch*, 132 Cal. 214, 64 Pac. 284.

The question then is: Did Thomas J. Hill die seised of an ancestral estate in the land in question, and, if so, who are entitled to share in his allotment? That he died seised of an ancestral estate is no longer an open question in this jurisdiction, having been settled in *Shulthis v. McDougal*, 170 Fed. 529, 95 O. C. A. 615, and *Pigeon v. Buck*, 38 Okl. 101, 131 Pac. 1063.

We are therefore of opinion that, as the allotment in question came to Thomas J. Hill, not by purchase, but by descent, and is ancestral, his brothers and sisters of the whole blood are entitled thereto to the exclusion of his brother and sister of the half blood; that is, to the exclusion of plaintiff and Ruth Hill, and for that reason the judgment of the trial court is reversed, with directions to set aside the judgment complained of and to enter judgment pursuant to the views herein expressed. All the Justices concur, except THACKER and SHARP, JJ., who dissent.

SHARP, J. (dissenting). The opinion of the court is, in my judgment, founded upon an incorrect conception of the statute governing the devolution of the title to allotted lands, where the next of kin consists of brothers and sisters of both the half blood and of the whole blood. It is rested upon the premise that the allotment of Thomas J. Hill, a Chickasaw Indian, was an ancestral estate, under the rule announced in *Shulthis v. McDougal*, 170 Fed. 529, 95 O. C. A. 615, and companion cases, and followed by this court and the Supreme Court of the United States in *Pigeon et al. v. Buck et al.*, 38 Okl. 101,

131 Pac. 1063; *Id.*, 237 U. S. 386, 35 Sup. Ct. 608, 59 L. Ed. 1007; *McDougal v. McKay*, 43 Okl. 251, 142 Pac. 987; *Id.*, 237 U. S. 372, 35 Sup. Ct. 605, 59 L. Ed. 1001, construing section 2531, Mansfield's Digest of the Laws of Arkansas, in force by act of Congress in the Indian Territory at the time the descent in said several cases was cast. Applying the rule there announced, in construing section 8427, Rev. Laws 1910, it is held that kindred of the half blood are excluded from inheriting equally with those of the full blood in the same degree, on the theory that an allotment constitutes an estate of inheritance from the tribal parent or parents within the meaning of said section. The Arkansas statute construed in the cases cited provided that:

"In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act. * * *"

Section 8427 of our statutes, which it is claimed excludes from the right of inheritance the brother and sister of the half blood, reads:

"Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

Under the Arkansas law of descent, so long as there were descendants, it was immaterial whether the real estate was ancestral or a new acquisition. Turning to the ascending line, in determining the character of the estate cast, it was necessary to first determine whether the estate was ancestral or a new acquisition. This was the difficult question before the court in *Shulthis v. McDougal* and *McDougal v. McKay*, *supra*.

But, first, it is important to see whether, if in the cases upon which the opinion is rested, it is held that an allotment is an estate of inheritance under the Arkansas statute. The leading case is that of *Shulthis v. McDougal*, in which at the outset of the opinion emphasis was laid upon the fact that section 2531 fitted into neither of the classes named therein, the court using this language:

"The lands of that tribe fit into neither of the classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only."

And again, after referring to the tribal governments, and the possessory rights or titles to land recognized by the Indian tribes in the Indian Territory prior to allotment, it was further said:

"But, when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe."

The opinion of this court in *Pigeon et al. v. Buck et al.*, and companion cases, simply followed the rule announced by the Circuit Court of Appeals in *Shulthis v. McDougal*, while in *Lovett v. Jeter et al.*, 44 Okl. 511, 145 Pac. 334, it was said of lands allotted to the intestate, "such property passes, in such cases, as if by inheritance." In *McDougal v. McKay*, supra, the Supreme Court, after reviewing the opinions of the Circuit Court of Appeals and of this court in the cases last named, said, in addition thereto:

"We recognize the unusual difficulties surrounding the problem presented upon the record, and appreciate the very forceful arguments offered in support of the conflicting theories. The circumstances are novel, and the canons of descent contained in *Mansfield's Digest* are not precisely applicable thereto; but these rules must be accommodated to the facts and the great purpose of Congress effectuated as nearly as may be, and not only would it be improper for us to disregard the effect of the decisions already announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, which are supported by cogent reasoning, but, considering the peculiar and rapidly changing conditions within that state, especial consideration must be accorded to them. We accordingly accept the doctrine announced therein, and hold the property must be treated as an ancestral estate which passed in accordance with the applicable provisions of chapter 49, *Mansfield's Digest*."

From these opinions it will be seen, and readily, that there has been no pronouncement of either of said courts that an allotment of land constituted an estate of inheritance, but that, on the other hand, in construing and giving effect to section 2531 of the Arkansas statute, an allotment would be so treated, for the reason that it possessed more nearly the characteristics of such an estate than of an estate by purchase. Sight must not be lost of the fact that the court there expressly held that an allotment of land did not come to a member of the tribe by inheritance from any ancestor. The doctrine in the *Shulthis* Case was the child of expediency, the creature of a statute unsuited to the title involved, and has ever been recognized by the courts to be a strained construction, but one that was justified because an allotment was more akin to an

ancestral estate than to a new acquisition. To hold that the allotment was a new acquisition, and that the fee title passed to the collateral kindred, brothers or sisters, or uncles and aunts, or cousins and other remote relatives, according to their proximity to the deceased, subject to a life estate in the surviving father, and then a life estate over to the surviving mother, was a conclusion to be avoided as one opposed to natural justice. By rejecting the rule that the allotment was a new acquisition, the court gave the statute an equitable construction. Natural justice preferred the father and mother to the collateral kindred and it is a well-settled rule of statutory construction that:

"In construing statutes it is not reasonable to presume that the Legislature intended to violate a settled principle of natural justice. * * * Courts, therefore, in construing statutes, will always endeavor to give such an interpretation to the language used as to make it consistent with reason and justice."

Black on Interpretation of Laws, p. 100; Sutherland on Statutory Construction, § 490. Under the doctrine of the *Shulthis* Case, as applied to the Arkansas law, the death of one or both the parents was not a condition precedent to the allotment being treated as ancestral. It was ancestral "if the estate come by the father," or "if the estate come by the mother." In other words, as applied in the *Shulthis* Case, the rule of descent was worked out through the blood of the tribal parent, and was not made to depend upon inheritance from a deceased ancestor as is commonly the case. Having held that an allotment was not a new acquisition, no alternative remained save to hold that it was in the nature of an estate of inheritance; otherwise section 2531 of the statute, there under consideration, would have been rendered nugatory. Because of the anomaly and the injustice that would have attached, had a different rule been followed, it was deemed proper to treat an allotment as an inheritance from the tribal parents, though technically such was not the case.

Turning to the statutes of this state, and under which the descent was cast, no need of "treatment" of the statute appears. No reasoning by analogy, no fiction of law, need be resorted to. The statute "fits," whereas the Arkansas statute did not. Under the third subdivision of section 8418, Rev. Laws 1910, if there be no issue, nor husband nor wife, nor father nor mother, an estate not otherwise limited by marriage contract, of one who dies without disposing of it by will, descends in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. The only exception to this rule is that named in section 8427, providing that if the inheritance come to the intestate by descent, devise, or gift, of some one of his ancestors, those who are not of the blood of such ancestor must be excluded from such inheritance. Now we have seen

that the estate of Thomas J. Hill was not, technically at least, an estate of inheritance; that it did not come to him by devise, or gift of some one of his ancestors. Except as provided by section 8427, kindred of the half blood share equally with those of the full blood in the same degree. The statute is but the local enactment of a very general rule of descent. In *re Smith's Estate*, 181 Cal. 423, 63 Pac. 729, 82 Am. St. Rep. 358. As said by Judge Cooley, in *Rowley v. Stray*, 32 Mich. 75:

"Ours is but the expression of a general policy which has always characterized our legislation, * * * and which, * * * in most respects, has put the half blood on a footing of equality with the whole blood in the law of descents. * * * A discrimination against the half blood is the exception, and is not to be extended beyond the obvious intent."

Also, as said in *Lynch v. Lynch et al.*, 132 Cal. 214, 64 Pac. 284:

"It seems to us that the only possible question is whether the section includes the brothers and sisters of the half blood. The statute makes no distinction between brothers or sisters of the half blood and those of the whole blood. The well-established rule in this country is that where the term 'brothers or sisters' is used without limitation, it includes half brothers and half sisters."

In the very able opinion of *Oliver v. Sanders*, 8 Ohio St. 501, the same rule is announced. It is also said, in respect to the history of the rule:

"The English canon, which excluded the half brother from inheriting real estate, did not do so on the ground that the half brothers of an ancestor were not his brothers, much less on the idea that they were not of the blood of such ancestor, but because they were not, presumptively, of the blood of the first feud or purchaser from whom the estate was originally derived. The rule and its reason have no application whatever in our statute of descents, which finds the ancestor in the person from whom it was immediately inherited, and not in the original first feudatory, or purchaser. The term ancestor, in our statute, has no reference whatever to such first purchaser, but refers to the person from whom the intestate derived the estate."

In the well-considered opinion of Judge Story, in *Gardner v. Collins et al.*, 2 Pet. 58, 7 L. Ed. 347, it is said in the syllabus:

"The phrase 'of the blood,' in the statute, includes the half blood; this is the natural meaning of the word 'blood,' standing alone, and unexplained by any context. Half brother or sister is of the blood of the intestate; for each of them has some of the blood of the common parent in his or her veins. A person is, with the most strict propriety of language, affirmed to be of the blood of another, who has any, however small, a portion of the same blood, derived from a common ancestor. In the common law, the word 'blood' is used in the same sense."

See, also, *Prescott v. Carr*, 29 N. H. 453, 61 Am. Dec. 652, and note, and *Anderson v. Bell et al.*, 140 Ind. 375, 39 N. E. 735, 29 L. R. A. 541, where it is held:

"Brothers and sisters of the half blood are included in a statutory provision for descent to brothers and sisters, unless a contrary intention appears."

The English canons of inheritance excluding the half blood, being of feudal origin, no

occasion for their observance exists in our jurisprudence. Indeed the rule has been abolished in England (St. 3 & 4 Will. IV; 2 Wood, § 150, note). The exclusion of the half blood being looked upon as both unreasonable and unnatural, and there being no necessity growing out of our tenure for its continuance, the rule has been abrogated, except where the question is dealt with by the Legislature, and is therefore dependent upon the terms and provisions of the statute. Constituting an exception in the law of descent, before those otherwise qualified should be excluded from the rights of heirs, the statute upon which reliance is placed must clearly disclose such purpose and leave nothing to implication. As the rule has very generally been criticized as harsh and unjust, courts should not extend the statute beyond the clear import of the language used, or enlarge its operation so as to embrace estates not specially included, even though standing in close analogy.

In *Moffett et al. v. Conley*, 161 Pac. —, this day decided, quoting from *Blackstone's Commentaries*, § 204, in respect to titles by descent, we said:

"Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately upon the death of the ancestor; and an estate, so descending to the heir, is, in law, called the inheritance."

It is of such estates only that the statute makes the exception against the brothers and sisters of the half blood. It is hardly necessary to emphasize the fact that the allotment of Thomas J. Hill did not come to him by descent of some one of his ancestors. On the other hand, it is clear that it came to him in his own right, as an enrolled citizen of the Chickasaw Nation or Tribe of Indians. By virtue of this right, and his act in segregating and having set aside to him from the tribal lands of the Chickasaw Nation, the lands in question, Hill in his own name, by a joint patent from the Principal Chief of the Choctaw Nation, and the Governor of the Chickasaw Nation, obtained title to the lands of which he died seised. This title neither came to him by inheritance, devise, or gift, of some one of his ancestors, and was not therefore an estate of inheritance within the meaning of section 8427, Rev. Laws 1910. His allotment set apart to him through the supervision of the general government, acting for the Indians, was in no wise dependent upon the fact that a particular ancestor was living or dead. That he did not take the title to these lands by purchase, or that his title is difficult of classification according to common-law principles, does not warrant us in holding that he therefore took said lands by inheritance, or in the course or nature of inheritance.

The statute, which it is claimed excludes the brothers and sisters of the half blood,

expressly provides that such kindred shall inherit equally with those of the whole blood in the same degree, unless the inheritance come by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance. So that unless the estate involved is of the excepted class, those of the half blood must be included, under the terms of the statute. The exception to the general rule of descent fixed by the statute must be strictly construed. *Lewis' Sutherland on Statutory Construction*, § 351. It was so held in *Brewer et al. v. Rust*, 20 Okl. 776, 95 Pac. 233, where we said:

"A proviso in a statute is to be strictly construed. It takes no case out of the enacting clause which is not fairly within the terms of the proviso."

Whether the provision of the statute be considered as partaking of the character of an exception or a proviso, the result is the same. The office of a proviso is to restrain or modify the enacting clause of a statute. As said by Story, J., in *United States v. Dickson*, 15 Pet. 165, 10 L. Ed. 689:

"The general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words, as well as within the reason thereof."

Neither the statute, properly construed, or reason requires that the kindred of the half blood of Thomas J. Hill should be excluded from participating as heirs in the distribution of his estate.

We need not dwell upon the fact that the estate did not come to Hill by devise or gift of some one of his ancestors, as distinguished from descent from such ancestors. These terms are too well understood to require at our hands the citation of authorities.

For the reasons given, I am unable to concur in the majority opinion, and am authorized to say that Mr. Justice THACKER concurs in these views.

THACKER, J. I fully concur in the dissenting opinion of Mr. Justice SHARP in this case. The cases upon which the majority opinion is grounded do not hold that such estates are estates of inheritance under the common law or the law creating them, nor otherwise, except in respect to their relation to chapter 49, § 2531, *Mansfield's Digest of the Statutes of Arkansas of 1884*, in force in Indian Territory prior to statehood. To the contrary, those cases show that such estates are not absolutely estates of inheritance in their inherent nature, and are only so

within the broad meaning of this Arkansas statute of descent and ascent. In other words, those cases merely construe this Arkansas statute in its application to such estates, and hold that such estates are ancestral within the breadth of meaning of that statute, notwithstanding their lack of some of the essential inherent qualities of ancestral estates. In the instant case there is no question of what is an ancestral estate within the scope of the broad meaning of this Arkansas statute, nor is there any question of construction or application of that statute presented to this court. The question here is as to whether such estates are estates of inheritance within the meaning of and excepting the less comprehensive provision of our own statute, which must be construed as narrowly as the language used will permit. Under this provision of our statute an estate is not one of inheritance unless it clearly and absolutely belongs to this class of estates; and an estate, partaking of the nature in part only of an estate of inheritance, cannot be so classified here. And, as clearly shown by the dissenting opinion of Mr. Justice SHARP, these estates are not estates of inheritance within the meaning of this exception to our own statute.

SPAULDING et al. v. BEIDLEMAN et al. (No. 7437.)

(Supreme Court of Oklahoma. June 27, 1916.
Rehearing Denied Sept. 12, 1916.)

(Syllabus by the Court.)

1. TRIAL \S 48 — RECEPTION OF EVIDENCE — PURPOSE OF INTRODUCTION.

Where an instrument is offered in evidence, and the court inquires as to the purpose for which it is offered, and counsel offering such instrument states such purpose, if the instrument be inadmissible for the purpose stated, its rejection will not constitute reversible error, although it might have been admissible in evidence for some purpose other than that stated by counsel.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 120; *Dec. Dig.* \S 48; *Evidence*, Cent. Dig. § 425.]

2. ATTORNEY AND CLIENT \S 143 — MUTUAL RIGHTS AND LIABILITIES — CONTRACT FOR COMPENSATION.

A contract for attorney's fees and the giving of a note and mortgage to secure the same, made after the inception of the litigation in which the attorney's services are to be rendered, although to be scrutinized with care, will not be set aside, in the absence of any allegation or proof of fraud, mistake, or imposition.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 328-331; *Dec. Dig.* \S 143.]

3. CHAMPERTY AND MAINTENANCE \S 5(1) — CONTRACTS INVALID — COMPENSATION OF ATTORNEY.

A contract for attorney's fees is not champertous and void merely because it provides that the client shall consult and advise with the attor-

before making any compromise of the litigation.

Ed. Note.—For other cases, see Champerty 1 Maintenance, Cent. Dig. §§ 24, 28-33; Dec. 5. ☞5(1.)

(Additional Syllabus by Editorial Staff.)

ADVERSE POSSESSION ☞70—"COLOR OF TITLE."

"Color of title" is distinct from just or absolute title; it is defined to be "that which in appearance is title, but which in reality is no title" (citing Words and Phrases, Color of Title).

Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394-414; Dec. Dig. ☞

Commissioners' Opinion, Division No. 2. Appeal from Superior Court, Muskogee County. H. O. Thurman, Judge.

Action by George C. Beidleman and others against Josie C. Spaulding and others, to foreclose a mortgage. From a judgment for plaintiffs, defendants appeal. Affirmed. See, also, 152 Pac. 367.

Bailey & Wyand, C. A. Moon, Geo. S. Rambo, E. A. De Meules, M. E. Rosser, and S. Kauffman, all of Muskogee, for plaintiffs error. Merwine & Newhouse and Geo. C. Beidleman, all of Okmulgee, for defendants error.

BURFORD, C. This was an action instituted in the superior court of Muskogee county by Geo. C. Beidleman et al., to foreclose a certain mortgage executed by Jennie Yarbrough and Will Yarbrough to secure a note the sum of \$2,000 and interest. The petition alleged the execution of the note and mortgage and default therein, and prayed for judgment of foreclosure. Josie Spaulding and H. S. Evans answered, setting up that the mortgage was given in pursuance of a certain contract entered into between Jennie Yarbrough and her husband, on the one hand, and Merwine & Newhouse, on the other hand, whereby Merwine & Newhouse, attorneys at law, were employed to prosecute a certain action. This contract provided that the attorneys were to receive for their services an undivided one-half interest whatever amount they might recover on the mortgage by means of their professional services. The contract contained the following stipulation:

"After any suit may be filed by said attorneys they agree not to settle or compromise the same without the consent of the said Jennie Yarbrough, and the said Jennie Yarbrough after the execution hereof agrees not to settle said cause without consulting and advising with her said attorneys about the same."

It was further alleged that said contract was solicited by Merwine & Newhouse, attorneys, and that they agreed to pay all costs of the action, and that therefore the contract for the mortgage based upon it were void against public policy. This portion of the answer also alleged that a suit in ejectment was tried in the district court of Mus-

kogee county for the recovery of the land named in the mortgage by an action being brought by Jennie Yarbrough against Josie C. Spaulding et al.; that said cause was appealed to the Supreme Court and reversed (Yarbrough v. Spaulding, 31 Okl. 806, 123 Pac. 843), and again tried in the district court and appealed to the Supreme Court, "and, while the appeal was pending was compromised, by which said Josie C. Spaulding became the owner of said land." Spaulding v. Yarbrough, 41 Okl. 131, 140 Pac. 782.

For a second defense Josie Spaulding set up that at the time of the execution of said mortgage, and long prior thereto, she had been, through her tenant, in actual possession of said premises, and that Jennie Yarbrough was not in the possession thereof, nor had she taken any rents or profits therefrom for a space of one year prior to the execution of the mortgage in suit; that Jennie Yarbrough was the allottee of said land, and acquired the same direct from the Creek Nation, and that Jennie Yarbrough at the time of the execution of the note and mortgage did not have any just title to said land, or any part thereof. This second defense alleged that the contract above referred to, and the mortgage given in pursuance thereof, was void because in violation of the provisions of the Code in relation to champerty, being sections 2259, 2260, Rev. Laws 1910. Jennie Yarbrough answered much along the same line.

Plaintiffs filed separate replies to the two answers, in which they admitted that they were attorneys, and had performed the services set out, and that the actions referred to in defendants' answer had been tried, appealed, retried, again appealed, and compromised and settled, as therein set out, but denied that they had solicited the litigation, or that they had agreed to or had paid the costs of the action. They set out fully their services rendered in relation to the various cases, and further alleged that the execution of the note and mortgage was a separate, new, and distinct contract to Merwine & Newhouse and to Geo. C. Beidleman, for services rendered, and that the original contract, which was between Jennie Yarbrough and Merwine & Newhouse, had been abandoned; that the mortgage was recorded; and that Josie Spaulding took her title through a quitclaim deed given on the compromise of the former litigation, which was after the execution of the note and mortgage. Upon these issues a trial was had to the court.

At the trial the plaintiffs offered in evidence the note and mortgage and rested. The defendants then offered in evidence a deed from Jennie Yarbrough and Will Yarbrough to Josie C. Spaulding, dated June 18, 1909, and filed for record in the office of the register of deeds of Muskogee county on the same day. This was the original deed in-

volved in the prior litigation. To the introduction of this deed an objection was made on the ground that it is incompetent, irrelevant, and immaterial, and did not tend to prove any issue in the case. Thereupon the following colloquy took place between court and counsel:

"By the Court: For what purpose is the deed offered?"

"By Mr. Ramsey: For the purpose of showing that Josie Spaulding was in possession under color of title at the time this mortgage was made.

"Mr. Merwine: If that is the reason, we wish to present that question to the court.

"By the Court: All right; I will hear you."

Counsel then presented the question to the court, as shown by the record, on the proposition of whether or not the deed was competent under sections 2259-2261, Rev. Laws 1910. After the discussion had progressed for a time Mr. Ramsey, for the defendant, stated that before the court passed upon the point he desired to offer some other testimony, and then offered "to prove by parol testimony, and other evidence extraneous to the enrollment records of the Commission to the Five Civilized Tribes, that Jennie Yarbrough, the allottee of the land, was more than 18 years of age prior to May 27, 1908."

A great deal of space is taken in the briefs in the discussion of the effect of the decisions of this court in *Yarbrough v. Spaulding*, 31 Okl. 806, 123 Pac. 843, and in *Spaulding v. Yarbrough*, 40 Okl. 731, 140 Pac. 782. In our judgment, a determination of the questions raised in this regard is not essential to the proper decision of this case. Although sections 2259, 2260, Rev. Laws 1910, forbid, in terms, the buying of lands in suit or pretended titles, or procuring the sale of land of which the grantor has not been in possession, or received the rents or profits for more than one year, section 2261, provides:

"The last two sections shall not be construed to prevent any person having a just title to lands, upon which there shall be an adverse possession, from executing a mortgage upon such lands."

The question in the case at bar then, in so far as the validity of the mortgage under these sections was concerned, was whether or not Jennie Yarbrough had just title to the lands in question at the time of the execution of such mortgage. If it were proven that she did not have such title at the time, then, under the statute, proof of adverse possession would come in, cutting off any after-acquired title, and the mortgage would be worthless, but if she did have such just title, the fact of adverse possession could not affect the validity of the mortgage.

[1, 4] Defendant's answer alleged, in the first defense, that she, Josie Spaulding, took title under the compromise, which would place her title subsequent to that of the mortgage. But in the second cause of action it is alleged that at the time of the execution of the mortgage Jennie Yarbrough

had no just title to the lands. This answer was not challenged in any regard; and, had it been sought to prove the allegations of the second defense, a different question would be presented, but counsel did not seek to prove the allegations that Jennie Yarbrough had no just title at the time of the execution of the mortgage, as set out in the second defense. Upon question by the court it was specifically stated that it was offered for the purpose of showing *possession* under *color of title*. This question, so far as the mortgage was concerned, was absolutely immaterial and irrelevant, until it had been shown that Jennie Yarbrough had *no just title* at the time of the execution of the mortgage. Color of title is clearly distinct from just or absolute title. It is defined to be "that which in appearance is title, but which in reality is no title." *State v. Farrier*, 47 N. J. Law, 383, 1 Atl. 751. See 2 Words and Phrases (O. S.) 1265, where many decisions, adopting this definition, are collected. As was said in *Wright v. Mattison*, 18 How. 50-56, 15 L. Ed. 280:

"The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, *but which in reality is no title.*" (Italics ours.)

This definition is adopted by this court as early as *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357, and has never since been changed. In view of it we cannot say that "color of title" is synonymous with just or actual title.

Counsel urge that plaintiff in error ought not to be bound by statements of counsel during the heat of trial. We cannot conceive, however, when a litigant ought more justly to be bound by the statements of his counsel than during the trial which the attorney is employed to prosecute, or why it is proper that we should hold that where special inquiries are made by the court, and answered by counsel, the parties ought thereafter be heard to urge that they are not bound by the statements thus made. The evident purpose of the court was to ascertain the reasons of plaintiff in error for offering the deed. It was said to be offered upon a definite theory. Upon that theory it was not competent or material. Whether or not it might have been competent upon some other theory it is not necessary for us to decide, for we have held so frequently that it has become settled beyond question that parties will not be allowed to assume one attitude in the trial court and another here. *Wallace v. Duke*, 44 Okl. 124, 142 Pac. 308; *Dodder v. Moberly*, 28 Okl. 334, 114 Pac. 714; *Herbert v. Wagg et al.*, 27 Okl. 674, 117 Pac. 209; *Hamilton v. Brown*, 31 Okl. 213, 120 Pac. 950; *Checotah v. Hardridge*, 31 Okl. 743, 123 Pac. 846; *St. L. & S. F. R. Co. v. Key*, 28 Okl. 769, 115 Pac. 875. Nor does it appear that there were any special circumstances justifying the assumption of any lapse of memory or understanding upon the

part of counsel. At the opening of the trial two instruments were offered by plaintiff without objection. Plaintiff then rested, and defendant offered the deed in question. A short objection was made, and then the colloquy above set out took place. From this record it certainly does not appear that there was any such "heat of trial" that we ought to hold that counsel, of the experience of the attorney in charge of this case, forgot the definite legal meaning of the terms employed, as adopted by the courts of this state, and, not incidentally, but in response to a definite question, stated that which he did not mean.

The refusal to permit this deed to be introduced for the purpose for which it was offered was not, in our judgment, error, as it was immaterial at that stage of the proceeding, and was never afterward made material.

Nor is it necessary that we should decide the question raised as to the effect of the act of May 27, 1908 (c. 199, 35 Stat. 312) upon the rights of persons who had actually become of age prior to its passage, and upon whom there were no restrictions as to alienation, but who had not executed any conveyances of their land prior to the passage of the act. The reason is that this evidence could only have been competent or material to show that Jennie Yarbrough had a right to convey the land prior to the execution of the mortgage to plaintiffs. But it was immaterial to show that she had a *right* to convey until it was shown that she had made some conveyance prior in date to the mortgage. This was not shown nor, as we have above stated, was any proper offer to show such state of facts made.

[2, 3] The final question is as to the validity of the note and mortgage. It was alleged in the reply, and there was testimony to sustain it at the trial, that the note and mortgage were given in pursuance of a new agreement, and not to carry out the contract with Merwine & Newhouse. It is to be noted that Beidleman was not a party to this contract, but was a party to the note and mortgage.

It is urged that transactions between attorney and client should be examined with the greatest care. Conceding this settled doctrine, there is not the slightest evidence in the record in relation to any fraud or imposition upon the client, in the procurement of the note and mortgage, or that the amount charged for the services rendered was excessive. It was denied that the plaintiffs had solicited the employment, or that they had agreed to or had paid the costs of the action. The trial court found a general judgment for the plaintiffs, which would carry a decision of all of these disputed questions in their favor, and after an examination of the record we thoroughly agree with such a conclusion. The allegation that the note and mortgage were a new contract, and the finding of the

trial court in the plaintiffs' favor, would take out of the case the question of the validity of the original contract. However, we have considered the allegations of the plaintiffs in error in regard to this contract. It is urged that the contract is against public policy because it requires that Jennie Yarbrough should consult and advise with her counsel before making a compromise of the cause. Upon this question we are of the opinion that the public policy of this state does not condemn such a contract, for the reason that the statutes of this state in regard to attorney's liens (sections 248, 249, Rev. Laws 1910) make the opposite party liable for the attorney's fee, where there is a proper cause of action, the lien has been asserted, and the cause compromised without the consent of the attorney. The original act, Comp. Laws 1910, § 276, provided for the liability unless the attorney had notice of the settlement and an opportunity to be present. This, in effect, gave the attorney the right to be present at the settlement and advise his client. If, by filing a lien, the plaintiff could have accomplished practically the same result as that accomplished by their contract, we see no reason to declare that contract void as opposed to public policy, as Legislature has, by analogy at least, expressed the public policy of the state to the opposite effect. Nor do we see anything wrong or unjust in requiring that clients, especially of Indian blood, some of them ignorant, and all of them but recently wards of the government, should be required to consult with the attorneys who have their interests in charge, before making a settlement of pending litigation which might, and probably would, without the advice of such attorneys, be unwise and improvident. This case does not present a contract where the client agrees not to compromise the cause of action without the attorneys' consent. Here the contract only requires that the client shall *consult* and *advise* with her attorneys before affecting any compromise. The contract does not take the conduct of the litigation out of the hands of the client, as did the contracts in the cases cited by plaintiff in error, of which *K. O. Ry. Co. v. Service*, 14 L. R. A. (N. S.) 1105, note, and cases there cited, are examples, but only requires that she shall have the benefit of their advice before settling her cause of action. No decision has been cited which goes so far as to hold such a contract invalid. We are of the opinion, therefore, that under the state of this record, not only was the original contract valid, but also the subsequent note and mortgage.

It was admitted that the defendant Jennie Yarbrough was the allottee of this land. The execution of the note and mortgage by her was admitted, and their introduction in evidence established a *prima facie* case. There was no proof, or proper offer of proof, that Jennie Yarbrough was not the just

owner of the land at the time of the execution of the note and mortgage. This was a part of the defendants' defense, pleaded by them in their answer. They failed to establish it or any other defense which would avoid the effect of the note and mortgage. As above stated, what might have been the effect, if the proper offer had been made, we are not called upon to decide. Nor is the effect of the act of May 27, 1908, material, since there was no conveyance offered to which such testimony could be related.

We find no error in the record, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

COOK, Mayor, v. BOARD OF EDUCATION OF INDEPENDENT SCHOOL DIST. NO. 15 OF ATOKA COUNTY. (No. 8270.)

(Supreme Court of Oklahoma. Oct. 24, 1916.)

(Syllabus by the Court.)

MANDAMUS \S 79 — SUBJECTS OF RELIEF — ACTS OF OFFICERS.

Section 20, art. 6, c. 219, Session Laws of Oklahoma of 1913, clothes the mayor of cities of the first class located in any independent school district with ministerial duties only; and under such section it is the duty of the mayor, upon the request of the board of education of such school district, to forthwith call an election, as provided in said section, and in the event of his failure or refusal so to do mandamus will lie to require the performance of such duty.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. $\S\S$ 170-176; Dec. Dig. \S 79.]

Commissioners' Opinion, Division No. 4. Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Action by the Board of Education of Independent School District No. 15 of Atoka County against I. L. Cook, as Mayor of the City of Atoka. Judgment for plaintiff, and defendant brings error. Affirmed.

Humphreys & Cook and J. G. Ralls, all of Atoka, for plaintiff in error. J. W. Clark, M. C. Haile, Baxter Taylor, W. H. Parker, and Robert M. Rainey, all of Atoka, for defendant in error.

EDWARDS, C. This is an action in mandamus, wherein the board of education of independent school district No. 15 of Atoka county, filed its petition in the district court of said county praying for a writ of mandamus to require I. L. Cook, as mayor of the city of Atoka, to issue a proclamation for an election to be held in said city for the purpose of raising funds to purchase a school site and to erect or purchase and equip a school building, and setting out that the board of education by resolution had decided to call such election, and that W. A. McBride, Sr., secretary of said board, and

authorized by the board for such purpose, had requested the said mayor to call an election, which request had in writing been refused by the mayor, a copy of such refusal being attached. Upon the filing of such petition an alternative writ of mandamus was issued ordering the issuance of a proclamation for such election, or that the said I. L. Cook appear before the court and show cause for his refusal so to do.

The defendant filed his return to said alternative writ, setting out his reasons for refusing to issue the proclamation for the calling of an election at great length, most of which is irrelevant, and, among other things, alleging that the petition or motion of the plaintiff was not sufficiently verified; that the money sought to be raised by the board of education was unnecessary; that no certified copy of the proceedings of the board of education was furnished the defendant informing him of the action of such board; that McBride, as secretary of the plaintiff, was without authority to make request for the issuance of the proclamation; that a previous election had been held in said school district, which had rejected a similar proposition, and the calling of an election would be a useless and unnecessary proceeding and expensive to said school district; that the board of education is seeking to have such election held on a contention that the former election was not fairly held, but that such was a subterfuge and an attempt to evade a contest of said former election; that the bond issue contemplated would raise the indebtedness of said district to an amount in excess of the amount of indebtedness authorized under the Constitution of the state, and would therefore be void; that the defendant is authorized to investigate and determine for himself whether or not such proceeding was legal and would serve any useful purpose; that such school district already has sufficient grounds, buildings, and school facilities; that the demand for the proclamation was not properly made and was too full, in that it specified the voting places and the names of election officers, thereby usurping the functions of the defendant as mayor; that the board of education is not the real party in interest, but that the real party in interest is a bond buyer to whom said bonds if issued have been contracted to be sold; that defendant is entitled to a trial by jury.

Upon said cause coming on for hearing the plaintiff moved for a peremptory writ, which was by the court granted, and a peremptory writ issued, to which judgment and order the defendant excepted, and brought the case to this court by transcript. The question for determination is: Do the provisions of section 20, art. 6, c. 219, Session Laws of Oklahoma of 1913, vest the mayor with any discretion in the calling of an election as there-in provided? The section is as follows:

"Sec. 20. It shall be the duty of the mayor of each city governed by this article, upon the request of the board of education, forthwith call an election, to be conducted in all respects as are special elections for city officers in the same city, except that the returns shall be made to the board of education for the purpose of taking the sense of such district upon the question of issuing such bonds, naming in the proclamation of such election the amount of bonds to be voted on and the purpose for which they are to be issued; and he shall cause to be published in a newspaper of general circulation published in the said district the time and place of such election, such notice to be given at least ten days before such election."

A mere reading of the section would seem to be a sufficient answer to this question, as the meaning is so evident that no construction is necessary, and the brief of the plaintiff in error does not contend that the defendant is given any discretion under the operation of the statute just quoted. The only grounds argued in the brief for a reversal are, first, that the petition was not properly verified. The verification attached to the petition is as follows:

"State of Oklahoma, County of Atoka—ss.:
A. McBride, Sr., being first duly sworn, deposes and states that the facts stated in said petition are true"

which affidavit is signed and sworn to under the statute authorizing the issuance of a writ (section 4911, Revised Laws 1910) provides that the motion for a writ must be made upon affidavit. But this objection, even well taken, would go only to the issuance of the alternative writ, since at the time the peremptory writ was issued the defendant had made his appearance in court by filing a return to the alternative writ, thereby averring a general appearance, and it would not be immaterial whether the petition were verified at all. In 26 Cyc. 431, it is stated: "If the complaint or petition is not verified, proper practice is to move to reject it. If the opposite party takes issue of law or fact thereon, the objection is waived."

See, also, *Pallady et al. v. Beatty*, 15 Okl. 83 Pac. 428. The remainder of the brief of plaintiff in error is taken up with a discussion of what is admitted by the motion of the plaintiff for the peremptory writ; being contended that all the various matters set out in the answer are admitted; such as the allegation that the funds sought to be raised by the school district were unnecessary; that a former election had been held in said district, and that it would be useless and unnecessary to hold another election;

that the bonds, if issued, would have been void; that the board of education knew that it was not necessary to purchase additional grounds or erect additional buildings; and other matters hereinbefore adverted to. The true rule of law is that a motion or demurrer does not admit as true immaterial allegations, matters which are not well pleaded, matters of opinion or conclusions of law. *Laughlin v. Thompson*, 76 Cal. 287, 18 Pac. 330; *Story's Equity Pleading*, 40; *Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. 526; *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 54 N. E. 1081; *State v. School District No. 8*, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41; *Peake v. Buell*, 90 Wis. 508, 63 N. W. 1053, 48 Am. St. Rep. 946; *Starbuck v. Farmers' Loan Co.*, 28 App. Div. 308, 51 N. Y. Supp. 8.

The return to the alternative writ by the defendant, construed as a whole, and disregarding the irrelevant matter, matters of opinion, and conclusions of law, amounts to no more than a statement that, in the judgment of the defendant, the calling of the election was unnecessary and useless, and for that reason the proclamation should not issue. The statute, however, does not clothe the mayor with any discretionary power, and does not constitute him a judicial officer to determine the propriety or necessity of calling the election. His acts in the premises are simply ministerial, and it is expressly made his duty upon the request of the board of education forthwith to call an election to be conducted in all respects as are special elections for city officers in the same city. The necessity for calling the election or the issuing of the bonds, or whether the same, if issued, would be legal or otherwise, is not for his determination. *Threadgill et al. v. Cross*, 26 Okl. 403, 109 Pac. 558, 138 Am. St. Rep. 964.

It is his duty, when requested by the board of education, to issue the proclamation and call the election, and to cause a notice to be published in a newspaper as provided in section 20, supra. If for any legal reason the proclamation presented to him by the board of education is unsatisfactory, he may prepare another in conformity to the statute.

The return to the alternative writ failing to show any cause, the peremptory writ was properly ordered by the trial court.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

RECORDS et al. v. EAVES. (No. 8764.)

(Supreme Court of Colorado. Dec. 4, 1916.)

1. JUSTICES OF THE PEACE \Leftrightarrow 90—**ACTIONS—PLEADING.**

In an action in a justice court, there being no pleadings, the plaintiff is entitled to recover if the evidence establishes an indebtedness, regardless of the form of action.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 306; Dec. Dig. \Leftrightarrow 90.]

2. SALES \Leftrightarrow 182(4)—**ACCEPTANCE AND RETENTION OF GOODS—EVIDENCE—QUESTIONS FOR JURY.**

Where the evidence as to the sale was undisputed, and plaintiffs testified that the goods were not returned, but defendant offered a letter which recited that they had been returned, there was such a conflict in the evidence as to require submission to the jury.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 495; Dec. Dig. \Leftrightarrow 182(4).]

3. TRIAL \Leftrightarrow 173—**DIRECTION OF VERDICT—SUBMISSION OF CASE.**

It is error to direct a verdict for defendant over objection of plaintiff's counsel that they have not rested their case.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 397; Dec. Dig. \Leftrightarrow 173.]

Error to Clear Creek County Court; Walter S. Hobbs, Judge.

Action by J. L. Records and T. O. Loveland, copartners, doing business under the firm name of the Equitable Manufacturing Company, against E. A. Eaves. Judgment for defendant, and plaintiffs bring error. Reversed.

Herman E. Crist, of Georgetown, and George S. Berry, of Denver, for plaintiffs in error. F. L. Collom, of Idaho Springs, for defendant in error.

TELLER, J. Plaintiffs in error brought suit in a justice court to recover the purchase price of a lot of jewelry. Judgment was rendered for the defendant, from which an appeal was taken to the county court.

[1] On the trial in that court a verdict was directed for the defendant. The cause is here for a review of the judgment there entered. There were, of course, no pleadings, and the plaintiffs were entitled to recover if the evidence established an indebtedness due to them regardless of the form of action.

[2] One of the plaintiffs testified that the defendant purchased of plaintiffs goods to the amount of \$187.60; that they were delivered to defendant, retained by him, and not paid for. There was in evidence a letter from defendant to plaintiffs advising them that defendant had concluded to "withdraw from the proposition." A second letter, dated two days later, acknowledged receipt of the goods, and announced that they had been returned, "as the stipulation made with your salesman was that the order was

not to be sent for 60 days, and we intended making out an entirely different order, and had he explained this situation to you, you would not have gone to all the trouble." From this letter the jury would have been justified in concluding that the defendant acknowledged the purchase, and complained only of a too early delivery.

Even if the statement in the letter as to the return of the goods be taken as evidence of their return, it does no more than create a conflict of evidence on that point; the testimony of one of the plaintiffs being that the goods had never been returned. There was undisputed evidence of a sale, and if the goods were retained, the plaintiffs were entitled to recover their value. There being a conflict of evidence as to the return of the goods, the case should have gone to the jury. The direction of a verdict was error.

[3] It appears further that the verdict was directed over the objection of plaintiffs' counsel that they had not yet rested their case.

Because of these errors, the judgment is reversed.

Judgment reversed.

GABBERT, C. J., and HILL, J., concur.

BUOY et al. v. ARDMORE BRICK & TILE CO. (No. 4152.)

(Supreme Court of Oklahoma. Oct. 10, 1916. Petition for Rehearing, Nov. 28, 1916.)

(Syllabus by the Court.)

NEW TRIAL \Leftrightarrow 93—**GROUND—"UNAVOIDABLE CASUALTY" AND MISFORTUNE.**

Judgment was rendered against plaintiffs in error, and from the judgment rendered an appeal was attempted to be prosecuted to the Supreme Court; case-made being duly signed, sealed, and filed in the trial court within the time provided. Two firms of lawyers, living at different points, represented plaintiffs in error, and one of said firms, after said case-made was settled and signed, mailed the same to the other firm of attorneys, with request that such attorneys prepare the petition in error and file the case-made in the Supreme Court. The said case-made was miscarried by the mail and never reached the attorneys to whom it was sent, and the said case-made and petition were not filed in the Supreme Court within the time provided by law for taking an appeal. Thereafter, in accordance with the statute, the plaintiffs in error filed petition in the trial court in which said judgment was rendered, praying that the judgment rendered be vacated and a new trial granted, predicated upon "an unavoidable casualty and misfortune preventing the parties from prosecuting or defending," and setting up as such unavoidable casualty and misfortune, the loss of said case-made in the mail. Held, that the loss of said case-made in the mail and the subsequent failure to file the same in the Supreme Court within the time provided by law was not such "unavoidable casualty or misfortune as entitled the plaintiffs in error" to a new trial of the cause in which said judgment was rendered.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 189; Dec. Dig. \Leftrightarrow 93.

For other definitions, see *Words and Phrases*, First and Second Series, *Unavoidable Casualty*.]

Commissioners' Opinion, Division No. 1. Error from County Court, Carter County; M. F. Winfrey, Judge.

Action by A. P. Bucey and others against the Ardmore Brick & Tile Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Cruce & Potter, of Ardmore, and Eddleman & Graham, of Marietta, for plaintiffs in error. Johnson & McGill, of Ardmore, for defendant in error.

COLLIER, C. This is an action brought by the plaintiffs in error against the defendant in error to vacate a judgment entered in favor of defendant in error and against plaintiffs in error on the 21st day of October, 1911, for the sum of \$316, with interest thereon from the 15th day of October, 1909, and for costs of suit. The parties hereto will hereinafter be designated as they were in the trial court.

The unquestioned evidence is that the defendants presented a case-made, and the same was duly settled, signed, and filed in the trial court within the time prescribed in said order; that two firms of attorneys, Cruce & Potter, composed of W. I. Cruce and W. D. Potter, residents of the city of Ardmore in said county of Carter, and Eddleman & Graham, composed of A. Eddleman and J. C. Graham, residents of Marietta, Love county, Okla., were and are the attorneys for defendants; that after said case-made had been duly settled, signed, and filed as aforesaid, W. I. Cruce, on the 10th day of February, 1912, mailed the same to Eddleman & Graham, at Marietta, Okla.; that said case-made was inclosed in an envelope properly addressed, postage thereon being fully prepaid, and said case-made deposited in the post office at Ardmore, Okla., with a letter addressed to said Eddleman & Graham requesting that they prepare a petition assigning errors to the Supreme Court of the state of Oklahoma, and forward the case-made to and file the same with the clerk of the Supreme Court of Oklahoma; that said Eddleman & Graham, nor either of them, never received said letter or said case-made, but that the same was lost or miscarried in the mail; that if said Eddleman & Graham had received said case-made they would have prepared a proper petition in error, and would have transmitted and filed said case-made with the clerk of the Supreme Court of the state of Oklahoma within the time, and would have perfected the appeal of these petitioners; that said Cruce & Potter, relying upon Eddleman & Graham to prepare petition in error and file the same in the Supreme Court, believed, and had a right to believe, that said appeal had been perfected, and did not know that said case-made had been miscarried and lost until the statutory time had expired for filing same in the Su-

preme Court; that said Eddleman & Graham not having received said case-made, nor said letter, believed that said Cruce & Potter had perfected said appeal and filed said case-made in the Supreme Court, and did not know that the same had not been filed until after the statutory time for filing same in the Supreme Court had expired.

There was evidence also tending to show that the defendants had a defense to the action in which said judgment, which it was sought to set aside, was rendered. The case was tried to the Court, and a judgment rendered denying the vacation of the judgment rendered, and refusing the defendants a new trial.

Within the statutory period, motion was made for a new trial of the action of the court in refusing to vacate the judgment rendered and grant a new trial, which was overruled and duly excepted to. To reverse the judgment denying the vacation of the judgment rendered, and refusal of the court to grant defendant a new trial, this appeal is prosecuted.

This action is a statutory one, and the right to a new trial in the cause is predicated "upon unavoidable casualty, or misfortune preventing the parties from prosecuting or defending." The question of the validity of defense to the action in which the judgment was rendered we think unnecessary to consider, as the grounds upon which a new trial of the cause is urged is not sustained by the evidence.

We do not think that the failure of the attorneys to file within the proper time the appeal in the Supreme Court, due to the failure of one set of attorneys to receive the case-made by reason of failure of the mail to deliver the same, is such "an unavoidable casualty" as is provided by the statute upon which to predicate a new trial, especially in view of the fact that such unavoidable casualty, in order to be available, must have occurred in the trial in which judgment was rendered.

In *Farmers' & Merchants' Bank v. Welborn et al.*, 32 Okl. 1, 121 Pac. 620, it is held:

"The fact that the stenographer, who took the testimony at a trial, loses his notebook and is unable to make a transcript thereof for the losing party, is not sufficient ground for a new trial." *Marshall v. Marshall*, 7 Okl. 240, 54 Pac. 461.

In *J. H. Butts et al. v. Emma E. Anderson et al.*, 19 Okl. 367, 91 Pac. 906, it is held:

"The district court is only authorized to grant a new trial for the causes, and in the manner set forth in the statute, and it is manifest and material error to grant a new trial when the complaining party is unable to procure any one who can transcribe a deceased stenographer's notes of the trial."

We are of the opinion that the court did not commit error in its refusal to set aside

the judgment rendered and to grant a new trial, and that this cause should be affirmed.

PER CURIAM. Adopted in whole.

Petition for Rehearing.

COLLIER, C. The petition for rehearing in this case is predicated upon the averment that subsection 9 of section 5033, Revised Laws of Oklahoma 1910, was not called, by brief of plaintiffs in error, to the attention of the court, and was overlooked by the court.

Subsection 9 of said section 5033 reads:

"When without fault of complaining party, it becomes impossible to make case-made."

It is true that subsection 9 of section 5033 was not called to the attention of the court, but in fact was not overlooked by the court. The facts of the petition under review show conclusively that subsection 9 has no field of operation in the instant petition, as said subsection relates alone to making a case-made. In the instant case, the case-made was not only made, but duly certified by the trial judge and attested by the clerk under seal of the court, and lost in the mail while in transit from one to another of the plaintiffs' attorneys.

The misfortune of being denied a review of this cause upon its merits, that comes to the plaintiffs in error, is not "due to the impossibility of making the case-made," but failure to file the case-made together with petition in error in this court within the statutory time, due to the fact that plaintiffs in error had two sets of lawyers, residing in different towns, each of whom relied upon the other to file said case-made and petition in error in this case. We are not informed, and have not been directed to any law, that, under the facts of said petition, that subsection 9 of section 5033 could be invoked as entitling the plaintiffs in error to a new trial in this case. Failure to secure a review of this case upon its merits may work a hardship, but with this we have nothing to do. We are to construe, but not make, laws.

Finding no grounds upon which a rehearing in this case should be granted, petition for rehearing is hereby denied.

PER CURIAM. Adopted in whole.

HUBBARD v. MEEK et al. (No. 4686.)
(Supreme Court of Oklahoma. July 11, 1916.
Rehearing Denied Nov. 28, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐567(1)—RECORD — CASE-MADE—SETTLEMENT.

In the absence of a waiver by the defendants in error, a case-made, signed and settled by the trial court before the expiration of the time granted for suggestion of amendments, is a nullity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2515-2518, 2520-2522; Dec. Dig. ⇐567(1).]

2. APPEAL AND ERROR ⇐568—RECORD—CASE-MADE—SETTLEMENT.

Where no notice of the time of settlement of a case-made is given or waived, and there is no appearance of the opposite party, either in person or by counsel, a case-made so settled is a nullity, and no jurisdiction is vested in this court to decide any question arising thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. ⇐568.]

Commissioners' Opinion, Division No. 4. Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by J. F. Hubbard against May Meek, administratrix of the estate of M. H. Meek, and others. Judgment for defendants, and plaintiff brings error. Dismissed.

T. G. Outlip, of Tecumseh, for plaintiff in error. W. S. Pendleton and H. H. Smith, both of Shawnee, and G. A. Outcalt, of Tecumseh, for defendants in error.

DAVIS, C. [1, 2] The verdict of the jury was returned in the case and filed on July 20, 1912; motion for a new trial was filed by the defendants on July 22, 1912, judgment was rendered by the court on October 17, 1912, and on the same day the motion for a new trial was overruled. The judgment was filed in the trial court October 30, 1912. On the 17th of October, 1912, an order, granting the defendants, for good cause shown, 30 days in which to make and serve case-made and 10 days in which to suggest amendments, and the same to be settled and signed on 5 days' notice in writing by either party was made by the court. Thus it will be readily seen from the above and foregoing that the defendants had 10 days after the 16th day of November, 1912, or until November 26, 1912, in which to suggest corrections and amendments to the case-made, unless they saw fit to waive same. There is no waiver on the part of the defendants or any of them as to the suggestion of corrections and amendments to this case-made, absolutely none. There is no notice to them, or either of them, of the settling and signing of said case-made—none. There is nothing in this record to show that the defendants were present in person or by counsel when the same was settled and signed by the trial judge—nothing. Service of the case-made by acceptance was had on counsel of record for two of the defendants on October 25, 1912, and for two of the defendants on October 26, 1912. The trial judge settled and signed the case-made on November 22, 1912. Under these conditions and circumstances, and as is plainly manifest, the court settled and signed the case-made herein 4 days before the time had expired as granted by the trial court in which defendants were allowed to make their suggestions of corrections and amendments thereto.

"In the absence of a waiver by the defendant in error a case-made, signed and settled by the

trial court before the expiration of the time granted for suggestion of amendments, is a nullity. * * * The rule in this state, as laid down in *Cummings v. Tate*, 147 Pac. 804, is that the defendant in error is entitled to the full time allowed for the suggestion of amendments after the expiration of the time allowed for making and serving the case-made, unless he waives the same, and from an examination of the record in this case we are confident that the same comes within the rule above laid down; that is, that the full time allowed for the suggestion of amendments after the expiration of the time allowed for making and serving case-made has not been given, and that the record does not show a waiver of the suggestion of amendments. The cause should therefore be dismissed." *Deep Red Oil Co. v. Shortridge et ux.* (not yet officially reported in the Oklahoma State Reports) 155 Pac. 873; *Deep Red Oil Co. v. Owen et ux.* (not yet officially reported in the Oklahoma State Reports) 155 Pac. 874.

"Where no notice of the time of settlement of a case-made is given or waived, and there is no appearance of the opposite party either in person or by counsel, a case-made so settled is a nullity, and no jurisdiction is vested in this court to decide any question arising thereon." *Tracy et al. v. Dennis*, 45 Okl. 206, 145 Pac. 772; *Moore v. Howard Mercantile Co.*, 40 Okl. 491, 139 Pac. 524; *Wyant v. Wheeler*, 38 Okl. 68, 132 Pac. 137; *Symms Gro. Co. et al. v. Burnham, Hanna, Munger & Co.*, 5 Okl. 222, 47 Pac. 1069.

"It is a well-established rule that if no notice of the time of settlement is given, or waived, and there is no appearance of the opposite party, either in person or by counsel, the case so settled is a nullity." *New Trials and Appeals*, Kan.-Okl. p. 200; *Railway Co. v. Wingfield*, 16 Kan. 217; *Weeks v. Medler*, 18 Kan. 425; *Railway Co. v. Roach*, 18 Kan. 592; *Gross v. Funk*, 20 Kan. 655; *Shadwell v. Hamilton*, 24 Kan. 266; *Boot & Shoe Co. v. Martin*, 45 Kan. 765, 28 Pac. 424; *Safford v. Turner*, 53 Kan. 728, 37 Pac. 121; *Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727; *Christie v. Carter*, 56 Kan. 166, 42 Pac. 708; *Railway Co. v. Greenwood*, 1 Kan. App. 330, 41 Pac. 225; *Rhoades v. Rhoades*, 6 Kan. App. 739, 50 Pac. 972; *Baker v. Hall*, 29 Kan. 617.

These questions going to the jurisdiction of this court on appeal, under the law, should be raised by the court sua sponte. *V. J. Howard et al. v. Freeman Arkansaw et al.*, No. 6648 (Okl.) 158 Pac. 487 (not yet officially reported), and authorities therein collected and cited.

This appeal and proceedings in error are therefore dismissed.

PER CURIAM. Adopted in whole.

FESSLER v. STATE. (No. A-2348.)

(Criminal Court of Appeals of Oklahoma. Nov. 25, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §13—POWER OF LEGISLATURE.

The Legislature in creating an offense may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce, a certain defined or described result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. §13.]

2. LEWDNESS §5—CRIMINAL PROSECUTION—INFORMATION.

An information based on section 2793, Rev. Laws 1910, which provides that any person who willfully and wrongfully commits any act which grossly disturbs the public peace, or which openly outrages public decency and is injurious to public morals is guilty of a misdemeanor, and which charges that the defendant, a married man, and well known to the general public as being a married man, did, lasciviously associate in public and private with an unmarried female, about 18 years of age, and did openly and publicly go with and accompany the said female on and about the streets and other public places in such a manner and under such conditions as to be injurious to public decency and public morals, and that he did then and there openly and publicly go with and accompany said female to certain rooms, and did lock himself in said rooms with the said female for the purpose of committing lascivious, lewd, immoral, and indecent acts, all of which said open, public, and notorious conduct and acts of the said defendant with and toward the said female did then and there grossly disturb the public peace, openly outrage public decency, and injure public morals, is sufficient to charge an offense under the statute.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. §§ 7-12; Dec. Dig. §5.]

Appeal from County Court, Custer County; J. C. McKnight, Judge.

C. J. Fessler was convicted of a misdemeanor, and appeals. Affirmed.

A. J. Welch, of Clinton, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error was convicted of a violation of section 2793, Rev. Laws, which is as follows:

"Any person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency and is injurious to public morals, although no punishment is expressly prescribed therefor by this chapter, is guilty of a misdemeanor."

The jury failed to fix the punishment. He was adjudged to pay a fine of \$100, and he appeals.

[2] The information after alleging time and venue charged that:

He did "openly, willfully, wrongfully, and unlawfully commit acts, in the presence of and among divers and sundry persons in said county and state, which did then and there grossly disturb the public peace, openly outrage public decency, and injure public morals in the manner and form as follows, to wit: The said C. J. Fessler, being a married man residing with his family in said county and state, and well known to the general public as being a married man and a man with a family, did then and there meet and lasciviously associate, in public and private, with one Floy Atkins, an unmarried female about 18 years of age, and not the wife of the said C. J. Fessler, and did then and there openly and publicly go with and accompany the said Floy Atkins on and about the streets of the city of Clinton, Okl., and other public places, in such a manner and under such conditions aforesaid as to be injurious to public peace, public decency, and public morals, and did then and there openly and publicly go with and accompany the said Floy Atkins to certain rooms in the First State Bank Building and in the

Thurman Building, both in the said city of Clinton, and did then and there openly and publicly, in the presence and hearing of divers and sundry persons, lock himself in said rooms together with the said Floy Atkins for the purpose of committing lascivious, lewd, immoral, and indecent acts and prostitution. All of said open, public, and notorious acts and conduct of the said C. J. Fessler with and toward the said Floy Atkins did then and there grossly disturb the public peace, openly outrage public decency, and injure public morals, as aforesaid, contrary to," etc.

A demurrer was interposed to this information on the ground that the facts stated do not constitute a public offense. The first assignment of error is based on the action of the court in overruling said demurrer. Obviously the information is subject to criticism for redundancy and unnecessary repetition, but the facts stated are clearly sufficient to charge a violation of the provision of the Penal Code above quoted. Our Code of Criminal Procedure provides that no information is insufficient by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Section 5747, Rev. Laws.

The only other contention that we deem worthy of notice is that the evidence is insufficient to sustain the verdict. The facts which the testimony of numerous witnesses tended to show were that the defendant, a married man, living with his family, consisting of his wife and one child, in the town of Clinton, and Floy Adkins, a girl 17 years old, who lived with her parents in the town of Clinton, were often together, automobile riding in and around the town of Clinton; that the father of the girl, while looking for her, found her riding with the defendant in his automobile about 10 o'clock at night.

Miss Floy Adkins testified that she went riding with the defendant in his "auto"; that the defendant made her a present of a bracelet some two weeks before his arrest, which had her name, "Floy," engraved on it; that she was in the defendant's room with him when the deputy sheriff and others attempted to enter the room; that she did not know that the door was locked; that she went there to look at some pictures and to tell him that her father did not want her to go with him; that the defendant never made love to her; and that his conduct toward her was not improper.

Tom Polk testified that he had a room rented in both buildings, and that the defendant occupied these rooms with him and paid half the rent; that witness used the rooms to sleep in; that he saw the defendant with Floy Adkins in their room in the Thurman Building; that he had seen the defendant

and this girl out together at other places in both town and country, yet he never saw anything improper in their conduct.

The defendant as a witness on his own behalf testified that he is a real estate agent in the town of Clinton; that he occupied a room in the State Bank Building, and previously to that a room in the Thurman Building; that he and Tom Polk occupied the same rooms and divided the rents between them; that he was at each of these rooms when they were visited by Miss Floy Adkins; that she telephoned to him in the Thurman Building that she wanted to see him about some pictures, and another time she telephoned to him that she had something to tell him, and he told her to go to his office and he would come; that the office is used by Tom Polk as a sleeping room, but the furniture belongs to the defendant, and he pays half of the rent; that this girl was in the room with him when the deputy sheriff and others demanded that he open the door. He admitted that he had often taken Miss Adkins riding in his automobile, and that he bought her the bracelet and had it engraved, and this after he had learned of her father's objections to his conduct with her, but denied that there was anything improper in their relations.

Thus it appears that this is a case in which the essential and controlling facts are without dispute.

[1] In the case of *Stewart v. State*, 4 Okl. Cr. 564, 109 Pac. 248, 32 L. R. A. (N. S.) 505, this court, having under consideration the question of the validity of this provision of the Penal Code, held that the Legislature, in creating an offense, may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce a certain defined or described result, and that this statute is not void for uncertainty as to what acts the Legislature thereby intended to penalize.

We think the common sense of the community as well as the sense of decency, propriety, and morality which most people entertain is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it. That the conduct of which the defendant stands charged and convicted is rendered criminal by this statute is so indubitably indicated by both common sense and common morality as to make any argument in support of such conclusion wholly superfluous.

Having carefully examined the record in this case, and finding no material error, the commitment and judgment is affirmed.

ARMSTRONG and BRETT, JJ., concur.

SHANNON v. STATE. (No. 2114.)
(Criminal Court of Appeals of Oklahoma.
Nov. 28, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 753(2)—EMBEZZLEMENT
 \S 44(1)—TRIAL—DIRECTION OF VERDICT—
SUFFICIENCY OF EVIDENCE.

When the evidence introduced upon the trial of a person indicted or informed against for crime fails to disclose the commission of a public offense, the court should advise the jury to return a verdict of not guilty, for the reason that a verdict of guilty would be contrary to both the law and the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1727, 1729; Dec. Dig. \S 753(2); Embezzlement, Cent. Dig. \S 67, 70; Dec. Dig. \S 44(1).]

2. EMBEZZLEMENT \S 11(1) — ELEMENTS OF
OFFENSE—FRAUDULENT CONVERSION.

A fraudulent conversion is an essential element of the crime of embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. \S 9; Dec. Dig. \S 11(1).]

Appeal from District Court, Grady County; Frank M. Bailey, Judge.

E. W. Shannon was convicted of embezzlement, and appeals. Reversed and remanded, with directions to dismiss.

F. E. Riddle, of Chickasha, and O. F. Dyer, of Geary, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, E. W. Shannon, was convicted at the January, 1913, term of the district court of Grady county, on a charge of embezzlement, and his punishment fixed by judgment of the court at imprisonment in the state penitentiary for one year and one day. From the judgment of conviction in the trial court, the plaintiff in error prosecutes this appeal, and the principal ground upon which he relies for a reversal is that the verdict of the jury is contrary to law and to the evidence.

It appears that a corporation known as the Southwestern Wholesale Grocery Company was organized at Chickasha in 1908; that the plaintiff in error invested \$5,000 in the capital stock, Henry Oberstein \$5,000, H. B. Spencer \$2,000, R. L. Richards \$1,000, C. M. Hollingsworth \$2,000, and J. B. Harper \$5,000. Harper was elected president and had charge of the management of the business. Plaintiff in error, Shannon, was elected secretary and treasurer, and was also one of the active officers of the corporation.

At the beginning of business in October, 1908, certain of the officers and directors opened accounts between themselves and the corporation, among them the plaintiff in error. All of the merchandise and money drawn from the corporation by the plaintiff in error was charged to his account at the time the same was drawn. The salaries were credited to the respective accounts of those drawing them from time to time as the same became due.

It appears that the plaintiff in error drew

the checks for the payment of all bills and accounts. The account between the corporation and the plaintiff in error was carried from the day the business was opened until it was closed, a period of three or four years. There is no irregularity in the account and no contention, so far as we can discern from the evidence, that any sum of money or any merchandise was ever taken from the corporation by the plaintiff in error, except such items as were charged to his account at the time taken.

When the business was finally dissolved, J. B. Harper was appointed trustee to wind up its affairs. At the time of the appointment of the trustee, the plaintiff in error was indebted to the corporation in a sum amounting to about \$1,200. Harper, as trustee, took the note of the plaintiff in error in settlement of his account. The trustee was appointed the latter part of 1910 or the first part of 1911. In December, 1911, the trustee, Harper, died, and H. B. Spencer was appointed to succeed him. Spencer and Shannon were unfriendly. It appears that Shannon had participated in a meeting of the board of directors that ousted Spencer from the directorate.

During the year 1912, Spencer, Hollingsworth, and Richards, all of whom were original stockholders in the corporation, appeared before the grand jury and sought to have the plaintiff in error indicted, but the grand jury refused to indict him. About the same time, the county attorney of Grady county was consulted by these witnesses with the view of prosecuting the plaintiff in error. The county attorney refused to prosecute the plaintiff in error at the public expense. Later, however, the prosecution was instituted. A short time prior to the dissolution of the business, the plaintiff in error, who had been connected with the same since it started, was ousted as manager and treasurer, and C. M. Hollingsworth, one of the prosecuting witnesses, was substituted in his stead. The plaintiff in error was continued as bookkeeper.

[1] A review of the record impels one to the conclusion that this prosecution was resorted to solely for the reason that the plaintiff in error failed to pay the \$1,200 note due the corporation. At all times the books of the corporation showed the status of its affairs. The directors at all times knew, or should have known—it was their duty to know—the existence of its relationship between its customers and itself. The testimony given by the prosecuting witnesses indicates clearly that there was no effort on the part of the plaintiff in error at any time to mislead the board of directors or any officer or stockholder as to the facts, and neither of the prosecuting witnesses pointed out a single transaction in his testimony which indicates that plaintiff in error, Shan-

non, was endeavoring to fraudulently appropriate the assets of the company to his own use and benefit. In fact, there is a total absence of the fraudulent intent required under the law to constitute the crime of embezzlement. The relation was clearly that of debtor and creditor. Extracts from the testimony of the prosecuting witnesses clearly indicate that fact to our minds.

Witness Spencer, among other things, testified as follows:

"Q. What position have you held with the corporation yourself? A. Director. Q. What is your official position at this time? A. I was appointed trustee to wind up the business, after Mr. Harper's death. Q. What position do you hold at this time? A. Trustee, appointed by the court. Q. What was Mr. Hollingsworth's position with that corporation when he went in? A. We put him in there as manager and to oversee it. Q. Was this defendant employed there at that time? A. Yes, sir; he was. Q. At the time Mr. Hollingsworth went in as manager of the concern, from then on what was this defendant's position there? A. Bookkeeper. Q. At the time Mr. Hollingsworth went in there as manager were you a stockholder and director of that corporation? A. Yes, sir. Q. At that time, I will ask you if this defendant, E. W. Shannon, as secretary and treasurer of that corporation, made a financial statement of that corporation to the board of directors? A. He did. Q. In which it showed the liabilities and the assets of the corporation? A. He did. Q. Mr. Spencer, have you any other record that shows a statement about that time to that corporation? A. I have a note in my possession given to J. B. Harper for \$1,200. I don't know what it was given for. Q. Where did you get that note? A. I found it in the papers I got from Mr. Harper. Q. Have you ever presented that note for payment? A. Yes, sir; I went to Oklahoma City to see Mr. Shannon about it, and he said he could not pay anything on it. Q. At that time state whether or not he admitted or denied the execution of that note. A. He did not deny it; he just said he could not pay it. Q. How many times have you seen him on those occasions? A. I went there on but one occasion; maybe twice. Q. Have you any other record which shows his standing with that corporation? A. There is a trial balance there he got off. Q. Who made it out? A. Mr. Shannon did, I suppose. He is the only one who had charge of the books. Q. Where did you get it? A. In the papers I got from Mr. Harper after his death. Q. Does that statement show any indebtedness of this defendant, E. W. Shannon, to the Southwestern Wholesale Grocery Company? A. Yes, sir; an indebtedness of \$1,200. Q. And Mr. Shannon got that up? A. Yes, sir; and there is a line drawn through it and says 'note.' Q. And when did you get it? A. After I was appointed trustee. Q. Mr. Spencer, have you any other statement here which shows his standing with that corporation about that time? A. At different times down to that date I have. Q. State to the court and jury whether or not the one you have identified here as being his standing with the corporation was the last statement he ever rendered the corporation. A. Yes, sir. Q. Whose handwriting was that kept in? A. In Mr. Shannon's handwriting. Q. Has that amount of \$1,200, as shown by that note and as shown by the books here, ever been paid to the company by this defendant? A. No, sir; it has not. Q. It is outstanding? A. Yes, sir. Q. Who composed the board of directors at that time? A. Mr. Shannon, Mr. Oberstein, Mr. Harper, Mr. Richards, Mr. Smith, and myself. Q. What kind of an official position did Mr. Harper have with that corporation? A. President. Q. What

were his duties? A. To kinder oversee things and take charge of it. Q. And to run the business? A. Yes, sir; it would have been his duty if he had attended to it. Q. He is dead now? A. Yes, sir. Q. You did not tell him when he was alive that he did not attend to it? A. No, sir; he was a good old man. Q. And this note was given for this account? A. I suppose so. Q. You testified before the justice of the peace that it was? A. I suppose so; and Mr. Shannon did not deny it. Q. The record shows it was closed by a note? A. Yes, sir. Q. It is payable one year after date, with interest at 8 per cent? A. Yes, sir. Q. Did you go to see Mr. Shannon before this note was due? A. I asked him about it several times before he left town, and I went to Oklahoma City to see him. Q. You did present it to him when it was due? A. Yes, sir; after it was due. Q. And he said he was not able to pay it? A. Yes, sir. Q. When was Mr. Shannon employed down there? A. At the beginning of business in 1908. Q. The books show that he opened up an account there with himself? A. I don't know. Q. You say you are trustee and have not examined that account? A. I examined the last part of it. Q. You have not looked over the account? A. Yes, sir. Q. When did it begin? A. I can look at the book and see; I have looked at the tail end of the account. Q. Did Mr. Harper owe the company? A. He did, and he paid it. Q. And the board of directors knew that? A. Not until all this came up; we knew it all at the same time. Q. You and the board of directors had considerable trouble at one time? A. A little. Q. Didn't Mr. Shannon and Mr. Harper and Mr. Oberstein put you off the board of directors at one time? A. Yes, sir; and turned and elected me back. Q. Who was at the meeting when they voted you off? A. All of the directors, I think. Q. Who? A. Mr. Shannon, Mr. Oberstein, Mr. Harper, Mr. Smith, and Mr. Hollingsworth. * * * If Mr. Shannon had paid that note you would not have had him arrested, would you? A. So far as I am concerned, I don't suppose I would have had anything to do with it, so far as I am concerned. Q. You would not have tried to have him arrested? A. I would not have sworn out the complaint against him unless I had to. Q. Isn't it a fact that what actuated you to swear out this complaint was that he did not pay the note? A. If he had paid the note when it was due, I would not have sworn out a warrant for him. Q. The fact that he did not pay it was the matter that actuated you in swearing out the complaint? A. Yes. Q. I will ask you if since this case has been set for trial this term of court, if you have not made efforts to have this matter settled through Ed Johns? A. No, sir; Mr. Johns took that up himself; I told Mr. Johns I thought it could be settled. Q. Didn't you ask him last Saturday? A. I called him up and asked what Mr. Shannon had done. Q. Assuming that Mr. Shannon's account started when this business started, it was a regular and continuous account until the business closed? A. I think so. Q. All the money drawn was charged to his open account, regularly, so far as you know? A. Yes, sir; so far as I know. Q. You don't know of a dollar that he took that he did not charge to his account? A. His books are all I have to go by. Q. The books do not show any? A. No, sir. Q. And he is credited on that account with all the salary due him? A. Yes, sir. Q. And that account run for a period of something like 2½ or 3 years? A. Yes, sir; about 8 years. Q. And at the end of that account he owed the corporation \$1,200? A. Yes, sir. Q. And it was settled by this note, that is correct, is it? A. I suppose so. Q. And you have not found anything irregular in this account, or any one else, have you? A. No, sir. Q. I will ask you if Mr. Harper, as chief executive officer of the corporation, he had the general management of the corporation?

A. Yes, sir. Q. Do you know anything about what authority he gave any of the officers connected with the corporation? A. No, sir; I do not."

Witness Hollingsworth, among other things, testified as follows:

"Q. What position did you occupy? A. Stockholder. Q. Any other position? A. Director. Q. When were you elected director? A. At the first meeting after the charter. Q. When was that? A. In August, 1908. Q. How long did you continue to be a stockholder of that corporation? A. As long as it existed. Q. During the life of that corporation, from the time that it was organized up to just before it was dissolved, what connection did the defendant here, E. W. Shannon, have with that corporation? A. Director and secretary and treasurer from the beginning up to January or February, 1911, and after that time he was just the bookkeeper there. Q. Who was manager from then on? A. I had charge of the business from February the 1st until the business was closed up. Q. When did you take charge of the corporation? A. February 1 or 2, 1911. Q. Was there a meeting of the stockholders or directors just prior to that time? A. Yes, sir; directors and stockholders too. Q. State if at this meeting this defendant, E. W. Shannon, rendered a financial statement of the condition of the corporation to that meeting. A. Yes, sir; to the stockholders. Q. Did he render any statement which showed the personal liability of persons to the corporation? A. At that meeting, I think the statement rendered to the stockholders' meeting was the bulk and not an itemized statement of each one's account; but just after that I got a statement from him, he gave me a statement and itemized list of parties who owed the corporation. Q. Do you know where that statement is now? A. No, sir. Q. Have you ever delivered that statement to any one else? A. I delivered the statement to Mr. Westheimer, and we went over it. Q. Did you get it back in your possession? A. Yes, sir; I think I did; I may not have. Q. Do you remember what that statement showed, if it did show the financial condition of Mr. Shannon, with the corporation at that time? A. Yes, sir; it showed Mr. Shannon owed something over \$1,200; funds taken out by Mr. Shannon. Q. Examine this and state what it is. A. Itemized statement of accounts at the close of the business when Mr. Harper was made trustee. Q. Were you at that time connected with that business? A. Yes, sir. Q. As manager? A. Yes, sir. Q. Do you know who prepared that? A. Mr. Shannon prepared this. Q. What was he doing at that time? A. Bookkeeper. Q. Examine this page of the record and see if it shows the condition of E. W. Shannon's account relative to the Southwestern Wholesale Grocery Company at the time that statement was made. A. Yes, sir. Q. What does it show it to be? A. \$1,200."

Witness Richards, among other things, testified:

"Q. How much stock did Mr. Shannon have? A. \$5,000, I think. Q. Paid that much in cash? A. I think so. Q. Mr. Shannon lost all his \$5,000? A. I think so."

The plaintiff in error, among other things, testified:

"Q. Was Mr. Spencer put off the board of directors? A. Yes, sir; he was put off at the meeting in January and stayed off until some time in February, when they appointed the new directors. Q. Under whom did you act? A. I acted as manager under the president; the manager was appointed by the officers of the company. Q. Did you at any meeting of the board of directors ever try to conceal anything

from any one relative to your account? A. No, sir. Q. Was there ever a dollar not charged up against you on your account? A. Just as they occur each day. Q. Tell the jury if you gave yourself credit there for one cent you were not entitled to. A. No, sir. Q. Did you try to charge up to yourself one cent you did not believe you were entitled to? A. No, sir. Q. Was anything drawn from the company that is not charged on that account? A. No, sir. Q. Tell the jury if Mr. Harper knew the condition of your account during the time the business was running. A. Yes, sir; every month the sale ledger and personal ledger was gone over, taken off and handed to the credit department each month, that was Mr. Oberstein and Mr. Harper, every month. Q. Did that include your account? A. Yes, sir. Q. And they were open to the board of directors at all times? A. Yes, sir. Q. This is your signature, to State's Exhibit '3'? A. Yes, sir; I signed that note. Q. At whose request did you give that note? A. At the request of Mr. Harper. Q. Did Mr. Spencer come to Oklahoma City to see you about that note? A. Yes, sir. Q. Could you have paid him at that time? A. No, sir. Q. What did you tell him? A. I told him I was not in a position to pay it. Q. What became of your \$5,000 and the \$500 dividend you put into the business? [Objected to and sustained.] Q. Did you, in drawing your salary, draw it at the end of the month? A. Just as I needed it. Q. Just as it is charged on your account? A. Yes, sir. Q. You say there was a credit of \$500 on your account at the beginning? A. No, sir; that is an error; it was a charge against my account, but that was later paid, and on the 30th of October, 1908, my account was balanced. Q. The account discloses every dollar that you ever drew from the company? A. Yes, sir."

The foregoing is a substantial statement of the evidence, and it appears therefrom that there is no material dispute as to the main facts.

The conclusion which we have reached, that the relation between the Southwestern Wholesale Grocery Company and the plaintiff in error was that of debtor and creditor, is not based upon the fact that the plaintiff in error failed to deny the debt or that he admitted owing it and executed the note in payment of same. This conclusion is based upon the facts and circumstances surrounding the entire transaction from the organization of the corporation until it was closed. The fact that all the transactions were within the knowledge of the officers and directors of the corporation, and that the account was run and kept in the regular course of business just as any other account, without any fact or circumstance from which the least inference of criminal intent could be deduced, indicates clearly that no criminal conversion occurred.

[2] A fraudulent conversion is an essential element of the crime of embezzlement. See *Blake v. State*, 12 Okl. Cr. —, 160 Pac. 30, and authorities therein cited and quoted.

The proof having failed to disclose the commission of a public offense, from any reasonable view thereof, it follows that the court should have sustained the motion on the part of the plaintiff in error to advise the jury to return a verdict of not guilty. In

our opinion the verdict is both contrary to the law and the evidence.

The judgment is therefore reversed, and the cause remanded, with directions to dismiss. Mandate ordered forthwith.

DOYLE, P. J., and BRETT, J., concur.

UPTON v. STATE. (No. A-2647.)
(Criminal Court of Appeals of Oklahoma. Nov. 27, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 376—EVIDENCE—CHARACTER OF DEFENDANT.

The state cannot attack the character of a defendant unless he first puts that in issue by introducing evidence of his good character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 836-839, 841, 843; Dec. Dig. \S 376.]

2. WITNESSES \S 344(2)—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE—CHARACTER OF WITNESS.

Where the purpose of testimony is to impeach a witness for want of truth and veracity, the inquiry and the answer must be as to his general character or reputation for truth and veracity in the community in which he resides, and testimony as to the general reputation of a defendant for being a bootlegger is incompetent to impeach the credibility of a defendant as a witness in his own behalf, or for any other purpose.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1125; Dec. Dig. \S 344(2).]

Appeal from County Court, Garvin County; W. R. Wallace, Judge.

E. R. Upton was convicted of violation of the prohibitory law, and he appeals. Reversed.

Henry M. Carr, of Pauls Valley, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. This appeal is prosecuted from a conviction had in the county court of Garvin county, in which plaintiff in error was found guilty of selling whisky to one W. D. Digby, and his punishment assessed at 30 days' confinement in the county jail and a fine of \$50.

The errors assigned are that the court erred in permitting the state to introduce testimony to impeach the credibility of the defendant as a witness by permitting witnesses for the state to testify that the general reputation of the defendant was that of a bootlegger, and in giving the following instruction:

"Gentlemen of the jury, the state in this cause has introduced testimony as to the general reputation of the defendant being a bootlegger. Such testimony, you are instructed, is admissible, not for the purpose of proving him guilty of the specific offense charged in this case by the information, but for the sole purpose of affecting his credibility as a witness. Excepted to by defendant. Exceptions allowed. W. R. Wallace, County Judge."

[1, 2] When the case was called for final submission the Attorney General filed the following confession of error:

"E. R. Upton, plaintiff in error here and defendant below, was informed against for selling whisky in the county court of Garvin county. He was tried and convicted. During the trial the state offered evidence as to his reputation in the community in which he lived as a bootlegger by two witnesses. One of the witnesses, indicated, but never directly made, an answer. The other said that his reputation in that line was bad. There were but two other witnesses in the case, and their testimony went to the facts, and one of these witnesses was defendant and the other was the deputy sheriff who had informed against him. The court in his charge instructed the jury on the question of going into the reputation of a bootlegger, and under the facts in the case we think it was very material, and was or might have been the cause of the defendant's conviction.

"This court has recently said, in *Kirk v. State*, 11 Okl. Cr. 203, 145 Pac. 807, that you cannot go into a man's character or reputation as a bootlegger. It also said the same thing in *Proctor v. State*, 8 Okl. Cr. 537, 129 Pac. 77. But it laid down the doctrine in *Wilkerson v. State*, 9 Okl. Cr. 662, 132 Pac. 1120, which is as follows, where the court says: 'The reason and philosophy of the law underlying the principle stated in the above cases is that the character of the house is an element of the offense committed, for it is the advertisement of the owner, and assists him in committing the offense and is a source of revenue to him, and the offense is continuous. But where a person is charged with an offense which is based upon one specific transaction, the question of character does not become an element of the offense, and therefore the general reputation of the defendant in such case is not admissible. This is the line of demarcation * * * in which reputation is admissible and is not admissible.'

"It is likely that the able judge who gave this instruction and permitted this testimony had in his mind the following cases: *Hendrix v. State*, 4 Okl. Cr. 611, 113 Pac. 244; *Anderson v. State*, 7 Okl. Cr. 493, 124 Pac. 86; *Crawford v. Ferguson*, 5 Okl. Cr. 378, 115 Pac. 278, 45 L. R. A. (N. S.) 519. These cases say that you may inquire of a man if he is not a bootlegger, and there they stop; they do not go into it—his general reputation on the subject. To do this in the language of Bishop (2 New Crim. Pro. 1112): 'Bad character is never admissible in evidence against a defendant as ground for presuming guilt. This doctrine is absolute; thus the evidence of stealing a horse cannot be reinforced by showing that the defendant is an associate of horse thieves.'

"In the instant case the father and son were informed against for selling the same bottle of whisky. The son owned up and was fined, we presume, at least he pleaded guilty, and the defendant in the instant case is the father. We state this as one of the facts of the case, and believe that the old man is technically guilty, but under the holdings of this court as cited above we think there was error committed at the trial. Most respectfully submitted."

Upon a careful review of the record it is the opinion of the court that the confession of error is well taken and should be sustained.

The judgment appealed from is therefore reversed.

BLOOM et al. v. RUGH et al. (No. 20276.)

(Supreme Court of Kansas. July 8, 1916.
Rehearing Denied Oct. 13, 1916.)

(Syllabus by the Court.)

1. WAIVER OF RIGHT OF FORFEITURE.

Rule followed that a right of forfeiture must be promptly asserted, or it will be treated as waived.

2. MINES AND MINERALS ⇐78(5), 79(3)—OIL AND GAS LEASE—FORFEITURE—WAIVER—VALIDITY OF LEASE.

An oil and gas lease for a term of one year and as long thereafter as gas and oil might be found in paying quantities contained a clause: "Second party agrees to commence well on the above-described premises within 90 days from the date hereof, and in case of failure to do so this lease shall become null and void and without any further effect whatever, unless the lessee shall pay for the delay at the rate of one dollar per acre per annum thereafter until a well shall be commenced." No well was commenced within the time agreed but the lessor did not assert her right of forfeiture for nearly three months thereafter, at which time she made a second lease to other parties in which it was stipulated that the lessees should be "responsible for all action that may be brought from former lease." *Held*, that the failure of lessor to assert her right of forfeiture promptly and unequivocally on the first default waived that right, and the first lease was not void for uncertainty as to the time when rent should be paid if the well was not commenced in 90 days, and payment of rent at any reasonable time on demand would be sufficient to avoid the forfeiture, following *Smith v. Steele*, 96 Kan. 106, 150 Pac. 519.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 207, 209; Dec. Dig. ⇐78(5), 79(3).]

3. MINES AND MINERALS ⇐78(2) — OIL AND GAS LEASE—RENTAL—TIME FOR PAYMENT.

In such a lease, time of payment of rent is not of the essence of the contract, and payment at any reasonable time or upon reasonable demand would be sufficient to avoid forfeiture. *Smith v. Steele*, 96 Kan. 106, 150 Pac. 519.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 206; Dec. Dig. ⇐78(2).]

4. MINES AND MINERALS ⇐78(7) — OIL AND GAS LEASE—FORFEITURE.

Evidence of the lessor as to an oral agreement made at the time the written lease was executed that she was to get rent in 90 days if the well was not commenced is not sufficient to support an adjudication of forfeiture when the lessee, during the first year and definitely fixed term of the lease, put down a well producing 2,000,000 feet of gas per day, and when the lessor's rights can otherwise be adequately protected.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 206; Dec. Dig. ⇐78(7).]

Appeal from District Court, Labette County.

Action by A. B. Bloom and another, against E. L. Rugh and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded with instructions.

John J. Jones and James A. Allen, both of Chanute, for appellants. Stanford & Stanford, of Independence, for appellees.

DAWSON, J. This is a lawsuit between rival lessees of gas and oil rights on a farm in Labette county. On February 22, 1913, the owner leased the oil and gas rights in her farm to E. L. Rugh for one year and as much longer as oil and gas might be found in paying quantities. The lease in part provided:

"2 (a) Should gas be found in paying quantities to pay to the lessor the sum of one hundred dollars per year for each well from which gas is being sold or utilized off of the premises, payable quarterly in advance from time well or wells are completed, and agree to drill second well within eight months, provided first well is of commercial value.

"1 (a) Second party agrees to commence well on the above-described premises within 90 days from the date hereof, and in case of failure to do so this lease shall become null and void and without any further effect whatever, unless the lessee shall pay for the delay at the rate of one dollar per acre per annum thereafter until a well shall be commenced.

"(b) Such payment shall be made to the lessor's credit in Mound Valley State Bank at Mound Valley, Kansas.

"2. That lessee shall have the right at any time to terminate this lease by the payment of one dollar and by surrendering this lease, and shall thereafter be released from all obligations and liabilities under same."

On August 13, 1913, the owner made a second lease of the oil and gas rights in the farm to A. B. Bloom and George M. Bowen for two years and as much longer as gas and oil might be found in paying quantities. This lease provided:

"Provided, a well is not commenced on said premises within 90 days from the date hereof, unavoidable accidents and delays excepted, then this grant shall become null and void, unless second party shall pay to the said first party a yearly rental of eighty (\$80.00) dollars, payable quarterly in advance for each quarter thereafter such commencement is delayed.

"It is expressly agreed that the payment of all moneys due under this lease may be made by cash or check, to M. E. Hassell, by deposit to her credit in the Mound Valley State Bank, of Mound Valley, Kansas. * * * Second party agrees to be responsible for all action that may be brought from former lease given 2—22—1913.

"It is further mutually agreed by and between said party of the first part and said party of the second part that the said party of the second part shall have the right to surrender this lease to said party of the first part at any time upon payment of one dollar and that thereupon this lease shall cease and determine, and be and become absolutely null and void, and no longer binding upon either party."

On January 17, 1914, Bloom and Bowen brought this action against Rugh and his associates under the first lease, setting up their lease of August 13, 1913, and alleging:

"(5) That on or about the — day of November, 1913, the said defendants, conniving and acting together, did over the protest of these plaintiffs, and that of the said lessor, M. E. Hassell, without any right whatever so to do, wrongfully and forcibly enter upon said premises, and thereafter over the further protest of these plaintiffs, and, in utter disregard of plaintiffs' rights, said defendants proceeded to and did drill a well upon said leasehold premises, which produced, and ever since the completion thereof,

to wit, on the — day of November, 1913, has been producing, natural gas in paying quantities, the exact volume of which plaintiffs are unable to state, but on information and belief avers that the same is 2,000,000 cubic feet per day of 24 hours," etc.

Their petition prayed for a receiver, for ouster of the first lessee, for possession, accounting, and damages. Defendants' demurrer was overruled, whereupon they answered, setting up their prior lease, asserting their full compliance therewith in all its terms and their reliance thereon. They prayed for the cancellation of the second lease, that their own title be quieted, and that the second lessee be enjoined from interfering with the defendants' use and occupancy. The reply was a general denial. The district court made findings of fact and conclusions of law, and gave judgment for the plaintiffs, who claimed under the second lease. The defendants who claim under the first lease appeal. The errors they assign are the rulings of the court on the demurrer to the petition and demurrer to the evidence and to the court's interpretation of the law relating to defendants' lease.

The briefs of both plaintiffs and defendants in this case show an unusual amount of legal lore, each tending to show that the lease of his opponent is invalid. Technical differences there may be between an oil and gas lease and the ordinary contract of lease between landlord and tenant, but we perceive no ground for abrogating the ordinary rule that a claimant to any interest in reality cannot depend upon the weakness of his adversary's title, but must rely on the strength of his own, and the other ancient rule "first in time, first in right." As to the right of the lessee to terminate the lease upon payment of \$1, the one contract is as bad as the other. This provision might be important in an action between the lessor and lessee. We do not discern its relevancy between rival lessees, both holding lease contracts which have this identical stipulation.

[1-3] Governed by the precedents of this court, there appears to be no infirmity in defendants' lease. The land was leased for one year. The duration beyond a year need not be considered. A consideration was recited in the deed. The forfeiture clause did not provide that if a well were not commenced in 90 days the rent was to be paid in advance, and that the first rental payment should be due in 90 days. "One dollar per acre per annum" were the words of the contract fixing the liability for delay. This language clearly indicated that the lease was to be of some considerable duration, and indicated the possibility of delay in commencing operations, and since the specific dates when the rents were payable were wanting, payments, at reasonable intervals should be interpreted. *Smith v. Steele*, 96 Kan. 106, 150 Pac. 519. Moreover, the 90 days to commence a well expired May 22,

1913, and the lessor did nothing to assert her right of forfeiture for nearly three months thereafter, at which time she executed the second lease to plaintiffs, binding them at the same time to shoulder the burden of overcoming the till then unforfeited rights of her first tenants. It is familiar law that a right of forfeiture must be promptly asserted, or it is waived. Even the lessor's belated attempt to exercise the right of forfeiture by the granting of the second lease three months after the termination of the time to commence the well was not unequivocal, but merely an assignment of that right to the second lessees, since their grant was subject to the condition:

"Second party agrees to be responsible for all action that may be brought from former lease given 2-22-1913."

Counsel for plaintiffs say:

"The appellants' lease is what is termed among the oil and gas fraternity an 'unless lease' in contradistinction to what is termed an 'or lease.'"

A nice distinction is sought to be made between the case at bar and that of *Rhodes v. Oil Co.*, 80 Kan. 762, 104 Pac. 851, which was an "or lease" contract. The cases decided by this court have not attached any importance to such subtleties of language, but have been determined upon their individual and substantial merits; and the later drift of the decisions show a decided tendency to frown on forfeitures where the rights of the parties insisting thereon can otherwise be adequately protected. *Edwards v. Gas Co.*, 65 Kan. 362, 367, 69 Pac. 350; *Monfort v. Lanyon*, 67 Kan. 310, 72 Pac. 784; *Rose v. Lanyon*, 68 Kan. 126, 74 Pac. 625; *Ringle v. Quigg*, 74 Kan. 581, 87 Pac. 724; *Brick Co. v. Bailey*, 76 Kan. 42, 90 Pac. 803, 12 L. R. A. (N. S.) 745; *Davis v. Gas Co.*, 78 Kan. 97, 96 Pac. 47; *Work v. Gas Co.*, 79 Kan. 118, 126, 98 Pac. 801; *Gas Co. v. Harris*, 79 Kan. 167, 100 Pac. 72; *Myers v. Shertzer*, 82 Kan. 275, 108 Pac. 105; *Howerton v. Gas Co.*, 82 Kan. 367, 108 Pac. 813, 34 L. R. A. (N. S.) 46; *Wheeland v. Gas Co.*, 82 Kan. 862, 109 Pac. 187; *Collins v. Oil & Gas Co.*, 85 Kan. 483, 118 Pac. 54, 38 L. R. A. (N. S.) 134; *Smith v. Steele*, 96 Kan. 106, 150 Pac. 519.

This case is much like *Smith v. Steele*, supra, and is easily distinguished from *O'Neill v. Risinger*, 77 Kan. 63, 93 Pac. 340, where the forfeiture was based upon a breach of the contract to pay the annual rent in advance if a well were not drilled within the agreed time.

[4] It was not error to overrule the demurrer, since the defendants' lease was not then before the court. Possibly the case might have been shortened by motions for judgment on the pleadings. Proceeding, however, to consideration of the evidence, as the trial court did, we think the defendants' lease was not void for uncertainty as to the time when the rent should be paid on failure to commence the well (*Smith v. Steele*, supra),

nor do we think the evidence of the lessor as to the oral agreement that she was to receive rent in 90 days if the well was not commenced was of sufficient consequence to warrant the adjudication of forfeiture, since she did not act promptly to assert her right of forfeiture.

Long before the expiration of the definitely fixed term of the lease, one year, the well had been completed and the payments for the delay had been made. In such a situation the principles of equity should not be used to assist a purchaser of a mere debatable right of forfeiture. The judgment is reversed, and the cause remanded, with instructions to render judgment for defendants. All the Justices concurring.

MOFFATT v. FOUTS et al. (No. 20400.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. ESTOPPEL. \S 22(2) — ESTOPPEL TO ASSERT INVALIDITY OF PRIOR MORTGAGE.

Ordinarily a mortgagee may assert the invalidity of a prior mortgage, but he is estopped to do so where his mortgage contains an express recital that it was taken subject to the prior mortgage.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 30-45; Dec. Dig. \S 22(2).]

2. CHATTEL MORTGAGES \S 157(1) — RIGHTS OF PARTIES — ACTIONS — SCOPE OF INQUIRY.

In an action of replevin for the possession of a stock of mortgaged merchandise brought by a junior mortgagee against those claiming a prior lien questions affecting and incident to the question of the right of ownership of the property, including the claim that the defendants were fraudulently endeavoring to absorb more property than was necessary to the payment of the prior lien, may be determined.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. \S 157(1).]

3. PLEADING \S 350(3) — TRIAL \S 109 — MOTIONS — JUDGMENT ON PLEADINGS.

Upon a motion for judgment on the averments in the petition and the opening statement of counsel such averments and statements should be liberally interpreted, and it is held herein that the averments of plaintiff's petition and the opening statement of his counsel did not warrant the court in sustaining defendant's motion for judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1076, 1077; Dec. Dig. \S 350(3); Trial, Cent. Dig. \S 91, 270, 367, 388, 395; Dec. Dig. \S 109.]

Appeal from District Court, Labette County.

Action by John Moffatt against F. P. Fouts and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

John Madden and C. E. Cooper, both of Parsons, for appellants. Paul H. Kimball, of Parsons, and Russell & Russell, of Scott, for appellee.

JOHNSTON, C. J. Action of replevin to recover possession of a stock of merchandise in a furniture store, together with books of account and contracts. It seems that the plaintiff, John Moffatt, who owned a furniture store in the city of Parsons, traded it to the defendant Fouts for 160 acres of land in Scott county. After the exchange the plaintiff discovered that there was a mortgage for \$625 on the land in process of foreclosure, which he found it necessary to discharge. Fouts then gave to plaintiff a chattel mortgage on the furniture stock to secure the latter for the \$625 paid on the mortgage, and also for any additional expenses that might be incurred. For some time prior to the exchange mentioned Fouts had been indebted to the First National Bank of Scott City, one of the defendants, and as security for the payment of the debt had executed a deed to his land which was not recorded, and after Fouts exchanged the land for the furniture store he delivered to A. B. Daugherty, a director of the bank and one of the defendants, a bill of sale of the furniture stock, with the understanding that it was to stand as security for Fouts' indebtedness to the bank, and thereafter Daugherty for the bank took possession of the goods, and Fouts continued in the management of the store and assisted in selling goods. The mortgage given by Fouts to the plaintiff recognized the existence of the bill of sale, reciting that it was "subject, however, to bill of sale to A. B. Daugherty, and amount due First National Bank of Scott City, Ks., and accounts covering same," and when plaintiff accepted the mortgage he was informed by Fouts that Daugherty had an interest in the goods. About two months after the exchange and in a few days after the mortgage to the plaintiff was executed, he brought this action to recover possession of the mortgaged property.

It was alleged that Fouts had failed to pay the amount due under the mortgage, and, further, that the bill of sale to Daugherty was a mere pretense, that the latter had no interest in the property, and that he and Fouts through a secret arrangement were absorbing the property, and thereby attempting to defraud the plaintiff out of the property to the possession of which he was entitled under his mortgage. At the trial the court on the motion of the plaintiff had those portions of the answers of the defendants following the general denials stricken out as being irrelevant and redundant matter. In the opening statement counsel for plaintiff recited the facts given, and also stated that the defendants continued to conduct the store without accounting to any one for Fouts' debt to the bank, selling off the goods from day to day, which had originally invoiced \$4,000, until at the time of the beginning of this suit the stock only in-

voiced \$700, and were fraudulently trying to absorb property which should be applied on the plaintiff's lien. The defendants then moved for judgment upon the opening statement of counsel and on the pleadings, upon the ground that they did not set forth facts sufficient to constitute a cause of action in favor of the plaintiff against the defendants; and the court sustained the motion. The ruling appears to have been based on the ground that the plaintiff, in taking his mortgage subject to the bill of sale and lien of the bank for which Daugherty was acting, is estopped to question the validity of the bank's claim and lien, although they might have been previously open to attack. The summary action, however, in taking the case from the jury and rendering judgment for the defendant upon the pleadings and opening statement of plaintiff cannot be sustained.

[1] The bill of sale to the bank is in effect a mortgage, and when the plaintiff took his mortgage expressly subject to the lien of the bank, he estopped himself to deny the validity of the lien. A mortgagee may assert the invalidity of a prior mortgage in order to subject the mortgaged property to a payment of his claim, if he has done nothing which operates as an estoppel against him, but if the mortgage which he takes expressly recites that it is accepted subject to a prior mortgage, he cannot thereafter attack the validity of the prior mortgage, although it may have been open to attack by the mortgagor. *Burnham v. Citizens' Bank*, 55 Kan. 545, 40 Pac. 912; *Taylor v. Riggs*, 8 Kan. App. 323, 57 Pac. 44. See, also, *Simpson v. Greeley*, 8 Kan. 586; *Green v. Houston*, 22 Kan. 35; *Haxtun v. Sizer*, 23 Kan. 310; *Case, Bishop & Co. v. D. M. Steele & Co.*, 34 Kan. 90, 8 Pac. 242; 27 Cyc. 1226.

[2, 3] While this rule eliminates from the case the averments and statements as to the fraud in the transactions leading up to the execution of the bank's bill of sale and the possession taken under it, plaintiff is still entitled to insist that good faith shall be exercised in the handling and sale of the goods, and that after the bank's debt has been satisfied and the necessary expenses of the sale, the balance shall be applied on the plaintiff's mortgage. An allegation in the petition and the statement made by counsel in opening the case are to the effect that Daugherty, who was in possession of the stock for the bank, and Fouts were conducting the business in such a way as to appropriate the entire stock of goods; that the goods taken possession of by the parties amounted in value to \$4,000, and that the sale had been made until only \$700 in value remained; and still no credits had been given on the bank's claim and no account of the business had been kept. Upon a motion for judgment on averments in the petition

and opening statements of counsel the averments and statements should be liberally interpreted. *Weber v. A., T. & S. F. R. Co.*, 54 Kan. 889, 38 Pac. 569; *Rezac v. Zima*, 96 Kan. 752, 153 Pac. 500. Upon those made herein the plaintiff, if he can procure the evidence, is entitled to show that the proceeds of the sale already received by the bank are sufficient to discharge the amount of the bank's claim against Fouts, that the remaining property is subject to the junior mortgage of plaintiff, but that it is being misappropriated and converted by the defendants, and therefore the plaintiff is entitled to its possession. Many questions affecting and incident to ownership and the right of possession of property may be considered and decided in actions of replevin. The rights of mortgagees and other claimants in personal property may be determined in replevin, and especially where, as here, it is alleged that the prior mortgagees who have gained possession of the property are fraudulently endeavoring to absorb property which should be applied upon the second mortgage. *McDonald v. Swisher*, 57 Kan. 205, 45 Pac. 593. See, also, *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584; *Deford v. Hutchison*, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257; *Grain Co. v. Harbour*, 89 Kan. 824, 133 Pac. 565, 47 L. R. A. (N. S.) 173; *Ely v. Holloway*, 95 Kan. 8, 147 Pac. 1128; *Miller v. Thayer*, 96 Kan. 278, 150 Pac. 537.

The averments and statements are not as full and clear as they might have been made, but they are deemed to be sufficient as against the motion upon which the judgment was given.

The judgment will be reversed, and the cause remanded for a new trial. All the Justices concurring.

CHAMBERLAIN METAL WEATHER STRIP CO. v. BANK OF PLEASANT- TON. (No. 20286.)

(Supreme Court of Kansas. July 8, 1916. Rehearing Denied Oct. 13, 1916.)

(Syllabus by the Court.)

1. BANKS AND BANKING ⇨140(3)—CHECKS— LIABILITY OF BANK.

Under the Negotiable Instruments Act, chapter 310 of the Laws of 1905, General Statutes 1909, § 5243 et seq., an ordinary bank check is a bill of exchange (Gen. Stat. 1909, § 5379), and when it is presented to and retained by the bank and the account of the maker is charged therewith, the bank is liable to the payee as an acceptor. Gen. Stat. 1909, § 5315.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 385-388; Dec. Dig. ⇨140(3).]

2. BANKS AND BANKING ⇨140(3)—LIABILI- TY OF BANK—PAYMENT OF CHECKS.

Where a debtor has ample funds in a solvent bank and gives a check thereon to satisfy his debt, and the check is made payable to the order of the creditor, the bank which receives and retains the check and charges the drawer's account

therewith is liable to the creditor thereon, and by a payment of the check to a third party on an unauthorized indorsement the bank does not avoid its liability to the creditor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 885-888; Dec. Dig. ¶ 140(3).]

3. PLEADING ¶ 350(8)—JUDGMENT ON PLEADING—QUESTIONS OF FACT.

Where a vital question of fact is involved in a lawsuit, it is not error for a court to set aside its judgment on the pleadings and to grant a new trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1075, 1077; Dec. Dig. ¶ 350(3).]

Appeal from District Court, Linn County.

Action by the Chamberlain Metal Weather Strip Company, a corporation, against the Bank of Pleasanton, a corporation. From a judgment for plaintiff, defendant bank appeals. Affirmed.

James D. Snoddy, of Pleasanton, for appellant. Charles F. Trinkle, of La Cygne, for appellee.

DAWSON, J. The Chamberlain Metal Company performed certain services and furnished certain materials for Mrs. S. J. Ellis, and she gave her check on the bank of Pleasanton for \$134 in favor of the company in payment therefor. Mrs. Ellis delivered the check to Sprague T. Haskell, who indorsed it in the name of the company, "by Sprague T. Haskell, Agt.," and he presented it to the bank and received the money thereon. Haskell did not pay over the money to the plaintiff company, and it brings this action against the bank alleging these facts, and alleging, also, that Haskell had no authority to indorse the check, and that the indorsement of its corporate name was a forgery, that he had no authority to make collections on plaintiff's account, that the bank was not authorized to pay the check to Haskell, and that there was due from defendant to plaintiff upon the said check the sum of \$134, etc.

The bank's demurrer was overruled, whereupon it answered by general denial. The plaintiff replied with an allegation that Haskell was not its general agent and denied that he had authority to receive or collect money on its behalf. At the trial, after statements of the case by counsel in harmony with the pleadings, the defendant objected to the introduction of evidence. The objection was sustained, and judgment was entered for defendant. Later a motion for a new trial was granted, and the bank appeals.

[1, 2] Was it proper for the court to grant a new trial? Plaintiff alleged that its debtor, Mrs. Ellis, gave her check to Haskell, and alleged that Haskell was not its general agent, and that he had no authority to indorse it, and had no authority to receive or collect money for the plaintiff. Appellant argues that this is inconsistent. We hardly think so. It is very common for business houses to employ clerks to receive checks

and to open mail containing checks, but it would hardly do to say that such clerks or employes are general agents with power to indorse their employers' names or the names of their business firms, with or without the clerks' own signatures as agents, and the employment to receive checks does not imply the additional authority to indorse such checks and to receive money thereon.

Whatever may have been the rule before the adoption of the Negotiable Instruments Act (Laws 1905, c. 310), the bank's liability to the payee of an accepted check is now clear (Gen. Stat. 1909, § 5315). The retention of the check and the charging of Mrs. Ellis's account was an acceptance. Gen. Stat. 1909, §§ 5372, 5389, 5390. In 5 R. O. L. 521, it is said:

"The acceptance of a check, so as to give a right of action to the payee, is inferred from the retention of the check by the bank, and a subsequent charge of its amount to the drawer, although it was presented by, and payment made to, an unauthorized person. Under the Negotiable Instruments Act a constructive acceptance will take place upon failure to return the check within twenty-four hours."

See, also, *Ballard v. Bank*, 91 Kan. 91, 96, 136 Pac. 935.

[3] Mrs. Ellis had ample funds in the appellant bank, and the bank was solvent. It was the duty of the bank, since it did not decline acceptance (Gen. Stat. 1909, § 5390), to pay it to the plaintiff or to the holder under plaintiff's valid indorsement. But the bank was bound to determine, at its peril, whether Haskell had authority to indorse the plaintiff's name on the check and to receive the money thereon. This is a question of fact, and the last ruling of the court which set aside its first judgment on the pleadings and granted a new trial thereon is correct. See the well-considered case of *McFadden v. Follrath*, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201, and note.

The judgment is affirmed. All the Justices concurring.

KANSAS CITY v. SEAMAN. (No. 20567.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

COMMERCE ¶ 43, 44—LICENSES ¶ 13—POLICE REGULATIONS—LICENSE TAX—SUBJECTS OF INTERSTATE COMMERCE.

A corporation located and doing business in Missouri as a steam laundry sent an employe with a wagon to gather up the linen of patrons in Kansas City, Kan., carry it to the laundry, and when the service was completed deliver it to the patrons in Kansas and collect the charges. The employe while so engaged was arrested and fined for the violation of an ordinance of Kansas City, Kan., imposing a license tax upon each laundry operated within the city, the amount to be determined by the number of wagons employed. *Held*, that the conviction is unlawful, first, for the reason that the employe of the laundry company was not conducting a laundry within the city as contemplated by the ordi-

nance, and, second, for the reason that collecting the articles in Kansas, carrying them into Missouri, and returning them to their owners after the service had been performed is interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 32, 35; Dec. Dig. ¶¶ 43, 44; Licenses, Cent. Dig. § 24; Dec. Dig. ¶ 13.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Appeal from District Court, Wyandotte County.

Harry Seaman was convicted of violating an ordinance of the City of Kansas City, Kan., and appeals. Reversed and remanded, with directions that defendant be discharged.

Stubbs & Stubbs, of Kansas City, Mo., for appellant. H. J. Smith, of Argentine, for appellee.

PORTER, J. The appellant was convicted and fined in the police court of Kansas City, Kan., for carrying on the occupation and business of a laundry within the city without having obtained a license under the provisions of a city ordinance. The district court affirmed the conviction, and he appeals.

The appellant resided in Kansas City, Mo., and was in the employ of the Fern Laundry Company, a corporation located in and doing business as a steam laundry in Kansas City, Mo. Among the customers of the laundry company are people who reside in Kansas City, Kan. It was the custom of the laundry company to send the appellant with the company's horse and wagon to Kansas City, Kan., to gather up the linen of its patrons, take it to the laundry, and when it was ready for delivery, return the same to its patrons and collect the charges. The appellant while so engaged was arrested for violation of an ordinance of the city, which provided that no person, firm, or corporation, either as principal, officer, agent, servant, or employe, shall carry on or operate within the city any calling, trade, or occupation therein specified, without first obtaining a license therefor. The ordinance fixed the occupation tax for the business of laundries as follows:

"Laundry Wagon. Any person or corporation conducting, pursuing or carrying on a laundry business by collecting or delivering laundry by means of a wagon or other vehicle, for each wagon or vehicle, \$10."

We construe the ordinance as imposing an occupation tax upon the laundry business; the amount of the tax against the business being determined by the number of wagons employed therein.

There are two reasons why we think the judgment convicting the appellant must be reversed: First, he was not carrying on the business of a laundry within the city, and therefore was not within the terms or contemplation of the ordinance. The laundry was conducted in Kansas City, Mo. He was engaged solely in collecting and distributing articles to be laundered in Missouri. He had no place of business in Kansas City,

Kan., but was simply using the streets for the lawful purpose of transporting from that city to the state of Missouri articles to be laundered and to return them to the owners when the service was completed. Second, in the course of his employment the appellant was engaged in interstate commerce. The appellee insists that there was no commerce involved, or, at least, that commerce was only incidental to the business, because there was no barter or sale of personal property. A number of decisions are cited in which "trade, barter, sale or transportation involving trade, barter or sale" are spoken of as constituting the elements of interstate commerce. In the appellee's brief it is said:

"The contract between the laundry company and its customers is, that the company will take wash, and return the clothing. The transaction is for a personal service with reference to property owned by the customer. No goods are sold by the company. They have nothing but services to sell."

It is seriously insisted that interstate commerce has been defined by the federal courts to involve only the transfer of the title to personal property and its transportation, and the business of transporting passengers or intelligence. But certain services are held to be commodities. In *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 491, 54 L. Ed. 878, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, it was held that teaching by correspondence, the business of imparting knowledge, is interstate commerce when conducted between residents of different states, because teaching is a service. In the case at bar there was a sale of service involving transportation between the homes of the customers in Kansas and the place where the service was performed in Missouri.

One of the cases relied upon by the appellee which illustrates its attitude as regards the claim that appellant was employed in interstate commerce is *Cargill v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619. In that case Cargill owned a number of grain elevators located upon the rights of way of interstate railways. At these elevators he purchased grain from citizens of Minnesota and shipped it in car-load lots to points in other states; the grain being purchased for the express purpose of shipping as Cargill's property to his terminal elevators in Wisconsin and Illinois. A statute of Minnesota required grain elevators operating in that state to pay a license fee. The court held that the statute imposing the license was valid for the reason that it had reference only to the business of the defendant at his elevators and warehouses in Minnesota, "in respect to business conducted at an established warehouse in the state between the defendant and sellers of grain." The Minnesota case does not support the contention of the appellee. If the laundry company were resisting the imposition of a license tax by

the state of Missouri on its business conducted there, upon the theory that some, or a large part, of its business was interstate, the Minnesota case would be an authority upholding the power of the state of Missouri to levy such a tax for the reason that the tax would be imposed in respect to a business conducted in an establishment located in Missouri. Or if a person conducting a laundry business in Kansas City, Kan., sought to avoid the license tax imposed by the ordinance in question, by claiming that its customers resided in Missouri, the Minnesota case would uphold the authority of the city to levy such a tax in respect to the business actually carried on within the city.

Undoubtedly there were some features of the business conducted by the laundry company which involved interstate transactions. The sending of its wagons into another state with agents to collect articles to be laundered, the transporting of the same to its place of business in Missouri, and returning the articles to the owners in Kansas after the work had been completed, involved trade and intercourse. In *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. Ed. 23, Chief Justice Marshall said:

"Commerce, undoubtedly, is traffic, but it is something more—it is intercourse."

Anything which can be bought and sold is a subject of commerce. *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 17, 84 C. C. A. 167. In *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, it was held that:

"Intercourse or communication between persons in different states through the mails and otherwise, and relating to matters of regular continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the states within the commerce clause of the federal Constitution."

When a resident of Kansas contracts with an individual doing business in Missouri that the latter will mend a pair of spectacles for him, and the one who engaged to perform the service agrees to send into this state for the article which is to be repaired, take it to his place of business in Missouri, and after the service has been performed return it to the owner, the servant or agent of the individual in Missouri, while engaged in transporting the article to Missouri and returning it to the owner in Kansas, is engaged in trade and intercourse between individuals of different states. The servant or agent of the one performing the service is not, while so engaged, carrying on the business of mending spectacles; that business is carried on in Missouri.

A wholesale grocer in Missouri who sells goods there to a retail dealer in Kansas under a contract which requires him to deliver them in Kansas may send them by his own wagon to the customer's place in Kan-

sas. In such a transaction he, and of course his agents are engaged in interstate commerce. His traveling men who solicit business in Kansas are not engaged in conducting a wholesale grocery in this state, nor can they be required to pay a local license tax. *Kinsley v. Dyerly*, 79 Kan. 1, Pac. 228, 19 L. R. A. (N. S.) 405, and cases cited in the opinion; note, 19 L. R. A. (N. S.) 297, 316. Since the decision of *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733, an exception to the general rule exists in the case of intoxicating liquors because of the provisions of the Wilson Act and other recent acts of Congress touching the control of such liquors.

Instances might be multiplied of cases involving transactions between citizens of different states whereby the owner of personal property in one state sends it to an individual, firm, or corporation in another state to have some service or labor performed upon it there, and afterwards to be returned to the owner in Kansas. The collecting and transporting of the thing from one state to another, and the return of it after the labor and service has been performed, is trade and intercourse between citizens of different states.

While engaged in collecting articles to be laundered or in returning them to the owners in Kansas after the labor and service had been performed in Missouri, the appellant, as the servant and agent of his employer, was not carrying on the laundry business in Kansas; and for that reason alone was not within the provisions of the ordinance which purports to levy an occupation tax upon persons carrying on such business within the state. If the ordinance were given the construction contended for by the appellee, grievous burdens might be imposed by one state by the enactment of laws and ordinances which would embarrass traffic, trade, and intercourse between the citizens of different states.

It follows that the appellant is not amenable to the provisions of the ordinance, and his conviction for its alleged violation is void.

The judgment will be reversed, and the case remanded with directions that appellant be discharged. All the Justices concurring.

In re HANSON. (No. 20118.)*

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by Editorial Staff.)

1. CONTEMPT ~~§~~ 6—ACTS CONSTITUTING—PUBLICATION RELATING TO COURT.

If the language confessedly used by an attorney and officer of the Supreme Court in a petition for rehearing be such as to carry beyond question its own inherent and inevitable significance, the user must have intended the natural

and proper consequences of his use of such language.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. ¶6.]

2. CONTEMPT ¶6—ACTS CONSTITUTING—PUBLICATION RELATING TO COURT.

Language used by attorney in application for rehearing in the Supreme Court held to show utter disrespect and the plainest intent to express contempt for the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. ¶6.]

3. ATTORNEY AND CLIENT ¶43—DUTIES—RESPECT TO COURT.

It is one of the plainest and most primary duties of an attorney to be respectful to the courts in which he practices.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. ¶43.]

4. ATTORNEY AND CLIENT ¶43—SUSPENSION—GROUNDS—CONTEMPT.

Under Laws 1913, c. 64, § 2, giving the Supreme Court power to disbar or suspend an attorney for a willful violation of his oath or any duty imposed on an attorney at law, an attorney who persists in the use of contemptuous language in briefs addressed to the court will be suspended until further order of the court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. ¶43.]

Citation to John F. Hanson for contempt. Respondent suspended from practice as an attorney at law until further order of court.

S. M. Brewster, Atty. Gen., for plaintiff.
John F. Hanson, of Lindsborg, for defendant.

PER CURIAM. The Attorney General, having been directed by the court to take such steps as might be proper in the premises in the case of State of Kansas ex rel. Agnes Bjorn v. Robert Creager, filed, after due and proper preliminary proceedings, an accusation against John F. Hanson, setting forth, among other things, that the Creager Case, appealed from the district court of McPherson county, was heard and determined in this court, and that an opinion filed February 12, 1916, sustained the judgment of the lower court; that John F. Hanson was one of the attorneys for the plaintiff and appellant in that case, and as such filed his brief in this court, and after affirmance of the judgment there was filed in this court a petition for rehearing prepared by Hanson as attorney for the appellant; that John F. Hanson is an attorney at law, duly admitted to practice in the district courts and in the Supreme Court of this state, and as such is an officer of this court, and while acting as such attorney in such petition for rehearing made various and divers attacks and reflections upon this court, and willfully used towards this court contemptuous and insulting language, found in various portions of the petition set forth in numerous paragraphs thereof. The Attorney General alleged:

That this language was calculated to bring the court into disrepute and contempt, and was willfully and purposely used by Hanson

for the purpose of bringing the court into contempt. That his attention had been directed to the use of such language and his conduct towards this court, and that he had been admonished in an opinion in State v. Linderholm, 95 Kan. 671, 149 Pac. 427, wherein it was said, among other things:

"But the writer finds in the pleadings, correspondence, and documents of counsel a persistent insolence and effrontery towards this court and the individual justices which are wholly inexcusable, and which must not be repeated. The very least that this court can do with such contumacious and insulting documents is to strike them from the files and consign them to the waste basket."

That notwithstanding this warning, Hanson willfully and maliciously persisted in maintaining towards this court and the individual justices thereof a "persistent insolence and effrontery" for the purpose of showing contempt of the court and its opinions. In answer to this accusation respondent, after asserting that he appears specially and objects to and denies the jurisdiction of the court, and alleging that the accusation does not constitute contempt, pleads generally not guilty. Further answering, he admits, among other things, that—

"he prepared and filed the said petition for rehearing referred to in said affidavit, and that he did so intentionally, with the exception of a few minor clerical errors, which appear from the context and will be later herein referred to."

He referred to the petition for rehearing, and such parts of the record in the Creager Case—

"as can possibly pertain to or throw any light on the said language used in said petition for rehearing"; "but he specifically denies that he disregarded his duties and obligations while acting as such attorney, but, on the contrary, exerted his utmost efforts in behalf of his client's cause, and further specifically denies that he intentionally made any improper, unlawful, or unjustifiable attacks and reflections upon the said Supreme Court in said petition for rehearing, or that he intentionally used insulting language toward them, or any language towards the court, or to the individual justices thereof, which was not warranted by the circumstances; that he further specifically denies that he willfully and maliciously persists in maintaining toward this court, or the individual members thereof, a persistent insolence and effrontery; and he further specifically denies that he has done anything with the purpose and intent of showing contempt for this court or the individual members thereof; and he further specifically denies that said language, or any part thereof, considered in the proper light and the surrounding circumstances constitutes contempt against this court, or any member thereof, and alleges that any holding, rule, or statute, to the effect that it does constitute contempt under the circumstances, would so restrict procedure and the right to be heard that it would not be due process of law, and would be in contravention of section 1 of the Fourteenth Amendment to the federal Constitution."

Another portion of his answer is as follows:

"The said John F. Hanson, further answering, alleges and says that the unusual and vehement language used in the said petition for rehearing

is made necessary by what seems to be a persistent practice of the court of going to extremes adverse to him in their rulings and position in causes before them in which he is counsel or party, and in not giving them as full and careful attention as they seem to merit, and for want of other adequate remedy he is compelled to make the most out of the opportunity in presenting matters to the courts in the hope that they might be awakened to a greater sense of their duty and attention in these matters."

And, after referring to numerous cases in which he complains of the action of this court, the answer continues:

"That in view of this state of affairs the use of emphatic language such as set out in said affidavit should at least be excusable, as it is used with an honest purpose to get better and closer attention to the matters under consideration, and no disrespect is intended."

The answer closes thus:

"And, further answering, the said John F. Hanson says that the slang used in said language was not intended as any disrespect, and, though contending that it does not constitute contempt, he is willing to make due apologies therefor; and, if the court will clearly point out in further opinion, or otherwise show him that his position in this cause in any instance is so erroneous that any emphatic language or severe criticism is uncalled for, he is then willing to make due apologies for having used such language in that or those particular instances."

But one construction can be placed on this answer, which is that the respondent admits using the language substantially as charged, and claims that he was justified in so doing because the court had rendered decisions in other cases in which he was interested which were unsatisfactory to him, and had shown such partiality against him that he might properly resort to this sort of language in order to win proper attention and consideration, and that while all this was intentionally done, it was not for the purpose of showing contempt for the court.

[1, 2] If the language confessedly used by an attorney and officer of this court in a petition for rehearing be such as to carry beyond question its own inherent and inevitable significance and character, then the user must have intended the natural and proper consequences of his act in using such language. Particular attention is called to certain statements found in the quotations from the petition for rehearing set forth in the accusation:

"The court evidently is not parading this immaterial statement for any good purpose. * * * Those statements are libelous if they mean anything wrong."

"Now have you stated this fairly? If it does not insinuate anything wrong, why is it stated at all? If it does, it is libelous, because it does not state enough of the record as it is to put it in the right light. Cut it out, or state it fully!"

"Does not that look like duplicity? Looking at it closely, it appears that the preliminary hearing is meant, but it was your duty to say: 'At this preliminary hearing.' * * *"

"This court has been imposed on by counsel for defendant. This court has bitten so often on dope and extrinsic matter put out by opposite counsel that they are getting bold in the matter they put over."

"Why do you holler about her not getting this

correct when none of the other witnesses, including the defendant, could place the time positively? Why do you expect so much more from her? Do you have a grudge against her that you point out her shortcomings all the time, even when they are immaterial?"

"Your statement is absolutely misleading and unfair. * * *"

"Does not this show malice by the court?"

"Your opinion is absolutely libelous on this matter, and you should be fair enough to grant a rehearing, correct these wrong impressions of facts, and decide this question in the new light."

"Your adding to the first sentence 'who was not guilty' is absurd and ambiguous. In the first syllabus you have intimated that this involved a question of a motive to obtain money wrongfully, and that is libelous."

"From your first syllabus one might infer that you insinuate that the record shows something wrong of that kind, and so far it is libelous. And in so far as you hold it a defense without such a wrong it is absolutely ridiculous and not tenable."

"Further you do not meet our issue, and in fact dodge the real question."

"We think that the way you dispose of this is utterly frivolous; that, in one sense, it is only a method to dodge the real questions. But the most important trouble is that I fear that it will make Kansas law ridiculous, not only in Kansas, but all over the United States. That they will give this the horse laugh all along this line."

"You are now introducing a rule that would serve no good purpose, excepting to make it possible to introduce prejudicial matter that really has no probative effect or any pertinence to the real issue. This is the limit! Lord protect us! Opportunity!"

"The disposing of error as you do shows malice upon its face by this court. Every lawyer in the state can read it between the lines. It is a sham at an error in judgment that ought to be too raw for this court to put over and be left to stand."

These are a few of the expressions contained in the charge and admitted by the respondent, and it must be held that they bear upon their faces plenary and satisfactory evidence that they were used, not only with utter disregard of anything like respect, but with the plainest intent to express contempt and disrespect for the court to which they were addressed.

[3] It is one of the plainest and most primary duties of an attorney to be respectful to the courts in which he practices. It was held in the case of *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747, that:

"An attorney, as an officer of the court, is under special obligations to be considerate and respectful in his conduct and communications to the court, or judge." Syl. 4.

In the opinion it was said:

"We remark, secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity." 18 Kan. 74, 26 Am. Rep. 747.

[4] By statute this court is given express power to disbar or suspend an attorney at law "for a willful violation of his oath, or any duty imposed upon an attorney at law." Section 2, c. 64, Laws of 1913. See, also, *State v. Waugh*, 53 Kan. 688, 87 Pac. 166; *I*

re Hanson, 80 Kan. 788, 105 Pac. 694; Hanson v. Sward, 92 Kan. 1, 140 Pac. 100; In re Dunn, 85 Neb. 606, 124 N. W. 120; 2 R. C. L. 1092; 6 R. C. L. 523.

The motion, affidavit, and application for citation for contempt in this matter were filed March 25, 1916. The respondent filed an answer to the citation April 7th, and what he terms a "plea of the jurisdiction" May 1st, a motion to strike July 6th, a motion to make more definite and certain July 25th, and his answer to the accusation August 5th. He appeared in court in his own behalf at the October sitting, but in all this time no expression has come from him modifying in any way the terms of his answer already referred to.

In view of the circumstances and situation presented, it is by the court ordered that the respondent, John F. Hanson, for his contempt as hereinbefore set forth, be, and he is hereby, suspended from practice as an attorney at law in any of the courts of this state until the further order of this court. All the Justices concurring.

HOWARD v. TOURBIER et al. (No. 20296.)

(Supreme Court of Kansas. July 8, 1916.
Affirmed on Rehearing, Oct. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 715(1) — RECORD — QUESTIONS PRESENTED FOR REVIEW.

Testimony which it is not claimed appears in the transcript of the evidence cannot be considered in this court for any purpose. Root v. Street Railway Co., 96 Kan. 694, 153 Pac. 550.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2964, 3278; Dec. Dig. \S 715(1).]

2. APPEAL AND ERROR \S 640 — REVIEW — PRESUMPTIONS — MATTERS NOT SHOWN BY RECORD.

While it is necessary in order to sustain a judgment of foreclosure that there be proof of title in the mortgagors and of title in the defendant, it is held in this case that, since the appellant makes no claim that the mortgagors were not in fact the holders of the legal title, is not denying the source of his own title, and makes no claim that he has the least defense to the action, he is not entitled to a reversal, although the transcript of the evidence fails to show formal proof that when the mortgage was executed the mortgagors owned the property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2788, 2829; Dec. Dig. \S 640.]

3. MORTGAGES \S 381 — FORECLOSURE — RECEIVERS — STATUTORY PROVISIONS.

Section 498 of the Civil Code (Gen. St. 1909, \S 6093), which is part of an act revising the procedure in the sale of real estate on execution or other judicial process (Laws 1893, c. 109), does not repeal the general provision of section 266 of the Code (Gen. St. 1909, \S 5860), which authorizes the appointment of receivers in actions for foreclosure where it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed and the prop-

erty is probably insufficient to discharge the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1146; Dec. Dig. \S 381.]

4. MORTGAGES \S 474 — FORECLOSURE — RECEIVERS — DISCHARGE.

A receiver appointed under section 266 of the Code before sale in a foreclosure case should be discharged when the sale is confirmed, and it is error to continue the receivership after the sale without a showing under section 498 of the Code that a receiver is necessary to prevent waste.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1886; Dec. Dig. \S 474.]

Appeal from District Court, Douglas County.

Action by J. L. Howard against A. C. Tourbier and others. From a judgment for plaintiff, defendant I. O. Pickering appeals. Modified.

I. O. Pickering, of Olathe, for appellant. David F. Carson and James T. Cochran, both of Kansas City, for appellee.

PORTER, J. The action in the district court was brought to foreclose a mortgage on real estate. I. O. Pickering was made a defendant, the petition alleging that he claimed some title or interest in the property inferior to plaintiff's lien. His answer alleged that he was the owner in fee simple and in possession of the real estate, and denied the other allegations of the petition. The plaintiff recovered judgment from which Pickering appeals.

[1] The first contention is that the evidence fails to sustain the judgment. The appellee is challenged to point out the slightest evidence of title in the mortgagors, or what was the source of appellant's title. An attempt is made to meet the challenge by a counter abstract, in which appears a copy of an affidavit of appellee, which alleges that an abstract of title was offered in evidence, and that Mr. Pickering stated that he raised no question about the title. The counter abstract also recites what purports to be the substance of the abstract of title, showing the various conveyances of the property before and after the mortgage was executed. It also sets forth a purported copy of the warranty deed under which it is claimed the appellant acquired title. It is not claimed that any of these matters appear in the transcript of the evidence, and for that reason they cannot be considered for any purpose. The challenge made by the appellant must be sustained. Root v. Street Railway Co., 96 Kan. 694, 153 Pac. 550.

[2] In Cooper v. Rhea, 82 Kan. 109, 107 Pac. 799, 29 L. R. A. (N. S.) 930, 136 Am. St. Rep. 100, 20 Ann. Cas. 42, and in Gibson v. Rea, 92 Kan. 262, 140 Pac. 893, it was held that in order to sustain a judgment for the foreclosure of a mortgage, there must be proof of title in the mortgagors.

The court is of the opinion, however, that, inasmuch as appellant makes no claim that

the mortgagors were not in fact the holders of the legal title, is not denying that he derived title through them, and makes no claim that he has the least defense to the action, he has failed to show error which authorizes a reversal. *Bank v. Brechelsen*, 98 Kan. 193, 157 Pac. 259. To reverse the judgment and order a new trial merely to enable the appellant to introduce records from the office of the register of deeds, the existence and effect of which are not denied, would serve no purpose except to delay the proceedings.

On the same day the judgment of foreclosure was rendered, the court, over appellant's objections, appointed a receiver to take charge of the property and collect the rents. There was conflicting evidence as to the value of the property, but there was some evidence to support a finding that the fair market value did not exceed the amount of the interest, taxes, judgment, and costs.

[3] It is contended that the court erred in appointing a receiver in advance of the sale; that the only authority to appoint a receiver in foreclosure cases is after the sale, under section 498 of the Civil Code (Gen. St. 1909, § 6093) which reads:

"The holder of the certificate of purchase shall be entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction; or, when required to protect said premises against waste, appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed, and shall be entitled to rent, control and manage the same; but the income during said time, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of its legal title."

Section 266 of the Code (Gen. St. 1909, § 5860) authorizes the appointment of a receiver in an action of foreclosure, where it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt. There is room for the operation of both statutes. Section 498 is a part of an act revising procedure in the sale of real estate on execution or other judicial process (Laws 1893, c. 109), and does not repeal the general provisions authorizing the appointment of receivers under section 266 of the Code. *Schultz v. Stiner*, 97 Kan. 555, 155 Pac. 1073.

[4] After the sale of the property and its purchase by the appellee, the appellant filed a motion to discharge the receiver, and he now complains that the court erred in denying the motion. A receiver appointed before sale should be discharged when the sale is confirmed, unless there is, under section 498 of the Code, a showing of a necessity for a receiver in order to prevent waste. The error of the court in denying the motion to discharge the receiver after the sale will not

justify a reversal, but the judgment will be modified by directing that the costs and expenses of the receivership from the time of the sale be charged to the plaintiff, and that the defendant Pickering be given the income of the property from the time of the sale to the expiration of the period of redemption. The costs of the appeal will be divided.

Judgment modified. All the Justices concurring.

STATE v. GLASS et al. (No. 20821.)
(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS — 271 — NUISANCES—ABATEMENT—PLEADING.

The state of Kansas is the plaintiff in an action to abate an intoxicating liquor nuisance, and it is not necessary that the petition show in the title that the action is prosecuted on the relation of any person or officer. The petition is properly signed.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 407; Dec. Dig. —271.]

2. INTOXICATING LIQUORS — 274 — NUISANCES—ABATEMENT—PLEADING.

In an action to abate a liquor nuisance, a cause of action was stated in a petition which alleged that at the place described a nuisance, as defined in the statute, was maintained with the knowledge, permission, and consent of the defendants, who owned the property.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 410; Dec. Dig. —274.]

3. INTOXICATING LIQUORS — 275 — NUISANCES—ABATEMENT—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to warrant the judgment rendered.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 411; Dec. Dig. —275.]

4. SUFFICIENCY OF EVIDENCE—KNOWLEDGE OF DEFENDANTS.

The finding of the court that the defendants had knowledge of the unlawful use of their premises was sustained by the evidence.

5. INTOXICATING LIQUORS — 265 — NUISANCES—INJUNCTION.

An injunction will lie against the owner of premises who knowingly permits a nuisance to be maintained thereon.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 404; Dec. Dig. —265.]

6. PLEADING — 236(6)—AMENDMENT—DISCRETION OF COURT.

The granting of permission to amend a petition so as to ask for additional attorney's fees is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 601; Dec. Dig. —236(6).]

7. COSTS — 207—DETERMINATION—SUFFICIENCY OF EVIDENCE.

Attorney's fees may be allowed without proof of the value of services rendered, where the services were rendered in the presence of the court.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 781-787; Dec. Dig. —207.]

8. INTOXICATING LIQUORS — 277—NUISANCES—INJUNCTION.

An injunction against maintaining a liquor nuisance should be broad enough to preclude every possibility of the continuation or reopening of the nuisance by the persons enjoined or by

any one acting for, by, through or under them, or either of them, or with their permission.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 413; Dec. Dig. ¶277.]

Appeal from District Court, Labette County.

Action by the State against C. A. Glass and another. From judgment for plaintiff, defendants appeal. Affirmed.

John Madden and C. E. Cooper, both of Parsons, for appellants. S. M. Brewster, Atty. Gen., W. P. Montgomery, Asst. Atty. Gen., and Elmer Columbia, of Oswego, for the State.

MARSHALL, J. The plaintiff obtained an injunction against the defendants under the intoxicating liquor law of this state (Gen. St. 1909, §§ 4361-4402), and the defendants appeal.

[1] 1. The title to the action, as set out in the petition, is:

"The State of Kansas, Plaintiff, v. A. A. Glass and C. A. Glass, Defendants."

The opening statements of the petition are:

"Now comes the plaintiff herein, the state of Kansas, by W. P. Montgomery, Assistant Attorney General, of Labette county, Kan., and for cause of action against the said defendants, and each of them, alleges."

The petition is signed, "W. P. Montgomery, Attorney for Plaintiff," and is verified on information and belief. The defendants contend that the petition is insufficient because the action is not prosecuted on the relation of W. P. Montgomery, and because the petition is not signed by W. P. Montgomery as Assistant Attorney General. In *Pottenger v. State ex rel.*, 54 Kan. 312, 38 Pac. 278, an action to enjoin the maintenance of a liquor nuisance, this court, in speaking of the necessity for adding the name of a relator, said:

"We think there is no necessity for adding the name of any person as relator." 54 Kan. 312, 38 Pac. 278.

The petition is signed by W. P. Montgomery. It shows his official capacity and follows the language generally used in petitions in such actions in this state. This is all that is necessary. The defendants' objection is not well founded.

[2] 2. The defendants objected to the introduction of evidence under the petition on the ground that it did not state facts sufficient to constitute a cause of action. The petition alleged, in substance, that at the place named a nuisance, the character of which was described, was maintained with the knowledge, permission, and consent of the defendants, who owned the property. The petition alleged all that was necessary.

[3] 3. The defendants insist that the evidence was not sufficient to warrant the court in rendering judgment against them. The evidence established that the defendants were the owners of the premises in question; that the building situated thereon was divided into several rooms; that each of the

defendants occupied a room in the building as a place of business; that intoxicating liquors were sold and drunk on the premises; that intoxicated persons congregated and stayed there; that raids on the place were made by the police department of the city of Parsons; that the building was known as "West Point"; and that "West Point" had the general reputation of being a place where intoxicating liquors were sold, drunk, and given away in violation of law. Each of the defendants testified that he knew nothing of the sale of any intoxicating liquor on the premises. The trial court found otherwise, and that finding was justified by the evidence. The objection that the evidence was not sufficient to warrant judgment against the defendants is without foundation.

[4] 4. The court found as follows:

"Twentieth. From the circumstances shown by the evidence, and the findings as detailed in the preceding nineteen special findings, the court finds that defendants and each of them had knowledge and notice of the unlawful sale of intoxicating liquors on the premises, of the drinking of the same on the premises as a beverage, and that persons congregated there for all of said purposes."

The defendants contend that this finding was contrary to the evidence. The finding was not only supported, but was amply justified, by the evidence set out in the defendant's abstract.

[5] 5. The defendants insist that the testimony did not prove that a nuisance had been kept or maintained by them. It was not necessary to prove that they had kept or maintained the nuisance. It was sufficient if the evidence proved that the nuisance had been kept and maintained with the knowledge, permission, or consent of the defendants.

[6] 6. The petition, as originally filed, asked for \$100 attorney's fee. On the trial the court permitted an amendment so as to make the petition ask for an attorney's fee of \$200. The defendants complain of this. The granting of such permission was within the sound discretion of the trial court.

[7] 7. Complaint is made that \$200 attorney's fee was allowed without proof of the value of the services rendered. The services were rendered largely in the presence of the court. In *State v. Porter*, 76 Kan. 411, 415, 91 Pac. 1073, 1075 (13 L. R. A. [N. S.] 462), this court said:

"In many lawsuits the more burdensome part of the lawyer's duties are discharged out of court and beyond the observation of the judge, and in such cases evidence would be required thereof in court. In this case it is evident that his own senses and observation were the best witnesses possible to the judge, and this court is able to say from the record that under the circumstances the sum allowed as fees was not unreasonable for the services rendered."

[8] 8. The judgment enjoins the defendants and each of them and their agents, servants, employes, successors and assigns, and each of them, and all other persons, from keeping, maintaining, or operating, or per-

mitting to be kept, maintained, or operated, in or upon the premises described, or in the buildings situated thereon and appurtenant thereto, a place where intoxicating liquors are kept for sale, barter, or delivery in violation of law, and from selling, bartering, or giving away, or permitting to be sold, bartered, or given away, intoxicating liquors on said premises in violation of law, and enjoins all persons from entering into or congregating upon the premises for the purpose of drinking intoxicating liquors as a beverage, or from in any manner assisting in placing intoxicating liquors on said premises to be used in violation of law. The defendants contend that this judgment is too broad in its scope, and that it subjects the defendants to burdens unwarranted by the facts. There is no burden imposed on the defendants or either of them, except that of not using their premises in violation of law nor permitting them to be so used by others. When it is shown that a place is a common nuisance under the liquor law of this state, and an injunction is granted to abate that nuisance, the judgment should be broad enough to preclude every possibility of the continuation or reopening of the nuisance by the persons enjoined, or by any one acting for, by, through, or under them, or either of them, or with their permission.

The judgment is affirmed. All the Justices concurring.

FREEDOM TP. OF REPUBLIC COUNTY v. DOUGLAS, County Clerk, et al.
(No. 20876.)

(Supreme Court of Kansas. Nov. 11, 1916.)

(Syllabus by the Court.)

1. TAXATION \S 276—ASSESSMENT—SITUS OF PROPERTY.

It is competent for the Legislature to fix the situs of property for the purpose of taxation, and it was within its power to provide that the moneys, notes, and other property in the hands of the treasurer of a mutual fire insurance company shall be listed for taxation where he resides, and that all other property of the company shall be listed where the secretary of the company resides.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 453, 466-468; Dec. Dig. \S 276.]

2. STATUTES \S 95(1), 121(1) — TAXATION \S 40(11)—ASSESSMENT—SPECIAL LEGISLATION—SUBJECT AND TITLE OF ACT.

Chapter 276 of the Laws of 1905, which is amendatory of chapter 132 of the Laws of 1885, is not repugnant to sections 16 and 17 of article 2 of the state Constitution, nor is it violative of the constitutional limitation which requires a uniform and equal rate of assessment and taxation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 105, 106, 146, 173; Dec. Dig. \S 95(1), 121(1); Taxation, Cent. Dig. \S 83; Dec. Dig. \S 40(11).]

Original application by Freedom Township of Republic County for mandamus to Henry

Douglas, County Clerk, etc., and others. Judgment entered.

Mahin, Hasty & Mahin, of Smith Center, for plaintiff. Vance & McTaggart and H. H. Van Natta, all of Belleville, for defendants.

JOHNSTON, C. J. The situs of notes, bonds, and mortgages for purposes of taxation is the question involved in this case.

The Republic County Mutual Fire Insurance Company has its principal office and place of business in Belleville, Republic county, and it does business in Republic and adjacent counties. The secretary of the company is in charge of its office, has the custody of its notes, bonds and mortgages, and a part of his duties is to collect all moneys due the company, including the principal and interest accruing on the notes, bonds, and mortgages, and to pay the same over to the treasurer of the company. The investments of the surplus funds of the company are made by the executive board, and its orders are drawn upon the treasurer, who keeps an account of the moneys received and disbursed by him; and the book in which his accounts are kept is placed in the custody of the secretary in Belleville for safe-keeping. The secretary resides in the city of Belleville, while the treasurer resides in Freedom township, which is a part of Republic county.

On March 1, 1916, the treasurer had \$9,470 of the money of the company which he had placed on deposit in a bank of Belleville. At the same time the company had \$36,100 in value in notes and mortgages, which were in the hands of the secretary in Belleville, and he also had possession of \$400 worth of office furniture and fixtures. The assessor of Belleville listed the notes and mortgages, and also the furniture and fixtures mentioned, for taxation in the city. The assessor of Freedom township listed in his township not only the cash which was in the hands of the treasurer, but also the notes and mortgages of the company held by the secretary. Later the county clerk concluded that all the property of the company, including the cash, was taxable at Belleville, and so entered them on the tax roll.

[1] Is the situs of the company's property for the purpose of taxation in Belleville, where its principal office is maintained, or is the property, or some part of it, to be assessed in Freedom township? It is entirely competent for the Legislature, except as limited by the Constitution, to fix the situs of property, tangible and intangible, for the purposes of taxation. 37 Cyc. 947. In the absence of specific legislation, debts evidenced by notes and mortgages are ordinarily taxed at the domicile of the owner. There are general provisions of the statute on the subject of taxation to the effect that incorporated companies, except such as are specifically pro-

vided for by statute, are required to list, by their agents, their stock at the places where their principal offices are kept. Gen. Stat. 1909, § 9229. A provision of the tax law which was enacted in 1876 and amended in 1891, relating mainly to the taxation of the stocks of banks and investment companies, provides that that act shall apply to mutual fire and life insurance companies. Gen. Stat. 1909, § 9298. But for the enactment of a later statute which specifically provides for the listing and assessment of property of mutual fire insurance companies, the earlier provisions would apply to the property in question. In 1905 the Legislature amended chapter 132 of the Laws of 1885, and the statute as amended provides for the organization of mutual fire insurance companies, the kinds of property they may insure, the investment of their surplus funds, the duties of the officers and the control of their property, and, among other things, it provides:

"The treasurer and secretary shall each give bonds to the company for the faithful performance of their duties in such amount as shall be prescribed by the board of directors, and all moneys, notes or other property belonging to such company and in the hands of the treasurer shall be listed by him for taxation in the county, township and school district in which he resides, and all other property belonging to the company shall be listed by the secretary in the county, township and school district in which he resides." Gen. Stat. 1909, § 4220.

The obvious meaning of the section quoted is that property, including the moneys and notes of the company in the hands of the treasurer, is to be listed by him in the district where he resides, and that all property of the company not in his hands is to be listed by the secretary in the district where he resides. Here the treasurer had the custody of money to the amount of \$9,470 and had no other property in his hands; hence, this was properly listed in Freedom township, where he resided, and all other property of the company is to be listed in the city where the secretary resides. It is competent for the Legislature to fix the situs of property for taxation where it is either actually or constructively located, and for reasons of its own the Legislature chose to fix the situs of the property of the company at the residences of the officers who had actual custody of the same. In other instances the Legislature has exercised this power and provided that part of the personal property of an owner shall be listed where he resides while other personal property of his shall be listed where it is actually kept. Gen. Stat. 1909, § 9223. Property may have a situs as determined by common-law principles, or it may have one fixed by the Legislature, and within constitutional limits the Legislature has a free hand, and may fix the situs of any property wherever it sees fit.

[2] The provision in question, which is chapter 276 of the Laws of 1905, does not contravene the constitutional limitation which

requires a uniform and equal rate of assessment and taxation. It is true the property of the company located in the city may be taxed higher than that which is listed in the township, but that is true in many cases where the property of an owner is located in more than one taxing district. Each taxing district imposes taxes for municipal purposes at a rate to meet its necessities, and a tax imposed to pay for a bridge or a public building in one may not be needed in the other, with the result that more tax will be paid on the same valuation of like property in one district than in the other. The constitutional provision invoked relates to the rate of taxation, and only requires that the rate shall be uniform and equal throughout the district in which the tax is levied. *Com'rs of Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101. Nothing in the act in question infringes upon that limitation.

There is no ground either for the claim that it is special legislation, and therefore violative of section 17 of article 2 of the Constitution.

It is finally contended that the title of chapter 276 of the Laws of 1905 is not broad enough to cover its provisions; that is, the subject is not clearly expressed in the title, as required by section 16 of article 2 of the Constitution. The title is:

"An act to amend section 13 of chapter 132 of the Session Laws of 1885, relating to mutual fire insurance companies, and to repeal said section."

The act of which it is amendatory had a very general and comprehensive title, namely:

"An act to provide for the organization and control of mutual fire insurance companies, and to repeal chapter one hundred and eleven, Laws of eighteen hundred and seventy-five."

It provides for the organization and control of mutual fire insurance companies, the duties of their officers, the control and management of their property, their relations with the policy holders and with the public, and the title of the act was broad enough to have included any of the duties of the officers, including the listing of its property for taxation. The title of the amendatory act of itself is notice that the act relates to mutual fire insurance companies, and also that it is amendatory of the act of 1885, which has the comprehensive title. Titles of this kind purporting to amend other acts have been examined and upheld against the objection of narrowness. *Com'rs of Marion County v. Com'rs of Harvey County*, 26 Kan. 181; *La Harpe v. Gas Co.*, 69 Kan. 97, 76 Pac. 448.

It follows that the moneys in the hands of the treasurer must be listed in and entered upon the tax roll in Freedom township; while all other property of the company will be listed and entered for taxation in the city of Belleville.

Judgment will accordingly be given. All the Justices concurring.

SECURITY STATE BANK OF ROSEDALE
v. CLARKE et al. (No. 20099.)

(Supreme Court of Kansas. Nov. 11, 1916.)

*(Syllabus by the Court.)*1. **BILLS AND NOTES** \S 293—**INDORSEMENT—OPERATION AND EFFECT.**

Where a note secured by a mortgage is assigned before maturity to one of the makers, and reissued by him to a new obligee by means of an indorsement stating that the transfer is without recourse upon either of the makers individually, and that the assignee "assumes and agrees to pay the said note as between the makers thereof," the makers are thereby relieved from personal liability to any subsequent holder of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 662-664; Dec. Dig. \S 293.]

2. **MORTGAGES** \S 459(1) — **FORECLOSURE—ISSUES AND PROOF.**

No error is committed in allowing the claim of the assignor of a note to recover it, because of fraud practiced in obtaining it from him, to be litigated upon proper pleadings in an action brought by a subsequent holder to foreclose a mortgage which it secures, where all the persons affected are parties, and the issue is submitted to a jury.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1343, 1345; Dec. Dig. \S 459(1).]

3. **BILLS AND NOTES** \S 350—**INDORSEMENT—GOOD FAITH OF HOLDER.**

The owner of a note who has been fraudulently deprived of it may reclaim it against one who acquired it after maturity from the perpetrator of the fraud (or from one who obtained it from him without a valuable consideration) without notice thereof, as security for a pre-existing debt.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 882; Dec. Dig. \S 350.]

Appeal from District Court, Miami County.

Action by the Security State Bank of Rosedale against W. D. Clarke and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lane & Lane and Sheldon & Shively, all of Paola, for appellant. Sheridan & Sheridan, of Paola, and Rufus A. Underwood, of Tulsa, Okl., for appellees.

MASON, J. The Security State Bank brought an action seeking a personal judgment against W. D. Clarke upon a note executed by him and his wife, and the foreclosure of a real estate mortgage securing it. G. W. Hampton, one of the defendants, through whom, by intervening assignments, the plaintiff derived title, claimed to be the real owner of the note and mortgage, and entitled to their proceeds, on the ground that he had been induced by fraud to transfer them, and that the plaintiff had not acquired them under such circumstances as to give it the rights of an innocent purchaser. The court held that the admitted facts relieved Clarke from personal liability, and submitted Hampton's claim of ownership to a jury, which found in his favor, judgment being rendered on the finding. The plaintiff ap-

peals from the decision releasing Clarke, and from that declaring Hampton to be entitled to the proceeds of the mortgage.

[1] 1. The note was executed July 8, 1910, to the Citizens' State Bank of Paola, and was made payable in two years. On October 24, 1910, the payee executed an assignment purporting to transfer the note and mortgage to Clarke. On February 15, 1911, Clarke delivered the papers to G. E. Hampton, with this indorsement on the note:

"The within note is hereby transferred and assigned without recourse on either of the makers of the said note individually as shown by the assignment of the mortgage securing this note. W. D. Clarke."

The assignment written on the mortgage was in these words:

"For value received I, the undersigned, W. D. Clarke, transfer without recourse on me or upon my wife, the other maker, hereby assign and transfer, to G. E. Hampton, all my right, title, and interest in and to a certain mortgage executed by myself and wife on the following real estate: [Describing it.] * * * As a part consideration of this assignment the said G. E. Hampton assumes and agrees to pay the said note as between the makers thereof. The said note having become due prior hereto by reason of the default in the payment of the interest thereon under the terms of said mortgage, this assignment is made with the agreement on the part of the present holder of the title to said real estate, subject to this mortgage."

Subsequently assignments of the note and mortgage were made by G. E. Hampton to G. W. Hampton, by G. W. Hampton to W. J. Hartman, by Hartman to P. S. Carpenter, and by Carpenter to the plaintiff.

By statute a note is discharged when the principal debtor becomes its holder at or after maturity. Gen. Stat. 1909, § 5372. Some difference of opinion exists as to whether the transfer of a note to its maker before it is due affects a discharge so as to prevent its further negotiation. 4 A. & E. Encycl. of L. 500, 501. See, also, 8 O. J. 342, 584; 3 R. C. L. 1272; note 95 Am. Dec. 587. Such an assignment to one of several makers is held to destroy its character as a negotiable instrument so far as to prevent the transfer by him of a right to look to his comakers for anything more than contribution. 4 A. & E. Encycl. of L. 501, and note 4. But no reason is apparent why a maker to whom a note has been assigned might not in any case reissue it in such manner as to make it binding upon himself. Curry v. Lafon, 133 Mo. App. 163, 113 S. W. 248. Such an arrangement where a discharge had been effected would, of course, constitute an entirely new contract. The plaintiff contends that here the use of the phrase "without recourse" in the indorsement only relieved Clarke from liability as an indorser, and left him still personally liable as the maker. That the parties actually intended that he should be released in one capacity and not in the other is hardly conceivable. Assuming, however, that the mere use of the term "without

recourse" would have that effect on the ground that custom has given it a meaning applicable only to an indorser, the indorsement on the note adopts by reference the provisions of the assignment written on the mortgage, and the language of the latter makes it clear that the parties had in mind that the assignee was to look only to the land for the payment of the indebtedness, having assumed the payment of the note "as between the makers." The special contract, by which the transfer of the note and mortgage was effected, being shown by the indorsement, was binding upon subsequent assignees, and should be enforced according to its obvious meaning.

[2] 2. G. W. Hampton pleaded, in substance, that he had traded the note and mortgage to W. J. Hartman for land which he fraudulently represented that he owned, but to which, in fact, he had no title. Evidence was introduced in support of the allegation, which was accepted by the jury and trial court, so that the fact for the purposes of this proceeding must be deemed to be established. The plaintiff contends that Hampton could raise the question of fraud only by a direct attack, while that which he has here undertaken is collateral. If Hampton was defrauded, he had a right to reclaim the note and mortgage in an action brought for that purpose. All the persons concerned or affected were parties to the foreclosure, and, as the issue of fraud was submitted to a jury, their rights were as fully protected as though a separate action had been brought for its determination, and no error was committed in requiring it to be decided in this one.

[3] 3. The transfer from Hartman to Carpenter was dated March 8, 1913, and was shown not to have been made for a valuable consideration, so that Hampton's right to reclaim the note was not affected by it. The vital question was whether the bank received the note from Carpenter under such circumstances as to give it the rights of an innocent holder as against Hampton. The note being overdue at the time, no question peculiar to the transfer of negotiable paper was involved. The rule with regard to the past-due note was the same as in the case of any ordinary personal property, an owner who had been fraudulently induced to part with its title could reclaim it from one who had received it without notice of the fraud, unless in obtaining it he had parted with something of value; and accepting it as security for an existing debt does not meet that requirement. *Schulein v. Hainer*, 48 Kan. 249, 29 Pac. 171; note, 36 L. R. A. 161.

There was some evidence to the effect that the plaintiff acquired the note in controversy as collateral security for a pre-existing debt, and the jury must be deemed to have found this to be the case; for the

court instructed them, in effect, that the plaintiff's right to be regarded as an innocent purchaser depended upon whether it acquired the note for a new consideration, or as security for a debt already incurred. The jury having found, upon sufficient evidence, that the plaintiff's rights to the note were no greater than Hartman's, it was concluded by the finding against him, and Hampton was properly adjudged to be entitled to the proceeds of the mortgage.

Complaint is made of the sustaining of an objection to a question asked of one of the plaintiff's witnesses, but the matter to which it related seems to have been covered by other testimony, and in any event no showing was made at the hearing of the motion for a new trial as to what the answer would have been. Civ. Code, § 307 (Gen. St. 1909, § 5901).

The judgment is affirmed. All the Justices concurring.

BELL v. FLEMING.

(Supreme Court of Oregon. Nov. 21, 1916.)

APPEAL AND ERROR—§ 624—RECORD—TIME FOR FILING—EVIDENCE.

Where an appeal was perfected in accordance with L. O. L. § 550, subd. 4, on April 19th, the trial court had no authority, under section 554, requiring the transcript to be filed within 30 days after the appeal is perfected, to enter an order on May 27th extending the time to file the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. § 624.]

Appeal from Circuit Court, Multnomah County; Henry B. McGinn, Judge.

Action by Seymour H. Bell against J. C. Fleming. From a judgment for plaintiff, defendant appeals. Dismissed.

C. M. Idleman, of Portland, for appellant. Leon W. Behrman and Maurice W. Seitz, both of Portland, for respondent.

PER CURIAM. This is a motion to dismiss an appeal on the ground that an order of the trial court enlarging the time within which to file the transcript on appeal was not made while that court retained jurisdiction of the cause. An inspection of the papers sent up in this cause shows that on February 15, 1916, the plaintiff secured a judgment against the defendant; that on April 4th following a notice of appeal was served and filed by defendant's counsel, who 10 days thereafter also served and filed an undertaking on appeal. No objections to the sufficiency of the sureties on the undertaking appear to have been made, and hence the appeal became perfected April 19, 1916. L. O. L. § 550, subd. 4. The appellant was allowed thereby 30 days from the latter date, or until May 19th, in which to file his transcript on appeal. Id. § 554. The order ex-

tending the time in which to file the transcription was not made until May 27, 1916.

The trial court had lost jurisdiction of the cause, and hence the motion is allowed.

MERIDIANAL CO. v. BOURNE.

(Supreme Court of Oregon. Nov. 21, 1916.)

APPEAL AND ERROR \S 419(1)—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL—IDENTIFICATION OF JUDGMENT.

A notice of appeal describing the judgment appealed from by reference to the title and date of entry, if insufficient to identify the judgment, may be read in connection with the undertaking on appeal, including in its description of the judgment the statement of the amount for which it is entered, and, when so read, sufficiently identifies the decision to confer jurisdiction on the Supreme Court by the filing of the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2145; Dec. Dig. \S 419(1).]

Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Action by the Meridianal Company against J. Kenyon Bourne. From a judgment for plaintiff, defendant appeals. Motion to dismiss denied.

R. O. Wright, of Portland, for the motion. Clyde Richardson, of Portland, opposed.

MOORE, O. J. This is a motion to dismiss an appeal on the ground that the written notice thereof does not sufficiently identify the judgment attempted to be reviewed. Omitting the immaterial parts of the notice, it reads:

"You and each of you are hereby notified that the defendant J. Kenyon Bourne, in the above-entitled action, hereby appeals to the Supreme Court of the state of Oregon, from all that certain judgment rendered and entered in the above-entitled court and cause on the 17th day of June, 1916, which said judgment was in favor of the plaintiff and against the defendant."

If it be assumed that this notice is inadequate under the rule announced in this court (Crawford v. Wist, 28 Or. 598, 39 Pac. 218; Hamilton v. Butler, 33 Or. 370, 54 Pac. 200; Duffy v. McMahon, 30 Or. 806, 47 Pac. 787), the undertaking on appeal may be read in connection with the notice for the purpose of identifying the judgment or decree complained of (Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675; Keady v. United Rys. Co., 57 Or. 325, 100 Pac. 658, 108 Pac. 197; MacMahon v. Hull, 63 Or. 133, 119 Pac. 348, 124 Pac. 474, 126 Pac. 3; Holton v. Holton, 64 Or. 290, 129 Pac. 532, 48 L. R. A. [N. S.] 779).

The material part of the undertaking on appeal herein reads:

"Whereas, the defendant in the above-entitled action appeals to the Supreme Court of the state of Oregon from a judgment made and entered against defendant in said action in the said circuit court, in favor of the plaintiff in the said action and against the defendant on the

17th day of June, A. D. 1916, for \$1,000, and \$120 attorney's fees, and disbursements of \$26.65."

This description of the judgment sufficiently identifies the decision to be reviewed, and, when read in connection with the notice of appeal, shows that jurisdiction of the cause was conferred upon this court by the filing of the transcript.

The motion is denied.

FRENCH v. McKEAN, Sheriff, et al.

(Supreme Court of Oregon. Nov. 21, 1916.)

APPEAL AND ERROR \S 414—PROCEEDINGS TO TRANSFER CAUSE—NOTICE OF APPEAL—PERSONS ENTITLED—"ADVERSE PARTY."

Under L. O. L. \S 550, requiring notice of appeal to be served on such adverse party or parties as have appeared, an appeal by a defendant from a decree enjoining enforcement of the judgment will be dismissed where a codefendant of the appellant who would be compelled to pay the judgment in case of reversal of the decree appealed from is not served with process; an "adverse party," within section 550, being one whose interest in relation to the judgment or decree is in conflict with the modification or reversal sought by the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 2137, 2138; Dec. Dig. \S 414.

For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

In Banc. Appeal from Circuit Court, Sherman County; D. R. Parker, Judge.

Bill in equity by L. R. French against J. O. McKean, as sheriff of Sherman County, and others. From a decree for plaintiff, defendant W. L. Cooper appeals. Dismissed.

W. L. Cooper, of Portland, in pro. per. J. B. Hosford, of Moro (Roy J. Baker, of Grass Valley, on the brief), for respondent.

BEAN, J. At the threshold of the case counsel for plaintiff challenge the jurisdiction of this court to review the decree appealed from for the reason that the notice of appeal was not served upon all of the adverse parties who have appeared in the suit. It appears from the record that plaintiff, French, instituted a suit and obtained a decree in the circuit court of the state of Oregon for Sherman county against all of the defendants herein, declaring a certain judgment and decree in favor of C. E. Johnson, plaintiff therein, and against L. R. French, Harriet M. French, George E. Quiggle, S. Schupbach, Sarah Schupbach, W. C. Repass, Florence Repass, Emil Thielhorn, H. G. Kemp; Ben Kivich, Sarah Kivich, and Sam Chavis, defendants therein, for the sum of \$500, with interest at 10 per cent. per annum and \$150 attorney fees and \$31.25 costs, fully paid and satisfied, and enjoining the enforcement thereof on execution, that by the decree so enjoined it was provided for a sale of real estate upon the foreclosure of a mortgage, and further decreed that the

plaintiff therein have execution against L. R. French, Geo. E. Quiggle, S. Schubach, H. G. Kemp, and Ben Kivich for any balance that remained unpaid after the application of the proceeds of such sale.

In the present suit upon this appeal the notice was served upon plaintiff, L. R. French, but was not served upon any of the defendants. Section 550, L. O. L., provides in so far as it is here applicable:

"An appeal shall be taken and perfected in the manner prescribed in this section, and not otherwise. * * * If the appeal is not taken at the time the decision, order, judgment, or decree is rendered or given, then the party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place in the state," etc.

S. Schubach appeared and filed an answer in the cause, and plaintiff contends that notice of appeal should have been served upon this defendant. The judgment enjoined by the decree appealed from was against Schubach, and if the decree should be reversed and the judgment reinstated Schubach's interest would be affected, as according to the adjudication he would be required to pay the amount, and the notice of appeal should have been served upon him.

An adverse party, within the meaning of section 550, is a party whose interest in relation to the judgment or decree is in conflict with the modification or reversal sought by the appeal. *Conrad v. Packing Co.*, 34 Or. 342, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021; *Lillenthal v. Caravita*, 15 Or. 339, 15 Pac. 280; *Alliance Trust Co. v. O'Brien*, 32 Or. 333, 50 Pac. 801, 51 Pac. 640. This is a jurisdictional matter, and the court has no discretion to exercise. *Lane v. Wentworth*, 69 Or. 245, 133 Pac. 849. It was said in the latter case:

"It has constantly been determined by this court that, although parties are both plaintiffs or both defendants, yet if an appeal would unfavorably affect the rights of one of them, as determined by the decree appealed from, he is an adverse party as respects his coplaintiff or co-defendant, and that the jurisdiction of this court depends upon service of the notice upon all such parties."

The fact that Schubach claimed to be interested in the suit in another capacity would not change his status as to the judgment.

The appeal is dismissed.

MOFFITT v. CITY OF SALEM.

(Supreme Court of Oregon. Nov. 21, 1916.)

1. MUNICIPAL CORPORATIONS — 523(2) — RECOVERY OF BENEFIT ASSESSMENT—VOLUNTARY PAYMENT.

Where plaintiff paid a benefit assessment to have the lien on his lots discharged so that he might make a sale of the property, and he was not entrapped by sudden pressure of city's agent

into making the payment, and was not without other remedy, his payment was voluntary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1233; Dec. Dig. — 523(2).]

2. MUNICIPAL CORPORATIONS — 523(1)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—REFUND—PARTIES ENTITLED.

Plaintiff voluntarily paid a benefit assessment, under an agreement with the city treasurer to return it if illegal, and, the assessment being declared void, City Charter of City of Salem, § 52, was amended to authorize the return of the assessment to the record owners of property when the amendment was adopted. *Held*, that the right to recover money voluntarily paid in discharging a void tax must be found in a statute or ordinance authorizing it, and the agreement with the city treasurer was invalid, and therefore plaintiff's grantees, and not plaintiff, were the proper parties to receive the money.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1232; Dec. Dig. — 523(1).]

Department 2. Appeal from Circuit Court, Marion County; Percy B. Kelly, Judge.

Action by A. T. Moffitt against the City of Salem, a municipal corporation. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

The complaint charges:

"That at all times hereinafter mentioned defendant, the city of Salem, was and now is a municipal corporation, duly and regularly incorporated, organized, and existing under and by virtue of the laws of the state of Oregon; that on and between the 13th day of October, 1911, and the 10th day of November, 1911, defendant received from A. T. Moffitt the sum of \$115.44, to and for the use of plaintiff; that thereafter and prior to the commencement of this suit plaintiff duly demanded payment thereof from the defendant, but said defendant failed, neglected, and refused to pay the same to plaintiff or any part thereof."

The answer admits the incorporation of the defendant, but denies all other allegations above set forth. For a further defense it is stated that the defendant is a municipal corporation; that its common council enacted and the mayor approved ordinances numbered 821 and 876 the 27th day of June, 1910, and the 19th day of December, 1910, respectively, levying a special assessment within a specified district for the construction of the South Salem sewer, and laying upon lots 3 and 4 in block 19 of Nob Hill addition to Salem, Or., then owned by the plaintiff, a burden of \$115.44 for benefits conferred by the improvement, which sum was entered in the Docket of City Liens on the 29th day of December, 1910; that thereafter the validity of that assessment was contested in the courts, and before a final decision was rendered in the suit the plaintiff voluntarily paid to the defendant the sum so assessed, and the lien was discharged. For a further defense it is alleged that the assessment for the construction of that sewer was ultimately determined to have been irregular, whereupon

the charter of the city of Salem was amended, pursuant to which municipal bonds were issued by the defendant, sufficient in amount to defray the entire cost of the improvement; that prior thereto the plaintiff sold and conveyed the lots described in the complaint to C. Pemberton and his wife, who thereafter received from the defendant the payment so made by the plaintiff and interest thereon, amounting to \$129.83.

The reply controverted all the allegations of new matter in the answer, except that when the plaintiff paid the assessment he had an opportunity to sell the lots, in case he would procure the lien thereon to be discharged, without which release the purchasers refused to accept a conveyance. It asserts that the assessment was paid under protest in order to remove a cloud from the title to the lots, and that the money paid for that purpose was taken into consideration by the plaintiff and the purchasers of the real property. For a further reply it is stated that the defendant ought to be estopped from alleging or proving the defense set forth on the ground that when the assessment was paid it was agreed by and between the plaintiff and the defendant's officer who received the money that if the assessment should be decreed to be illegal the sum so received should be returned to Mr. Moffitt. By stipulation the cause was tried without a jury, and findings of fact and of law were made, and judgment was given to the plaintiff for \$115.44, with interest from November 10, 1911, and the defendant appeals.

B. W. Macy, City Atty., of Salem (Wm. H. Trindle and Rollin K. Page, both of Salem, on the brief), for appellant. W. C. Winslow, of Salem, for respondent.

PER CURIAM. The only question to be considered is whether the findings of fact support the conclusion of law and the judgment founded thereon. The findings of fact accord with the material averments of the complaint, of the answer, and of the reply. These findings further state that ordinances numbered 821 and 876 of the defendant were duly enacted and approved, pursuant to which a sewer was constructed in South Salem, and by reason thereof there was imposed on lots 3 and 4 in block 19 of Nob Hill addition to Salem, Or., then the property of the plaintiff, a burden of \$115.44, which sum was entered in the Docket of City Liens; that the validity of that assessment was challenged in a suit instituted for that purpose; that pending the decision of that cause the plaintiff had an opportunity to sell the lots, but the proposed purchasers would not accept a conveyance of the land until the lien was discharged; that the plaintiff paid the sum stated to the city treasurer pursuant to an agreement with him that if it should be finally determined that the assessment was invalid the sum so received would

be returned to Mr. Moffitt; that on the 25th day of October, 1911, the plaintiff and his wife executed to the purchasers, C. Pemberton and wife, a deed to the lots; that thereafter it was finally determined that the assessment was illegal (*Jones v. Salem*, 63 Or. 126, 123 Pac. 1098); that section 52 of the city charter was amended the 2d day of December, 1912, so as to authorize the defendant's council to issue and sell bonds, and from the money thus obtained to refund the sums collected on account of the assessment, and also to pay the contractors the remainder due for making the improvement. A clause of that amendment reads:

"(e) That upon the adoption of this amendment and the passing and adoption by the qualified voters of the city of Salem of an ordinance providing for the issuance of bonds or warrants for the payment of sewers and drains heretofore constructed, and for the refunding of outstanding bonds or warrants issued by the city for such purposes, and for the repayment of any and all special assessments levied on said account, the city council shall proceed to issue and sell said bonds as provided by law, and as may be hereafter provided by ordinance, and from the funds derived from the sale thereof shall repay to all property owners who have heretofore paid into the city treasury by themselves or their grantors such sum or sums as may have been from time to time paid by themselves or their grantors on account of the special assessment levied against any property to which said person holds the record title at the date of the adoption of this amendment, for the construction of sewers or drains."

The court further found that ordinances were enacted and approved carrying into effect that amendment; that pursuant to the provisions of those ordinances C. Pemberton and his wife filed their claim for the money so paid by their grantor, and thereupon received the same, with interest thereon amounting to \$129.83; that thereafter the plaintiff demanded of the defendant a return of the money which he had paid, but upon a refusal to comply therewith he instituted this action.

[1, 2] Unless the city treasurer was authorized to make a valid agreement on behalf of the defendant to return the money to the plaintiff in case the assessment was declared to be illegal, the findings of fact do not uphold the conclusion of law and the judgment, and C. Pemberton and his wife, the holders of the legal title to the lots December 2, 1912, when section 52 of the charter was amended, were the proper parties to receive the money. *Neer v. Salem*, 77 Or. 42, 149 Pac. 476.

The plaintiff paid the assessment in order to have the lien on the lots discharged so that he might make a sale of the property. He was not intrapped by sudden pressure of the defendant's agents into making the payment, nor was he without other means of escaping an existing or imminent infringement of his rights of person or property. His payment was voluntary. *Johnson v. Crook County*, 53 Or. 329, 100 Pac. 294, 133 Am.

St. Rep. 834; Tillamook City v. Tillamook County, 56 Or. 112, 107 Pac. 482.

The right to recover money paid by a person of his own accord in discharging a void tax must be found in a statute or ordinance authorizing the repayment. Board of Commissioners v. Ruckman, 57 Ind. 96, 98. In deciding that case Mr. Justice Worden, in speaking of the voluntary payment of an illegal tax, says: "Without some statutory provision, taxes thus paid cannot be recovered back." Before the amendment of section 52 of the charter the city treasurer could not make any valid agreement to repay the assessment voluntarily made, and for that reason the findings of fact do not support the conclusion of law.

The judgment is reversed, and the action dismissed.

CAPLES v. MORGAN.

(Supreme Court of Oregon. Nov. 21, 1916.)

1. PLEADING \S 259—AMENDMENT—SURPRISE.

In action by landlord for rent installments, where defendant counterclaimed for being induced by false representations to execute a lease of the premises for enhanced rental, allowing defendant during trial, over plaintiff's objection, to amend his answer so as to call his claim a set-off and recoupment instead of counterclaim, and to change the prayer to one that plaintiff take nothing and defendant be dismissed, was not error; it not being shown that plaintiff was surprised or her rights prejudiced thereby.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 783-792; Dec. Dig. \S 259.]

2. LIMITATION OF ACTIONS \S 62 — DEFENSES — FRAUD.

The statute of limitations cannot be urged against a mere defense, such as that defendant was fraudulently inveigled into the contract sued on, but such a defense lasts as long as the contract it affects; the statute of limitations applying only to one who seeks affirmative relief.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 342; Dec. Dig. \S 62.]

3. LANDLORD AND TENANT \S 233(2)—ACTION FOR RENT — QUESTIONS FOR JURY — FALSE REPRESENTATIONS.

In action for rent, where defendant sought to recoup damages for being induced by false representation to execute the lease for a higher rental than he would otherwise, the issue whether the false representation did have the effect of inducing defendant to agree to the higher price was for the jury's determination.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 941; Dec. Dig. \S 233(2).]

4. LANDLORD AND TENANT \S 223(4)—ACTION FOR RENT—RECOUPMENT.

In an action for rent, that the tenant, by false representations of the landlord's agent that another party was seeking a lease of the premises at a higher price, was induced to execute the lease at such higher price, was a good defense by way of recoupment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 887, 888; Dec. Dig. \S 223(4).]

5. SET-OFF AND COUNTERCLAIM \S 6 — "RECOUPMENT"—NATURE.

"Recoupment" is the keeping back or stopping something which is due, and, under the principles of the common law, recoupment could

be invoked when defendant sustained damages from plaintiff's nonperformance of the contract sued on, in which case the damages to which the defendant was entitled could be abated from plaintiff's claim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. \S 6, 7; Dec. Dig. \S 6.]

For other definitions, see Words and Phrases, First and Second Series, Recoupment.]

6. FRAUDS, STATUTE OF \S 58(1)—LEASES — TERM FOR YEARS—ORAL NEGOTIATIONS.

In an action for rent on five-year lease, where defendant sought recoupment of damages from false representation of plaintiff's agent that another party desired the lease at a higher price, inducing defendant to execute the lease at such higher price, the oral negotiations of the parties concerning the lease were inadmissible under L. O. L. \S 808, providing that leases for a longer period than one year are void if not in writing, and no evidence of such agreement shall be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 90; Dec. Dig. \S 58(1).]

7. LANDLORD AND TENANT \S 223(3) — DIFFERENCE BETWEEN LIABILITY INCURRED FOR RENT AND RENTAL VALUE OF PREMISES.

Where a tenant was induced to take a five-year lease of an apartment house at \$10 instead of \$8 per room per month by false representation of landlord's agent that another party had offered to take the lease for the higher price, and set up such claim in recoupment in action by the landlord for installments of the rent, the measure of his damages was the difference between the agreed rent and the reasonable value of the premises as of the date the contract was made.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 886; Dec. Dig. \S 223(3).]

Department 2. Appeal from Circuit Court. Multnomah County; C. U. Gantenbein, Judge.

Action by Jane Caples against W. L. Morgan. From judgment for defendant, plaintiff appeals. Reversed and remanded.

This is an action to recover sundry monthly installments of rent alleged to be due upon a five-year lease of real property in Portland, the execution of which and possession thereunder being admitted. That anything is due is denied. Answering affirmatively, the defendant alleged, in substance, that he was the principal stockholder in a firm of architects engaged in the business of building apartment houses and family dwellings; that oral negotiations were entered into between the defendant and the agent of plaintiff for the erection upon the real property of the latter of an apartment house containing 71 rooms, to be leased to the defendant for the term of five years at the rate of \$8 per room per month; that before the negotiations were completed and the lease finally executed the plaintiff's agent falsely represented to the defendant that a third party had offered to take a lease for that term at the rate of \$10 per room per month, in which event, if accepted, the defendant

firm would not be allowed to construct the building; that this representation was made for the purpose of inducing the defendant to agree to the larger rental; that, relying upon the statement mentioned, and believing it to be true, the defendant agreed to the lease in question at the larger rental, and as he says, "will be obliged for the remainder of the term of said lease to pay the sum of \$2 per room per month more than he had agreed with said agent to pay for the same, or than said plaintiff was offered for same, or could have then or now receive from any other person therefor, or than same was then or is now worth, and defendant was, has been, and is damaged by reason thereof and thereby in the sum of \$8,520." A demurrer to the further and separate answer on the ground that it did not state facts sufficient to constitute a cause of defense to the complaint or counterclaim against the plaintiff, and that the defendant's cause of action set forth as a counterclaim did not accrue within two years prior to the commencement of this action nor within two years prior to the filing of the counterclaim, was overruled. Every allegation in the new matter of the answer was denied by the reply, except as expressly admitted therein. It admits that the agent was authorized to negotiate for and find a tenant for an apartment house to be erected on the property, and to negotiate for proposals to construct the same, but that he was not authorized to enter into such a lease, nor to conclude the contract for the construction of the building; that the defendant proposed to the agent to take a lease on the building to be erected for five years on the basis of \$8 per room per month, but that the proposal was never accepted. It also admits that the agent represented that the third party had made an offer for a lease running for the same term at \$10 per room per month, and avows that the plaintiff is informed and believes, and therefore alleges, that the offer had, in fact, been made; and, lastly, affirmatively avers the defense of the statute of limitations, for that it appears that the alleged fraud was perpetrated April 11, 1910, whereas the answer was not filed until more than two years after that date. A general demurrer to the new matter in the reply was sustained, apparently on the ground that the questions involved had been settled by the ruling on the demurrer to the allegations of the answer. During the progress of the trial, over the objection of the plaintiff, the defendant was allowed to amend his answer so as to call it set-off and recoupment instead of counterclaim, and by changing the prayer to the effect that the plaintiff take nothing and defendant be dismissed with his costs and disbursements. The jury found a special verdict to the effect that the statement of the agent that the third party had offered \$10 per month was false, that defendant in taking the lease relied upon that offer, and that

but for the offer he would have secured it at a rental of \$575 per month for the whole building; and as a general verdict the jury found for the defendant. From the judgment rendered on this verdict, the plaintiff appeals.

M. L. Pipes and J. W. Reynolds, both of Portland (Flagel, Reynolds & Flagel, of Portland, on the brief), for appellant. T. G. Greene and E. B. Seabrook, both of Portland (Bauer & Greene, A. H. McCurtain, and Malarkey, Seabrook & Dibble, all of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1, 2] Complaint is made about permitting the amendment of the answer. It is not shown, however, that the plaintiff was taken by surprise or that her rights were prejudiced thereby. She could not have experienced any injury on that account; for, whereas the original answer demanded a judgment for the excess of the damages alleged over what should be found due to the plaintiff by the terms of the lease, the change allowed her to escape any judgment for this possible overplus. Neither can the statute of limitations be urged against a mere defense of the kind here involved. Our statute stating the time within which actions may be brought refers to instances where the party claiming to have been defrauded institutes proceedings on his own behalf for the recovery of damages. It does not contemplate mere resistance of a claim founded upon a contract into which the defendant has been inveigled by the fraudulent conduct of the other contracting party. The rule is thus stated by Mr. Justice Henshaw in *Hart v. Church*, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195:

"It is also true that, where a party seeks relief upon the ground of fraud or mistake, the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake; but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three-year statute of limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and, when enforcement is sought against him, excuse himself from performance by proof of the fraud."

To like effect are the cases of *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732; *State v. Tanner*, 45 Wash. 348, 88 Pac. 321; *Advance Co. v. Doak*, 36 Okl. 532, 129 Pac. 736. The injured party is not bound to presume that his adversary will at all events endeavor to enforce the contract which is corrupted with his own fraud, at least beyond what would be justly his due. A wronged individual may safely rest on a mere defense grounded upon the deceit of the other party so long as the

contract itself is liable to be enforced. The taint is inherent in the agreement, and as a defense will last as long as the convention it affects.

The most difficult question to be determined is whether or not the false representation that the third party had offered \$10 per month is material and vitiates the contract or is a basis of damage pro tanto. That the representation was false is established by the special verdict of the jury beyond our power to investigate. So far as the precise question thus presented is concerned it is new in this state. There are many authorities which sustain the position of plaintiff. The argument is stated in *Williams v. McFadden*, 23 Fla. 143, 1 South. 618, 11 Am. St. Rep. 345, as follows:

"To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions in regard to some facts or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of the contract which will render it void or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation"—citing 3 *Suth. Dam.* 484, and *Long v. Woodman*, 58 Me. 49.

The reasoning seems to be that the representation does not affect or pretend to affect the intrinsic qualities of the property under consideration; that the statement of the offer of the third party is but another way of saying that he has an opinion that the value is so much; that opinions are not material, and may be set down as "trader's talk." A fair statement of the rule relied upon by the plaintiff is found in *Beare v. Wright*, 14 N. D. 26, 103 N. W. 632, 69 L. R. A. 409, 8 Ann. Cas. 1057:

"It is apparent that the representation as to what others paid for the stock did not affect its value. It has not been found that there were any fiduciary relations existing between the parties, or that there were any other facts or circumstances giving rise to an implied agreement that the price paid by the vendor or others should be the price to the plaintiff. It is not found or admitted that there was any express contract to that effect. In the absence of special circumstances of that nature, a mere false statement as to the price paid by the vendor or others is not actionable deceit"—citing many authorities.

Again, in *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086, the court, speaking by Mr. Chief Justice Campbell, says:

"While a statement by the vendor that property cost him a certain sum of money is not a mere expression of opinion, but a statement of fact which, if relied upon and proved to be false, may be a ground for rescinding a contract entered into upon the faith of it, it is quite uniformly held that a statement by a vendor that he has been offered a certain sum for his property, or that it is of any given value, are not such representations of fact as to be the foundation of an action."

In *Dingle v. Trask*, 7 Colo. App. 16, 42 Pac. 186, a creditor of a merchant falsely stated to him that another creditor was about to attach the property of the merchant, and so induced the latter to give him a mortgage upon his goods. The court held that this false statement did not constitute ground for an action of deceit looking to the cancellation of the mortgage. In *Dillman v. Nadleffer*, 119 Ill. 567, 7 N. E. 88, it was held that a false statement by the defendant that he had been offered \$25,000 for a certain patent furnished no ground for rescission of the contract induced by this statement. In *Noetting v. Wright*, 72 Ill. 390, the syllabus says:

"A purchaser cannot maintain an action against his vendor for false statements in regard to the value of the property purchased, or its good qualities, or the price he has been offered for it."

Like cases are these: *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Hemmer v. Cooper*, 8 Allen (Mass.) 334; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Mackenzie v. Seeberger*, 76 Fed. 108, 22 C. C. A. 83; *Brown v. Castles*, 11 Cush. (Mass.) 348.

Even upon authorities holding that the simple representation falsely made of an offer for the property being sold will not vitiate the contract, many exceptions have been engrafted in the progress of time. For instance, where the party making the representation has or affects to have superior knowledge as to the value of the property, while the other party is ignorant and relies upon the statement thus made, or where the property is at a distance so great that it is impracticable for the buyer to examine the same, the representation is held to be material, and its falsity will avoid the contract. On the theory that a statement of an offer is but the expression of some other man's opinion, this court has restricted the doctrine in *Olston v. O. W. P. & R. Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915, note, where it is held that a statement of an opinion is necessarily based on a fact or carries with it such an inference that it can be interpreted as a statement of fact, and where it is known to be false and made with intent to deceive, it may be actionable.

On the other hand, there are many authorities indicating that the trend of judicial thought is toward the doctrine that, where a falsehood is uttered in a manner calculated to and which does swerve the judgment of a reasonably prudent man under all the circumstances, it will work the destruction of the contract or an award of damages in favor of the injured party. If, notwithstanding the deceit, he makes an independent investigation of the matter, and through that method forms his judgment and decision, he must abide by the resultant contract under the doctrine of *Wimer v. Smith*, 22 Or. 463,

30 Pac. 416, for thus it is made to appear that he did not rely upon the cozenage of the other party. The case of *Strickland v. Graybill*, 97 Ya. 602, 34 S. E. 475, directly holds the doctrine that a false representation about the offer of another directly affects the value of the property in question. So do *Ives v. Carter*, 24 Conn. 392, and *Seamen v. Becar*, 15 Misc. Rep. 616, 38 N. Y. Supp. 69. Cases like *Prescott v. Brown*, 30 Okl. 428, 120 Pac. 991, *Stauffer v. Hulwick*, 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914A, 951, *Kehl v. Abram*, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158, *Fottler v. Moseley*, 179 Mass. 295, 60 N. E. 788, and *Chisum v. Huggins* (Okl.) 154 Pac. 1146, are all complicated more or less with fiduciary relations existing between the parties or ignorance of the defrauded party who relies upon the superior knowledge of the other, or where opportunity to examine the property has been denied to the one who suffers from the fraud. A valuable case with an exhaustive note appended is *Kohl v. Taylor*, 85 L. R. A. (N. S.) 174, reported also in 62 Wash. 678, 114 Pac. 874.

[3, 4] We think the better argument may be thus stated: The ground for saying that an opinion as to value is negligible is that it is impossible to prove the falsity of a mere matter of judgment about which honest men may reasonably differ. But even this rule has been restricted as above stated. The reason, however, fails when a statement is made of a fact the truth of which may be demonstrated or disproved. In the present instance the third party either made the offer or he did not make it. That fact is capable of proof or refutation. There can be no honest difference of opinion about whether or not he made the offer. Again, the statement of the fact of the offer at the increased price was made for the purpose of inducing the defendant to agree to the higher price. It was intended to operate in that direction, and whether or not it did have that effect is for the jury to determine. If demonstrable falsehood has been used to induce the execution of a contract in a manner calculated in the judgment of a jury to influence the decision of a reasonably prudent man under all the circumstances, it is sufficient to defeat the agreement at the election of the injured party. Under such conditions the court will not busy itself to determine how much untruth may be injected into a transaction without spoiling it. It is wrong to lie, and a person who has thus set a trap for the other party cannot be heard to complain that the latter should not have walked into the snare. It better comports with common honesty to condemn falsehood as a means of constructing a contract. There was no error in overruling the demurrer to the answer on that ground.

[8] It remains for us to consider to what extent the recoupment urged by the defendant shall be allowed to prevail in this ac-

tion. This is not an action to rescind the contract. On the contrary, the defendant proceeds in affirmation of the agreement, does not allege a return of the property which he received under the lease, but as originally framed demands an affirmative judgment for damages in excess of what remained due on the rent. The amendment whereby he waives such a judgment and uses his claim for damages as a mere defense does not alter the case. Recoupment, as defined by Mr. Justice Moore in *Krausse v. Greenfield*, 61 Or. 502, 507, 123 Pac. 392, 394, Ann. Cas. 1914B, 115, is the keeping back or stopping something which is due. He says:

"Under the principles of the common law, 'recoupment' could be invoked when the defendant sustained damages by reason of the plaintiff's nonperformance of his part of the contract sued on, in which case the damages to which the defendant was entitled could be abated from the plaintiff's claim."

The question then is: By what rule shall it be determined how much the defendant is entitled to hold back from the amount due on the rent, conceding, as we must under the verdict, that he was imposed upon by the fraud of plaintiff's agent? The plaintiff requested and the court refused the following instructions to the jury:

"If you believe from the evidence that the rental under this lease was a reasonable rental at the time the lease was entered into, taking into consideration the rents then prevailing, you must allow defendant nothing on his counterclaim. If you find for defendant on his counterclaim, you should determine how much less valuable this lease was to defendant than if Phil Gevurtz had made the offer of \$10 per room as represented, and allow such amount to defendant as his damages. In assessing damages, if any are assessed, you are not to take into consideration any decrease in the rental value of the property which has occurred since April 11, 1910, the date of this lease, for plaintiff could not be charged with any loss accruing to defendant by a decline in the rental value."

It appears from the record that the plaintiff offered to prove what was the reasonable rental value of the building at the time the defendant took the lease, but this offer was denied, over the plaintiff's exception. The theory adopted by the court is embodied substantially in this instruction to the jury:

"There can be no middle ground in this case on the question of the amount of damages defendant has sustained, if any. If you find the issues in favor of the defendant, then your duty would be to ascertain the amount of credit he was entitled to. In doing this you must find from the evidence one of two possible facts: Either that defendant could and would have secured said lease at a rental of \$575 per month but for said alleged false representation, or, on the other hand, that he could and would not. If you find the fact to be that defendant would have secured said lease at the monthly rental of \$575 per month but for said representation, defendant has been damaged to the extent of \$135 per month for five years, and your verdict should in such case be for defendant; but if you fail to so find, then plaintiff is entitled to a verdict for the sum of \$6,515.05."

The sum of \$575 alluded to in this instruction was what the defendant claims was orally agreed upon as the rental of the building

per month prior to the execution of the written lease.

[6] As a standard for the measurement of damages the oral negotiations of the parties must be laid out of the case because of the provisions of section 808, L. O. L. It is there stated:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * * 6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein. * * *"

This enactment, more stringent in its terms than most statutes of fraud in other states, not only says that an oral agreement is void, but goes further, and interdicts any evidence of such a convention. For the purposes of this case, therefore, the oral testimony about what was offered for the lease on the one hand and accepted on the other is utterly of no value whatever.

[7] It is stated by Mr. Justice Bean, in *Robertson v. Frey*, 72 Or. 599, 604, 144 Pac. 128, 130:

"The general rule of damages in cases of fraud is that the party defrauded is entitled to recover the amount of loss caused by the fraud of the other party, or damages adequate to the injury which he has sustained. The recovery must be limited to the actual loss. 20 Cyc. 130. There are a great number of cases in which the rule is stated that the measure of damages is the difference between the value of the thing purchased and the price paid, or in case of exchange the difference between the value of that with which the injured party was fraudulently induced to part and what he received."

In *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279, there was before the court a case wherein the plaintiff sought to recover damages which he had suffered by reason of the purchase of stock in a corporation induced by false and fraudulent representations made to him by the defendant. Mr. Chief Justice Fuller said:

"If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery. Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that

would necessarily be applied in reduction of the damages."

The matter may be likened to a statement of account between the parties wherein the defendant's gross damages may be set down as the amount of rent which he agreed to pay. With this he must be credited. In reduction of this he must be charged with the reasonable value of that which he received. If the value of what he has received is less than or equal to the amount of gross damages, the verdict should be for the defendant under the present form of the pleading; but, if the value of what he received is greater than his gross damage, the verdict should be for the plaintiff in the amount of the difference. The written lease, affirmed as it is by the defendant, is the contract by which the parties must be bound, subject to abatement in damages by reason of fraud alleged to have been practiced on the defendant. To refer to the oral convention said to have been had between the parties as a standard for fixed damages would be to make a new contract for them and to install as a rule governing their conduct what the statute says is utterly void and beyond the pale of testimony. The defendant may have been outwitted in the contest over the price to be paid; but it does not follow that because the plaintiff was at fault we must violate the statute of frauds and establish a contract which the parties did not make and which the law says is null and of no effect. In correcting the balance of the scale disturbed by the fraud of the plaintiff, we must not go as far the other way beyond the reasonable value of the property which he received. The question about the abatement of the rental value must therefore be decided by what is the difference between what the defendant agreed to pay and the reasonable value of what he received as of the date the contract was made. He took his chances about fluctuation in the market value of rents, and a subsequent decline cannot affect the case. If, indeed, the rent was reasonably worth the stipulated price, or if he has himself recouped his loss, he has no cause of complaint, for damages can be awarded only to one who has been really injured.

For these reasons, the judgment is reversed, and the cause remanded for further proceedings.

MOORE, C. J., and BEAN and HARRIS, JJ., concur.

PARKER v. CITY OF HOOD RIVER et al
(Supreme Court of Oregon. Nov. 21, 1916.)

1. STATUTES §64(5) — CHARTER — EFFECT OF PARTIAL INVALIDITY.

A provision in a city charter for personal liability on an assessment for municipal improvements, if invalid, does not vitiate the charter in other respects.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 62, 195; Dec. Dig. §64(5).]

2. ESTOPPEL ~~§~~62(5) — MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — ASSESSMENTS.

A city is not estopped by unauthorized false statements of the city recorder as to the probable cost of an improvement from enforcing the assessment for the improvement.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 153; Dec. Dig. ~~§~~62(5); *Municipal Corporations*, Cent. Dig. § 379.]

3. MUNICIPAL CORPORATIONS ~~§~~514(7) — PUBLIC IMPROVEMENTS — ASSESSMENTS — IRREGULARITIES — "WAIVER."

An express waiver, in a bond given under L. O. L. § 3245 et seq., on application to pay an assessment for a municipal improvement under the terms of that act, of irregularities or defects in the proceedings for the improvement, does not affect a supplemental assessment therefor levied long after, of which the party could have no knowledge, since a "waiver" exists only when one, with full knowledge of material fact, does or forbears to do something inconsistent with the existence of the right or of his intention to rely on that right.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1211; Dec. Dig. ~~§~~514(7).]

For other definitions, see *Words and Phrases*, First and Second Series, *Waiver*.]

4. MUNICIPAL CORPORATIONS ~~§~~463 — PUBLIC IMPROVEMENTS — ASSESSMENTS — VALIDITY.

An assessment of \$485.44 for a street improvement, the estimated cost of which was \$255, being an excess of more than 90 per cent. over the estimate, is so unreasonable as to invalidate it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1107; Dec. Dig. ~~§~~463.]

In Banc. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Suit by F. E. Parker against the City of Hood River and others. From a decree for defendants, plaintiff appeals. Modified.

This is a suit to enjoin a sale of plaintiff's property in the city of Hood River in payment of certain special assessments against the same for the improvement of State street upon which such property fronts. From a decree dismissing the suit, plaintiff appeals.

S. W. Stark, of Portland, for appellant. Geo. B. Wilbur, of Hood River, for respondents.

BENSON, J. The history of this case as developed in the record is about as follows: Early in 1910 the common council of the city of Hood River determined to improve State street from the west line of Sixth street to the east line of East Second street and called upon the city engineer for an estimate of the probable cost. This having been supplied, the city notified plaintiff of the proposed improvement, that the estimated cost as to his property was \$255, and notified him to apply for a permit, under the provisions of an ordinance, in the event that he wished to do the work himself. Plaintiff did not take any steps to do the work himself, so a contract was let for the improvement by the city, and on September 19, 1910,

an ordinance was approved which declared the cost of the work and assessed the property of the plaintiff therefor in the sum of \$292. Thereafter, on October 6, 1916, plaintiff and his wife made written application to pay such assessment under the terms and conditions of the "Bancroft Bonding Act" (section 3245 et seq., L. O. L.), in which application, conforming to the terms of the statute, occurs the following:

"We, Frank E. Parker and Pearl J. Parker, hereby expressly waive all or any irregularity or defect, jurisdictional or otherwise, in the proceedings to improve said street, or lay said sewer, and in the apportionment and assessment of the cost thereof on the property affected thereby. * * *"

On May 11, 1911, the city recorder notified plaintiff of a supplemental assessment in the sum of \$198.44, making the total assessments upon plaintiff's property the sum of \$485.44. The property upon which this burden rests is a residence lot with a frontage of 47½ feet on State street.

[1] Plaintiff insists that these assessments are invalid by reason of the fact that the charter of the city contains the following clause:

"And from the time of the entry therein of an assessment against any property the sum so entered is to be deemed a tax levied and a lien against said property, and all other property within the city of Hood River then or thereafter owned by such person."

It is argued that this clause, in effect making the assessment a personal liability, is unconstitutional. The validity of such a provision has never been passed upon by this court; the only reference thereto which we have found being in the case of *Ivanhoe v. Enterprise*, 29 Or. 245, 45 Pac. 771, 35 L. R. A. 58, wherein Mr. Chief Justice Bean says:

"It is extremely doubtful whether a statute creating or authorizing a personal liability against a landowner for local improvements can be upheld on constitutional grounds."

It was not necessary to a decision of the case then pending, nor is it material in the case at bar; for, even if such a provision violates the Constitution in any particular, it would only vitiate the charter to that extent and no further. *State v. Wiley*, 4 Or. 184; *Fleischner v. Chadwick*, 5 Or. 152.

[2] In this case there is no attempt shown to subject any property to the burden of the lien other than that abutting upon the improvements. Plaintiff urges that he was misled by false representations of the city's agent as to the probable cost of the improvement, but the evidence discloses this to have been some loose statements in a conversation by the city recorder, and our attention has not been called to any authorities which would make the city responsible for unauthorized statements of an officer outside the scope of his authority, and these allegations can have no effect in our consideration of the case. We conclude that, so far as the first

assessment is concerned, the plaintiff is estopped to complain of any irregularities in connection therewith by reason of his express waiver in the application to pay the same under the provisions of the bonding act.

[3, 4] The waiver, however, does not effect the supplemental assessment levied long after, for "a waiver exists only when one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right." 40 Cyc. 259. In this case the plaintiff could not know that there would be another and additional assessment, and therefore did not waive his right to contest the validity thereof. Plaintiff contends very strenuously that the assessments are so greatly in excess of the estimates that he was misled thereby to his injury, and, as to the supplemental assessment, we think there is merit in his contention. It will be recalled that the estimated burden upon plaintiff's property was \$255. If the last assessment be upheld the actual cost will be more than 90 per cent. in excess of such estimate. We think this is so excessive a variance as to be unreasonable in the light of the doctrine set forth in *Miller v. Portland*, 78 Or. 165, 151 Pac. 728. The views herein expressed render a discussion of the other questions involved unnecessary.

The decree will be modified to the extent of enjoining the city from enforcing any lien as to the second assessment of \$193.44; neither party to recover costs in either court.

EVERDING & FARRELL v. TOFT et al.

(Supreme Court of Oregon. Nov. 21, 1916.)

1. BILLS AND NOTES — 373 — INDORSEMENT — RIGHTS OF HOLDERS.

The perpetration of fraud will not alone defeat the holder of a negotiable instrument, but it must be supplemented by a notice to the holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 966-970; Dec. Dig. — 373.]

2. BILLS AND NOTES — 327 — INDORSEMENT — "HOLDER IN DUE COURSE."

Under L. O. L. § 5885, defining a holder in due course, a person is not a holder in due course if he does not take the note in good faith without notice of any infirmity in the instrument or affecting the title of the person negotiating it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. — 327.]

For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

3. BILLS AND NOTES — 337 — INDORSEMENT — NOTICE OF DEFECTS.

A person who takes a note has notice of an infirmity in the instrument or defect in the title if he had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. — 337.]

4. BILLS AND NOTES — 339 — INDORSEMENT — BAD FAITH OF INDORSEE — "NEGLIGENCE" — "BAD FAITH."

While negligence is not synonymous with bad faith, yet where a person takes a note under suspicious circumstances and, having means of knowledge, willfully abstains from making inquiries, his intentional ignorance may result in bad faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 821-823; Dec. Dig. — 339.]

For other definitions, see Words and Phrases, First and Second Series, Bad Faith; Negligence.]

5. BILLS AND NOTES — 537(6) — ACTIONS — QUESTIONS FOR JURY.

The question of good or bad faith of the holder of a note is peculiarly for the jury and not for the court, especially when the burden rests on the holder to show that he became the holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1879; Dec. Dig. — 537(6).]

6. BILLS AND NOTES — 497(5) — ACTIONS — BURDEN OF PROOF.

Under L. O. L. § 5892, providing that when it is shown that the title of any person who has negotiated an instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as a holder in due course, when a note had its origin in fraud, the burden is on the owner to prove that he or some person under whom he claims was a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1683-1685, 1687; Dec. Dig. — 497(5).]

7. BILLS AND NOTES — 509 — ACTIONS — ADMISSIBILITY OF EVIDENCE.

In an action by an indorsee on a note for \$5,000, evidence that the plaintiff acquired the note for \$4,000 is admissible, especially in connection with information received by plaintiff as to one indorser and inquiries made or omitted concerning other indorsers and the maker, as bearing on the question whether the holder was chargeable with bad faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1740-1745; Dec. Dig. — 509.]

8. BILLS AND NOTES — 509 — ACTIONS — ADMISSIBILITY OF EVIDENCE.

A person may resort to circumstantial evidence to show that the owner of a negotiable instrument is not a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1740-1745; Dec. Dig. — 509.]

9. BILLS AND NOTES — 537(6) — ACTIONS — QUESTION FOR JURY.

In an action by an indorsee on a note, evidence held to present a question for the jury as to the good faith of the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1879; Dec. Dig. — 537(6).]

10. BILLS AND NOTES — 489(7) — ACTIONS — ISSUES AND PROOF.

Where a complaint on a note charges a defendant with being an indorser in due course of business, he cannot be held liable as a maker or guarantor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1638; Dec. Dig. — 489(7); Pleading, Cent. Dig. § 1325.]

11. BILLS AND NOTES — 48, 281 — LIABILITIES OF PARTIES — "PRIMARILY LIABLE" — "SECONDARILY LIABLE."

Under L. O. L. § 6023, providing that the person who by the terms of an instrument is ab-

solutely required to pay is primarily liable and all other parties are secondarily liable, the maker of a note is primarily liable while the indorser is secondarily liable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 65-68, 70, 71, 627; Dec. Dig. ¶48, 281.]

For other definitions, see Words and Phrases, First and Second Series, Primarily Liable; Secondarily Liable.]

12. BILLS AND NOTES ¶301—INDORSEMENT —“DISCHARGE” OF INDORSER.

L. O. L. § 5953, subd. 3, declaring that a person secondarily liable on an instrument is discharged by discharge of a prior party, applies only to a discharge by act of the creditor, and does not include discharges by operation of law, nor where, after a trial on the merits, the note is destroyed because of a vice inherent in the transaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 706-721; Dec. Dig. ¶301.]

For other definitions, see Words and Phrases, First and Second Series, Discharge.]

13. BILLS AND NOTES ¶538(1) — ACTIONS — INSTRUCTIONS.

Where, after a trial on the merits, it is determined that because of fraud and notice there is no subsisting debt of the maker of a note, there is no debt of an indorser, and it is error to instruct that there may be a verdict in favor of the maker, but against the indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1895-1898, 1902, 1906, 1907; Dec. Dig. ¶538(1).]

Department No. 2. Appeal from Circuit Court, Multnomah County; O. U. Gantenbein, Judge.

Action by Everding & Farrell against John F. Toft and others. From a portion of the judgment in favor of defendant J. L. Hoffman, plaintiff appeals, and from a portion in favor of plaintiff against defendant John F. Toft, the latter appeals. Reversed and remanded.

The Colombian Timber Company is a corporation, and it will be mentioned by its name or as the timber company. Everding & Farrell is likewise a corporation, but it will be referred to either by its corporate name or as the plaintiff. The Colombian Timber Company sold 5,000 shares of its capital stock to J. L. Hoffman who paid for it by executing a note for \$5,000 dated August 7, 1912, payable one year after date to the order of the timber company at the Merchants' National Bank of Portland, Or. Everding & Farrell purchased the note, on September 13, 1912, from the Colombian Timber Company for \$4,000. When the paper was delivered to the plaintiff it bore the indorsements of John F. Toft, the Colombian Timber Company, and John F. Shorey in the order named. Payment having been demanded and refused, the paper was protested, and the plaintiff then commenced this action to recover the full amount of the note, naming as defendants J. L. Hoffman, the maker, and John F. Toft, Colombian Timber Company, and John F. Shorey, the indorsers. The timber company and Shorey defaulted. Hoffman and Toft filed separate answers, each claim-

ing that the plaintiff purchased the note with knowledge of fraud. The complaint alleges that Hoffman executed and delivered the note, and that the paper was, "in due course of business, indorsed by the defendants J. F. Toft, the Colombian Timber Company, and John F. Shorey."

The defendant Toft defends by saying that W. E. Douglas as agent for the corporation came to him and "stated that the Colombian Timber Company was trying to raise some money by making a sale of said note, and as defendant John F. Toft was a business man on Front street, in Portland, Or., that if he (Toft) would indorse said note that the Colombian Timber Company could readily sell the same." The answer continues by alleging that the corporation through its officers and especially through its stock salesman W. E. Douglas represented that it owned logging equipment and machinery which could not be duplicated for less than \$50,000, and that it owned a contract, "which will no doubt run into millions of dollars," to log and ship for a price of \$50 per 1,000 feet board measure upwards of 5,000,000,000 feet of mahogany and Spanish cedar timber located on the Martello estate in the United States of Colombia, South America, and that for the purpose of raising funds with which to install "its machinery on the ground and commence actual operations of logging and shipping under the terms of its contract" it was offering to sell 50,000 shares of its treasury stock. Continuing, the answer recites that while acting for the Colombian Timber Company, Douglas represented that it owned property which was reasonably worth \$50,000, and was free from incumbrances, and that Shorey was worth \$100,000, and that the Hoffman note was accompanied by a negotiable instrument for \$10,000 which was held as collateral security. After charging that all the representations were false and that he indorsed the note in reliance upon them, Toft alleges that the timber company offered to sell the Hoffman note to Everding & Farrell, and that afterwards Thomas Farrell, who is a representative of the plaintiff—

"interviewed the defendant John F. Toft as to the genuineness of said promissory note, and at said time the said Thomas Farrell asked (stated to) said John F. Toft that said note had been offered to him (Thomas Farrell) for \$4,000, or \$1,000 less than the face value thereof, and that he was thinking of purchasing the same, whereupon the defendant John F. Toft made the following statement to Thomas Farrell: 'If the Colombian Timber Company was offering you that note for \$1,000 less than the face of the note there is something wrong with it. It certainly doesn't look good to me. You better investigate it further. There would be no occasion to sacrifice this note if the statements made to me by W. E. Douglas, the agent of this company, which were that the company had property of the reasonable value of \$50,000, and that John F. Shorey, the president of said company, was possessed of property of the reasonable value of \$100,000 were true. There is something radically wrong about this transaction.

You better be careful. I am going to investigate the matter myself. Don't buy this note expecting me to pay it, I never will."

Toft avers that notwithstanding the warning and information given by him the plaintiff "thereafter went and purchased said promissory note from the Colombian Timber Company," and consequently with "due notice that the note and indorsement by the defendant John F. Toft had been procured by fraud."

The answer filed by Hoffman sets forth that the timber company made false representations, substantially the same as those made to Toft, concerning the logging equipment, the timber contract, and the purpose for which the treasury stock was to be sold, but he goes further and alleges that "John F. Toft was at the time acting as agent of said defendant corporation" in the sale of its corporate stock, and that he conspired with W. E. Douglas, who was a stock salesman and promoted the sale to Hoffman, to induce a purchase of the stock, and told Hoffman that Douglas was reliable, and that "he (Toft) had carefully examined into the said proposition of defendant corporation, its properties and the value thereof, that it owned the properties" represented to be owned by it, and "that he had invested of his own money in the corporate stock in the said corporation the sum of \$5,000," and "that said capital stock was worth the par value thereof"; and Hoffman then avers that Toft never invested any sum in the capital stock, and that the only stock ever received by him was as a commission for inducing Hoffman to buy the 5,000 shares. Hoffman says that he relied upon the fraudulent representations of the corporation, and also upon the statements made by Toft, and on that account purchased the stock and gave his note. After stating that the plaintiff had purchased the note at a discount of 20 per cent., Hoffman then avers:

"That recently he has been informed, and therefore alleges the fact to be, that prior to the purchase of said note by plaintiff, plaintiff was warned that there was something wrong about the note, and advised to investigate the same; and that sufficient of the circumstances surrounding the transactions hereinbefore alleged was brought to the knowledge of the plaintiff, so that plaintiff was not and is not a purchaser for value in good faith, without notice of the facts hereinbefore set forth."

Plaintiff replied to both answers by denying any fraud or notice of the alleged infirmity in the note. A trial resulted in a verdict in favor of the defendant J. L. Hoffman, but at the same time the jury found for the plaintiff and against the defendant Toft for the full amount of the note. The plaintiff appealed from that part of the judgment which was favorable to Hoffman, while Toft appealed from that portion which is against him.

C. A. Bell, of Portland (Reed & Bell, of Portland, on the brief), for appellant. E. B. Seabrook, of Portland (Malarkey, Seabrook &

Dibble and Walter G. Hayes, all of Portland, on the brief), for appellant John F. Toft. A. E. Clark, of Portland (M. H. Clark, of Portland, on the brief), for defendant J. L. Hoffman.

HARRIS, J. (after stating the facts as above). The plaintiff appealed because the court: (1) Denied a motion to strike out all evidence relating to the charge of fraud; (2) refused to direct a verdict for the plaintiff; and (3) instructed the jury that "under the evidence in this case, you may find a verdict in favor of the defendant Hoffman, although you may find the plaintiff is entitled to recover against the defendant Toft." The appeal prosecuted by Toft is predicated upon the theory that the discharge of the maker of the note necessarily operates as a discharge of the indorser.

The nature of the questions involved in the two appeals makes it proper to take some notice of the testimony before attempting to discuss the assignments of error. The Colombian Timber Company issued a printed prospectus and employed W. E. Douglas to sell its capital stock. The prospectus stated that the timber company owned tools, machinery, and equipment for logging, "and in fact complete equipment for the woods" which "could not be duplicated for less than \$50,000," and that "the company also owns the contract for logging the property of the Fearon & Martello Company, the value of which cannot be estimated, but which will no doubt run into millions of dollars." The prospectus recited that the timber company "will engage in the business of logging mahogany and Spanish cedar timber exclusively, and by virtue of a logging contract which it holds covering upwards of 5,000,000,000 feet of timber," and it is also represented that "the Colombian Timber Company offers for sale 50,000 shares of its treasury stock, fully paid and nonassessable, at par, \$1 per share. The funds realized from the sale of this stock will be used to install its machinery on the ground and commence actual operations of logging and shipping under the terms of its contract as hereinbefore set forth." The statements appearing in the prospectus were false. The timber company did not own any logging tools, machinery, or equipment, nor did it own any logging contract. The Colombian Timber Company owned practically nothing except a few books and some stationery. According to the testimony of Hoffman his attention was first directed to the Colombian Timber Company by Toft who gave him a copy of the prospectus, "and explained that it was a great proposition to invest money in," and "that he was going to invest \$10,000 of his own money, and he thought if I wanted to put any money in, there was not a better proposition open." A few days afterwards Toft introduced Hoffman to Douglas, and, according to the testimony of Hoffman, he

was told by Toft that he could rely upon any statements made by Douglas. Hoffman and Douglas then went to the office of the timber company, and, after being assured by Douglas that the statements in the prospectus were true, Hoffman there, either at that time or three or four days afterwards, gave his note in payment for the 5,000 shares of the capital stock which he purchased. A note payable to Hoffman was delivered to the timber company as collateral security. The next day a certificate for 500 shares of the capital stock was issued in the name of Toft and delivered at his place of business. Toft indorsed the note after it was delivered to the payee, and on August 9, 1912, he received from the Colombian Timber Company a certificate for 5,000 shares of its capital stock in payment for his indorsement.

The plaintiff buys and sells "grains, salmon, and the like," and does not "make a business of buying and selling notes on the market," although it loans "a great deal of money." Everding & Farrell purchased the note from the Colombian Timber Company for \$4,000. Before buying the paper Thomas G. Farrell, who is the secretary of the plaintiff, and conducted the negotiations for the purchase of the note, made inquiries at a bank concerning the financial standing of Toft, and ascertained that the latter was "good for any amount to \$5,000"; he made no inquiries concerning the timber company, but was told that Shorey was "reputed to be worth a good deal of money"; he testified that he did not realize that the maker of the note was the defendant J. L. Hoffman because he "always called him Joe," notwithstanding the fact that he had known Hoffman for many years and had "asked Mr. Toft who the man was, and he said he was a farmer out here somewhere"; and he also told the jury that the note was purchased because of the financial worth of Toft and without knowing whether the maker "had one dollar or a million."

Thomas G. Farrell had at least one and probably two conversations with Toft before purchasing the note. Toft testified that:

"Mr. Thomas Farrell came down and asked me if I indorsed a note to the Colombian Timber Company for \$5,000. I stated that I had, and probably some other remarks were made, but nothing of any importance, and he went away. A few days later he came down and said they were offering the note for \$4,000. I said, 'Tom, if such is the case, there is something wrong.' The statement made to me by Mr. Douglas was that the company owned property valued at \$50,000, the president was worth \$100,000, the vice president was worth from \$40,000 to \$60,000, and that they were holding as collateral security a note for \$10,000, and that if those facts were true, there would be no occasion to sell that note for \$4,000, and he had better look into the matter; that I certainly should do it. * * *

Continuing, the witness also stated that before leaving Farrell said, "John, I might possibly have to call on you to pay the note;" and Toft replied by saying, "Tom never buy that note thinking I will ever pay it." Farrell denies the conversation as related by

Toft, but the version given by the former need not be stated because the inquiry is now directed to whether there was any evidence to take the case to the jury.

Two or three months after the execution of the note Hoffman received a pamphlet which the timber company had recently issued, and upon noticing that no reference was made to logging equipment he went to the office of the Colombian Timber Company and ascertained for the first time that the representations concerning the logging equipment and contract were false, and that his note had been sold by the payee. He interviewed Toft and learned that Toft had indorsed the note "so they could realize on it," and that it had been purchased by Everding & Farrell.

The testimony of Toft is to the effect that Douglas gave him a copy of the prospectus, directed his attention to the printed statements concerning the logging equipment and the logging contract, and at that time assured the witness that the representations appearing in the prospectus were true; that Douglas represented that the president of the Colombian Timber Company was worth \$100,000; and that the vice president was worth \$40,000 or more. Toft also says that he was induced by the statements appearing in the prospectus and the representations made by Douglas to indorse the note for the purpose of giving credit to the paper, and he admits that he received 5,000 shares of stock for indorsing the note. Toft claims that he first suspected that the note might be tainted with fraud when Farrell informed him that the paper could be purchased for \$4,000, and it was not until after that conversation that he ascertained the falsity of the statements printed in the prospectus and the falsehoods uttered by Douglas.

[1] The defenses interposed by both the maker and the indorser involve two elements: (1) Fraud; and (2) notice to the plaintiff. The maker alleges that the note was induced by fraud, and the indorser avers that the indorsement was brought about by the same means. The perpetration of fraud will not alone defeat the holder of a negotiable instrument, but it must be supplemented by notice to the holder. In the final analysis, the correctness of the ruling on the motion to strike out the testimony relating to the fraud and on the motion for a directed verdict depends upon whether there was any evidence showing notice to the plaintiff when it acquired the note. Everding & Farrell bought the paper before maturity and is a holder in due course, unless the instrument was taken with knowledge of facts amounting to bad faith. There was evidence tending to show that the capital stock of the Colombian Timber Company was worthless, and that the issuance of the note was induced by false representations; and it now becomes necessary to refer to the statute which

defines what constitutes notice, and then to determine whether there is any evidence bringing the plaintiff within the rule.

[2] A person is not a holder in due course if he does not take a note in good faith without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Section 5885, L. O. L.

[3] A person who takes a note has notice of an infirmity in the instrument or defect in the title to the paper if at the time he took the note he "had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Neither of the answering defendants argue that the plaintiff had actual knowledge of the alleged infirmity in the note itself or in the indorsement, and consequently the plaintiff did not take the paper with notice, unless it had knowledge of such facts that its action in taking the instrument amounted to bad faith.

[4] The plaintiff argues that it did not have knowledge of any facts, and that at the most it only had notice of a suspicion or opinion on the part of Toft that possibly something was wrong with the note. The knowledge must be of such facts that the act of taking the instrument amounts to bad faith, and hence the ultimate inquiry is whether on account of the facts known to him the holder was guilty of bad faith. It may be conceded that knowledge of facts which are calculated to arouse the suspicions of an ordinarily prudent man does not as a matter of law constitute bad faith, nor does the owner of commercial paper necessarily forfeit the rights of a holder in due course merely because he neglected to make inquiries or failed to use the caution of that fictitious person known as the "ordinarily prudent man." *Matlock v. Scheuerman*, 51 Or. 49, 56, 93 Pac. 823, 17 L. R. A. (N. S.) 747; *Triphonoff v. Sweeney*, 65 Or. 299, 305, 130 Pac. 979; *Bond v. Ellison*, 157 Pac. 1103; *Bowman v. Metzger*, 27 Or. 23, 29, 39 Pac. 3, 44 Pac. 1090; 3 R. C. L. 1072. As said in *Bowman v. Metzger*:

"It is the policy of the law to eliminate from the consideration of the jury the question of common prudence as the measure of good faith, and with it the question of negligence, except in so far as it may be taken as indicative of bad faith."

While negligence is not synonymous with bad faith, yet a person who takes a note under suspicious circumstances, and, having the means of knowledge, willfully abstains from making inquiries, then his intentional ignorance may result in bad faith, because the final question is one of honesty and good faith. 3 R. C. L. p. 1075; 8 C. J. 505; *Griffith v. Shipley*, 74 Md. 591, 22 Atl. 1107, 14 L. R. A. 405; *Bowman v. Metzger*, 27 Or. 23, 31, 39 Pac. 3, 44 Pac. 1090; *Benton v. Sikyta*, 84 Neb. 908, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; 7 Cyc. 946. Even though the existence of suspicious circumstances does not neces-

sarily spell bad faith, and negligence is not a synonym for bad faith, and failure to make inquiries does not inevitably create an irresistible force which compels a finding of bad faith, nevertheless since the ultimate inquiry is one of honesty and good faith it is competent to show the existence of suspicious circumstances, failure to make inquiries and want of prudence, and it then becomes the province of the jury to say whether a person taking with knowledge of those facts is guilty of bad faith. 8 C. J. 501, 502, 503; *Arnd v. Aylesworth*, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638; *McPherrin v. Tittle*, 36 Okl. 510, 129 Pac. 721, 44 L. R. A. (N. S.) 395; *Matlock v. Scheuerman*, supra; *Harrington v. Butte & Boston Min. Co.*, 33 Mont. 330, 83 Pac. 467, 114 Am. St. Rep. 821; *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Bowman v. Metzger*, supra; 3 R. C. L. p. 1075.

[5] The question of good or bad faith is peculiarly one for the jury and not the court, especially when the burden rests upon the owner of the note to show that he became a holder in due course. *Arnd v. Aylesworth*, supra; *Union Investment Co. v. Rosenzweig*, 79 Wash. 112, 139 Pac. 874; *Rohweder v. Titus*, 85 Wash. 441, 149 Pac. 583.

[6] Section 5892, L. O. L., provides that:

"When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course."

And, therefore, when it is shown that a note had its origin in fraud, the burden is then placed upon the owner to prove that he or some person under whom he claims acquired the note as a holder in due course. 3 R. C. L. 1039; *Matlock v. Scheuerman*, 51 Or. 49, 53, 93 Pac. 823, 17 L. R. A. (N. S.) 747; *Sink v. Allen*, 79 Or. 78, 154 Pac. 415; *Griffith v. Shipley*, 74 Md. 591, 22 Atl. 1107, 14 L. R. A. 405; *Arnd v. Aylesworth*, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638; *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Union Investment Co. v. Rosenzweig*, 79 Wash. 112, 139 Pac. 874. There was ample evidence, if believed, to warrant the jury in finding that the note was induced by fraudulent representations, and that the capital stock issued to Hoffman was utterly worthless, and consequently by force of the statute *Everding & Farrell* assumed the burden of showing that it purchased the paper as a holder in due course.

[7] The plaintiff admits that it paid \$4,000 for a \$5,000 note. The instrument was purchased after *Everding & Farrell* had ascertained from a bank that a \$5,000 note would be worth face value if Toft signed it. It is not necessary to decide whether the discount was of itself enough to compel a finding of bad faith, but it is sufficient for the purposes of this controversy to say that evidence of the discount was admissible, especially

when viewed in the light of the information received from the bank relative to Toft and the inquiries made or omitted concerning the other indorsers and maker of the note, and the jury was entitled to consider the fact of the discount along with the other evidence already narrated in determining whether the holder was chargeable with bad faith. 8 C. J. 509; *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 908; 3 R. C. L. 1051 and 1079; 7 Cyc. 930 and 949. See, also, note to *Hogg v. Thurman*, as reported in 17 Ann. Cas. 383.

[8] A person is permitted to resort to circumstantial evidence to show that the owner of a negotiable instrument is not a holder in due course, and indeed in many cases it is the only kind of evidence available to a party. 8 C. J. 496; 3 R. C. L. 1041; *Arnd v. Aylesworth*, supra; *Union Inv. Co. v. Rosenzweig*, supra; *Bowman v. Metzger*, supra; *Farmers' State Bk. v. West*, 77 Or. 602, 606, 152 Pac. 238.

[9] The trial court properly refused to strike out the evidence relating to the fraud charged by the defendants, and it would have been error if the court had directed a verdict, because on the record made by all the parties it was the exclusive province of the jury to determine from all the evidence whether plaintiff took the note in good or bad faith. 8 Cyc. 289; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Sink v. Allen*, 79 Or. 78, 154 Pac. 416.

[10] The plaintiff contends that it was error to instruct the jury that a verdict could be rendered which would discharge Hoffman and at the same time make Toft liable; and Toft argues that the verdict releasing the maker automatically discharges the indorser. At the very beginning of the investigation of this branch of the controversy it must be premised that for the purposes of this appeal the plaintiff has by its pleadings fixed the character of liability which it seeks to impose upon Toft. The complaint charges Toft with being an indorser in due course of business, and therefore he could not at the trial nor can he on this appeal be held liable as a maker or as a guarantor; and consequently the rights and obligations of Toft must be measured by the standard fixed for an indorser. *Deering & Co. v. Creighton*, 19 Or. 118, 121, 24 Pac. 198, 20 Am. St. Rep. 800; *Schlittler v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S. E. 342.

[11] The person who by the terms of the instrument is absolutely required to pay is primarily liable, and all other parties are secondarily liable. Section 6023, L. O. L. The maker is primarily liable because his promise is absolute, while the indorser is secondarily liable because his promise is contingent and accessorial, and when considered as parties to the instrument the former is prior to the latter. Unless a note has reached the hands of a holder in due course, the

maker can defeat the instrument if it was induced by fraud.

[12] The instant case is not governed by subdivision 3 of section 5953, L. O. L., which declares that a person secondarily liable on an instrument is discharged "by the discharge of a prior party." The provision quoted from the statute only applies to a discharge by the act of the creditor, and does not include discharges by operation of law, for example bankruptcy, nor does it embrace a situation where after a trial on the merits the note is in effect destroyed because of a vice which is inherent in the transaction. 7 Cyc. 1048; 8 C. J. 612 and 617; 10 Yale Law Journal, 94; 15 Harvard Law Review, 34.

[13] If subdivision 3 of section 5953 only applies to discharges by some act of the creditor, then the general principles of suretyship govern. A discharge of the maker by virtue of a judgment predicated upon fraud in the note and bad faith on the part of the holder extinguishes that which has only appeared to be an obligation, but in the end and in its finality is a mere paper which in truth is not a real debt. 8 C. J. 612; *Richards v. Market Exchange Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000, 28 L. R. A. (N. S.) 99. And therefore when after a trial on the merits it is ascertained that because of fraud and notice there is no subsisting debt of the maker then by the same token there is no debt of the indorser. The judgment in favor of the maker, or principal, satisfies the note, and therefore on general principles of suretyship the indorser, or surety, is not liable because the judgment inures to the benefit of the surety. *Michener v. Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59; *Leslie v. Bonte*, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62; *Levi v. McCraney*, 1 Morris (Iowa) 191; *Soward v. Coppage*, 10 Ky. Law Rep. 486, 9 S. W. 389; *Evants v. Taylor*, 18 N. M. 371, 137 Pac. 583, 50 L. R. A. (N. S.) 1113; *Schlittler v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S. E. 342; 8 Cyc. 66.

Hoffman could be discharged only by finding fraud in the note plus bad faith on the part of Everding & Farrell, and on the case as made by the pleadings of the plaintiff Toft could only be held liable as an indorser. A verdict releasing the maker necessarily implies fraud in the note followed by notice to the holder and a verdict against the indorser, on the pleadings as they now stand, in the same trial and on the same evidence involves contradictory findings. The verdict is inconsistent with itself, and the instruction which permitted the verdict was erroneous and probably misleading.

The whole verdict is set aside, the entire judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

MOORE, C. J., and BEAN and BURNETT, JJ., concur.

McCULLY et al. v. HEAVERNE.

(Supreme Court of Oregon. Nov. 21, 1916.)

1. PLEADING \S 236(2) — AMENDMENT — COMPLAINT — DISCRETION OF COURT.

The allowance of an amendment to the complaint after the expiration of ten days allowed in which to amend is within the discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 601; Dec. Dig. \S 236(2).]

2. TRIAL \S 419 — DENIAL OF NONSUIT — CURE OF ERROR.

The denial of a motion for nonsuit at the close of plaintiffs' case will not be disturbed when the omission, if any, is subsequently supplied by either party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 982; Dec. Dig. \S 419.]

3. JUDGMENT \S 948(1) — PLEADING — NECESSITY.

Estoppel by a former decree is an affirmative defense which must be pleaded in order to be available.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1787, 1789, 1791, 1792; Dec. Dig. \S 948(1).]

4. BOUNDARIES \S 46(3) — ESTABLISHMENT — STATUTORY PROCEEDINGS — VALIDITY.

Where adjoining landowners had their boundary line surveyed, and agreed that the line established should be the boundary line, and acted on such agreement for many years, and defendant took the land subject to such agreement, a proceeding by defendant under L. O. L. \S 2991, against the county surveyor, to establish the boundary, is a nullity as to the adjoining owner.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. \S 221-225; Dec. Dig. \S 46(3).]

5. PLEADING \S 180(4) — REPLY — DEPARTURE.

In a suit to quiet title, where the complaint in the usual form alleges that plaintiffs are the owners, and the defendant sets up ownership and possession in herself, a reply setting up an agreement as to boundary between plaintiffs and the predecessor in title of defendant settling the title to the land in dispute in plaintiff is not a departure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 377; Dec. Dig. \S 180(4).]

In Banc. Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Action by F. D. McCully and another against Elizabeth Heaverne. From a judgment for plaintiffs, defendant appeals. Affirmed.

The complaint is in the usual form in a suit to quiet title to a narrow strip of land a half mile long. It alleges, in substance, that plaintiffs are now, and for many years have been, the owners in fee of the land described; that the defendant is not now, and never has been, in possession thereof, and that it is not now in the actual possession of any one; that defendant claims and asserts an interest therein adverse to plaintiffs, but such claim is without right; and that she has no title or interest whatever therein. A prayer follows to the effect that she be required to set forth the nature of her claim, and that it be determined by decree of the court that plaintiffs are the owners and en-

titled to the exclusive possession thereof, and that defendant has no title or interest therein. The defendant answered with a general denial and affirmative allegation of ownership and possession. To this answer plaintiffs replied, alleging that in 1883 plaintiffs, being then, as now, the owners of the west half of the northwest quarter of section 32, and one Roberts the owner of the east half of said northwest quarter, the strip of land in controversy being a part of the west half, and said Roberts being the predecessor in interest of the defendant in said east half, the boundary line between the two tracts was unknown, uncertain, undefined, and in dispute; that in 1883 the plaintiffs and Roberts caused the boundary line to be surveyed and located, and mutually agreed that the line so located and established should be the true and final boundary line between their lands; that in the same year upon this agreed line they built a fence, which has been maintained ever since thereon; that by reason of these facts defendant is estopped to claim any interest in the disputed tract. A trial being had, there was a decree for plaintiffs, and defendant appeals.

Turner Oliver, of La Grande, for appellant. J. P. Rusk, of La Grande (A. W. Schaupp, of Joseph, on the brief), for respondents.

BENSON, J. (after stating the facts as above). [1] Defendant's first assignment of error is based upon the fact that the court permitted an amendment to the complaint after the expiration of the ten days which had been allowed in which to amend. We need only to remark that amendments of pleadings are discretionary, and there is nothing in the record disclosing any abuse of such discretion.

[2] It is next contended that the court erred in denying defendant's motion to dismiss the suit when plaintiffs rested their case in chief, for the reason that they had failed to make a prima facie one. It is needless to go into the evidence upon this point; for, whatever the condition of the testimony may have been at that time, it was subsequently remedied, and this court has frequently held that a ruling on a motion for nonsuit will not be disturbed when the omission, if any, is subsequently supplied by either party. *Caraduc v. Schanen-Blair Co.*, 66 Or. 310, 133 Pac. 630.

[3, 4] Defendant then urges as error that the court ignored the effect of a former decree in the case of *Heaverne v. Merryman*, as County Surveyor, which she insists establishes the boundary line according to her contention, and should therefore estop the plaintiffs from claiming the disputed land. There are two reasons why this assignment is without merit. In the first place, it is an affirmative defense which, in order to be of any avail, must be pleaded, and defendant's

answer contains no reference thereto. *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513; *Gladstone Lumber Co. v. Kelly*, 64 Or. 163, 120 Pac. 763, and cases there cited. The second reason for disregarding this contention is found in the fact that the former suit referred to appears to be a proceeding under the provisions of section 2991, L. O. L., which was instituted by defendant against the county surveyor in August, 1910. It appears from the evidence that in 1883 the boundary line was uncertain and in dispute; that plaintiffs and defendant's grantor had the line surveyed, and agreed that the line so established should be the boundary line, and acted upon such agreement for many years; that the defendant took the land subject to such agreement. This being so, there was no dispute upon which to base the later proceedings, and as to plaintiffs they would be a nullity. *Egan v. Finney*, 42 Or. 599, 72 Pac. 133.

[5] It is also earnestly contended by defendant that the affirmative matter in the reply is a clear departure from the cause of suit set out in the complaint. We cannot agree with this. The complaint alleges ownership generally, and, where the defendant by answer denies this and sets up ownership and possession in herself, plaintiffs are undoubtedly entitled to set up facts which disclose the manner in which their title became unassailable. We find no inconsistency in the two.

The remaining assignments attack the sufficiency of the evidence to sustain the findings of the trial court. The evidence is voluminous, and, in some details, conflicting and the trial court had far better opportunity than we to determine where the truth lay. It is sufficient to say that, in our opinion, the weight of the evidence supports each of the findings so made, and they will not be disturbed.

The decree of the lower court is affirmed.

LIEBLIN v. BREYMAN LEATHER CO. et al.

(Supreme Court of Oregon. Nov. 21, 1916.)

1. INSANE PERSONS § 95 — SERVICE OF SUMMONS — STATUTE — CONSTRUCTION.

Under L. O. L. § 55, subd. 4, providing that in the case of a person judicially declared to be of unsound mind and for whom a guardian has been appointed summons shall be served by delivering a copy, with a certified copy of the complaint, to such guardian and to the defendant personally, service only upon a defendant, who had been adjudged insane and for whom a guardian had been appointed, was not sufficient.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 166, 167; Dec. Dig. § 95.]

2. PLEADING § 192(2) — ACTION TO VACATE JUDGMENT — DEMURRER.

In a suit to cancel a judgment and restrain execution against land of which plaintiff alleged he was the owner, if defendant desired a more detailed statement as to the derivation of plain-

tiff's title to the land, he should have proceeded by motion, or in some other manner than by demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 409, 410; Dec. Dig. § 192(2).]

3. JUDGMENT § 414 — ACTION TO VACATE — GROUNDS — FRAUD.

Where a trial court had jurisdiction to render a judgment, in order to assail it, although irregular or voidable, it would be necessary to allege that there was fraud or unfairness in the obtaining thereof.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 780; Dec. Dig. § 414.]

4. JUDGMENT § 521 — ACTION TO VACATE — NATURE — "DIRECT ATTACK."

A suit to cancel a judgment and to enjoin the enforcement thereof by execution against land of which plaintiff claims to be owner is a direct, and not a collateral, attack upon the original judgment (citing *Words and Phrases*, *Direct Attack*).

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 964; Dec. Dig. § 521.]

5. EXECUTION § 171(4) — INJUNCTION — JUDGMENT AGAINST ANOTHER.

The owner of real property has the right to restrain the sale thereof under a judgment against a third party, for the payment of which the owner of such realty is not liable.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 502, 506-516; Dec. Dig. § 171(4); *Judgment*, Cent. Dig. §§ 794, 795, 813, 825.]

In Banc. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Suit for injunction by Frank Lieblin against the Breyman Leather Company and another. From a decree sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded, with directions.

This is a suit to cancel and restrain the enforcement of a judgment. From a decree sustaining a general demurrer to plaintiff's complaint and dismissing the suit, plaintiff appeals. On December 21, 1911, defendant, the Breyman Leather Company, filed a complaint in the circuit court for Wasco county against John W. Dickens, for the recovery of the sum of \$1,117.73. On the same date it filed an affidavit and undertaking for attachment against the property of said John W. Dickens, and a writ of attachment was issued, directing the sheriff to attach all the property of the said John W. Dickens within Wasco County, Or., not exempt from execution, or as much as would be sufficient to satisfy the judgment of the Breyman Leather Company. On that date the sheriff attached the real property claimed to be owned by the plaintiff in this case as the property of said John W. Dickens. On March 26, 1912, said John W. Dickens was, by order of the county court of Wasco county, adjudged to be an insane person, and on the 2d day of April, 1912, letters of guardianship were issued to Ida M. Dickens as the guardian of the person and estate of John W. Dickens. On April 17, 1913, in the case of *Breyman Leather Company v. John W. Dick-*

ens, summons was served on the said John W. Dickens personally and in person, but was not served upon his guardian. On March 6, 1914, the Breyman Leather Company recovered judgment against said John W. Dickens for the amount prayed for in its complaint, and for its costs and disbursements, and the attached property was ordered sold to satisfy the same. On August 5, 1914, an attachment execution issued on said judgment, commanding and directing the sheriff of Wasco county to sell the property attached in said action for the satisfaction of said judgment. The sheriff of Wasco county was proceeding to advertise this property for sale at the time this suit was filed, praying for a writ of injunction to enjoin the sheriff from selling said premises at execution sale. Thereafter defendants interposed their demurrer in this suit upon the ground that the complaint does not state facts sufficient to constitute a cause of suit, and the circuit court entered an order sustaining said demurrer.

R. R. Butler, of The Dalles, for appellant.
C. L. Pepper, of The Dalles (Hurlburt & Layton, of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above). In addition to the facts stated above, plaintiff alleges that he is the owner of the real estate attached in the action against John W. Dickens, and that on account of a lack of service of the summons upon Ida M. Dickens, the guardian of the defendant in that action, the circuit court which rendered the judgment did not acquire jurisdiction over the person of that defendant so as to authorize the rendition of the judgment, and that the same is absolutely void, and should be canceled and the enforcement upon execution enjoined in order to prevent a cloud upon plaintiff's title to the land. The manner of service of summons is regulated by statute, and so long as the legislative enactment does not provide for the taking of property without due process of law, its mandate in this respect must be obeyed. Service of summons upon a person judicially determined to be of unsound mind, for whom a guardian has been appointed, is directed by section 55, L. O. L., to be made in the following manner:

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: * * * 4. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian and to the defendant personally."

[1] Before the court is clothed with jurisdiction to render a judgment against John W. Dickens, who, it is alleged in the complaint, has been judicially declared to be of unsound mind, and for whom Ida M. Dick-

ens has been appointed as guardian, summons must be served upon the guardian as well as upon the ward. In no other manner can there be a compliance with our statute. The laws of other states provide differently.

[2] It is contended by counsel for defendant that the judgment cannot be attacked by plaintiff in this suit; that this is a collateral attack. The plaintiff asserts that he is the owner of the land, and brings this suit for the express purpose of restraining the enforcement of the judgment for the reason that his rights will be injuriously affected. If the defendant desires a more detailed statement as to the derivation of plaintiff's title to the land, he should have proceeded by motion or in some other manner than by demurrer.

[3, 4] If the trial court had obtained jurisdiction to render the judgment in question, then in order to assail it, although the same be irregular or voidable, it would be necessary to allege that there was fraud or unfairness in the obtaining thereof. This suit is for the purpose of canceling the questioned judgment, and for an injunction to enjoin the enforcement thereof upon execution. It is a direct attack upon the original judgment. 3 Words and Phrases, 2070; Morrill v. Morrill, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, and note, 23 Am. St. Rep. 95, and note; Walker v. Goldsmith, 14 Or. 125, 12 Pac. 537; Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824.

[5] The owner of real property has a right to restrain the sale thereof under a judgment against a third party for the payment of which the owner of such realty is not liable. Wilhelm v. Woodcock, 11 Or. 518, 5 Pac. 202.

It is suggested by defendant's counsel that the service of the summons in the original action can be completed. It may be that upon the development of the equities of the case other questions may arise, but until they do, it would be premature to discuss them.

The lower court erred in sustaining the demurrer to the complaint; and the decree is reversed, and the cause is remanded, with directions to overrule the demurrer, and for such other proceedings as may be deemed proper, not inconsistent herewith.

RAINEY et al. v. RUDD et al.

(Supreme Court of Oregon. Nov. 21, 1916.)

1. WILLS § 828—LIABILITY OF LEGATEES—DEBT OF DECEDENT—WHAT LAW GOVERNS.

Where a note was payable in Colorado and the will of the maker, whereby defendants became residuary legatees, was probated in that state, the payee's right of action, if any, to subject property in the hands of the legatees to the payment of the note arose in Colorado, and was governed by its law.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 828.]

2. WILLS \S 832—LIABILITY OF LEGATEE—COMMON LAW.

At common law, no action can be maintained against a legatee upon a contract made by the decedent, as the legatee takes the property only after it has passed from the administrator or executor, in whose hands alone it is liable for the debts of the decedent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2139-2155; Dec. Dig. \S 832.]

3. DESCENT AND DISTRIBUTION \S 125—WILLS \S 836—LIABILITY OF HEIR.

The liability of an heir and devisee is confined to the real estate, with which the administrator or executor has nothing to do.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 457-477; Dec. Dig. \S 125; Wills, Cent. Dig. §§ 2139, 2140, 2150-2155; Dec. Dig. \S 836.]

4. EVIDENCE \S 35—JUDICIAL NOTICE—STATUTES OF ANOTHER STATE.

The Supreme Court will not take judicial notice of the statutes of another state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. \S 35; Appeal and Error, Cent. Dig. \S 2959.]

5. EVIDENCE \S 80(2)—PRESUMPTION—STATUTES OF ANOTHER STATE.

Where the statutes of another state are not pleaded, it will be presumed that upon the questions involved the common law prevails.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 101; Dec. Dig. \S 80(2).]

6. WILLS \S 847(3)—LIABILITY OF LEGATEE—ACTION ON NOTE—COMPLAINT.

Under L. O. L. \S 488, making legatees liable to a suit in equity by a creditor of the testator to recover the value of any legacy received by them, and providing plaintiff shall not recover unless he shows that no assets were delivered by the executor or administrator to the next of kin, that the value of such assets has been recovered by some other creditor, or that such assets are not sufficient to satisfy his demand, the complaint, in an action on a note against the legatees under the will of the maker, silent as to the statutory prerequisites, was demurrable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 2161; Dec. Dig. \S 847(3).]

In Banc. Appeal from Circuit Court, Wal-lowa County; J. W. Knowles, Judge.

Suit by Roy Rainey and another against Jessie S. Rudd and another. Decree for defendants, dismissing the suit on sustaining demurrer to the complaint, and plaintiffs appeal. Affirmed.

This is a suit wherein it is sought to subject property in the hands of residuary legatees to the payment of a promissory note of the testator. The allegations of the complaint disclose substantially the following facts: That on March 14, 1904, Wm. M. B. Sarell executed and delivered to Anna E. Rainey, then residing in Florida, a promissory note for \$750, payable at the office of John Hipp in Denver, Colo., one year after the death of the maker; that on August 13, 1905, Anna E. Rainey died in Florida, leaving a will whereby plaintiffs, as residuary legatees, became the owners and holders of the note; that Sarell, the maker of the note, died in Colorado on May 21, 1908, leaving a will, whereby the defendants became residu-

ary legatees, and received from the estate property of the value of about \$3,000. All of the parties to the suit are now residents of Oregon. Plaintiffs did not learn of Sarell's death until after the final settlement of his estate, and therefore failed to present their claim to the executor, and now bring this proceeding. A demurrer to the complaint having been sustained, plaintiffs declined to plead over, a decree was entered dismissing the suit, and plaintiffs appeal.

Thos. M. Dill, of Enterprise, for appellants. A. S. Cooley, of Enterprise, for respondents.

BENSON, J. (after stating the facts as above). [1] In the complaint it appears affirmatively that the defendants received whatever property they derived from the Sarell estate as legatees and not otherwise. It is contended by counsel for defendants that the complaint is fatally defective, in that it fails to plead any statute of the state of Colorado, giving a right of action against legatees for the debts of a testator. The note upon which this suit is predicated was payable at the office of John Hipp in Denver, Colo., and the will of the maker thereof was probated in the same state. Therefore the right of action, if any exist, arose in Colorado and "the law of the place where the right was acquired or the liability incurred will govern as to the right of action." *Bergman v. Inman*, 43 Or. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771.

[2, 3] At common law, no action can be maintained against a legatee upon a contract made by the decedent. The liability of the heir and devisee is confined to the real estate descended, with which the administrator or executor has nothing to do, while the next of kin and legatee take the property only after it has passed from the administrator or executor, in whose hands alone, under the common law, it is liable for the debts of the deceased. 14 Cyc. 207; 2 Woerner, Am. Law of Adm. (2d Ed.) \S 574. We must therefore look to the statutes for the right to follow assets into the hands of a legatee for the debts of a testator.

[4, 5] No statute of Colorado, where the right of action, if any, arose, is pleaded which permits the suit to be prosecuted, and it has been held by this court that it will not take judicial notice of the statutes of another state, and, if they are not pleaded, it will be presumed that upon the questions involved the common law prevails.

[6] Even if it could be held that the right of action arose in this state, the complaint is equally insufficient, for the statute contains the following provisions:

"Legatees are liable to a suit in equity by a creditor of the testator to recover the value of any legacy received by them. The suit may be maintained against all the legatees jointly, or

against any one or more of them severally. In such suit the plaintiff shall not recover unless he shows:

"1. That no assets were delivered by the executor or administrator * * * to his next of kin; or,

"2. That the value of such assets has been recovered by some other creditor; or,

"3. That such assets are not sufficient to satisfy the demand of the plaintiff."

Section 488, L. O. L.

The complaint is silent as to each of these prerequisites. It follows that no error was committed in sustaining the demurrer, and the decree is affirmed.

STEPHENSON v. LICHTENSTEIN et al. (No. 874.)

(Supreme Court of Wyoming. Nov. 21, 1916.)

1. JUDGMENT \Leftrightarrow 793(5)—LIEN—ENFORCEMENT—COMPLAINT—CONSTRUCTION.

Under Comp. St. 1910, § 4684, and sections 4759 and 4760, as amended by Laws 1915, c. 104, making judgments a lien on the lands, etc., of a judgment debtor, subject to his homestead rights, a petition in an action against grantee of a decedent judgment debtor alleging that the judgment debtor was the record owner of the property at the time of judgment, and praying that a judgment described be declared a lien, upon the property subject to a homestead exemption, and for general relief, should be construed as an action to enforce the judgment lien against the particular property, and not an action to establish a lien in view of Comp. St. 1910, § 5629, declaring that no execution will issue on a judgment for the recovery of money rendered for or against a testator or intestate during his lifetime.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1387; Dec. Dig. \Leftrightarrow 793(5).]

2. JUDGMENT \Leftrightarrow 793(5)—LIEN—ENFORCEMENT—NECESSITY OF DEMAND ON ESTATE OF JUDGMENT DEBTOR.

Where property had been conveyed by a deceased judgment debtor after the lien of a judgment attached, and was not a part of his estate, which is entirely insufficient to satisfy the judgment, presentation of the judgment to the administratrix as a claim against the estate was not necessary, before bringing an action against the grantee to enforce the judgment lien.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1387; Dec. Dig. \Leftrightarrow 793(5).]

Error to District Court, Sweetwater County; John R. Arnold, Judge.

Action by A. C. Stephenson against Amelia Lichtenstein and others. From a judgment sustaining a demurrer to the petition and dismissing the action on plaintiff's election to stand on the petition, plaintiff brings error. Reversed.

Walter B. Dunton, of Rock Springs, for plaintiff in error. T. S. Tallafarro, Jr., and W. A. Muir, both of Rock Springs, for defendants in error.

BEARD, J. The parties to this action stand in the same relation as in the district court. The substance of the statements of the petition in that court are that on May 17, 1912, plaintiff recovered judgment against

Oscar Feldscher and H. Lichtenstein in the district court of Sweetwater county for \$1,841.78 and \$6.90 costs, which judgment remains in force and unpaid, except the sum of \$300; that at the date of said judgment said Lichtenstein was the owner of and had the record title to lot No. 1 and the southerly 3 feet and 10 inches of Lot No. 2, in block 7, in the North addition to the Town of Rock Springs, in Sweetwater county, upon which said judgment became a lien at the date of its rendition; that Lichtenstein during his lifetime occupied said premises as a homestead; that about October 1, 1913, he conveyed said premises to his wife, Amelia Lichtenstein (one of the defendants here), and thereafter, about November 1, 1913, he died, leaving an estate of the value of \$300, and leaving as his sole heir his said wife, Amelia Lichtenstein, who since the transfer to her of said premises has occupied the same as a homestead; that at the date of said judgment the value of said premises was \$4,000, and the present value thereof is \$3,500; that on June 11, 1915, said Amelia Lichtenstein was appointed administratrix of the estate of her deceased husband, and is the duly qualified and acting administratrix of said estate; that Feldscher is now, and ever since the rendition of said judgment has been, insolvent; that defendants Joseph Benesch and Emil M. Benesch claim an interest in said premises by virtue of a mortgage given to them on said property by defendant Amelia Lichtenstein, dated November 8, 1913. Plaintiff prayed that the said judgment above described be declared a lien upon said real property, subject to the homestead exemption of \$1,500 of defendant Lichtenstein, for the sum of \$1,848.68, with interest at 8 per cent. from May 17, 1912, less the sum of \$300 paid thereon, and that said lien be declared a prior lien as against the defendants herein, and that the property be sold for the satisfaction of said judgment lien, free of all claims of defendants, other than said homestead exemption, and for general relief. The defendants filed a joint general demurrer to the petition, and defendant Amelia Lichtenstein also filed her separate general demurrer to the petition. The demurrer of defendants was sustained; and, plaintiff electing to stand upon his petition, the action was dismissed by the court at plaintiff's costs, and he brings error.

[1] It is not entirely clear what question was presented to and decided by the trial court. Counsel for defendants in their brief—they did not argue the case orally in this court—contend that the petition must be construed as an action to establish a lien upon the property therein described, and not an action to enforce a judgment lien already existing thereon, and that the facts stated are insufficient for that purpose; while plaintiff's counsel contend that the action is purely to enforce the lien of the judgment. If

we were to consider the specific prayer of the petition, to the exclusion of the prayer for general relief, as conclusive of the question, there would be much force in defendants' argument. But, considering the facts stated, and which must govern the decision, we think the petition should be construed as an action to enforce the judgment lien against this particular property. We understand this action was brought because of the statute (section 5629, Comp. Stat. 1910) which, in effect, declares that no execution will issue on a judgment for the recovery of money rendered for or against a testator or intestate in his lifetime. It is alleged that the judgment became a lien upon the property at the date of its rendition (a legal conclusion perhaps), but it is further alleged that the judgment debtor was at that time the owner of and had the title of record to the property. Such being the case, the judgment would become a lien thereon, subject to the homestead right of the judgment debtor; the statute (section 4684, Comp. Stat. 1910) making judgments a lien on the lands and tenements, including vested interests of the judgment debtor, and having provided for its sale on execution when the creditor makes an affidavit that he is of the opinion that it exceeds in value the sum of \$1,500 (now \$2,500). Sections 4759 and 4760, Comp. Stat. 1910, as amended by chapter 104, S. L. 1915. That is, the lien of the judgment attaches to the excess value over the value of the property exempt from execution sale as fixed by statute. *White v. Spencer*, 217 Mo. 242, 117 S. W. 20, 129 Am. St. Rep. 547, 16 Ann. Cas. 598, and cases cited in note.

[2] The petition does not state whether or not the judgment was presented to the administratrix as a claim against the estate of H. Lichtenstein. But plaintiff contends that such presentation was not necessary. The facts alleged, we think, sustain that contention. The value of the estate is alleged to be only \$300, an amount entirely insufficient to satisfy the judgment, and the property, having been conveyed by Lichtenstein after the lien of the judgment attached, was not a part of his estate, and could not be reached in the administration of the estate. In *Christy v. Dana*, 34 Cal. 548, where the property had been conveyed by the debtor after the execution of a mortgage on the land against which it was sought to be enforced after his death, it was held that:

"Inasmuch as no relief is demanded against the estate, and the intestate at the time of his death had no interest in the land, there was no need for the plaintiff to present his claim to the administratrix for allowance."

To the same effect see *Sichel v. Carrillo*, 42 Cal. 493; *Harp v. Calahan*, 46 Cal. 222; *Hibernia Savings & Loan Soc. v. London & L. Fire Ins. Co.*, 138 Cal. 257, 71 Pac. 384; *O'Doherty v. Toole*, 2 Ariz. 288, 15 Pac. 28. The Probate Code of Arizona, as well as of

this state, having been taken from that of California, the above-cited decisions are quite persuasive and in point.

In the case here the plaintiff is not seeking to establish the judgment as a claim against the estate of Lichtenstein, and the property against which it is sought to enforce the lien is not the property of his estate.

We have considered all of the questions presented by either counsel, and are of the opinion that the court should have overruled the demurrer. The record does not show what disposition, if any, was made of the separate demurrer of defendant Amelia Lichtenstein.

For the error in sustaining the demurrer of the defendants the judgment is reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings in accordance with law.

Reversed.

POTTER, C. J., concurs. SCOTT, J., did not participate in this opinion.

CAPITOL HILL STATE BANK v. RAWLINS NAT. BANK OF RAWLINS.

(No. 841.)

(Supreme Court of Wyoming. Nov. 21, 1916.)

1. APPEAL AND ERROR \S 302(1, 3)—OBJECTIONS BELOW—MOTION FOR NEW TRIAL—RULE OF COURT.

Under Supreme Court Rule 18 (104 Pac. xiii), providing that nothing which could have been properly assigned as a ground for new trial in the court below will be considered unless it appears that it was properly presented below by motion for a new trial, and that such motion was overruled and an exception then reserved, alleged error in denying plaintiffs motion to strike parts of the answer and in rejecting evidence offered by the plaintiff cannot be considered where not assigned as grounds for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1744-1747; Dec. Dig. \S 302(1, 3).]

2. TRIAL \S 39—OFFER OF EVIDENCE—DOCUMENTS—INDORSEMENT.

In an action by the indorsee and holder of an unpaid certificate of deposit issued by the defendant bank, where neither plaintiff's witness who described the certificate made an exhibit, nor counsel offering it in evidence mentioned the indorsement, and no other proof of the indorsement was either received or offered in evidence, the offer of the certificate did not include the indorsement, which was not so essentially a part of the certificate that it would be necessarily included in the offer of the certificate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 92-98; Dec. Dig. \S 39.]

3. EVIDENCE \S 373(1)—CERTIFICATE OF DEPOSIT—INDORSEMENT—PRELIMINARY PROOF.

In a suit against the bank issuing a certificate of deposit by one claiming to hold it by or under an indorsement, where the execution of the certificate and its indorsement were both denied, or the indorsement merely was denied, proof of the execution of the certificate would not prove the indorsement or entitle the indorsement to be admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1581; Dec. Dig. \S 373(1).]

4. EVIDENCE \Leftrightarrow 471(29)—FACT OR CONCLUSION—"NEGOTIATED."

In an action by the indorsee and holder of a certificate of deposit issued by defendant bank, a question to plaintiff's witness when the certificate of deposit was offered in evidence and his answer that it had been "negotiated with the plaintiff bank," in view of the meaning of the word "negotiated" under Comp. St. 1910, § 3188, to include indorsement as well as delivery of an instrument payable to order, involved a legal conclusion without any showing of the facts of the transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2174; Dec. Dig. \Leftrightarrow 471(29); Witnesses, Cent. Dig. § 833.]

For other definitions, see Words and Phrases, First and Second Series, Negotiate.]

5. BILLS AND NOTES \Leftrightarrow 523—CERTIFICATE OF DEPOSIT—ACTION BY HOLDER—EVIDENCE OF INDORSEMENT.

Such question and answer might be construed to mean nothing more than that the certificate had been transferred to the plaintiff by some one, and did not necessarily imply that such transfer was by the payee, or that the payee had indorsed or authorized the indorsement or transfer; but, where it was within the power of the plaintiff to show expressly or by direct evidence from whom and under what circumstances it received the certificate, the judgment for defendant would not be disturbed upon the ground of a merely possible inference of the payee's indorsement or transfer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. \Leftrightarrow 523.]

6. BILLS AND NOTES \Leftrightarrow 496(3)—TRANSFER—INDORSEMENT—RIGHT TO RECOVER.

Where the execution of a certificate of deposit was admitted by the issuing bank, the mere fact of possession shown by the production of the certificate at the trial and its introduction in evidence was not sufficient prima facie to entitle the plaintiff to recover, without proof of the indorsement necessary to plaintiff's title, in view of the denial of the alleged indorsement and delivery by the payee, as well as alleged ownership of the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1665½, 1671, 1672, 1674; Dec. Dig. \Leftrightarrow 496(3).]

7. BILLS AND NOTES \Leftrightarrow 496(3)—TITLE—STATUS—"HOLDER"—"BEARER"—"OR THE BEARER THEREOF."

Comp. St. 1910, § 3217, provides that every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any one who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. Section 3349 defines "holder" as the payee or indorsee of a bill or note who is in possession, or the bearer thereof, and defines "bearer" as the person in possession of a bill or note which is payable to bearer; and section 3188 declares that an instrument is negotiated when transferred so as to constitute the transferee the holder thereof, and that if payable to order it is negotiated by the holder's indorsement completed by delivery. *Held*, that the words "or the bearer thereof" referred to one in possession of an instrument payable to bearer, and that, unless an instrument payable to the order of a person named is indorsed by the payee in blank, it does not become payable to bearer, and the mere possession by one other than the payee will not constitute him the "holder," so that the mere fact of possession of an unindorsed certificate of deposit payable to order was not evidence of title, or that it was

indorsed by the payee in blank or otherwise, so as to dispense with proof of such indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1665½, 1671, 1672, 1674; Dec. Dig. \Leftrightarrow 496(3).]

For other definitions, see Words and Phrases, First and Second Series, Bearer; Holder.]

8. BILLS AND NOTES \Leftrightarrow 209, 330—TRANSFER—TITLE OF TRANSFEREE.

A negotiable instrument payable to order may be transferred by the payee or holder without indorsement, though in such case the transferee takes only the title and right of his transferor, and does not become a holder in due course, but has only the equitable instead of the legal title, which principle is recognized by the Negotiable Instruments Law (Comp. St. 1910, § 3207).

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423, 425-427, 497, 498, 501, 794-804; Dec. Dig. \Leftrightarrow 209, 330.]

Error to District Court, Carbon County; V. J. Tidball, Judge.

Action by the Capitol Hill State Bank against the Rawlins National Bank of Rawlins. Judgment for defendant, motion for new trial overruled, and plaintiff brings error. Affirmed.

E. E. Sarchet, of Denver, Colo., and George E. Brimmer, of Rawlins, for plaintiff in error. N. R. Greenfield, of Rawlins, for defendant in error.

POTTER, C. J. This is an action brought by the plaintiff in error, Capitol Hill State Bank, against the Rawlins National Bank of Rawlins, the defendant in error, upon a certificate of deposit issued by the defendant to the Western States Fire Insurance Company. The petition alleges that the Western States Fire Insurance Company, the payee named and intended to be named in said certificate, assigned and delivered the same before maturity to the plaintiff for a valuable consideration, and that the plaintiff is the owner and holder thereof; that no part of the certificate has been paid; that plaintiff presented it for payment at maturity, indorsed on the back by the payee in its name and by the plaintiff in its name, to the defendant, the maker thereof, and payment was demanded; that it was not paid, and the same was thereupon duly protested for nonpayment, of which due notice was given to the defendant; and that there is due the plaintiff thereon the sum of \$500, the principal, with interest at the rate stated in the certificate from the date thereof to its maturity and with interest at the rate of 8 per cent. thereafter upon the principal and accrued interest. The date of the certificate is August 23, 1912, and it certifies that the payee therein named has deposited with the issuing bank the sum aforesaid (\$500) payable to the payee's order in current funds 12 months after date with interest to maturity only at the rate of 5 per cent. per annum upon the return of the certificate, properly indorsed.

A copy of the certificate is set out in the petition, but without the indorsements.

The answer sets up three separate defenses. By the first defense the alleged corporate character of the plaintiff and defendant, respectively, is admitted; also, the execution of the certificate of deposit by the defendant, that the copy set out in the petition is a true copy thereof, and that the Western States Fire Insurance Company was the payee named and intended to be named in the certificate. Each and every other allegation of the petition is denied. By the second defense it is alleged, in substance, that the money for which the certificate was issued was deposited with the defendant bank by a subscriber to the stock of a proposed fire insurance company, on the representation of one Paul Fayn that he was engaged in organizing such company and in soliciting subscribers for the stock thereof, and upon his agreement that one-half of the par value of the stock subscribed for might be deposited in the local bank in the name of the Western States Fire Insurance Company, and remain in such bank for one year, unless the organization of the company was sooner perfected under a license to write fire insurance in Wyoming was granted, and to be repaid to the depositing subscriber if such organization was not perfected and a license to write fire insurance in this state granted within one year; that upon such representation and agreement the defendant issued said certificate of deposit and delivered it to said Paul Fayn; that the defendant had since learned that within a day or two after issuing the certificate the said Paul Fayn, with intent to deceive and defraud, indorsed the certificate by writing the name of the payee on the back thereof by himself as vice president, and delivered the same to the plaintiff, and thereupon appropriated to his own use the money received thereon and absconded and has never accounted to said insurance company for any part thereof; that at the time of such indorsement he was not, and never has been, the vice president of said company; that he had no authority to make such indorsement, and the certificate was not indorsed by the company, but that its name written on the back of the certificate is a forgery; that said Fayn had no authority to assign or deliver the certificate to the plaintiff; that the plaintiff obtained no title thereto by said indorsement or by any pretended assignment by said Fayn, or in any other manner; and that plaintiff is not, and never has been, the owner thereof.

The motion to strike the third defense was sustained, and a reply was filed to the second defense alleging, in substance, that the plaintiff was without knowledge as to the facts alleged respecting the representation and alleged agreement of Paul Fayn, the soliciting of subscriptions to the stock of a proposed fire insurance company, the payment by such subscribers into a local bank

of part of the par value of the stock subscribed for, or the deposit for which the certificate was issued, and therefore denying the same. The reply alleges that the certificate was indorsed and delivered to the plaintiff by the Western States Fire Insurance Company, by Paul Fayn as the vice president of said company, and that the company was thereupon credited with the amount of the certificate, and the money so deposited to its credit was thereafter checked out by the company and appropriated to its own use. The reply also alleges that the plaintiff is the bona fide holder of the certificate for value; that the plaintiff had no knowledge, at the time it accepted the same, of any equities in favor of the defendant, or any other person; and that the plaintiff obtained bona fide title to the certificate through the indorsement aforesaid by the company acting through said Paul Fayn.

Upon these issues the cause was tried to the court without a jury. No evidence having been introduced by the defendant, the alleged equitable defense is not in the case as it comes to this court; but the answer and reply concerning it have been referred to because they show the situation in which the parties entered upon the trial, and this may tend to illustrate the points to be considered. The only witness examined on the trial was Roy P. Gholson, the president since its organization of the plaintiff bank. After he had stated his residence and official connection with the plaintiff, he was handed a paper described in the question as "Plaintiff's Exhibit 1," and asked to state what it was. His answer and the remainder of his testimony was as follows:

A. Certificate of deposit; \$500; Rawlins National Bank to Western States Fire Insurance Company, with notice of protest and non-payment attached. Q. Is that the certificate of deposit in question? A. It is. Q. Was that certificate of deposit negotiated with the plaintiff bank? A. It was. Q. On what date? A. About August 26, 1912. Q. Plaintiff bank the present holder? A. It is. (Counsel for defendant here objected to the question and moved to strike out the answer, stating: "That is one of the material issues in the case. We object to the question as calling for a conclusion of the witness. That is one of the questions for the court to decide." The court ruled on the matter by saying: "It may be stricken out." The plaintiff took an exception.) Q. Has the plaintiff corporation received any payment of this paper, Mr. Gholson? A. It has not. Q. What is the amount now due on this certificate of deposit? A. \$528.60 was the amount of the certificate, with interest and protest fees. Q. That is, that includes interest and protest fees? A. Yes, up to the time it was presented and payment refused. Q. That was the amount due on the date of presentation? A. Yes, August 23, 1913. (Plaintiff's counsel here offered plaintiff's Exhibit 1 in evidence. Defendant's counsel objected as follows: "We object to the introduction of the form of protest attached to the certificate, for the reason that it is not an issue in this case. There are no pleadings here as to the protest fees; and, of course, the execution of the certificate is admitted. I will admit that the certificate of deposit was presented for payment on August 23, 1913; and the execution of the certificate is admitted in the pleadings."

The Court: "It may be admitted for that purpose—of showing presentment for payment.") Q. Mr. Gholson, what consideration did the plaintiff bank pay for this paper? (An objection to the question as immaterial, overruled.) A. Paid \$500, less 5 per cent. discount, making the paper draw 10 per cent. for the year. It carried 5 per cent. interest, and then we discounted 5 per cent. more.

There was no cross-examination, and no further testimony was introduced or offered by either party. On the back of the certificate of deposit is stamped, as if by a rubber stamp, the name "The Western States Fire Insurance Company," and immediately underneath that name appears the written signature, "Paul Fayn, V. Prest."

The court found generally for the defendant and against the plaintiff, and judgment was rendered in defendant's favor for costs. A motion for new trial was filed and overruled, and the plaintiff has brought the case here on error. The grounds stated in the motion for new trial were, in substance: (1) That the decision is against the weight of the evidence and contrary to law. (2) That the court erred in finding for the defendant. (3) That the findings, decision, and judgment were in defendant's favor and against the plaintiff. (4) That the decision is not sustained by sufficient evidence. The overruling of the motion for new trial is assigned as error in this court, and also substantially as in the motion that the decision is against the weight of the evidence, contrary to law, and not sustained by sufficient evidence. Rulings of the court upon plaintiff's motion to strike out parts of the second defense in the answer, and rejecting evidence offered by the plaintiff, are also here assigned as error.

[1] Under our rule 13 (104 Pac. xlii), the alleged error in denying plaintiff's motion to strike portions of the answer and in rejecting evidence offered by the plaintiff cannot be considered. Those matters were not assigned as grounds for new trial in the court below, and the rule aforesaid provides that nothing which could have been properly assigned as a ground for new trial in the court below will be considered in this court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial, and that such motion was overruled and an exception at the time reserved to such ruling.

Although the certificate of deposit appears to be indorsed as above stated, there was no specific proof of the indorsement, and we understand that to have been the reason for the finding and judgment in defendant's favor, and perhaps, also, the failure to otherwise prove a transfer by the payee. Indeed, the principal contention here of counsel for defendant in error is that it was necessary for the plaintiff, to entitle it to recover, to prove the genuineness of the indorsement and the authority of Paul Fayn to indorse the name of the payee upon the instrument, if it be shown that he did so indorse it; and that

the offer and introduction in evidence of the certificate, with its execution admitted, did not carry with it the indorsement. On the other hand, it is contended by counsel for plaintiff in error that the plaintiff held the certificate as a negotiable instrument clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution and without notice of any equities between the prior parties to the indorsement; and that possession of the certificate was prima facie evidence of ownership and lawful possession, so that the plaintiff was required to do nothing in opening its case except to prove the execution of the instrument and introduce it in evidence; and, further, that all of the certificate, including the indorsement, was received in evidence when plaintiff's Exhibit 1 was offered and received without objection, except as to the protest notice; but that, if the indorsement is not in the evidence, the plaintiff would be entitled to recover for the reason that the mere production on the trial of an unindorsed negotiable instrument payable to order is prima facie evidence of ownership, and entitles the holder to recover in the absence of evidence rebutting such presumption. Said counsel also contend that indorsement by the payee is shown by the testimony of the witness Gholson that the certificate was negotiated with the plaintiff bank.

[2, 3] The questions thus presented will be considered in what we deem their proper order, and, first, whether the indorsement was offered and received in evidence without objection, so as to obviate the necessity of proving it, assuming for the present that if so offered and received such proof would be unnecessary but otherwise would have been required. We think the record fails to show that the indorsement was either received or offered in evidence. It was not referred to by the witness when asked to describe the proposed exhibit nor by counsel when offering the same in evidence, and there is no mention of it anywhere in the evidence. The first reference to the exhibit aforesaid or the certificate was by this question propounded by plaintiff's counsel to the only witness examined:

"I hand you Plaintiff's Exhibit 1 (handing paper to witness). You may state what that is."

The witness thereupon described it, as above shown, by stating that it was a certificate of deposit for \$500, Rawlins National Bank to Western States Fire Insurance Company, with notice of protest and nonpayment attached. Without any further description of it, "Plaintiff's Exhibit 1" was offered in evidence. The notice of protest having been referred to as part of the exhibit, an objection was interposed to it as immaterial under the issues, and it was admitted for the purpose of showing presentment for payment. But as the indorsement had not been mentioned as part of such

exhibit, in identifying it or in the offer, and no proof had been made of the indorsement, though denied by the answer, defendant's counsel might rightfully assume, and we think it must be understood that he did, that the offer did not include the indorsement. The indorsement is not so essentially a part of the certificate that it would necessarily be included in an offer of the certificate in evidence, where proof of the indorsement is required. *Witt v. Campbell-Lakin Segar Co.*, 66 Or. 144, 134 Pac. 816; *Johnson v. English*, 53 Neb. 530, 74 N. W. 47; *Levy v. Cunningham*, 56 Neb. 348, 76 N. W. 882; *Comstock v. Kerwin*, 57 Neb. 1, 77 N. W. 387; *Stroud v. Harrington*, Fed. Cas. No. 13,546a; *Wallace v. Reed*, 70 Ind. 263.

It is clear that in a suit against the maker of such an instrument, or of a promissory note, by one claiming to hold it by or under an indorsement, where the execution of the instrument and the indorsement are both denied, or the indorsement merely, so as to require proof in the one case of both execution and indorsement and in the other of the indorsement, proof of the execution alone would not prove the indorsement, or be sufficient to entitle the indorsement to be admitted in evidence. And we do not suppose it would be contended that the instrument, whether a promissory note, bill of exchange, or certificate of deposit, would be inadmissible in evidence without or separate from the indorsement. Yet the effect of a rule that the offer and admission merely of the instrument in evidence, upon proof of its execution, or without such proof where execution is admitted, or not denied, carries with it or includes the denied indorsement of the payee, would be to dispense with proof of such indorsement, and thus nullify the rule requiring it, or cause the exclusion of the instrument itself upon a valid objection to the indorsement. Since the indorsement appearing on the back of the certificate was not identified as part of it, or as part of the exhibit, or referred to in the offer, the defendant ought not to be held subject to the consequences of a failure to object to evidence offered and admitted.

[4, 5] But, as above stated, it is contended that, though the indorsement may not have been received in evidence under the offer aforesaid, the certificate is shown to have been indorsed by the payee and delivered by it to the plaintiff by the testimony of the witness Gholson that it was "negotiated with the plaintiff bank." This contention is based upon the technical meaning of the word "negotiated" in the law of negotiable instruments, which includes indorsement as well as delivery of an instrument payable to order. Comp. Stat. 1910, § 3188. So far as the use of the word in the question propounded to and answered in the affirmative by the witness may have

implied a legally proper and completed transfer, it involved a legal conclusion, and without any showing of the facts of the transaction. Certainly it was not the best or the proper method of proving the indorsement; nor would the affirmative answer aforesaid be conclusive if the facts were in evidence; and we seriously doubt whether, standing alone, it could properly be held sufficient to require a verdict or finding that the instrument had been either indorsed or delivered by the payee, even if the word was used in the question so propounded and answered in the sense above indicated. However, aside from the fact that the word has other ordinary meanings, and may be employed to denote something different and less than its technical definition in the law relating to the transfer of negotiable instruments, as well as the obvious difficulty in determining what the witness understood the question to mean, if not what counsel intended by it, the question and the answer thereto might reasonably be construed to mean nothing more than that the certificate was transferred to the plaintiff by some one; and this would not necessarily imply that such transfer was by the payee, or that the payee had indorsed or authorized the indorsement or transfer. We think a witness might answer such a question in the affirmative with reference to an instrument payable to order, but transferred merely by delivery by some third person, honestly believing it to be true because of an incorrect understanding of the law, or, if appearing to have been indorsed by the payee, believing that it was so indorsed. There is nothing in this case to show that the witness based his answer even partly upon the indorsement, for his attention was not directed to it, and it was not mentioned in the testimony. If we might properly assume that he knew what was necessary to the transfer of the title to a negotiable instrument payable to order, we are not satisfied that it ought also to be assumed that he was acquainted with the technical or statutory definition of the word "negotiated." If the contention as to this testimony was made in the trial court, that court evidently refused to accept it as proof of an indorsement by the payee, or a transfer and delivery by the latter to the plaintiff, or to infer from it the fact of such indorsement or transfer. It is in any event a mere conclusion, except as it may tend to show a transfer to plaintiff by some one not necessarily the payee; and as what was intended and understood by it is at least involved in much doubt, and it was within the power of plaintiff to show expressly or by direct evidence from whom and under what circumstances it received the certificate, we think the judgment ought not to be disturbed upon the ground of a merely possible inference or implication of the payee's indorsement or transfer from

the testimony aforesaid. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193; *St. Johns Table Co. v. Brown*, 126 Mich. 592, 85 N. W. 1124.

In *Vickery v. Burton*, supra, the name of the payee appeared on the back of the notes sued on, and the payee and another witness testified about a certain transaction, and that thereafter the plaintiff was the lawful owner and holder of the notes, but without stating that the payee had indorsed or assigned the notes, or referring at all to an indorsement or assignment. The court, in mentioning such testimony, said that there seemed to be a studied effort to avoid the crucial matter of the actual indorsement of the notes, and that the plaintiff had failed to show the essential fact of the indorsement by the payee; and it was held that the trial court erred in granting a motion for a directed verdict in plaintiff's favor.

[8] This brings us to the main question in the case, viz.: Whether the possession of the certificate entitled the plaintiff to recover without proving an indorsement, or at least a transfer, by the payee, or, in other words, whether, the execution of the certificate having been admitted by the pleadings, the mere fact of possession, as shown by the production of the certificate on the trial and its introduction in evidence, was sufficient prima facie to entitle the plaintiff to recover, in view of the denial by the answer of the alleged indorsement and delivery by the payee, as well as the alleged ownership of the plaintiff.

Counsel for plaintiff base their contention that the mere fact of such possession was sufficient to entitle the plaintiff to recover, first, upon the principle that possession of a negotiable instrument payable to the bearer, or indorsed in blank, is prima facie evidence of title. But that well-settled rule does not reach the question of the necessity of proving the indorsement. On the contrary, it assumes that the instrument has in fact been indorsed in blank by the payee or special indorsee, and does not refer to an instrument merely appearing to have been so indorsed. Where the genuineness of the indorsement is not legally challenged, or is established by proof, then the rule applies, and for the reason that, like an instrument made payable to bearer on its face, one payable to order may be negotiated by mere delivery when indorsed in blank by the payee. Hence the presumption of ownership from the mere fact of the possession of such an instrument.

This is illustrated by some of the cases cited and quoted from in counsels' brief. Among them is the case of *Dawson Town & Gas Co. v. Woodhull*, 87 Fed. 451, 14 C. C. A. 464, wherein Circuit Judge Thayer, in the opinion of the court, said:

"The legal presumption of ownership which exists in favor of one who is ostensibly in possession of negotiable notes indorsed in blank

by the payee, as these notes were, and who brings a suit thereon, is not overcome by a mere denial of the fact of ownership contained in the answer. When these notes were offered, they were in the hands of the plaintiff's attorneys. The legal presumption was that they had received them from the hands of their client, * * * and that they were the client's property. There was no occasion, therefore, for offering testimony to confirm the presumption before the notes were admitted in evidence."

The court was there clearly referring to the presumption of ownership in favor of one in possession of a negotiable note shown to have been actually indorsed in blank by the payee—not merely appearing to have been so indorsed, for the fact of such indorsement is stated in that part of the opinion above quoted, and in stating the facts of the case the learned judge said that the notes sued on were executed by the defendant in favor of J. T. Holle, as payee, "and were subsequently indorsed by him to said Woodhull."

Counsel quote from the opinion in the case of *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170, the statement, among others, that possession of a negotiable instrument payable to bearer, or indorsed in blank, is prima facie evidence that the holder is the proper holder and lawful possessor of the same, and that actual possession of such an instrument payable to bearer or indorsed in blank is plenary evidence of title in the holder until other evidence is produced to control it. But it was also stated in the opinion in that case that "the record shows that the draft was accepted by the defendant, and was duly indorsed by the payee," and that "due delivery of the executed draft of the contractor indorsed in blank is admitted." Thus the court had in mind an instrument shown to have been in fact indorsed by the payee. Indeed, it was further said, after stating that possession of an instrument payable to bearer, or indorsed in blank, is prima facie evidence that the holder is the lawful holder and possessor of the same, that in a suit in the name of the transferee the former has nothing to do in the opening of his case, "except to prove the signatures to the instrument, and introduce the same in evidence."

In this connection, also, counsel cite and quote from the Connecticut case of *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 76 Conn. 126, 55 Atl. 604. The question in that case was whether the trial court had found the note to have been indorsed by the payee, and whether the evidence was sufficient to show such indorsement. The note appeared to have been indorsed in the name of the payee, a corporation, by "one Tutton in its behalf." The evidence in the case went beyond the mere production of the note on the trial, and among other things it was shown that Mr. Tutton, while negotiating with the plaintiff in behalf of the payee for the purchase of certain machinery, left the note with the plaintiff to be credited to the payee, and that it was so credited. That case does not hold that the mere fact of pos-

session of a note appearing to have been indorsed in blank is sufficient without proof of the indorsement.

Counsel also rely upon the case of Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1103. But that case cannot be regarded as authority in support of the contention since explained in the more recent Colorado case of Marks v. Munson, 59 Colo. 440, 149 Pac. 440. It was held by a majority of the court in the latter case that the mere fact of possession was not sufficient without proof of the indorsement, and the case of Gumaer v. Sowers, supra, was referred to as follows:

"There the objection to the introduction of a note without proof of the signatures was not made in apt time, so as to make the ruling on its admission reviewable in this court. The judgment was properly affirmed, but in the opinion there are some statements which support the position of defendant in error in this case. They were, however, not necessary to the decision, were due to evident misapprehension of the authorities, as in the case above discussed (Pendleton v. Smisgaert, 1 Colo. App. 508, 29 Pac. 521), and should be regarded as dicta merely."

In Daniel on Negotiable Instruments, § 812, it is said:

"The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports prima facie * * * that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where indeed such proof is necessary), prima facie establishes his case, and he may there rest it."

Thus the author seems to exclude from such presumption the genuineness of the instrument, if put in issue, which we think was intended to embrace the signature of an indorser necessary to negotiation as well as that of maker or acceptor. And in the succeeding section (813) it is said that it "is not competent for the defendant to deny that the plaintiff is the owner and holder of a note upon which he brings suit as such, without traversing the signature, the indorsement, or the delivery of the note," clearly recognizing, it seems to us, the right to deny the indorsement and the resulting necessity of proving it to make out a prima facie case. Should the indorsement, if in blank, be proved, the presumption of ownership would then, of course, apply.

The same learned author stated the rule as to the presumption from possession in section 1200, by quoting from Whiteford v. Burkmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640, as follows:

"A bill payable to bearer, or a bill payable to order and indorsed in blank, will pass by delivery, and bare possession is prima facie evidence of title; and for that reason possession of such a bill would entitle the holder to sue"

—citing only Crosthwait v. Misener, 13 Bush (Ky.) 543, and Wells v. Schoonover, 9 Heisk. (Tenn.) 805, in addition to the Maryland case aforesaid. The Maryland case was against the indorser, and it shows that the plaintiff proved the handwriting of both drawer and

indorser. The Tennessee case shows the fact of indorsement by the payee of the notes sued on, and that it was not denied that the legal title to the notes passed by the indorsement of the payee to the plaintiff. And in the Kentucky case the court merely said:

"Possession of a note is prima facie evidence of ownership, and appellee exhibits the note and claims it as his; that claim and possession will be respected till his title to the note is denied by the pleadings of his adversary."

It does not appear, therefore, that the author was stating a rule dispensing with proof of the indorsement, but rather a rule of evidence where the indorsement is not denied, or, if denied, is established by proof. In the sixth edition of the same work by T. H. Calvert a paragraph is added to section 1200, stating that possession of the note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed, citing only certain Minnesota cases, viz. Bank v. Mallan, 37 Minn. 404, 34 N. W. 901, Tarbox v. Gorman, 31 Minn. 62, 16 N. W. 466, and Bank v. Loyhed, 28 Minn. 396, 10 N. W. 421. But the cases so cited were each based upon a statute so providing, viz. that in actions on promissory notes or bills of exchange by the indorsee, the possession of the note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed.

The Supreme Court of Colorado, by Teller, J., considering the rule aforesaid and the cases cited to sustain the contention that under it proof of the payee's indorsement of an instrument is not required, say in the recent case of Marks v. Munson, supra:

"The language of these cases, when applied to the facts thereof, clearly means only that an instrument in fact executed as a note, bearing a genuine indorsement, when offered in evidence by an indorsee, if indorsed in blank, makes a prima facie case of ownership."

And further:

"There is no presumption that the names on the note were written by or under the authority of the persons whose signatures they purport to be."

So it was held that in a suit against the maker of a note by one claiming as an indorsee, when the execution and indorsement are put in issue by the answer, such note is not admissible in evidence without proof of the signatures.

The rule that a presumption of title arises from the fact of possession of a note payable to order and indorsed in blank is found stated in Randolph on Commercial Paper (2d Ed.) § 776. Yet in a preceding section (774) it is said that an indorsee in an action against maker or acceptor must prove the indorsements under which he holds, and that, where the indorsement is made by an agent, both his signature and authority must be proved. Evidently the former rule as stated was not supposed to be inconsistent with the latter. The rule as to presumption from possession, at least where the indorsement of an instrument to order is denied, we find

stated consistently with the rule as to proving the indorsement in *James v. Chalmers*, 6 N. Y. (2 Seld.) 209, 214. There the court said that the long-established and well-settled rule was that where a plaintiff introduces and proves a negotiable promissory note, payable to a third person or bearer, or, if to the order of such person, by proving his indorsement thereof, the plaintiff is prima facie not only to be deemed the lawful owner of the note, but that it came to him in the regular course of business before maturity. In *Way v. Richardson*, 3 Gray (Mass.) 412, 63 Am. Dec. 700, an action against the maker on a note indorsed in blank, Shaw, Chief Justice, said:

"The genuineness of the signature and indorsements was admitted. This, with the production of the note, was prima facie evidence of title, and good, unless rebutted."

And we think it clear that the rule as generally stated means, as to an instrument indorsed in blank, one actually so indorsed by the payee, or the special indorsee, as the case may be.

We are not now considering the manner of proving an indorsement, or what would be sufficient evidence thereof aside from the fact of possession, but the necessity for such proof. Although there are some decisions apparently to the contrary, we believe it to be well settled by the great weight of authority that an indorsement necessary to the title of one bringing suit upon a negotiable instrument must be proved to authorize the presumption of ownership from the fact of possession, when the indorsement is put in issue by the pleadings, and in the absence of a statute providing otherwise. *Story on Bills* (Bennett's Ed.) § 262; *Edwards on Bills & Notes*, 683; 2 *Greenleaf on Ev.* (Redfield's Ed.) §§ 163-168; *Byles on Bills*, 425; 3 *Phillips on Ev.* (Cowen & Hill's Notes) 189; *Abbott's Proof of Facts* (3d Ed.) 775; *Smith v. Chester*, 1 Term Rep. 654; *Robinson v. Yarow*, 7 Taunt. 456; *Beeman v. Duck*, 11 M. & W. 251; *Jacobs v. Tarleton*, 11 A. & E. (N. S.) 421; *Marston v. Allen*, 8 M. & W. 494; *Lloyd v. Howard*, 15 A. & E. (N. S.) 995; *Harrop v. Fisher*, 100 E. O. L. 196; *Spicer v. Smith*, 23 Mich. 96; *St. Johns Table Co. v. Brown*, 126 Mich. 592, 85 N. W. 1124; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Newton v. Principaal*, 82 Mich. 271, 46 N. W. 234; *McCormick v. Trotter*, 10 Serg. & R. (Pa.) 94; *Wallace v. Reed*, 70 Ind. 263; *Anniston Pipe Works v. Mary Pratt Furnace Co.*, 94 Ala. 606, 10 South. 259; *Jefferson Co. Sav. Bank v. Interstate Sav. Bank*, 5 Ala. App. 363, 59 South. 348; *Hugumin & Co. v. Hinds & Weissgerber*, 97 Mo. App. 346, 71 S. W. 479; *Wade v. Boone*, 184 Mo. App. 88, 168 S. W. 960; *Bank v. Hohn* (Mo. App.) 125 S. W. 539; *Claffy v. Farrow*, 18 N. Y. Supp. 160; *Church's Ex'r v. Church's Estate*, 80 Vt. 228, 67 Atl. 549; *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481; *Whiddon v. Sprague*, 203 Mass. 526, 89 N. E. 917; *Smith v. Bryan*,

33 N. C. 418; *Blum, Stern & Co. v. Sallis*, 24 La. Ann. 118; *Andrews v. Powers*, 35 Wis. 644; *Swanby v. Nor. State Bank*, 150 Wis. 572, 137 N. W. 763; *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471; *Baker v. Warner*, 16 S. D. 292, 92 N. W. 393; *Vickery v. Burton*, supra.

In *Story on Bills*, in the section cited, it is said that there is no implied admission on the part of the acceptor of the genuineness of the signature of the payee, or of any other indorser, and consequently the holder, in order to recover of the acceptor, must establish by proof the genuineness of such signatures, to show title to the bill, although he need not prove the signature of the drawer. In *Byles on Bills*, supra, it is also said that the indorsement must be proved, if the action be against a maker or acceptor by an indorsee. The doctrine is stated in *Greenleaf on Evidence* (vol. 2, § 163) as follows:

"Where the action is between the immediate parties to the contract, as payee and maker of a note, or payee and acceptor of a bill, the plaintiff, ordinarily, has only to produce the instrument and prove the signature. But where the plaintiff was not an original party to the contract, but has derived his title by means of some intermediate transfer, the steps of this transfer become, to some extent material to be proved."

And in section 166:

"The plaintiff is not bound to allege, nor of course to prove, any indorsements but such as are necessary to convey the title to himself. All others may therefore be stricken out."

And in *Phillips on Evidence*, above cited, it is said:

"The indorsement is to be proved in the ordinary mode, like other handwriting. * * * It must appear that the indorsement was made by the person by whom it purports to have been made."

In *Smith v. Chester*, supra, it was held that, in an action by an indorsee of a bill of exchange against the acceptor, it is necessary to prove the handwriting of the first indorser, notwithstanding that such indorsement was on the bill when it was accepted. Answering the contention that, as the indorsement was on the bill at the time of the acceptance, it must be taken to have been admitted by the drawee, and that he could not afterwards dispute it, *Ashhurst, J.*, said:

"The law has been otherwise settled. And if it were not so, there would be no difference in this respect between bills payable to order, and those payable to bearer. And it would open a door to great fraud."

And *Buller, J.*, said:

"This point was much considered in a late case before this court, when they were perfectly clear that an indorsee of a bill of exchange, in an action against the acceptor, was obliged to prove the handwriting of the first indorser. For when a bill is presented for acceptance, the acceptor only looks to the handwriting of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged."

In the Michigan case of *Spicer v. Smith*, in which the opinion was delivered by *Graves, Justice*, and concurred in by the other em-

inent justices of the court, Justices Cooley, Campbell, and Christlancy, it was held, in a suit brought by an indorsee against the maker of a promissory note payable to order and having indorsed upon it the name of the payee by one as agent, that it was incumbent on the plaintiff, aside from the execution of the note, to prove that the indorsement was made by the one signing as agent and that he had authority to make it. In the Wisconsin case of *Swanby v. Nor. State Bank*, supra, Chief Justice Winslow, delivering the opinion of the court, said that mere naked possession of negotiable paper payable to order does not prove title.

The rule as to proving an indorsement as well as the execution of a negotiable instrument has been modified or changed by statute in Minnesota, as above shown, and perhaps in other states by a statute to the same effect; and it has been modified in several states by statutory provision making proof of execution or indorsement unnecessary unless the same is denied under oath. Under our Code of Civil Procedure every pleading of fact must be verified by the affidavit of the party, his agent, or attorney, except in certain cases not here material. Comp. Stat. 1910, §§ 4422-4430. The answer in this case was verified as required by statute. Under the former Code, displaced by the one now in force, such verification was not required; but it was provided that, in all actions, allegations of the execution of written instruments and indorsements thereon shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent, or attorney. Comp. Laws 1876, p. 46, c. 13, § 103. That provision was omitted from the present Code, which requires verification in all cases, with the immaterial exceptions aforesaid, and obviously because of such requirement. Under the former Code the question might arise as to the effect of an unverified pleading denying the execution or indorsement of a negotiable instrument, and, though otherwise good as a pleading, such unverified denial would be, and was in practice, disregarded. And it will be found that many of the cases holding proof of execution or indorsement to be unnecessary are based upon a statutory provision to that effect, where the pleading containing a denial of such matter is not properly verified. See *Whiddon v. Sprague*, 203 Mass. 526, 89 N. E. 917; *First Nat. Bank v. Smith* (Tex. Civ. App.) 183 S. W. 862; *O'Rear v. Am. Tr. & Sav. Bank* (Ala.) 71 South. 105.

[7] Thus far, with respect to the contention that plaintiff's possession and production of the certificate in court was alone sufficient to entitle it to recover, we have considered the meaning and effect of the principle aforesaid that possession of a negotiable instrument indorsed in blank is prima facie evidence of title. But the contention is also based upon section 3217, Compiled Statutes of 1910, a

section of the Negotiable Instruments Law, the uniform law on that subject adopted in this state. The part of the section relied on reads as follows:

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

It is argued with reference to that section of the statutes that the plaintiff, being the holder of the certificate, is to be deemed a holder in due course until it is shown by proper evidence that the title of the person who negotiated the instrument was defective, and that the attack upon the indorsement to the plaintiff bank in the answer is not itself sufficient to overcome the presumption. The fault with this argument is that it fails to distinguish between mere possession and the legal term "holder," and misconceives the purpose and intent of the provision referred to, which is to state the presumption in favor of one who is in fact the holder that he is a holder in due course, but that the burden of proving that he acquired such title in due course will be upon him when the title of any person who has negotiated the instrument was defective. The section does not declare that one in possession is to be deemed a holder in due course, though it is true that he may come within the terms of the section if in fact the holder. The term "holder," as used in the section and throughout the act, unless otherwise shown by the context, is defined by that act as meaning "the payee or indorsee of a bill or note, who is in possession, or the bearer thereof." The same law defines "bearer" as meaning "the person in possession of a bill or note which is payable to bearer." Comp. Stat. 1910, § 3349. Hence one in possession may be the holder, and he is the holder of an instrument payable to bearer, either on its face or by the indorsement in blank of the person to whose order it has been made payable. The instrument is then transferable by mere delivery so as to pass the legal title. But if not payable to bearer, then the "holder" can only be the payee or indorsee who is in possession. *Swanby v. Nor. State Bank*, supra. The concluding words, "or the bearer thereof," in the above definition of "holder," evidently refer to one who is in possession of an instrument payable to bearer; that is, the "bearer," as defined by law. Unless an instrument payable to the order of a person named is indorsed by the payee in blank, it does not become payable to bearer, and therefore mere possession by one other than the payee will not constitute him the holder, as that term is defined by the statute and usually understood.

Whether or not the plaintiff, if it became the holder, was a holder in due course, is not the question in this case; for, if the plaintiff is the holder, then it would be deem-

ed a holder in due course, since no evidence was introduced to rebut that fact, or to throw the burden of proving it upon the plaintiff. But the question is whether it has been shown that the plaintiff was the holder, or, to be exact, whether the fact of possession, and that the plaintiff paid money for the instrument to some one not named in the evidence, is sufficient to show its title and right to recover. And we find nothing in the Negotiable Instruments Law making the mere fact of possession evidence of title to negotiable paper payable to order, or evidence that it was indorsed by the payee in blank or otherwise, or dispensing with proof of such indorsement, if denied, and the indorsement be relied on to show title or is necessary for that purpose. On the contrary, that law provides (Comp. Stat. 1910, § 3188) that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof, and that if payable to order it is negotiated by the indorsement of the holder completed by delivery; and the "holder" for the purpose of such indorsement and delivery, as manifestly intended by this provision, having reference to the definition of "holder" by the same statute, is the payee or indorsee in possession of the instrument. This clearly means an actual indorsement by the one to whose order the instrument has been made payable, or by his authority, a fact to be established by proof when it is put in issue, in the absence of a statutory provision making such proof unnecessary.

[8] However, it is well settled that a negotiable instrument payable to order may be transferred by the payee or holder without indorsement, though in such case the transferee takes only the title and right of the one so transferring it, and does not become the holder in due course, but has only the equitable instead of the legal title. 1 Daniel on Neg. Instr. § 741; First Nat. Bank v. Moore, 137 Fed. 505, 70 C. C. A. 89; Moore v. Miller, 6 Or. 254, 25 Am. Rep. 518. And this principle is recognized by the Negotiable Instruments Law. Comp. Stat. 1910, § 3207. Therefore, if the plaintiff had shown a transfer of the certificate to it by the payee, although without indorsement, it would have been entitled to recover, in the absence of evidence showing a good defense as against the payee, or that would otherwise interfere with such recovery. But mere possession is insufficient to show such a transfer. 1 Daniel on Neg. Instr. § 741; 2 Randolph on Commercial Paper, § 791; Caldwell v. Meshew, 44 Ark. 564; Sch. Dist. v. Reeve, 56 Ark. 68, 19 S. W. 106; Porter v. Cushman, 19 Ill. 572; Redmond v. Stansbury, 24 Mich. 445; Bausman v. Kelley, 38 Minn. 197, 36 N. W. 833, 8 Am. St. Rep. 661; Beard v. First Nat. Bank, 39 Minn. 546, 40 N. W. 842; Red Riv-

er, etc., Inv. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149; Vastine v. Wilding, 45 Mo. 89, 100 Am. Dec. 347; Jolly v. Huebler, 132 Mo. App. 675, 112 S. W. 1013; Turner v. Mitchell (Ky.) 61 S. W. 468; Frankenstein v. Levine, 65 N. Y. Supp. 562; Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Baker v. Warner, 16 S. D. 292, 92 N. W. 393; Swanby v. Nor. State Bank, 150 Wis. 572, 137 N. W. 763; Witt v. Campbell-Lakin Segar Co., 66 Or. 144, 134 Pac. 316; Crisman v. Swisher, 28 N. J. Law, 149. In the section of Daniel on Negotiable Instruments above cited it is said:

"Where a bill or note payable to order is transferred without indorsement, the transferee does not acquire the legal, but only the equitable, title. The holder under such a transfer must aver and prove the assignment, for the mere possession of the instrument unindorsed is not evidence of ownership, and its exhibition in a suit not sufficient ground of recovery."

We are aware that there is a direct conflict in the decisions on the question of the sufficiency of mere possession to show equitable ownership, so as to authorize a recovery against the maker by one other than the payee or special indorsee. The view is maintained in a few jurisdictions that possession is alone sufficient for that purpose, unless the presumption of ownership therefrom is rebutted by proof. It is so held in North Carolina, while conceding that the mere introduction of a note in evidence does not prove the payee's indorsement. Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803; Johnson Co. Sav. Bank v. Scroggin Drug Co., 152 N. C. 142, 67 S. E. 263, 50 L. R. A. (N. S.) 581, 136 Am. St. Rep. 821.

But the clear weight of authority and the better reasoning, in our opinion, sustains the rule that mere possession of such an instrument unindorsed is not sufficient or prima facie evidence of even the equitable title. See note in 50 L. R. A. (N. S.) 581-591. We agree with the remark of the court in Swanby v. Nor. State Bank, supra, that such possession "does not prove or tend to prove" the transfer of a note payable to order and not shown to have been indorsed by the payee. The fact necessary to the equitable title, in such case, is a transfer by the payee or the person to whose order the instrument has been made payable. Such proof is generally at least within the power of the person seeking to recover upon the instrument, if it has been so transferred, while the other party might be wholly without knowledge or information concerning the matter. The presumption of delivery from possession is proper and reasonable where the instrument is payable to bearer; but we see no good reason for giving effect to such presumption where the instrument is payable to order and not indorsed, so as to overcome the usual and primary presumption, in such case, that the instrument remains the property of the person to whose order it is made payable.

Holding, therefore, that the proof was in-

sufficient to entitle the plaintiff to recover, the judgment will be affirmed.

Affirmed.

BEARD, J., concurs. SCOTT, J., did not sit.

STATE v. SORESENSEN et al. (No. 2885.)

(Supreme Court of Utah. Sept. 20, 1916.
Rehearing Denied Nov. 27, 1916.)

1. BAIL § 89(1)—ACTION ON RECOGNIZANCE—PLEADING.

In action to recover on a recognizance given for bail for one arraigned before a justice, the complaint was not defective in not averring that the complaint made before the justice was verified, where defendants, by their undertaking, made a part of the complaint, recited that a complaint on oath was made and filed before the justice, and it was also alleged that a complaint was "duly and lawfully drawn, signed, made, and filed" before the justice.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 386, 388; Dec. Dig. § 89(1).]

2. BAIL § 89(1)—ACTION ON RECOGNIZANCE—PLEADING.

Such complaint was not insufficient in not stating the county of the crime so as to show the justice had jurisdiction; it being sufficient to aver that the bailed person was legally in custody, properly charged with a public offense, and was discharged because the bond was given, without averring in detail the facts in respect to such matters or describing the offense with the particularity required in an initial pleading.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 386, 387; Dec. Dig. § 89(1).]

3. BAIL § 89(1)—ACTION ON RECOGNIZANCE—PLEADING.

Direct averments in the complaint of a preliminary hearing and a binding over before the justice, although desirable, were not essential, where it averred that an information was filed in the district court by the district attorney charging the bailed person with the same crime with which she was charged before the justice, and that upon the filing of the information an order was made requiring her to appear for arraignment, since in a collateral proceeding every necessary preliminary step will be presumed to have been taken.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 386, 388; Dec. Dig. § 89(1).]

4. JUDGMENT § 495(1)—REGULARITY—PRESUMPTIONS.

In a collateral proceeding, every presumption is indulged in favor of the district court's jurisdiction and the regularity of its proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933; Dec. Dig. § 495(1).]

5. BAIL § 76—BOND—CONSTRUCTION—IN FAVOR OF SURETIES.

The liability of sureties on a bail bond may not be extended by implication or presumption beyond the terms of their undertaking, in view of the rule that sureties are favorites of the law.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 322-327; Dec. Dig. § 76.]

6. BAIL § 75—BOND—CONSTRUCTION.

In view of Comp. Laws 1907, § 4988, providing for admission of defendant before conviction to bail "for his appearance * * * at the court to which the magistrate shall be required to return the complaint," upon his being held to answer after examination, etc., where

a bail bond undertook that defendant "will appear and answer the charge above mentioned before said justice or in whatever court it may be prosecuted," (2) "will at all times hold herself amenable to the orders and process of said justice court," (3) "if held for trial will appear and render herself in execution of said orders and process and not depart without leave, or until discharged according to law," and (4) "if she fail to perform either of the conditions we will pay," etc., a default in failing to appear for arraignment in the district court was default within the bond.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 309-312, 315-321; Dec. Dig. § 75.]

7. BAIL § 88, 89(1)—ACTION ON RECOGNIZANCE—JUDGMENT OF FORFEITURE—PLEADING.

An order or judgment of forfeiture is a prerequisite to the maintenance of an action on a recognizance or bail bond, and must be alleged and proved.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 370, 393; Dec. Dig. § 83, 89(1).]

8. BAIL § 89(1)—ACTION ON RECOGNIZANCE—PLEADING ORDER OR JUDGMENT OF FORFEITURE.

In an action on a recognizance given for bail of one arraigned before a justice, a complaint alleging defendant failed to appear for arraignment before the district court, and that on the day fixed for arraignment and on her failure to appear "the court duly and lawfully declared said bond forfeited," etc., was sufficient to show a proper order or judgment of forfeiture was made.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 393; Dec. Dig. § 89(1).]

9. BAIL § 77(2)—JUDGMENT FOR FORFEITURE OF BOND—ENTRY.

Under Comp. Laws 1907, § 5007, requiring the court, if "without sufficient excuse" the defendant neglects to appear for arraignment, etc., to direct the fact to be entered upon its minutes, and providing that the undertaking of bail shall thereupon be forfeited, but if at any time before final judgment the defendant or his bail appears and satisfactorily excuses his neglect, the court may relieve from the forfeiture, etc., neither the ultimate nor evidentiary fact that such neglect was "without sufficient excuse" need be entered in the minutes in order to found upon the order of judgment of forfeiture an action to recover on the recognizance.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 341-349, 403; Dec. Dig. § 77(2).]

10. BAIL § 84—ACTION ON RECOGNIZANCE—DEFENSES.

It is no defense to an action on a recognizance that information was not filed within the statutory 30 days after defendant had been examined and committed; the contention being that this deprived the court of power to order defendant's appearance for arraignment, and hence invalidated an order of forfeiture of the bond, the failure of the district attorney not being available in such collateral proceeding.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 379-381; Dec. Dig. § 84.]

11. BAIL § 79(2)—DEFENSES—DENIAL OF RELIEF FROM FORFEITURE—COLLATERAL ATTACK—ACTION ON RECOGNIZANCE.

Denial of motion of sureties on a bail bond to set aside the judgment or order of forfeiture thereof, under Comp. Laws 1907, § 5007, as to relief from such forfeiture, precludes them from attacking the validity or justice of such order or judgment of forfeiture in an action to recover on their recognizance, that being a collateral

proceeding, even if they are not bound therein by the order or judgment of forfeiture itself.

[Ed. Note.—For other cases, see *Bail, Cent. Dig.* §§ 363-365, 369; *Dec. Dig.* ¶ 79(2).]

McCarty, J., dissenting.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by the State against P. A. Sorensen and another. From a judgment for the State, defendants appeal. Affirmed.

S. P. Armstrong, of Salt Lake City, for appellants. E. O. Leatherwood, Dist. Atty., of Salt Lake City, for the State.

STRAUP, C. J. This is an action brought to recover on a recognizance. Judgment was rendered for the plaintiff. The defendants appeal. It is contended that the complaint does not state sufficient facts. So far as material the substance of it is that "on a complaint duly and lawfully drawn, signed and made, charging M. Mellor with the crime of selling intoxicating liquors without a license, and duly and lawfully filed" before a named justice of the peace, M. Mellor was on the 1st of March 1913, "duly and lawfully arrested," and that to obtain her release the defendants executed this bond or undertaking:

"The State of Utah v. M. Mellor, Defendant. Bail Bond (Pending Examination). Complaint upon oath having been made and filed on the _____ day of _____, A. D. 1913, before F. M. Bishop, a justice of the peace of the No. 2 precinct, of Salt Lake county, state of Utah, charging M. Mellor with the crime of selling intoxicating liquors without a license, and the said M. Mellor having been duly arraigned upon said complaint, and admitted to bail pending examination and hearing thereof, in the sum of three hundred dollars:

"Now therefore, we, P. A. Sorensen and Nels J. Sorensen, do hereby undertake and promise that the above-named M. Mellor, defendant, will appear and answer the charge above mentioned before said justice or in whatever court it may be prosecuted and will at all times hold herself amenable to the orders and process of said justice's court, and, if held for trial, will appear and render herself in execution of said orders and process and not depart without leave, or until discharged according to law; or if she fail to perform either of the conditions, we will pay to the state of Utah, in lawful money of the United States the sum of three hundred dollars.

P. A. Sorensen. [Seal.]

N. J. Sorensen. [Seal.]

"Executed and acknowledged before me and approved this 1st day of March, A. D. 1913.

"F. M. Bishop, Justice of the Peace."

It then is averred that Mellor was "thereupon released," and that thereafter, on the 29th of May, 1913, an information was filed in the district court by the district attorney, charging Mellor with the crime of selling intoxicating liquors without a license; that on the 1st of July, 1913, an order was made and entered by the district court requiring Mellor to appear for arraignment on the 11th of July; that Mellor failed to appear, and that on the 11th of July the district court "duly and regularly declared said bond forfeited," and directed the district attorney

to institute proceedings to collect the forfeiture.

[1] It is contended that the complaint is defective because it is not averred that the complaint made before the justice was verified. The defendants by their undertaking, which is made a part of the complaint, recited that a complaint on oath was made and filed before the justice. It also is alleged that a complaint was "duly and lawfully drawn, signed, made, and filed" before the justice. These, we think, where such complaint is but collaterally drawn in question, answers that objection. *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044.

[2] It next is contended that the complaint is insufficient because it is not averred that the crime of selling intoxicating liquors was committed in Salt Lake county, and hence not shown that the justice, a precinct justice of that county, had jurisdiction of the offense. While it was essential to here aver that Mellor was legally in custody, properly charged with a public offense and was discharged by reason of the giving of the bond, still the facts with respect to such matters were not required to be averred in detail, nor was it requisite that the offense be described or designated with such particularity as is required in an initial pleading. *Holcombe v. State*, 90 Ala. 185, 12 South. 794; *United States v. Dunbar*, 83 Fed. 151, 27 C. C. A. 488; *Vaughan v. Candler*, 113 Ga. 9, 38 S. E. 352; *State v. Randolph*, 22 Mo. 474; *Allen v. Commonwealth (Ky.)* 73 S. W. 1027.

[3,4] It further is urged that the complaint is defective because it is not averred that Mellor had a preliminary hearing before the justice or that she was held to answer. It might be better pleading had that been averred. It, however, is averred that an information was filed in the district court by the district attorney, charging Mellor with the same crime with which she was charged before the justice, and that upon the filing of the information an order was made requiring her to appear for arraignment. Every presumption is indulged in the district court's jurisdiction and in the regularity of its proceedings, and, until the contrary appears by the record, or otherwise is rebutted by competent evidence, it will be presumed in this, a collateral proceeding, that every step necessary to the filing of the information and the making of the order was properly taken, and all that was required to be done in such particular was done. In view of this, direct averments of a preliminary hearing, and a binding over were not essential. *Jennings v. State*, 13 Kan. 80; *Bernhamer v. State*, 123 Ind. 577, 24 N. E. 509.

[5,6] It further is urged that the complaint does not show any breach of the recognizance. In this respect it is argued that the bail bond was given only for Mellor's

appearance in the justice court, and to hold herself amenable only to the orders and processes of that court; and hence Mellor's alleged failure to appear in the district court for arraignment was not a default or breach within the terms of the bond. While this bond, let it be conceded, is in some respects ambiguous, and as a form is not to be commended, still if from its language the intent of the parties may be ascertained to obligate the defendants for Mellor's appearance in the district court, then ought they to be held liable for such a breach? The statute (Comp. Laws 1907, § 4988) provides that:

"If the offense is bailable, the defendant may be admitted to bail: Before conviction—(1) For his appearance before the magistrate on the examination of the charge, before being held to answer; (2) to appear at the court to which the magistrate shall be required to return the complaint, upon the defendant being held to answer after examination; (3) after information filed or indictment found, either before warrant is issued for his arrest or upon any order of the court committing him or enlarging the amount of bail, or upon his being surrendered by his bail to answer the information or indictment in the court in which it is filed or found, or to which it may have been transferred for trial."

Under the familiar rule that sureties are favorites of the law, the liability of these defendants by implication or presumption may not be extended beyond the terms of their undertaking and contract. While, as is seen, the bond is labeled "bail bond pending examination," yet, because of the statute and of the language in the body of the bond respecting the defendants' promises and undertakings, it is apparent that the bond was intended to be a continuing bond, and that the defendants not only bound themselves for Mellor's appearance before the magistrate on the examination, but also for her appearance in the district court if she be held to answer after examination. By their own language they undertook and promised that Mellor: (1) "Will appear and answer the charge above mentioned before said justice or in whatever court it may be prosecuted;" (2) "will at all times hold herself amenable to the orders and process of said justice court;" (3) "if held for trial will appear and render herself in execution of said orders and process and not depart without leave, or until discharged according to law;" and (4) "if she fail to perform either of the conditions we will pay," etc. From this language it is argued that the defendants undertook that Mellor would hold herself amenable only to the "orders and process of the justice court"; that no default of any such order or process is alleged, and that the default which is alleged—failure to appear for arraignment in the district court—constitutes a default of an order of the district court and not of the justice court, and hence such default is not within the terms of the bond. The defendants, however, expressly under-

took that Mellor, "if held for trial, will appear and render herself in execution of said orders"—let it be conceded orders of the justice court. But the order holding Mellor for trial and requiring her to appear and answer in the district court is an order of the justice court, and one as to which the defendants promised and undertook Mellor would hold herself amenable. It is not by a strict, but only by a strained, construction, that the bond can be given any other meaning. Thus, when the information was filed in the district court and an order there made requiring Mellor to appear for arraignment, and when she failed to appear, she not only made default of the district court's order, but also of the justice's order holding her for trial and requiring her to appear in the district court, and there answer the charge.

[7, 8] It undoubtedly is the rule that an order or judgment of forfeiture is a prerequisite to the maintenance of an action on a recognizance or bail bond, and must be alleged and proved. It is alleged that Mellor failed to appear for arraignment, and that on the day fixed for the arraignment and upon her failure to appear "the court duly and lawfully declared said bond forfeited," and directed the district attorney to institute proceedings to collect the forfeiture. It is contended that these allegations were insufficient to show that a proper order or judgment of forfeiture was made. For reasons presently stated we think they are sufficient. We thus are of the opinion that the demurrer was properly overruled.

Questions are raised as to evidence. The state put in evidence the transcript of the justice's record in the case of State v. Mellor, transmitted to the district court on the 22d of April, 1913, which, among other things, showed a verified complaint filed before the justice charging Mellor with selling, without a license, intoxicating liquors in Salt Lake county, the bail bond sued on, the preliminary examination before the Justice and binding Mellor over to the district court and holding her to there appear and answer the charge, the information filed in the district court by the district attorney on the 29th of May, 1913, the order made by the district court requiring Mellor to appear for arraignment on the 11th, and minutes of the court made on the 11th that "this being the time heretofore fixed for the arraignment of the defendant herein (State of Utah v. Mellor), the district attorney being present, and neither the defendant nor her attorney being present, on motion of the district attorney it is ordered that the bond of the defendant be, and the same is, hereby declared forfeited, and the district attorney is directed to bring suit for the recovery of said bond." It is claimed that though the allegation of forfeiture be held sufficient, yet the evidence does not show a sufficient judgment or order of forfeiture.

This, because of the statute (Comp. Laws 1907, § 5007), which provides:

"If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, shall thereupon be declared forfeited. But if at any time before the final adjournment of the court, the defendant or his bail appears and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just."

[8] By reason of the statute it is argued that a good order or judgment of forfeiture requires a recital of facts in the minutes showing that Mellor "without sufficient excuse" neglected to appear; and as the proved order contains no such recital, no action can be founded upon it. The statute, undoubtedly, requires the fact to be entered in the minutes that the defendant failed or neglected to appear, etc., and that the bond was declared forfeited. But we do not think that either the ultimate or evidentiary fact that such failure or neglect was "without sufficient excuse" was also required to be entered in the minutes. *State v. Austin*, 141 Mo. 481, 43 S. W. 165; *People v. Bennett*, 136 N. Y. 482, 32 N. E. 1044; *McGuire v. State*, 124 Ind. 536, 23 N. E. 85, 25 N. E. 11; *Banta v. People*, 53 Ill. 434; *People v. Tidmarsh*, 113 Ill. App. 153. That a nonappearance is inexcusable could, so far as the state's showing, be deduced in most instances only from the defendant's failure or neglect to appear. Whether such failure or neglect is excusable is something resting peculiarly within the knowledge of the defendant and not of the state; hence the provision of the statute, that before the final adjournment of the court the defendant or his bondsmen may appear and satisfactorily excuse the neglect and thus cause the forfeiture to be vacated.

[10] The statute requires an information to be filed within 30 days after a defendant has been examined and committed. The record of the case of *State of Utah v. Mellor*, put in evidence by the plaintiff, shows that the information was not filed within that time. For this reason it is contended that the court, upon the filing of the information, was without power to order Mellor's appearance for arraignment, and hence that the order of forfeiture is of no effect. Such failure of the district attorney cannot aid the defendants in this, a collateral proceeding. *State v. Lagoni*, supra.

[11] The defendants, by their answer, with great particularity, averred that Mellor at all times was a resident of Salt Lake City, and resided within four blocks of the building where the district court was held; that she had counsel of record who also maintained his office within three blocks of the build-

ing; that she and her counsel were at no time during any of the proceedings absent from Salt Lake City; that both had telephones and by such and other means could readily have been notified of the filing of the information and of the order requiring Mellor to appear for arraignment; that upon the filing of an information and fixing a day for a defendant's arraignment it had been the long-established custom and practice of the court to notify the defendant or his counsel of the day so fixed, but no notice of the filing of the information nor of fixing the day for the arraignment was given Mellor or her counsel, or either of the defendants, and that none had notice or knowledge whatever of the filing of the information nor of the making of the order until the commencement of this action, and that Mellor, at all times, was ready and willing to appear in the district court whenever her appearance was required, and failed to appear solely for the reason that she and her counsel both were without notice or knowledge that she was required to appear. But it was indisputably shown that after this suit was commenced, and while it was pending, Mellor and these defendants, in pursuance of section 5007, appeared before the criminal division of the court, and on motion and by affidavits upon all of the grounds of excusable neglect set forth in the answer herein, asked that the order or judgment of forfeiture be vacated, which motion, upon a hearing had before that court, was before the trial of this action denied. Now, on the trial herein, the defendants offered evidence in support of the allegations of their answer, which, upon objections of the state, was refused. Complaint is made of the ruling. It evidently was made on the theory that the record of the forfeiture of the recognizance was conclusive evidence of the breach and could not be impeached by extrinsic evidence; and, further, that the matters so set up in the answer and offered to be proved were determined and adjudicated on the motion heretofore referred to. We think the ruling right. *State v. Hindman*, 159 Ind. 586, 65 N. E. 911; *People v. Wolf*, 16 Cal. 385; *McNamara v. People*, 183 Ill. 164, 55 N. E. 625; *State v. Hines*, 37 Okl. 196, 131 Pac. 688, Ann. Cas. 1915B, 431. Thus, whatever the truth may be as to the matters set up in the answer, or the legal effect of them, was not open to further litigation in this proceeding. Though it should be said that the defendants were not conclusively bound by the judgment or order of forfeiture itself, they certainly were bound by the adjudication made on their own motion to set the judgment or order aside, and hence were estopped from assailing it in this, a collateral proceeding.

The order, therefore, is that the judgment of the court below be affirmed, with costs.

FRICK, J., concurs.

McCARTY, J. (dissenting). I think the court, under the facts and circumstances disclosed by the record, abused its discretion in refusing to set aside the forfeiture. I am also of the opinion that we are not precluded by any recognized or known rule of law of this jurisdiction from considering the question.

The only theory upon which the claim can be maintained that appellants are precluded and estopped from assailing the order overruling the motion to set aside the forfeiture is that the order is, in contemplation of law, a judgment from which an appeal could be taken. Our statute defines a judgment as "a final determination of the rights of parties in actions or proceedings." Comp. Laws 1907, § 8183. Clearly neither the forfeiture nor the order overruling the motion to set aside was "a final determination of the rights" of either the appellants or the state in this matter. If either of these orders has, or the two combined, have the force and effect of a final judgment or order, and such is the logic of the prevailing opinion, as I construe it, then it necessarily follows that when the order denying appellants' motion to set aside the forfeiture was made the state was entitled to have an execution issued and sufficient of appellants' property not exempt from execution levied upon and sold to satisfy—pay off—the judgment of forfeiture, and the bringing of the suit on the bond was a vain and useless thing. No such doctrine is contended for by the state or expressly announced in the opinion, but the logic of the opinion and the conclusions therein announced seem to me to lead to such a result; otherwise sureties on bonds of the kind here involved are denied their constitutional right to have orders forfeiting such bonds reviewed and considered on appeal. Suppose, for illustration, appellants had appealed to this court from the order denying their motion to set aside the forfeiture only, and the state had moved to dismiss the appeal on the ground that it was not taken from a final judgment or order, I do not think it is even problematical respecting the position this court would have taken. Under such circumstances we would, in all probability, have dismissed the appeal, and in doing so invited appellants' attention to the fact that the order of forfeiture is in no sense a final judgment or order, that their liability or non-liability on the bond had not yet been judicially determined, and hence there was nothing upon which to base an appeal.

For the reasons stated, I am of the opinion that the judgment of the lower court should be reversed, with directions to that court to grant a new trial.

BROADBENT v. DENVER & R. G. RY. CO.
(No. 2840.)

(Supreme Court of Utah. Oct. 5, 1916. Rehearing Denied Nov. 23, 1916.)

1. APPEAL AND ERROR \S 150(1) — **RIGHT OF REVIEW—PERSONS ENTITLED — INTEREST IN SUBJECT-MATTER.**

Where claims against a railroad, which plaintiff claimed were assigned to him to sue, were assigned to another who sued the railroad, which settled with the subsequent assignee, taking an indemnity bond holding it harmless against plaintiff's demands, and thereafter plaintiff sued the railroad and recovered on the claims no more than the settlement, plaintiff was not entitled to have defendant's appeal dismissed on the ground that any further litigation of the claims by defendant involved merely a question of whether plaintiff or the subsequent assignee was the rightful owner, and hence defendant was no longer the real party in interest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934, 946; Dec. Dig. \S 150(1).]

2. ATTORNEY AND CLIENT \S 183—**ATTORNEY'S LIEN.**

Under Comp. Laws 1907, § 135, giving an attorney's lien "from the commencement of an action or the service of an answer containing a counterclaim," which lien "cannot be affected by any settlement between the parties before or after judgment," an attorney has a lien on a cause of action only "from the commencement of an action," etc., as stated in the statute.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 385; Dec. Dig. \S 183.]

3. APPEAL AND ERROR \S 1064(1)—**HARMLESS ERROR—INSTRUCTIONS.**

An instruction that an attorney's lien, relied on by plaintiff, attached upon employment rather than upon bringing of action by the attorney claiming the lien as specified in Comp. Laws 1907, § 135, was not prejudicial to defendant, where the settlement of the cause of action by defendant, with notice of and in disregard of such lien, took place after action had been commenced by the attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. \S 1064(1); Trial, Cent. Dig. §§ 475, 528, 553.]

4. APPEAL AND ERROR \S 544(1) — **CONTENTS OF RECORD—DENIAL OF CHANGE OF VENUE.**

Under Comp. Laws 1907, § 3283, as to what is deemed excepted to without a bill of exceptions, and Laws 1911, c. 94, as to how the judgment roll is made up, denial of motion for change of venue will not be considered on appeal unless made to appear by bill of exceptions; such ruling not being of the judgment roll without a bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412, 2417; Dec. Dig. \S 544(1).]

5. ATTORNEY AND CLIENT \S 20—**APPEARING FOR ADVERSE PARTIES.**

Where claims against a railroad, which plaintiff claimed were assigned to him to sue, were assigned to another who sued the railroad, which, with knowledge of plaintiff's claim, settled with the subsequent assignee, taking an indemnity bond holding it harmless against plaintiff's demands, the attorney for the subsequent assignee had a right to appear for the railroad in the action against it by plaintiff, the trial chiefly involving the issue of whether plaintiff or such assignee had the better title, since there-

by the attorney did not appear on both sides of an adverse proceeding or take antagonistic positions.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 27, 29; Dec. Dig. ¶20.]

6. EVIDENCE ¶220(1)—ADMISSIONS—ACQUISITION—STATEMENTS IN PRESENCE OF PARTY.

Where plaintiff's rights rested on parol, testimony of things said and done in his presence respecting the assignment to him of the claims sued on was properly received, either as direct evidence of the fact or as direct or indirect admissions of a fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771, 782-785; Dec. Dig. ¶220(1).]

7. TRIAL ¶267(1)—INSTRUCTIONS—REQUEST—REPETITION.

Striking from a requested instruction matter which is but repetition or restatement of other matter therein is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-671; Dec. Dig. ¶267(1).]

Appeal from District Court, Wasatch County; A. B. Morgan, Judge.

Action by Sylvester Broadbent against the Denver & Rio Grande Railway Company. From a judgment, both parties appeal. Affirmed on both appeals.

W. D. Riter, C. L. Olson, and Thos. Mario-neaux, all of Salt Lake City, for appellant. E. A. Walton, of Salt Lake City, and A. C. Hatch, of Heber, for respondent.

STRAUP, C. J. The plaintiff and twelve or more other sheep owners at or near Heber City claimed damages against the defendant by reason of its alleged failure or neglect to provide cars for the transportation of sheep to Eastern markets. He alleged that ten of them had assigned their claims to him. These he set forth in his complaint in separate counts. He dismissed as to six. We are therefore concerned only with four. A verdict was rendered in plaintiff's favor on two and in favor of the defendant on two. The defendant appeals, and the plaintiff cross-appeals.

The loss occurred in the fall of 1910. The two claims on which the plaintiff recovered were assigned to him in writing in February, 1911. He contends the other two were assigned to him orally and by the assignors turning over papers to him respecting the claims and directing him to prosecute them to judgment. As contended by the plaintiff, he, in pursuance of the assignments, and with the knowledge and consent of the assignors, employed counsel to prosecute the claims, agreeing to pay him for his services 10 per cent. of the claims at all events and 40 per cent. of the amount recovered, and incurred \$30 or \$40 expenses in looking up evidence and otherwise spending time in looking after the claims. In December, 1912, the four assignors of the plaintiff, together with other claimants, assigned their claims to another who employed other counsel on a contingent

fee of 50 per cent. of the amount recovered by settlement or judgment, and who, on the claims so assigned, commenced an action against the defendant in June, 1913. The plaintiff, through his counsel, also commenced an action in September, 1913, on the claims assigned to him. In November, 1914, the defendant, with knowledge and notice of the alleged prior assignments to the plaintiff and of the pendency of his action thereon, settled with the subsequent or second assignee, including the claims assigned to the plaintiff, and took from him a release and discharge, and also an indemnity bond holding the defendant harmless against demands of the plaintiff. The plaintiff thereafter brought his case on for trial as though no settlement had been made.

The defendant, among other things, pleaded the release and settlement in satisfaction and bar. The plaintiff replied that the subsequent assignments were made with knowledge of the prior assignments, and that the settlement was made by the defendant with knowledge and notice thereof and of plaintiff's alleged ownership of the four claims and of the pendency of his action, and that such settlement was subject thereto and to an attorney's lien for services rendered in the action brought by plaintiff.

The attorney representing the second assignee appeared at the trial of plaintiff's case, and, against his objection, represented the defendant.

[1] Since the plaintiff, on the two claims upon which he prevailed, recovered no more than the settlement (and as to one less than the settlement), the plaintiff contends that any future prosecution of them by the defendant involves merely a question of whether the plaintiff or the second assignee is the rightful holder of the claims, and hence the defendant no longer is the real party in interest. Upon that ground a motion is made by the plaintiff to dismiss the defendant's appeal. For reasons presently to be stated, and in connection with views to be expressed upon another question, we think the motion should be overruled.

Evidence was given by the plaintiff to support his contentions that two of the claims were assigned to him in writing and two orally and by the assignors' turning papers over to him and directing him to prosecute them to judgment, and that he, with the knowledge and consent of the assignors, employed counsel at an agreed price of 10 per cent. of the claims at all events and 40 per cent. contingent on the amount of recovery. The defendant gave evidence to show that the assignments were made on condition that the terms of employment of the attorney should be satisfactory to the assignors, and that the terms made by plaintiff were not satisfactory and not agreed to, and that after the alleged assignments to the plaintiff,

and before the assignments to the second assignee, the plaintiff and his attorney released the assignors from all obligations and consented to the second assignments. That was denied by the plaintiff and his attorney; the attorney testifying that his transactions were had and his employment entered into entirely with the plaintiff as the assignee of the claimants, and that he looked alone to him for directions and instructions in the premises.

With respect to these contentions the court charged that, unless absolute and complete assignments were made to the plaintiff, he could not recover anything, nor, though assignments were made, if the assignors thereafter were released, nor if the assignments were made on condition that the terms of employment of plaintiff's counsel were to be satisfactory to the assignors and that they had not agreed nor assented to them. The court also charged that, if the assignors authorized the plaintiff to employ counsel to prosecute the claims assigned to plaintiff, and that counsel was employed, "then you are instructed that, as to any cause of action, said A. C. Hatch [plaintiff's counsel] would have a lien thereon for the amount of his agreed compensation," and that in such event the plaintiff's assignors had not the right to reassign the causes of action so as to release the attorney's lien, and that the assignors thereafter could not settle with the defendant so as to release it from a liability to pay the agreed compensation of the attorney unless he himself released it or assented to the subsequent assignments. Complaint is made of what the court said on the question of an attorney's lien.

[2] It is urged that it is not in accordance with the statute (Comp. Laws 1907, § 135) which gives an attorney's lien "from the commencement of an action," or the service of an answer containing a counterclaim, and which "cannot be affected by any settlement between the parties before or after judgment." We think the contention well founded. As the court put it, if the attorney, with authority, was employed in the case to prosecute the action, that gave him a lien for his agreed compensation. But the statute declaring when an attorney has a lien, and, when it attaches, declares it to be "from the commencement of the action." So in such particular the jury were misdirected.

[3] But wherein did that harm the defendant? Had the settlement been made before the plaintiff commenced his action, or were the evidence as to that in conflict, then, of course, such a charge would be injurious. Here, however, it is indisputably shown that the settlement was made after the plaintiff had commenced his action, and with knowledge and notice of the prior claimed assignments to the plaintiff and of the pendency of his action and of his attorney's appearance in the cause. All that is stipulated. Thus, if the plaintiff rightfully had a cause when

he commenced it, then, indisputably, his attorney, if employed with authority upon an agreed compensation, had a lien on the cause of action which could not be affected by settlement, either before or after judgment, without the attorney's consent or release. Since, therefore, the court bound the jury before finding anything for the plaintiff to find that absolute and complete assignments had been made to him, that they had not been released, and that neither he nor his counsel had consented to the subsequent assignments, and that plaintiff's attorney was employed with authority and consent of the assignors, and since, without dispute, and upon the stipulation of the parties, the settlement was made after the plaintiff had commenced his action and with knowledge and notice of his claimed assignments, and the pendency of his action and his attorney's appearance in the case, the charge that the plaintiff's attorney in effect had a lien before the commencement of plaintiff's action could not and did not do any harm.

Something is said on questions of laches and estoppels on behalf of the plaintiff and his attorney because of their delay until September, 1913, before commencing an action. Such matters are not pleaded nor did the defendant ask to go to the jury on them. We thus as to that have only argument, but neither issues nor findings.

[4] So, too, is it argued that the court erred in denying the defendant's motion for a change of venue. There is not anything made to appear by the bill of exceptions, the only proper record to show such matters, that such a motion or ruling was made, or that any proceedings were had respecting such a question. The defendant contends that they are of the judgment roll without a bill. Under the statute (Comp. Laws 1907, § 3283; Laws 1911, p. 136) it is clear that they are not.

[5] Now, as to plaintiff's cross-appeal involving the two claims upon which the defendant prevailed: Plaintiff says the attorney for the subsequent assignee had no right to appear for the defendant in plaintiff's cause for the reason that the law does not tolerate the same counsel to appear on both sides of an adverse proceeding and where he is required to take antagonistic positions. The principle invoked may be conceded. But the defendant here joined the issue as to liability and plaintiff's right to sue on the claims, and also tendered the issue of settlement and payment. The defendant itself on none took inconsistent positions, and, as to all, was adverse and antagonistic to the plaintiff. Whatever legal effect the settlement had as to the issue of liability and the amount of recovery is another thing. The assignees had a common interest in establishing a liability against the defendant. In all other respects they were hostile to each other. The trial chiefly involved the question of whether the plaintiff, or the subse-

quent assignee, had the better title. As to that the assignees were hostile to each other, and the interest of the subsequent assignee and the defendant in common. The subsequent assignee, having given the defendant an indemnity bond holding it harmless against plaintiff's demands, had a pecuniary interest in the defendant maintaining the settlement and in defeating plaintiff's right or title. We thus do not see anything to plaintiff's objection to the attorney for the subsequent assignee appearing for and representing the defendant in the cause prosecuted by the plaintiff.

[8] Thirteen assignments are directed to the admission of testimony of things said and done in plaintiff's presence respecting the assignment of the claims to him, his power to employ an attorney to prosecute the claims and the compensation to be paid his attorney, and plaintiff's release of the claims. Since his rights as to the two claims upon which he prosecutes his appeal rest on parol, we think the testimony was properly received, either as direct evidence of the fact or as direct or indirect admissions of a fact.

[7] The plaintiff requested this:

"It takes at least two persons to make a contract, and if a contract is once made, it cannot be rescinded or undone at the instance only of the parties thereto, and in this case, if you find that there was an agreement between Broadbent and any or all of the said assignors that one or all of the claims in suit should be assigned to him for collection, and if said Broadbent in the execution of said agency incurred any expense or liability, then and in that case it would require his consent to a rescission of such contract; *in other words, it would require a new contract between the parties to undo the old or first contract.*"

The court gave it, except the italicized portion. Complaint is made because the whole of it was not given. We think no error was committed in this, because the part stricken is but a restatement or conclusion of what precedes it. We thus see no reversible error on either the defendant's or the plaintiff's appeal.

The judgment therefore is affirmed, with costs to the plaintiff on the defendant's appeal, and costs to the defendant on plaintiff's appeal.

FRICK and McCARTY, JJ., concur.

THERO v. FRANKLIN. (No. 2852.)

(Supreme Court of Utah. July 12, 1916.

Rehearing Denied Nov. 23, 1916.)

1. COURTS §35 — JURISDICTION — PRESUMPTION.

Although as to facts touching which a domestic record is silent, it will be presumed that what ought to have been done was rightly done, as Comp. Laws 1907, § 3197, makes a complaint which is not answered, with the memorandum indorsed thereon of default, and the summons with proof of service, a part of the judgment roll, the whole of which may be looked to,

where the record and judgment itself showed the summons issued on an original complaint, but no service or even filing of an amended complaint, thus reciting what was done in such respect to confer jurisdiction to render judgment on the amended complaint, it may not then be conclusively presumed that something else or additional was done.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146; Dec. Dig. §35.]

2. EVIDENCE §265(7)—JUDICIAL ADMISSIONS BY COUNSEL—VALIDITY OF JUDGMENT.

Whatever legal presumptions as to service and personal jurisdictions might be indulged from mere silence, when the truth of a fact which renders a judgment void, is judicially admitted, in open court and during the proceedings, for all purposes of the cause in which it is made, and as against him who made it, it ought to be treated as void.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1085; Dec. Dig. §265(7).]

3. JUDGMENT §102 — VACATION — WANT OF JURISDICTION.

Under Comp. Laws 1907, § 2964, requiring service of a copy of an amendment to a complaint, where the court, more than eight years after a default judgment, void because the complaint was not verified as required by Rev. St. 1898, § 3179, was rendered and entered, permitted the plaintiff, without notice or process, but on ex parte application, to amend his complaint, and, without service thereof or notices of any kind, rendered and entered judgment thereon, it acted without authority, and the judgment so rendered and the transcript filed with the recorder did not constitute a valid lien on property of the defendant in that action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 171-173; Dec. Dig. §102.]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Edythe Thero against H. H. Franklin, to quiet title to lands. Decree for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Gustlin, Gillette & Brayton, of Salt Lake City, for appellant. Story & Steigmeyer, of Salt Lake City, and J. C. Walters, of Logan, for respondent.

STRAUP, C. J. This action was brought to quiet title to lands in Salt Lake county. It is alleged that the plaintiff is the owner and in possession thereof, and that the defendant asserts a groundless and hostile interest therein. He answered that his interest was that of a judgment lien. The plaintiff replied that the judgment was void. The court found in favor of the defendant, held the judgment a lien, and rendered a decree accordingly. The plaintiff appeals. Her right is no greater or better than was the right of one R. W. Sloan, her immediate grantor.

By the pleadings, stipulations of the parties, and the evidence it is shown that in September, 1902, the defendant herein as plaintiff commenced an action in the district court of Weber county against Sloan and Thatcher on a judgment in the sum of \$784 by the filing of an unverified complaint and

issuance of summons. A copy of the complaint and the summons were personally served on both Sloan and Thatcher. They failed to appear, and so a default was entered against them on the 11th of November, 1902. On the same day an indorsement of default was made on the complaint by the clerk, and on that day this judgment, omitting the title of the court and cause, was rendered and entered in favor of Franklin and against Sloan and Thatcher:

"In this action the defendants, J. W. Thatcher and R. W. Sloan, having been regularly served with process, the proof of service thereof having been filed, and having failed to appear and answer the plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the default of the said defendants, J. W. Thatcher and R. W. Sloan, in the premises having been duly entered according to law, upon application of said plaintiff, judgment is hereby entered against said defendants in pursuance of the prayer of said complaint.

"Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that the plaintiff do have and recover from the said defendants the sum of \$1,316.14, with interest thereon at the rate of 8 per cent. per annum from date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$9.20.

"Judgment rendered November 11, A. D. 1902.

"Witness, Hon. Henry H. Rolapp, judge of said court, with the seal thereof affixed, this 11th day of November, 1902.

"C. R. Hollingsworth, Clerk."

There the matter rested until a day or two before the judgment was barred by the statute of limitations, when Franklin, on the 10th of November, 1910, to revive it, brought an action against Sloan and Thatcher in the district court of Salt Lake county. Sloan answered, and, among other things, defended on the ground that the judgment was void; that it had been rendered and entered on an unverified complaint. While that action was pending, Franklin, on the 23d of September, 1911, appeared in the district court of Weber county in the original action there commenced in September, 1902, and on ex parte proceedings on September 23, 1911, omitting the title of the court and cause, there obtained these orders: One:

"Upon motion of J. C. Walters, Esq., counsel for above-named plaintiff, it is ordered that the judgment, heretofore rendered against defendants, be, and same is hereby, set aside. Counsel for plaintiff is thereupon granted leave to verify the complaint, heretofore filed herein. The default of defendants is thereupon entered, upon their failure to answer or otherwise plead to plaintiff's complaint within the time allowed by law, and judgment is granted plaintiff as prayed for upon the testimony heretofore given. The court thereupon signs the judgment in accordance with the above order.

"Dated: Ogden, Utah, September 23, 1911.

"J. A. Howell, Judge."

The other:

"Order Setting Aside Judgment and Allowing Verification of Complaint.

"It appearing to the court that on the 11th day of November, 1902, the clerk of this court entered a judgment by default against the above-

named defendants, in said action, and that the complaint therein was not verified at the time of the filing thereof, and was not verified before said judgment was entered as provided by section 8179 of the Revised Statutes of Utah, 1908 (1898) then in force. Upon application and motion of James C. Walters, Esq., attorney for the plaintiff, it is hereby ordered that the said judgment so entered in the said action be, and the same is hereby, set aside, and the said plaintiff be, and he is hereby, permitted to amend his complaint by adding a verification thereof.

"Further ordered that, upon such verification being made, the clerk of this court proceed to enter default of the said defendants upon the complaint of the plaintiff as so amended.

"Done in open court this 23d day of September, A. D. 1911.

"J. A. Howell, District Judge.

"Filed September 23, 1911.

"S. G. Dye, Clerk."

On the same day, September 23, 1911, was attached to the original complaint a verification made by Franklin's attorney. On that amended complaint then a further indorsement was made by the clerk that the default of Sloan and Thatcher "is hereby duly entered this 23d day of September, 1911, for failure to answer or otherwise plead to the plaintiff's complaint within the time allowed by law." Upon such amended complaint thus verified, and upon the default thus entered, on the same day, this judgment, omitting the title of the court and cause was, by the Weber county district court, rendered and entered in favor of Franklin and against Sloan and Thatcher:

"This cause came on this day to be heard upon the complaint of the plaintiff, and, it appearing that the defendants, and each of them, have been personally served with summons, and have each failed to appear and answer within the time required by law; that the judgment heretofore entered against the said defendants on the 11th day of November, 1902, has been set aside by the judge of this court, and the plaintiff allowed to verify the complaint in said action; that the said complaint has been verified in accordance with the said order; thereupon the complaint, as verified the default of the said defendants and each of them, has been duly and regularly entered by the clerk of this court; and, the court having heard the evidence and proofs adduced on the part of the plaintiff, and being fully advised in the premises, it is now ordered and adjudged that the plaintiff, H. H. Franklin, do have and recover of the defendants, J. W. Thatcher and R. W. Sloan, the sum of \$1,876.46, together with interest thereon from the date hereof until paid at the rate of 8 per cent. per annum, and that plaintiff further have and recover of said defendants his costs and disbursements herein taxed, and \$12.40.

"Done in open court this 23d day of September, 1911. J. A. Howell, District Judge.

"Filed September 23, 1911."

A certified transcript of that judgment was filed with the recorder of Salt Lake county before the conveyance of the lands in question was made by Sloan to Thero, the plaintiff herein. It is this judgment upon which Franklin, the defendant herein, bases his lien and asserts his interest in and to the lands. Having obtained such second judgment, Franklin thereafter, and in May, 1912, and before the trial, voluntarily dismissed the action brought by him in the district court of Salt Lake county to revive

the first judgment rendered and entered in November, 1902. There the matter again rested until 1914, when Thero brought this action to quiet title and to remove the alleged cloud created by filing with the recorder of Salt Lake county the transcript of the judgment so obtained by Franklin against Sloan and Thatcher in September, 1911.

The plaintiff, over the defendant's objections, except an objection to the judgment of September, 1911, was permitted to put in evidence the records of all these proceedings. In the court below the defendant contended, and here contends, that the judgment rendered by the district court of Weber county in September, 1911, is, on its face, a valid judgment, and that it, either by its own recitals or by necessary conclusive presumptions, shows all jurisdictional requisites, both as to subject-matter and person; that in a collateral proceeding such as this, where the judgment is brought in question, it may not be collaterally impeached; and that to permit any of the proceedings to be shown prior to the judgment constituted such an impeachment. Hence the defendant, on such ground, objected to the complaint, the summons, the first judgment, the subsequent orders, and, in fact, all of the records of the proceedings in the district court of Weber county wherein Franklin was plaintiff and Thatcher and Sloan, defendants, except the second judgment, upon which he relied. The court, though it admitted all of such records in evidence, nevertheless finally held with the defendant that they constituted a collateral impeachment, and thus did not consider them, or else that they did not affect the validity of the second judgment, and hence decreed it a valid and subsisting lien on the premises in question.

[1] The decision thus turns upon the question of the validity of that judgment. As bearing upon it, however, both parties present and argue the question as to the validity of the first judgment rendered in the district court of Weber county, the judgment of November, 1902. In such respect the plaintiff contends that that judgment was valid, and hence the court, more than eight years after it was rendered and entered, was, on a mere ex parte motion, without authority to set it aside and to substitute another in its place. On the other hand, the defendant contends that that judgment was void, and was at any time subject to expungement on the suggestion or application of any one interested, or on the court's own motion. This because of the statute (R. S. 1898, § 3179), providing that, in an action arising on contract for the recovery of money, if no answer, demurrer, or motion is filed within the time specified in the summons, and the complaint and proof of service of summons shall have been filed, the clerk, upon the application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment

in the amount specified in the complaint. "If the complaint shall not have been verified it must be verified before judgment is entered." Thus it is argued, as the complaint was not verified, the judgment which was rendered and entered in November, 1902, was absolutely void, and hence the court authorized to render and enter the second judgment. The general statute relating to complaints did not require a complaint in ordinary actions to be verified (R. S. 1898, § 2959), but provided that (section 2983) when the complaint is verified, all subsequent pleadings, except demurrers, should be verified. But under section 3179, *supra*, to enter a judgment upon failure to answer, it seems, a verified complaint was required. When the judgment rendered and entered in November, 1902, alone is looked to, it appears to be regular, and to contain all necessary recitals of jurisdictional facts to the rendition of a valid judgment. But, when we look beyond it and to other portions of the judgment roll, as we may and should, we find that it was rendered upon an unverified complaint. For that reason, and because of section 3179, *supra*, let it be assumed, as is contended by the defendant, that that judgment was void, and that it at any time—for lapse of time added nothing to it—was, sua sponte, or at the suggestion or application of any one interested, subject to expungement by the court rendering it. Still, the crucial question is, What shown authority had the court, more than eight years after the rendition and entry of that judgment, to render and enter another in its place? We have a situation where the court, not only expunged a judgment for the sum of \$1,316.00, but, more than eight years after the rendition and entry thereof permitted the complaint to be amended by adding a verification, directed another default to be entered thereon, and, as recited in the judgment, heard "the evidence and proof adduced on the part of the plaintiff," and then entered another judgment for the sum of \$1,876.00. Assuming that nothing was essential to invoke action to expunge the void judgment, surely something was essential to invoke action to render and substitute another. In this respect it, in effect, is argued that, when the court expunged the judgment, that left the action pending for further proceedings or action, just where it was before the void judgment was entered, upon the original complaint filed and service of summons had in 1902. But what further action? No judgment could be rendered, so asserts the respondent, upon the original complaint as filed, for it was unverified. Thus was it necessary to do or present something to invoke judicial action. Such action was invoked by motion for leave to amend the complaint by adding a verification. And when such leave was granted and such verification made, another default was declared,

not on the original and unverified complaint, the complaint which was served, but upon the new, the amended, complaint which was not served. The statute (C. L. 1907, § 2964) requires service of a copy of an amendment to a complaint, or amended complaint, upon the defendant affected, or upon his attorney, if he appeared by attorney. Here, however, it is argued that the second judgment, the judgment rendered and entered in September, 1911, is silent as to service in such particular, and hence, being a domestic judgment, must it, in this a collateral proceeding where it is brought in question, be conclusively presumed, if such service or notice was essential, that it was made or given, and that all in such respect was done which was necessary to confer jurisdiction on the court to proceed and do what was done. Legal presumptions do come to the aid of a domestic record as to acts or facts touching which the record is silent. Where it is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; but when the record itself speaks what was done, it will not be conclusively presumed that something different or additional was done. The judgment itself, however, is not all that may be inspected. The whole of the judgment roll may be looked to, the technical judgment record, the mandatory record of jurisdictional elements. When any part of that record speaks as to what was done as to any jurisdictional fact, it may not be overthrown by indulging conclusive legal presumptions from silence in other parts of the record. In case a complaint be not answered, the summons, with proof of service, and the complaint, with the memorandum indorsed thereon of default, are just as much of the judgment roll as is the judgment itself. The statute says so. C. L. 1907, § 3197. When we look at these the judgment record itself speaks as to what, with respect to service and jurisdiction of person, was done, and furnishes its own proof of service. It shows service of the original complaint and of the summons issued thereon, but no service or even filing of the amended complaint. When the record thus as to jurisdiction of the person speaks and shows what was done in such respect to confer jurisdiction, if that be insufficient, conclusive legal presumptions may not then be indulged that something else or further was done to confer personal jurisdiction. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

Even the judgment itself assumes to recite what was done to confer jurisdiction of person and upon what the court obtained it and acted in rendering the judgment of September, 1911. The recital is that the defendants therein were "personally served with summons, and have each failed to appear and answer," the summons, of course, issued on the original complaint and served

in 1902, the only summons of record. Nothing else is therein, or elsewhere by the judgment roll, recited or shown to confer jurisdiction of person. The record thus reciting and showing just what was done to confer jurisdiction of person to render the judgment, it may not then be conclusively presumed something else or additional was done. Hence the case is not one of mere silence of the record as to personal jurisdiction, nor even a conflict of recitals of such jurisdictional facts where those supporting jurisdiction are to be accepted or taken in preference to those showing lack of jurisdiction. It is a case where, when the whole of the judgment record is looked to, it discloses that the court, more than eight years after a judgment was rendered, without process or notice of any kind, not only expunged that judgment, but also, on a mere ex parte application without notice, permitted a complaint to be amended, and, without service thereof or process thereon, entered another judgment on such unserved amended complaint.

[2] But, further, whatever legal presumptions as to service and personal jurisdiction might be indulged from mere silence, nevertheless, if facts or acts are judicially admitted which show the judgment to be void, it ought to be treated as void. *Hill v. City Cab, etc., Co.*, 79 Cal. 188, 21 Pac. 728. In the course of the proceedings in the court below the defendant's counsel in open court among other things, stated:

"Just so as to make the matter entirely clear to the court * * * the invalidity of the judgment appearing (the judgment of November, 1902), speaking from our side, and taking the position that it was an absolutely void judgment under the authorities, the plaintiff Franklin went into the court of Weber county and moved to set aside the void judgment, and for permission to verify the complaint and for judgment. In the meantime, I should say, that the defendants (Sloan and Thatcher) as shown by the return of the sheriff, had been duly served with summons (in 1902) and had failed to make any appearance whatever. So he (Sloan) was in default. Being in default, there was no amendment or any notice of this additional proceeding served upon him, but in any event the court set aside that judgment which had been entered by the clerk and entered a new judgment against the defendants, Sloan and Thatcher."

True, when the plaintiff separately offered in evidence the first judgment, the complaint, the summons, and the orders heretofore referred to, the defendant objected to each of them on the ground that such proffered evidence constituted a collateral impeachment of the second judgment, the judgment of September, 1911. But, in response to a statement of counsel for plaintiff in open court, "It can further be stipulated, I presume, that no notice of any kind was ever given R. W. Sloan, or this plaintiff, of any of the proceedings in the district court of Weber county subsequent to the service of summons upon them [in 1902]," the defendant's counsel replied:

"I imagine that is so. I could not, of course, stipulate that fact. In other words, I could not afford to stipulate away the presumption of regularity that exists in favor of the judgment of Weber county.

"The Court: I listened quite carefully to the record, and there is no finding there had been any service whatever.

"Plaintiff's Counsel: There had been no service.

"The Defendant's Counsel: No service of notice.

"The Court: No finding of service of the amended complaint."

Defendant's counsel also further insisted that, as the first judgment was a nullity, the court at any time had the right to expunge it, and on the service of the original summons was authorized, without any further notice or process, to permit the complaint to be amended by adding a verification and to enter a judgment in accordance therewith. From all this, in open court and during the proceedings, it appears that the real fact, the truth, was conceded to be that there was no service or notice of any kind after the service of the original and unverified complaint and of the summons in 1902, but that the defendant "could not afford" to admit it, for that would discharge the legal presumptions invoked by him. When thus the real fact, the truth, of something is admitted, not by a mere extrajudicial admission, but by a judicial admission, which renders a judgment void, it, for all purposes of the cause in which it is made and as against him who made it, ought so to be treated and regarded.

[3] From these considerations do we think it clear that when the court, more than eight years after the first judgment was rendered and entered, permitted the defendant, the plaintiff therein, without notice or process, but on an ex parte application, to amend his complaint, and, without service thereof or notice of any kind, rendered and entered a judgment thereon, it acted without authority, and hence that the judgment so rendered and the transcript thereof filed in Salt Lake county did not constitute a valid lien. The judgment of the court below is therefore reversed, and the cause remanded, with directions to make findings and to render and enter judgment quieting title in the plaintiff in accordance with the prayer of her complaint. Costs to respondent.

McCARTY, J., concurs.

FRICK, J. I concur. Under our statute the court was powerless to enter a default judgment upon an unverified complaint. A defendant, therefore, has the right to assume that unless he appears the court is powerless to enter a judgment against him upon the unverified complaint as filed. Our statute (C. L. 1907, § 2964) provides that if an amendment to a complaint, or if an amended complaint be filed, it must be served upon the defendant, and that he then has ten days after service, or such longer time as the

court may grant him, to answer the amended complaint, or the amendment thereto as filed. As pointed out by the Chief Justice the judgment roll in this case disclosed all of those defects, and hence it is not a case where presumptions of regularity prevail. The judgment in question, therefore, constituted no lien, and the district court erred in so holding.

O'DONNELL v. PARKER. (No. 2853.)

(Supreme Court of Utah. July 3, 1916. Rehearing Denied Nov. 23, 1916.)

1. LIMITATION OF ACTIONS §180(1)—PLEADING—DEMURRER.

Under the statute a defendant may demur on the ground that an action is barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 670; Dec. Dig. §180(1).]

2. CONSTITUTIONAL LAW §107 — VESTED RIGHTS—STATUTE OF LIMITATIONS.

The rule is general that, where the time has fully run, the right to invoke the statute of limitations, constitutes a vested right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 246-251; Dec. Dig. §107.]

3. WORDS AND PHRASES—"WAIVER."

A "waiver" is the abandonment of a known right.¹

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

4. LIMITATION OF ACTIONS §147—DEMURRER RAISING DEFENSE—WAIVER OF BAR.

Where a complaint in an action for goods sold, to avoid the plea of limitations, alleged that less than four years before the action defendant acknowledged the debt by scheduling the claim in his petition in bankruptcy, upon demurrer to the complaint on the ground that it appeared on its face that the action was barred under Comp. Laws 1907, § 2876, providing that such actions must be commenced within four years, the defendant will not be held to have waived the claim under section 2898, providing that in any case founded on a contract, when an acknowledgment in writing and signed by the party to be charged of an existing liability shall have been made, an action may be brought within the period prescribed for same after such acknowledgment, it being an independent action in which he has filed no pleading, and hence did not have an opportunity either to plead or waive the bar of the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 589; Dec. Dig. §147.]

Appeal from District Court, Salt Lake County; O. W. Morse, Judge.

Action by E. G. O'Donnell, doing business as O'Donnell & Co., against W. H. Parker. From a judgment sustaining a demurrer to the complaint and dismissing the action, plaintiff appeals. Affirmed.

Chris Mathison, of Salt Lake City, for appellant. T. F. Ashworth, of Salt Lake City, for respondent.

FRICK, J. The plaintiff, in the complaint, which was filed August 3, 1915, in substance alleged that on the 8th day of October, 1908, the plaintiff sold to the defendant, at his

request, certain goods, wares, etc., for which the defendant agreed to pay the sum of \$231.50, and that no part of said sum had been paid. The plaintiff, in order to avoid the plea of the statute of limitations as a bar to the action, which bar was complete at the end of four years from the 8th day of October, 1908, also alleged as follows:

"That less than four years before the date of the commencement of this action, to wit, on June 14, 1913, the defendant acknowledged the existence of the said debt by filing his petition in bankruptcy in the District Court of the United States for the District of Utah, and in schedule A-3 of said petition, at or about that time made, subscribed, and sworn to by the defendant, he scheduled the claim and account above set forth as a debt due from him to the plaintiff; that the defendant failed to petition for a discharge in said bankruptcy proceedings."

Plaintiff prayed judgment for the amount, with legal interest from October 8, 1908.

[1] The defendant appeared and demurred to the complaint upon the ground that it appeared upon the face thereof that the action was barred under the provisions of Comp. Laws 1907, § 2876, which, in substance, provides that actions belonging to the class mentioned in the complaint must be commenced within four years from the time the last charge is made. Under our statute a defendant may demur upon the ground that an action is barred. The court sustained the demurrer, and entered judgment dismissing the action, from which the plaintiff appeals.

[2-4] The only error assigned is predicated upon the ruling of the court in sustaining the demurrer. Plaintiff's counsel vigorously contends that the facts, which we have set forth in full, and which are admitted by the demurrer, constituted an acknowledgment of an existing liability on the part of the defendant, and, further, that they also constitute a waiver of the right to interpose the plea of the statute of limitations in this action.

The statute (Comp. Laws 1907, § 2898) which is relied on by counsel reads:

"In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

Counsel for appellant has gone into the subject most thoroughly, and has cited many cases both for and against his contention. We shall assume, without deciding, that the facts pleaded are sufficient to authorize the conclusion that the defendant was not discharged in the bankruptcy proceedings. We shall therefore limit the discussion to the question of whether the defendant, under our statute, waived his right to interpose the plea of the statute of limitations.

Section 2898 is taken from Kansas. See Kan. Gen. St. 1888, p. 634, § 24, which has remained in force in that state continuous-

ly and has been before the Supreme Court of Kansas many times, as appears from the following cases: *Elder v. Dyer*, 28 Kan. 604, 40 Am. Rep. 320; *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925; *Clark v. King*, 54 Kan. 222, 38 Pac. 281; *Disney v. Healey*, 73 Kan. 326, 85 Pac. 287; *Hawkins v. Brown*, 78 Kan. 284, 97 Pac. 479.

In *Elder v. Dyer*, supra, the Supreme Court of Kansas had under consideration a letter written by one who signed a note as comaker, and in which letter he referred to the note in question and requested the payee thereof to "write him (the principal debtor) a sharp letter, and demand of him an indorser there. I do not want to be held longer on the note." The Supreme Court of Kansas held that what was stated in the letter was a sufficient acknowledgment of an existing liability to take the case without the bar of the Kansas statute. In the course of the opinion (28 Kan. 610, 40 Am. Rep. 320), in speaking of what is a sufficient acknowledgment of an existing liability under the statute, it is said:

"No set phrase or particular form of language is required; anything that will indicate that the party making the acknowledgment admits that he is still liable on the claim, that he is still bound for its satisfaction, that he is still held for its liquidation and payment, is sufficient to revive the debt or claim; and there is no necessity that there should also be a promise to pay the same, either express or implied."

The court goes on at some length to show that in that regard the Kansas statute differs from many others where, in addition to an acknowledgment of the debt, a promise to pay it is necessary.

The same question in the same form was before the same court in the other four Kansas cases referred to, and the same result was reached.

In *Bissell v. Jaudon*, 16 Ohio St. 498, and in *Coffin v. Secor*, 40 Ohio St. 637, the Supreme Court of Ohio, under a statute like that of Kansas, and where the question before the court was the same as the one before the Supreme Court of Kansas, arrived at a like result.

The same result was reached by the Supreme Court of Nebraska as appears from *Harms v. Freytag*, 59 Neb. 359, 80 N. W. 1039.

The Supreme Court of Mississippi also arrived at the same conclusion under a similar statute and conditions. *Beasley v. Evans*, 35 Miss. 192.

In *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56, 28 L. Ed. 636, the Supreme Court of the United States, in a case originating in Kansas, followed the decision in *Elder v. Dyer*, supra.

A few other cases could be added to the foregoing, but it is not deemed necessary to do so.

By many of the courts, in passing upon statutes where a new promise is required, it is, however, held that a mere acknowledgment of an existing liability is insufficient

to revive the debt. We need not refer to those cases.

It will be observed that the precise question that is before us now was not before the courts in the foregoing cases to which reference has been made, and therefore is not passed on, unless it be held that any acknowledgment of an existing liability under any and all circumstances is sufficient both to toll the statute and to revive the claim in case the statute has fully run. Counsel for plaintiff, with some force, contends that such is the necessary effect of the cases to which reference has been made. Digressing from that question for a moment, we find that there are cases in which the precise question now under consideration was before the courts, and where different courts, apparently, have arrived at different conclusions. In *Re Resler* (D. C.) 95 Fed. 804, *Roscoe v. Hale*, 7 Gray (Mass.) 274, *Christy v. Flemington*, 10 Pa. 129, 49 Am. Dec. 590, *Hidden v. Cozzens*, 2 R. I. 401, 60 Am. Dec. 93, and in *Nonotuck Silk Co. v. Pritzker*, 143 Ill. App. 644, the courts held that the scheduling of a claim in bankruptcy proceedings does not constitute an acknowledgment that will revive the debt. While it is true that the courts have held that a claim which is barred by the statute of limitations is not a provable debt in bankruptcy, and hence need not be scheduled, yet the text-writers upon the subject of bankruptcy practically all agree that it is always proper to schedule such debts, and by doing so avoid subsequent actions thereon. The authors further say that by scheduling such claims the bar of the statute of limitations is not waived. In *Collier on Bankruptcy* (9th Ed., 1912) 235, the author, in referring to the subject of scheduling claims in bankruptcy proceedings, says:

"All creditors should be scheduled, even those barred by the statute of limitations. To schedule the latter is not a revival of the debt, although it may be different in case of voluntary bankruptcy, where it afterwards happens that the bankrupt was not insolvent."

In 1 *Loveland on Bankruptcy* (4th Ed.) 374, it is said:

"It is proper to include creditors whose debts are barred by the statute of limitations. The insertion of such a debt in the schedules does not revive the claim."

Upon the other hand, it was held by the trial judge in *Stuart v. Foster*, 18 Abb. Prac. (N. Y.) 305, that the listing of a promissory note by the debtor in a voluntary assignment for the benefit of his creditors was a sufficient acknowledgment of an existing liability to revive the debt. The same result was reached under a similar state of facts in *Van Patten v. Bedow*, 75 Iowa, 589, 39 N. W. 907. In *Re Gibson*, 4 Ind. T. 498, 69 S. W. 974; 4 Ann. Cas. 938, the Court of Appeals of Indian Territory held that, where an insolvent in filing a voluntary petition in bankruptcy scheduled a debt, by such act he waived the statute of limitations, and that the lower court did not err in denying his motion to

expunge the debt from the schedule so filed by him. The same result was reached, under similar circumstances, in *Re Hertzog*, Fed. Cas. No. 6,433, and in *Re Currier* (D. C.) 192 Fed. 695, 27 Am. Bankr. R. 597. It is not deemed necessary to cite more cases, although such could be done both for and against counsel's contention.

Counsel, however, insists that, in view that our statute is taken from Kansas, and that it was adopted in this state after the case of *Elder v. Dyer*, supra, was decided, we should follow the construction given it by the Supreme Court of that state. While it is true that the Supreme Court of Kansas has held that in a personal communication by the debtor to the creditor a mere acknowledgment of an existing liability is sufficient to revive the debt, yet that court has not yet held that the mere scheduling of a debt by an insolvent debtor in his petition in bankruptcy constitutes either the revival of the debt or a waiver of the bar of the statute in an independent action upon the claim. That is what we are asked to hold. It will be observed that in this case the bar of the statute was complete long before the defendant filed his petition in bankruptcy to which he attached the schedule of debts, and in which was included the claim in question. If it were held, therefore, that scheduling the claim constituted a sufficient acknowledgment of an existing liability to toll the statute, or that an action could be brought at any time within the four-year period, or if it were held that in that proceeding he had waived the right to thereafter claim the benefit of the statute, yet should it also be held that such an acknowledgment constitutes a waiver of the bar which is complete when the schedule is filed in the bankruptcy proceedings? So far as we are aware, the rule is general that where the time has fully run the right to invoke the statute constitutes a vested right. True, the debtor, under our statute, may waive the right although it be vested. Where a right, statutory or otherwise, has become vested, however, the courts are slow to declare the same waived, unless the language or conduct of the party possessing the right shows that he intended to waive it, or that his language and conduct are such that it can be clearly inferred, or that it may be said as a matter of law that he had waived the right. We held in *Schwab Safe & Lock Co. v. Snow*, 152 Pac. 171: "A waiver is the intentional abandonment of a known right." We think that is a correct definition of a waiver. True, when one fails to plead the statute of limitations in a pending proceeding, he is held to have waived it, but that result is apparent from his acts and conduct in the very proceeding in which he either has the right to plead or to waive the statute. May it, however, also be inferred that, where a debtor in a bankruptcy proceeding follows the rule laid down by the text-writers upon the

subject, all of whom agree, that it is either proper to schedule barred claims, or that they should be included in the schedule, by such scheduling the debtor intends to or does waive anything? Of course, it may be said, as counsel contends, and as some of the courts have held, that in scheduling the debt the debtor acknowledges it as an existing obligation. That, as we have seen, is done, however, in a proceeding where the debtor seeks to be relieved from his debts and obligations by due course of law. His acts therefore should be construed in the light of what he is attempting to do or accomplish under the bankruptcy law. To say that there is no difference between writing a personal letter by a debtor to his creditor in which the former acknowledges the existence of the claim and in filing a schedule of his debts under the rules governing bankruptcy proceedings is to lose sight of substance and be governed entirely by forms. We are not unmindful that some of the courts have held that under a statute like ours it is immaterial when or where the acknowledgment of the existing liability is made so long as it is clear that the debtor intentionally made it and that it was in writing and signed by him. Such, counsel contends, is the conclusion of the Supreme Court of Kansas, and for the reason that our statute was taken from that state after it was construed by that court we should follow its construction. We are impressed with counsel's argument, but we are not ready to concede that the Supreme Court of Kansas would hold that under circumstances like those in the case at bar the debtor had waived his right to rely upon the statute as a bar to the action. While we have the highest respect for the decisions of the Supreme Court of Kansas, yet, if that court had so held, the writer, at least, should hesitate to follow its decision, for the reason that in his judgment the mere scheduling of a claim in bankruptcy proceedings, under the circumstances disclosed by this record, does not indicate an intention to waive the bar of the statute. To so hold would be to entrap the debtor, which is not the design of the statute. Moreover, as we read the cases, the weight of authority is against the proposition that a mere scheduling of a claim which is barred is a sufficient acknowledgment of an existing liability to authorize the bringing of an independent action thereon; that is, to sue and recover upon it in a proceeding other than the bankruptcy proceeding in which the schedule is filed. While we do not now pass upon the question of whether one in scheduling a claim in a bankruptcy proceeding thereby waives his right to avail himself of the statute of limitations in another independent proceeding, yet we are free to confess that there may be, perhaps, some reason why the statute should be deemed to be waived in a bankrupt-

cy proceeding, which reason does not exist in an independent proceeding, and therefore it should not be held waived in an independent action wherein the debtor filed no pleading, and hence did not have an opportunity either to plead or to waive the bar of the statute.

For the reasons stated, we are of the opinion that the district court committed no error in sustaining the demurrer, and the judgment is therefore affirmed. Costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

NEW ERA IRR. CO. v. WARREN IRR. CO. et al. (No. 2787.)

(Supreme Court of Utah. Sept. 17, 1915.
Rehearing Denied Nov. 23, 1916.)

APPEAL AND ERROR ~~843~~(2)—REVIEW—MAT- TERIALITY OF QUESTION.

Where there was evidence to support finding of an actual appropriation, diversion, and use of the waters for irrigation purposes by a defendant and its predecessor, question whether state engineer's certificate of appropriation, reciting that defendant's predecessor had done all required to make a complete appropriation of a certain amount of water, was conclusive or only prima facie evidence, was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ~~843~~(2).]

Appeal from District Court, Weber County; C. W. Morse, Judge.

Action by the New Era Irrigation Company, a corporation, against the Warren Irrigation Company, a corporation, and the Pioneer Land & Irrigation Company, a corporation. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

Skeen Bros. & Wilkins, of Salt Lake City, and Johnson & Johnson, of Ogden, for appellant. Halverson & Pratt and H. H. Henderson, all of Ogden, for respondents.

STRAUP, C. J. The plaintiff, as against the defendants, claims a primary right to pump water from Weber river at or near a place called Draney's Bend, west of Ogden City. The plaintiff claims that it and its predecessor, at that place, in September, 1911, appropriated 30 second feet of unappropriated water by pumping it from the stream. It further claims that the defendants, above the plaintiff's intake, pumped water from the stream belonging to the plaintiff. It therefore brought this action for injunctive relief. The defendant Warren Irrigation Company answered and counterclaimed that it, for more than 8 years, had acquired and owned a primary right to pump, for irrigation purposes, 15 second feet of water from the river, which right was prior and superior to that of the plaintiff's. The other defendant, the Pioneer Land & Irrigation Company, answered that it and its predecessors, in January, 1903, appropriated 20 second feet of

water by pumping it from the stream, which right was superior and paramount to that of the plaintiff. The plaintiff, in reply, denied that the Warren Irrigation Company had, by means of pumping at the place in question, pumped, diverted, or used for a beneficial purpose any of the waters from the stream; and as to the other defendant, the Pioneer Land & Irrigation Company, it alleged that it, in the years 1903 and 1905, both inclusive, appropriated and pumped, at the place in question, not to exceed 2 second feet of water; but that in the early summer of 1905, and thereafter, and until 1913, it ceased to pump, or divert, or use any of the waters from the stream, and wholly abandoned and forfeited whatever right it may have had in and to the use of any of the waters. The case was tried to the court, who found the issues in favor of the defendants.

The court found that, in 1903, the Pioneer Land & Irrigation Company, and its predecessor, appropriated and acquired the right to use, for irrigation purposes, 7 second feet of water at the place in question, and that it, during the year 1905, pumped 7 second feet of water into its ditch for its stockholders for irrigation purposes; but "that from the years 1907 to 1911, both inclusive, it did not use any of the waters through its pumping system."

The court further found:

"That the said Joseph Howard Skeen (the predecessor of the Pioneer Land & Irrigation Company), at the time he established said pumping system, put in a 6-inch pump for the purpose of raising the waters of said Weber river into his flume and ditch. That thereafter, in the year 1905, the defendant Pioneer Land & Irrigation Company installed a 10-inch pump, which was operated by a steam engine of 25 horse power and a boiler of 40 horse power. That during the year 1908 the defendant Pioneer Land & Irrigation Company disposed of its engine and boiler and did not install another engine and boiler until the year 1912. That during the year 1909 the officers of the Pioneer Land & Irrigation Company were making investigations of electric power with the intention of operating said pump with electricity. That in the spring of 1912 the officer of the defendant Pioneer Land & Irrigation Company installed a 50 horse power engine and 60-horse power boiler, at an expense of \$2,500, for the purpose of operating said pump to lift water for irrigation purposes. That said engine and boiler were not installed in time so that said pump could be operated for irrigation purposes during the year 1912, but the Pioneer Land & Irrigation Company did pump during the fall of 1912, for the purpose of testing said pump, engine, and boiler. That during the year 1913 the defendant Pioneer Land & Irrigation Company furnished waters through its said pumping system as then installed and through its various ditches and flumes to irrigate about \$500 acres of land belonging to the stockholders of said company. That the main ditch used in conveying said water was 2 feet deep, 4 feet wide on the bottom, and 6 feet on the top, and carried water which was pumped through its said system of 7 second feet. That said 7 second feet of water is necessary for the use of the stockholders of the defendant Pioneer Land & Irrigation Company to raise and mature crops growing on their said lands. That all the land owned by the stockholders of the Pioneer Land & Irrigation Company is located in sections 4,

5, 6, and 32, township 6 north, range 2 west, Salt Lake meridian.

"That at no time has the defendant Pioneer Land & Irrigation Company intended to or has abandoned its rights to the use of the waters under said water right as set out in the notice of the said Joseph Howard Skeen.

"That more than 25 years ago the predecessor in interest of the plaintiff constructed that certain canal and canal system known as the Warren Irrigation Canal, tapping the Weber river about 4 miles below Ogden City and the Mill creek and Four Mile creek, tributaries of the Weber river, at points just above said canal as the same crosses said streams, and by means of said canal and lateral ditches and dams placed in said streams appropriated, diverted, and used all the waters aforesaid from said several sources of supply during the irrigation season of each and every year since said time, for the irrigation of crops, and for culinary, domestic, and other useful and beneficial purposes on the lands of the stockholders of the defendant Warren Irrigation Company, and their predecessors in interest, and have ever since continuously diverted, appropriated, and used all the waters aforesaid during the irrigation season of each and every year, except at such times when there was a surplus of water in said several sources of supply during the early irrigation season; and that on the 22d day of January, 1906, the state engineer of the state of Utah duly issued his certificate of appropriation to one W. L. Stewart, in the words and figures following [setting it forth in full]."

It shows an application for an appropriation of 15 second feet of water by W. L. Stewart for irrigation purposes, and contains recitals that the water is lifted from the stream by means of pumping and diverted and used for such purposes, and that he was entitled to the use of that quantity of water, and contains other necessary recitals not here material.

The court further found:

That Stewart and his wife, in June, 1912, conveyed all his right so acquired to the Warren Irrigation Company who "immediately in the same year installed a new pumping plant at the point described in the plaintiff's complaint, and known as Draney's Bend, and in said certificate mentioned, at great expense, to wit, at an expense of about \$8,000, and during every irrigation season since said time during the low water season when there was a shortage of water in the Weber river and the sources of supply of the said defendant Warren Irrigation Company, the said defendant Warren Irrigation Company, has pumped water from the Weber river by means of said pumping plant, and into said canal of the Warren Irrigation Company, and distributed the same through said canal system for irrigation, culinary, and domestic purposes to the stockholders of the defendant Warren Irrigation Company. That the stockholders of the defendant Warren Irrigation Company, and their predecessors in interest, have irrigated and still continue to irrigate about 1,700 acres of land under said canal system. That the lands of its said stockholders are arid in character, and without the use of irrigation will not produce valuable agricultural and other crops thereon, but that by and through irrigation said lands will produce valuable agricultural and other crops, and all of said waters all of said time during each and every irrigation season has been and still is needed by this defendant and its stockholders for the irrigation of said lands, and for domestic, culinary, and other purposes.

"That a second foot of water will irrigate 70 acres of land of the character described in the

complaint of the plaintiff and answers of the defendants.

"That on the 5th day of September, 1911, Lyman Skeen and D. A. Skeen filed an application in the state engineer's office of the state of Utah, to appropriate 30 second feet of the flow of the waters of the Weber river at a point just below the pumping station of the Warren Irrigation Company. That thereafter due notice of the filing of said application was given, and the said application was by said state engineer duly allowed and approved, which application, among other things, stated: 'That the water is to be pumped into Warren Irrigation Company ditch from the seepage water in the Weber river, which is formed by a union of the Ogden and Weber rivers. The water will then be carried in the Warren canal to the above-described land, and there distributed into private ditches. This application is made to obtain a right for a supply to supplement the existing right or rights owned by or to be owned by the Warren Irrigation Company not more than one cubic foot per second of water for each 70 acres of land will be diverted from all sources of supply or not more than 3 acre feet per acre of land per annum will be diverted from all sources of supply for these lands.'

"That pursuant to said application of the said Lyman Skeen and D. A. Skeen and within the time specified therein by said engineer in his approval of said application for the beginning of actual construction work, the said Lyman Skeen and D. A. Skeen actually began the construction of the said proposed diverting works. That thereafter and within the time originally granted and upon proper application being duly made by the said Lyman Skeen and D. A. Skeen and their successor the said engineer extended the time for the completion of said diverting works up to and including the 8d day of March, 1915.

"That thereafter and within the time so extended said Lyman Skeen and D. A. Skeen and their successors in interest constructed and installed and put into actual operation a pumping plant with sufficient capacity to divert said water, and constructed an independent ditch for distribution of and to carry the same to and upon a part of the land designated in said application, and did not pump said water into said Warren Irrigation Company's Canal at all, and during such time, and as soon as the flow of water would permit of the construction of said dam the plaintiff, as successor in interest of said Lyman Skeen and D. A. Skeen, began the construction of the cement and concrete dam as specified in its approved application to the state engineer to raise and impound said water, and as a part of the diverting works, which dam is now in course of construction and substantially completed, and which is necessary during the minimum flow of said Weber river in order to divert said water, and in the construction and installation of said diverting works and canal system plaintiff expended about \$8,000.

"That after filing said application in the state engineer's office and the approval and allowance thereof, and after the beginning of the construction work on said diverting works and canal, the said Lyman Skeen and D. A. Skeen, for a valuable consideration, sold, assigned, and transferred all their right, title, and interest in and to said application and water rights and works to the plaintiff.

"That the pumps and diverting works of the plaintiff and of the defendants are located on Weber river at what is known as Draney's Bend. That during each irrigation season of each year in what is known as the lower water season, there is from 12 to 30 second feet, varying in different years, flowing down said river at said point which can be pumped into plaintiff's and defendants' ditches, and that during the early irrigation season and during seasons when

there is an unusual supply of water in said river, there is a large quantity of water flowing in said river at said point in excess of the requirements of either plaintiff or the defendants."

Upon the findings it was adjudged that the defendant the Pioneer Land & Irrigation Company is entitled to and was awarded, as against the plaintiff, a superior and primary right to the waters in controversy, to the extent of 7 second feet; the Warren Irrigation Company, 15 second feet. The plaintiff's injunctive relief was therefore denied. From that judgment the plaintiff appeals. It, as to the Warren Irrigation Company, assails the finding in the particular that there is not sufficient evidence to support the findings that that company, prior to plaintiff's appropriation, had made any appropriation of the waters in question by pumping, diverting, or using any such waters. As to the other defendant, the Pioneer Land & Irrigation Company, the plaintiff contends that the evidence, without any substantial conflict, shows that that defendant, from 1905 to 1912, both inclusive, abandoned whatever rights it may have had in and to the use of any of the waters, and hence, that the finding, which the court made in such respect in favor of that company, is against the evidence. We, on an examination of the record, are satisfied that there is sufficient evidence to support and justify the findings so made. We see no good purpose in setting forth the evidence which, in our judgment, supports, or which may be said to be against, them.

There is but one question of law which divides the parties. The Warren Irrigation Company contends that the certificate of appropriation issued to its predecessor by the state engineer granting him 15 second feet of water, and reciting that he had done all that was required to be done to make a complete and valid appropriation of that amount of water, was conclusive on the plaintiff and all those claiming to have acquired rights subsequent thereto. On the other hand, the plaintiff contends that such certificate is but prima facie evidence of the facts therein recited, and that the proof, aliunde the certificate, shows that the recitals respecting the applicant's diversion, use, and appropriation of the waters were false. The court's finding was not based on the proposition that the certificate was conclusive, but on the evidence adduced of an actual appropriation, diversion, and use of the waters for irrigation purposes by the Warren Irrigation Company and its predecessor. And since there is evidence to support and justify such finding it is unnecessary to determine whether the certificate is conclusive, or only prima facie evidence. No assignment is made, nor does the record disclose, that the plaintiff was precluded from controverting any recital of fact contained in the certificate or that the court, by any ruling, held or treated the certificate as conclusive evidence against the plaintiff.

We, therefore, are of the opinion that the judgment ought to be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

MEMORANDUM DECISIONS.

PEOPLE v. GISH. (Cr. 349.) (District Court of Appeal, Third District, California. Sept. 2, 1916.) Appeal from Superior Court, Napa County; Henry C. Gesford, Judge. C. H. Gish was convicted of an offense, and he appeals. Appeal dismissed, and record stricken from the files. E. S. Bell, of Napa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The record in the above-entitled cause has been filed in this court. It contains, however, no notice of appeal, either from the judgment or the order denying the motion for a new trial. Neither has there been any appearance of appellant in this court. We may say, though, that we have read the record, and there appears to be no doubt of defendant's guilt, or that he had a fair trial. The purported appeal is dismissed, and the record stricken from the files.

We concur: **CHIPMAN, P. J.; HART, J.**

HARRIS v. SANSOM. (No. 8987.) (Supreme Court of Colorado. Nov. 6, 1916.) En Banc. Error to District Court, City and County of Denver; H. P. Burke, Judge. Action between C. B. Harris and William Sansom. From the judgment, C. B. Harris brings error. Supersedeas denied, and judgment affirmed. Philip S. Van Cise, of Denver, for plaintiff in error. Frank McLaughlin, of Denver, and Norman T. Mason and Eben W. Martin, both of Deadwood, S. D., for defendant in error.

PER CURIAM. This action involves the disposition of \$2,031 paid to the clerk of the court by the American Smelting & Refining Company, being the proceeds of a car of ore claimed to have been shipped to it by the defendant in error. The controversy grew out of a contract between the parties, under which it was alleged to have been shipped, etc. We have given the assignments careful consideration, and are of opinion that the record fails to disclose any prejudicial error, for which reason the application for supersedeas will be denied, and the judgment affirmed. Supersedeas denied; judgment affirmed.

GABBERT, C. J., and BAILEY, J., not participating.

ROUTT COUNTY SENTINEL PUB. CO. v. INDUSTRIAL BUILDING & LOAN ASS'N et al. (No. 9040.) (Supreme Court of Colorado. Oct. 2, 1916.) En Banc. Error to District Court, Routt County; John T. Shumate, Judge. Suit between the Routt County Sentinel Publishing Company and the Industrial Building & Loan Association and Fred S. Follett, Public Trustee for the County of Routt. To review an order appointing a receiver, etc., the Publishing Company brings error, applying for supersedeas. Application for supersedeas denied, and action dismissed. Joseph K. Bozard, of Steamboat Springs, for plaintiff in error. Hilliard, Lilyard & Finni-

cum, of Denver, and Gooding & Gooding, of Steamboat Springs, for defendants in error.

PER CURIAM. This writ of error and application for supersedeas is from an order appointing a receiver, etc., for certain real property in Routt county pending the result of the suit for its possession. Upon review of the entire record, we find no error in this respect, for which reason the application for supersedeas will be denied, and the action dismissed. Supersedeas denied, and action dismissed.

GABBERT, C. J., and BAILEY, J., not participating.

WATTS v. LOUTHAN et al. (No. 8844.) (Supreme Court of Colorado. July 21, 1916.) En Banc. Error to County Court, City and County of Denver; Ira C. Rothgerber, Judge. Action between George T. Watts and Howard C. Louthan, executor of the will of Lucinda B. Pike, deceased, and others. To review a judgment for the latter, the former brings error, and applies for writ of supersedeas. Application denied, and judgment affirmed. Tolles & Cobbe, of Denver, and Albert E. Dunning, of Los Angeles, Cal., for plaintiff in error. C. V. Mead and James G. Rogers, both of Denver, for defendants in error.

PER CURIAM. Application for supersedeas denied, and judgment affirmed.

GARRIGUES and SCOTT, JJ., not participating.

In re BURKERT. (No. 2177.) (Supreme Court of Nevada. Oct. 2, 1916.) In the matter of the disbarment of C. O. Burkert as an attorney at law. Respondent suspended from practice until further order. Hugh H. Brown and J. H. Evans, both of Tonopah, for Nevada Bar Ass'n. C. O. Burkert, of Oakland, Cal., pro se.

COLEMAN, J. A verified petition, charging C. O. Burkert, a member of the bar of the state of Nevada, with unprofessional conduct while acting in the capacity of attorney, was filed in this court on the initiative of the Nevada Bar Association. To the petition the respondent filed an unverified answer, denying the allegations of misconduct alleged in the petition. In a letter to one of the attorneys in this proceeding, the respondent wrote as follows: "I fully appreciate your position, and do not feel justified in asking for any more favors, and therefore I presume there is nothing for you to do but to go ahead. There will be no contest. The answer filed some time ago was purely formal, and was filed only for the purpose of formally giving me more time. * * * It is not claimed that the facts alleged do not constitute sufficient ground for suspension or disbarment. At the hearing, oral and documentary evidence was introduced in support of the allegations of the petition. The respondent is traveling the downgrade of the highway of life. It would serve no useful purpose to discuss the facts of the case, and the 'mantle of charity should be over all.' Suffice it to say that the allegations of the petition are fully sustained by the evidence. It is ordered that the respondent, C. O. Burkert, be, and he hereby is, suspended from the practice of the law in the state of Nevada until the further order of the court."

NORCROSS, C. J., and McCARRAN, J., concur.

MANEY EXPORT CO. v. CENTRAL GRAIN & COMMISSION CO. (No. 8088.) (Supreme Court of Oklahoma. Oct. 31, 1916.) Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County;

H. C. Thurman, Judge. Action by the Maney Export Company against the Central Grain & Commission Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial. Hills & Manatt of Enid, and Franklin & Carey, of Muskogee, for plaintiff in error.

BURFORD, C. This was an action brought by the plaintiff in error against the defendant in error to recover certain amounts for overcharge in weight and for loss by misgrading upon certain contracts for the sale of grain. The plaintiff in error has filed his brief in accordance with the rules of this court; the defendant in error has filed no brief, and under such circumstances we are not required to search the voluminous record in this cause, to find a theory upon which to support the judgment, provided the brief of the plaintiff in error reasonably supports his allegations of error in the trial court. The assignments by the plaintiff are directed almost wholly to the rejection of testimony by the trial court. Certain of this rejected testimony related to the customs prevalent among grainmen. Upon an examination of this rejected testimony we are of the opinion that it was not competent under the state of the pleadings, inasmuch as, although the plaintiff had pleaded certain customs of the grain trade, it did not plead the particular custom, testimony in regard to which was rejected. This was necessary under the ruling of this court in *Smith v. Stewart*, 29 Okl. 26, 116 Pac. 182. Testimony as to the weights of the various cars delivered was rejected, upon the ground that the weighing had not been made within a reasonable time after the delivery of the car. Upon this point we are not required to pass, inasmuch as there may be different pleadings and testimony upon a new trial. It does appear, however, that certain testimony, apparently competent and material, was rejected by the trial court. Among these instances appears the testimony in relation to the weighing of car No. 83577MP, which was rejected upon the ground that it did not appear when the car was weighed. From the testimony set out in the brief, it seems that there was a definite time fixed as to when the car was weighed. Whether there are other reasons which might justify the rejection of this testimony, we are unable to say, without the assistance of a brief from the plaintiff in error, or on examination of the record, which, in the absence of the brief, we are not required to make. The cause is reversed and remanded, with directions to grant a new trial.

PER CURIAM. Adopted in whole.

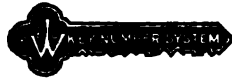
COFER v. STATE. (No. A-2633.) (Criminal Court of Appeals of Oklahoma. Sept. 23, 1916.) Appeal from Superior Court, Pottawatomie County; Leander G. Pitman, Judge. Oscar Cofer was convicted of violating the prohibitory law, and he appeals. Affirmed. Mark Goode, of Shawnee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. On information filed in the superior court of Pottawatomie county, charging that Oscar Cofer, did unlawfully and feloniously and without authority of law keep and maintain a place located at 7 West Main street, in the city of Shawnee, and known as the "Stagg Pool Hall," in which place intoxicating liquors were kept for sale, the plaintiff in error was tried and convicted, and his punishment fixed at a fine of \$50 and confinement in the county jail for a period of 30 days. From the judgment rendered on the verdict the defendant appealed, by filing in this court on January 13, 1916, a petition in error with case made. No brief has been filed, and when the case was called on the assignment for final submission no appearance was made in behalf of plaintiff in error. Upon a careful examination of the record it appears that the evidence is sufficient to support the verdict, and the charge of the court fully and fairly presented the law of the case. No error being apparent, the judgment of the court below is affirmed.

CLARKE & EATON CO. v. WARDEN INVESTMENT CO. (No. 13348.) (Supreme Court of Washington. Nov. 13, 1916.) Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge. Action by the Clarke & Eaton Company against the Warden Investment Company and another. Judgment for defendants, and plaintiff appeals. Affirmed. Peacock & Ludden, of Spokane, for plaintiff in error. Wakefield & Witherspoon and B. P. Twohy, all of Spokane, for defendant in error.

PER CURIAM. The question in this case is whether a payment of interest amounting to \$1,466.64, made upon a note secured by a real estate mortgage, should be credited upon a note executed by the defendant and held by the plaintiff. The trial court upon the issues of the case found that a settlement and stated account was had by the parties, and that the defendant had assumed this payment in addition to the note held by the plaintiff. The evidence plainly sustains this finding. The judgment must thereof be affirmed.

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and
Prior Reporter Volume Index-Digests

ABATEMENT AND REVIVAL.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) Abatement or Survival of Action.

⌚69 (Kan.) The death of either party pending an appeal from a judgment denying a divorce abates the action, and where the record shows no property rights involved, the appeal will be dismissed.—*Bunger v. Bunger*, 160 P. 976.

ABSENCE.

See Death, ⌚2.

ABSTRACTS.

See Appeal and Error, ⌚586, 639.

ABUTTING OWNERS.

See Municipal Corporations, ⌚450-523, 808.

ACCEPTANCE.

See Deeds, ⌚65; Sales, ⌚182.

ACCOMPLICES.

See Criminal Law, ⌚507.

ACCORD AND SATISFACTION.

See Compromise and Settlement; Novation; Payment; Release.

⌚7(1) (Colo.) Where a liquidated sum is due, the payment of a less sum in satisfaction thereof is not binding as such for want of consideration.—*New York Life Ins. Co. v. MacDonald*, 160 P. 193.

⌚10(1) (Colo.) The mere fact that a sum is due under an insurance policy of fixed value does not make the demand liquidated, where the insurer claims a set-off for sums due from the insured as its agent and for a loan on the policy.—*New York Life Ins. Co. v. MacDonald*, 160 P. 193.

⌚11(1) (Colo.) Where there was a bona fide dispute as to the sum due on an insurance policy, and the insured accepted a check for less than the face value, marked as "payment in full," he took it on such terms, and there was accord and satisfaction.—*New York Life Ins. Co. v. MacDonald*, 160 P. 193.

⌚25(2) (Cal.App.) In action for balance of salary at \$175 per month, held that allegations of answer did not set up an accord and satisfaction, requiring a finding on such issue.—*Breslauer v. McCormick-Saeltzer Co.*, 160 P. 251.

ACCOUNT.

See Account Stated; Executors and Administrators, ⌚481, 509; Partnership, ⌚345; Pleading, ⌚292.

ACCOUNT STATED.

See Evidence, ⌚134.

⌚1 (Cal.App.) An "account stated" is a writing which exhibits the state of an account between the parties and strikes a balance which is agreed upon by them so as to become a new contract.—*Fee v. McPhee Co.*, 160 P. 397.

⌚4 (Cal.App.) Monthly vouchers made out by railroad to dredging company, carrying receipt signed by latter showing estimated amount due it for filling in land, done during the previous month, at so much a cubic yard, held not accounts stated.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.* 160 P. 862.

⌚11 (Cal.App.) Where an account stated, because of a mistake of the bookkeeper in addition, does not show the true balance between the parties, it may be opened and corrected.—*Fee v. McPhee Co.*, 160 P. 397.

An account stated cannot be changed so as to charge against plaintiff certain items never before charged against him in similar transactions, and first charged on the books after suit on the account stated.—*Id.*

⌚13 (Cal.App.) A party seeking to avoid an account stated must allege the error, mistake, or fraud on which he relies, and establish it by clear and satisfactory evidence.—*Fee v. McPhee Co.*, 160 P. 397.

⌚19(3) (Cal.App.) In an action on an account stated, evidence held sufficient to sustain a finding that defendant corporation's president knew the contents of the statement when he approved it.—*Fee v. McPhee Co.*, 160 P. 397.

ACKNOWLEDGMENT.

See Acknowledgment; Limitation of Actions, ⌚147.

II. TAKING AND CERTIFICATE.

⌚29 (Or.) In considering sufficiency of certificate of acknowledgment of a mortgage, whole instrument should be examined.—*Coates v. Smith*, 160 P. 517.

Certificate of acknowledgment of mortgage will be liberally construed, and, when it refers to conveyance, reference may be had to body of deed or mortgage in aid of certificate, which is sufficient if two together show substantial compliance with statute.—*Id.*

No particular form is required for an individual acknowledgment of a mortgage.—*Id.*

⌚36(1) (Or.) Under L. O. L. § 7109, where certificate of acknowledgment of mortgage identified the parties as known to officer to be persons executing the instrument, fact that names

appeared spelled as "Samuel H. Smith" and "Adora L. Smith," instead of names of the mortgagors, Chester A. Smith and Otis S. Smith, will not vitiate the instrument.—*Coates v. Smith*, 160 P. 517.

IV. PLEADING AND EVIDENCE.

§59 (Or.) There is presumption that officer taking acknowledgment of deed or mortgage complied with L. O. L. § 7109, requiring that he know or have evidence that person acknowledging is individual described in and who executed conveyance.—*Coates v. Smith*, 160 P. 517.

ACQUIESCENCE.

See Estoppel, §94.

ACTION.

See Abatement and Revival; Dismissal and Nonsuit.

II. NATURE AND FORM.

§27(1) (Wash.) Where there is a positive duty created by implication of law independent of contract, though arising out of a relation or state of facts created by contract, an action on the case as for a tort will lie for violation or disregard of that duty.—*Fletcher v. Carstens Packing Co.*, 160 P. 14.

ADJOINING LANDOWNERS.

See Boundaries.

ADJUDICATION.

See Courts, §97; Judgment.

ADMINISTRATION.

See Executors and Administrators.

ADMISSIONS.

See Bastards; Evidence, §220-265.

ADULTERATION.

See Food.

ADVERSE POSSESSION.

See Tenancy in Common; Waters and Water Courses, §138.

I. NATURE AND REQUISITES.

(F) Hostile Character of Possession.

§70 (Ok.) Color of title is distinct from just or absolute title; it is defined to be "that which in appearance in title, but which in reality is not title."—*Spaulding v. Beidleman*, 160 P. 1120.

(G) Payment of Taxes.

§86 (Cal.App.) Under Code Civ. Proc. §§ 318, 322, 323, 325, the right of possession in plaintiff for four years could be destroyed only by ripening of adverse possession of defendant prior to that time with payment of taxes.—*People's Water Co. v. Boromeo*, 160 P. 574.

§92 (Cal.) Payment of taxes on a strip of land, as to which claims overlap, by claimant to title by adverse possession, is compliance with the law, even though they have been paid by the holder of the legal title also.—*Cummings v. Laughlin*, 160 P. 833.

§95 (Cal.App.) In ejectment against parties claiming by adverse possession, where plaintiff introduced assessment rolls showing that taxes were levied and assessed on the land, burden was on defendants to show such levies and assessments were invalid to entitle them to benefits of sections of Code relative to adverse possession.—*People's Water Co. v. Boromeo*, 160 P. 574.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§112 (Cal.App.) Under Code Civ. Proc. § 321, plaintiff, having the record title to land, was expressly presumed to be seized of its possession within time required by law, burden was on defendants to show that they, or either of them, having color of title, had possessed it as against plaintiff for statutory period of five years preceding action.—*Cory v. Hotchkiss*, 160 P. 841.

In action to quiet title to uncultivated land, a defendant, without color of title, to establish his claim of adverse possession, was required to show that land had been protected by a substantial inclosure and cultivated during his use and possession, as required by Code Civ. Proc. § 325.—*Id.*

§114(1) (Cal.App.) In action to quiet title to uncultivated, uninclosed land, evidence held not to show that defendant, having color of title, had continuously or at all occupied land for pasturage within Code Civ. Proc. § 323, subd. 3, for statutory period of five years necessary to establish his claim of adverse possession.—*Cory v. Hotchkiss*, 160 P. 841.

In action to quiet title to uncultivated, uninclosed land, evidence as to use of it by a defendant having no color of title held not sufficient to show that he or another defendant claiming under tax deed, had exclusive use and occupation of land for statutory period within Code Civ. Proc. § 323.—*Id.*

§114(2) (Cal.) In boundary suit, evidence of occupancy of and dominion over disputed boundary strip, by plaintiffs and predecessors held sufficient to show title by prescription.—*Cummings v. Laughlin*, 160 P. 833.

AFFIDAVITS.

See Depositions; New Trial, §151; Venue, §66, 67.

AGE.

See Evidence, §333.

AGENCY.

See Principal and Agent.

AGREEMENT.

See Contracts.

AGRICULTURE.

See Waters and Water Courses, §256-258.

AIDER BY VERDICT.

See Appeal and Error, §1068; Indictment and Information, §202.

ALIAS WRITS.

See Process, §45.

ALIENATION.

See Indians, §15; Perpetuities.

ALIMONY.

See Divorce, §200-287.

ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

§27(2) (Ok.) Where the defendant in an action on a note pleads material alteration without his consent, the burden is on him to prove it by a preponderance of the testimony.—*Kapp v. Levyson*, 160 P. 457.

AMBIGUITIES.

See Evidence, §450.

AMENDMENT.

See Appeal and Error, ¶889; Counties, ¶3; Judgment, ¶102; Pleading, ¶236-259; Replevin, ¶68.

AMOUNT IN CONTROVERSY.

See Courts, ¶120, 222; Justices of the Peace, ¶43, 44, 141.

ANIMALS.

See Carriers, ¶208-229; Chattel Mortgages, ¶49; Criminal Law, ¶252; Game; Railroads, ¶360, 405.

ANSWER.

See Pleading, ¶83.

APPEAL AND ERROR.

See Certiorari; Courts, ¶222; Criminal Law, ¶1032-1186; Exceptions, Bill of.

For review of rulings in particular actions or proceedings, see also the various specific topics.

III. DECISIONS REVIEWABLE.**(D) Finality of Determination.**

¶79(1) (Cal.) Judgment, after plaintiff's refusal to amend when demurrers to the complaint were sustained, in favor of three defendants in suit to avoid a deed under which they claimed, but not affecting their mortgagee, who was made a party, is nevertheless a final judgment as to them and appealable.—Baxter v. Boege, 160 P. 1072.

¶82(1) (Cal.) An order denying appellants' motion to call in another judge to hear a motion for new trial is appealable under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, as a special order made after final judgment.—Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co., 160 P. 545.

(E) Nature, Scope, and Effect of Decision.

¶93 (Or.) An order reinstating an action dismissed without prejudice, because limitations would bar the institution of another action for the same cause, is not final, and appeal therefrom will be dismissed.—Kyllä-Klerola v. Stanley-Smith Lumber Co., 160 P. 542.

IV. RIGHT OF REVIEW.**(A) Persons Entitled.**

¶150(1) (Utah) Where claims against a railroad, which plaintiff claimed were assigned to him to sue, were assigned to another who sued the railroad, which settled with the subsequent assignee, taking an indemnity bond holding it harmless against plaintiff's demands, and thereafter plaintiff sued the railroad and recovered on the claims no more than the settlement, plaintiff was not entitled to have defendant's appeal dismissed because defendant was no longer the real party in interest.—Broadbent v. Denver & R. G. Ry. Co., 160 P. 1185.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.**(A) Issues and Questions in Lower Court.**

¶171(3) (Wash.) Where a case was tried upon theory that denial in answer specifying paragraph 7 was intended to deny allegations of paragraph 8, that theory cannot be rejected for the first time on appeal.—Haas v. Washington Water Power Co., 160 P. 954.

¶171(3) (Wash.) Though the answer was in effect a negative pregnant and might be construed as an admission that one of the defendants did the act charged, where the trial below proceeded on the theory that it was a complete

denial, it must be so treated on appeal.—Gasch v. Rounds, 160 P. 962.

¶173(8) (Okla.) The question of the statute of frauds, not presented in the trial court, will not be considered for the first time on appeal.—Render v. Lillard, 160 P. 705.

(B) Objections and Motions, and Rulings Thereon.

¶185(1) (Okla.) The jurisdiction of the court from which an appeal comes is fundamental, the parties cannot waive the want thereof, and the want of jurisdiction will be noticed, though not challenged in the trial court.—First Nat. Bank of Poteau v. School Dist. No. 49 of Hughes County, 160 P. 68.

¶185(3) (Cal.) On appeal from an order of the judge refusing to call in another judge on ground of his disqualification, question of jurisdiction of judge to hear proceeding cannot be reviewed.—Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co., 160 P. 545.

¶193(9) (Or.) Adequacy of plaintiff's statement of his cause of action in his complaint may be questioned for first time on appeal.—Greenberg v. German-American Ins. Co., 160 P. 536.

¶197(4) (Cal.App.) Variance between complaint, alleging a contract to build a road, and the contract to build a road and bridges held not sufficiently raised in the trial court to be available on appeal.—Shelton v. Michael, 160 P. 578.

¶201(1) (Okla.) Where, without objection, suit to clear title is tried to jury and judgment rendered on verdict as in suit at law, it is too late to complain for the first time in the Supreme Court.—Carter v. Prairie Oil & Gas Co., 160 P. 319.

¶216(1) (Cal.App.) The court on appeal need not inquire whether an instruction directed to one of several defendants should have been given where no such instruction was asked.—Shelton v. Michael, 160 P. 578.

¶237(3) (Okla.) In the absence of demurrer to the evidence or motion for directed verdict, insufficiency of evidence is not presented on appeal.—Simpson v. Mauldin, 160 P. 481.

(C) Exceptions.

¶248 (Or.) There can be no reversal, where, throughout the testimony, no exception was taken to any ruling of the court.—Douglas Creditors' Ass'n v. Hutchason, 160 P. 539.

¶274(4) (Okla.) An exception to instructions does not challenge the sufficiency of the evidence.—Simpson v. Mauldin, 160 P. 481.

(D) Motions for New Trial.

¶281(1) (Colo.) Under Code Civ. Proc. § 237, and Rule No. 19, of Practice and Procedure in Civil Causes (148 Pac. xviii), adopted by Supreme Court, effective September 14, 1914, filing of a motion for new trial within the time and manner prescribed therefor is a condition precedent to have judgment reviewed.—Snider v. Ostrander, 160 P. 195; Quintanilla v. Quintanilla, Id.

¶302(1) (Cal.App.) An appeal, after abrogation by St. 1915, p. 209, of right of appeal from order denying new trial as granted by Code Civ. Proc. § 963, is properly before the court, regardless of whether the motion for new trial was based upon sufficient grounds.—Tormey v. Miller, 160 P. 858.

¶302(1) (Wyo.) Under Supreme Court Rule 13 (104 Pac. xiii), alleged errors in denying plaintiff's motion to strike part of the answer could not be considered, where not assigned as grounds for new trial in court below.—Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins, 160 P. 1171.

¶302(3) (Wyo.) Under Supreme Court 13 (104 Pac. xiii), alleged errors in rejecting evi-

dence cannot be considered, where not assigned as grounds for new trial in court below.—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins*, 160 P. 1171.

VI. PARTIES.

⚡322 (Okla.) Where one of two defendants in joint judgment files motion for new trial, but both join as plaintiffs in error, and case-made and notice for settling and signing it is served on defendant, who filed no motion, who waived issuance of summons in error and entered voluntary appearance, the party filing the motion is a proper plaintiff in error.—*Chicago, R. I. & P. Ry. Co. v. Cleveland*, 160 P. 328.

⚡323(3) (Okla.) All parties to a joint judgment must be joined in a proceeding in the Supreme Court.—*Long v. Bearden*, 160 P. 467.

⚡336(1) (Okla.) A failure to join any of the persons against whom a joint judgment has been rendered in proceeding to reverse a judgment is ground for dismissal.—*Grounds v. Dingman*, 160 P. 883.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

⚡339(2) (Kan.) On appeal from a judgment dismissing an action for failure to amend after demurrer sustained, the ruling sustaining the demurrer cannot be reviewed if made more than six months before appeal was perfected.—*Shimmer v. Rice*, 160 P. 984.

⚡339(2) (Kan.) Error in sustaining a motion for judgment on the pleadings and opening statement will not be considered, where the appeal was not perfected within six months from judgment.—*Stone v. Pugh*, 160 P. 988.

⚡347(1) (Utah) Under Comp. Laws 1907, § 3301, providing an appeal within six months from entry of judgment, where a final judgment was not entered and an appeal for that reason failed, and a judgment was thereafter entered, time for an appeal runs from the actual entry.—*Lukich v. Utah Const. Co.*, 160 P. 270.

⚡347(2) (Okla.) Where statute gives appeal from intermediate order, the party may institute proceedings for review at once or wait till final judgment, provided proceedings for review are taken within the statutory period after intermediate order.—*Chupco v. Chapman*, 160 P. 88.

Under Rev. Laws 1910, § 5236, the Supreme Court will consider error in sustaining demurrers when the petition in error is filed in Supreme Court within six months after sustaining the demurrers.—*Id.*

⚡347(3) (N.M.) The time for appeal from a judgment nunc pro tunc commences to run from its entry, not from the former date as of which it is entered.—*Simon v. El Paso & S. W. Co.*, 160 P. 352; *Shipp v. Same*, *Id.* 354.

⚡356 (Colo.) Under Rule No. 14 of Rules of Practice and Procedure in Civil Causes (148 Pac. xviii), adopted by Supreme Court, effective September 14, 1914, writ of error will be dismissed where plaintiff in error fails to institute proceedings in error until after expiration of time limited therefor.—*Snider v. Ostrander*, 160 P. 195; *Quintanilla v. Quintanilla*, *Id.*

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

⚡362(1) (Okla.) Error occurring at the trial cannot be considered by the Supreme Court, unless the ruling on motion for new trial based on such error is assigned in reviewing court.—*Brown v. Anderson*, 160 P. 724.

⚡362(3) (Okla.) After expiration of the statutory time for filing petition in error, it cannot be amended by setting up new assignments, and where permission to amend has been given, a

new assignment will not be considered.—*Brown v. Anderson*, 160 P. 724.

(D) Writ of Error, Citation, or Notice.

⚡414 (Or.) Under L. O. L. § 550, an appeal by a defendant from decree enjoining enforcement of judgment will be dismissed where a codefendant who would be compelled to pay judgment if decree were reversed is not served with notice of appeal.—*French v. McKean*, 160 P. 1151.

⚡419(1) (Or.) A notice of appeal, if insufficient in description of judgment, may be read with undertaking of appeal, and when the judgment is thereby sufficiently identified, jurisdiction is conferred on the Supreme Court by filing of the transcript.—*Meridional Co. v. Bourne*, 160 P. 1151.

⚡424 (Wash.) The requirement of service of notice on parties having an interest identical with appellant is to enable them to join in the appeal, and thus avoid successive appeals.—*Langley v. Devlin*, 160 P. 646.

Nonresident plaintiffs need not serve notice of appeal from adverse judgment on the surety on their cost bond against whom no judgment was rendered.—*Id.*

⚡424 (Wash.) Where the party at whose instance a cost bond was given waived in the Supreme Court all rights under the bond, there is no necessity for service of a notice of appeal on the surety.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 753.

⚡425 (Or.) Under L. O. L. § 550, as amended by Laws 1913, p. 617, § 1, and section 541, notice of appeal sent by mail, excluding day on which judgment was rendered, and including day on which it was mailed, held not served until the sixty-first day after judgment, and too late.—*Hutchison v. Crandall*, 160 P. 124.

⚡429 (Okla.) A defendant in error or his attorney may waive in writing issuance and service of summons in error at any time before expiration of time allowed for appeal.—*Chicago, R. I. & P. Ry. Co. v. Cleveland*, 160 P. 328.

⚡430(1) (Okla.) Where summons in error is not served upon all necessary parties and no praecipe has been filed, and time for valid summons has expired, appeal will be dismissed.—*Grounds v. Dingman*, 160 P. 883.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

⚡460(2) (Cal.) Provisions of Code Civ. Proc. §§ 942, 943, 944, and 945, relative to stay of proceedings on judgment appealed from, apply only where appellant has money or other property in possession or control which has been adjudged to belong to respondent, or where appellant has been directed to do some act for respondent's benefit.—*Halsted v. First Sav. Bank*, 160 P. 1075.

In action by executors against individual and bank to recover deposit, if bank had appealed from judgment for individual for amount of deposit, it could have stayed enforcement of the judgment pending its appeal only by giving stay bond provided by Code Civ. Proc. § 942.—*Id.*

⚡460(4) (Cal.) Under Code Civ. Proc. § 949, applying to cases not provided for in sections 942, 943, 944, and 945, in action by executors against individual and bank to recover deposit, so far as judgment for individual against bank for deposit was against executors, proceedings thereon were stayed, by their appeal duly perfected, without stay bond.—*Halsted v. First Sav. Bank*, 160 P. 1075.

⚡475 (Cal.) Where surety on undertaking to stay execution pending appeal becomes insufficient, or the undertaking is inadequate, relief can be obtained, under Code Civ. Proc. § 954, in the court below, but not when the amount is not sufficient in event of affirmance.—*Jameson v. Chanslor-Canfield Midway Oil Co.*, 160 P. 1066.

In view of Code Civ. Proc. §§ 942-946, 948,

and 954, Supreme Court, on application of plaintiff respondents that defendant be required to give further undertaking as condition to further maintenance of stay of execution pending appeal, on ground that amount fixed by trial court has become insufficient in the event of affirmance, cannot require such further undertaking.—Id.

Supreme Court has no authority, on application by plaintiff respondents for order requiring defendant appellant to give further undertaking as condition to maintenance of stay of execution, to review action of trial court in fixing amount of undertaking.—Id.

§479(1) (Cal.) In action by executors against individual and bank to recover deposit, where executors appealed from judgment for individual against bank, which appeal did not work stay, and, applying for supersedeas, alleged that individual had no means, and if money was collected by her executors would not be able to recover it, if they prevailed, writ of supersedeas will issue.—Halsted v. First Sav. Bank, 160 P. 1075.

§485(2) (Cal.) In view of provisions of Code Civ. Proc. §§ 942, 943, 944, 945, and 949, relative to stay by appeal, in action by executors against bank and individual to recover deposit, executors' appeal did not stay enforcement of individual's judgment against bank for amount of deposit.—Halsted v. First Sav. Bank, 160 P. 1075.

§488(2) (Or.) Where a corporation was enjoined from intermeddling with property, taking an appeal and giving supersedeas bond did not render it immune, while appeal was pending, from prosecution for contempt for a violation of the injunction.—Treadgold v. Willard, 160 P. 803.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§494 (Utah.) In case of appeal there must be record evidence showing that a final judgment was rendered and entered.—Lukich v. Utah Const. Co., 160 P. 270.

§499(3) (Ok.) On exclusion of testimony for plaintiff, the refusal to permit plaintiff to have incorporated into the record a formal tender or offer of the evidence which his witness would furnish is error.—Taliaferro v. Atchison, T. & S. F. Ry. Co., 160 P. 69.

§511(3) (Ok.) That the case-made does not affirmatively show that orders extending time to prepare and serve case-made are entered on the journal is not sufficient ground for dismissal of appeal.—Mutual Life Ins. Co. of New York v. Buford, 160 P. 928.

(B) Scope and Contents of Record.

§516 (Wash.) Where defendant withdrew his answer and demurred to the complaint, and demurrer being sustained, plaintiff refused to amend, and appealed from judgment of dismissal, the question was the sufficiency of the complaint, so that the record need not include opening statement of plaintiff's counsel prior to the demurrer.—Jacobs v. City of Seattle, 160 P. 299.

§518(1) (Ok.) The record proper in a civil action consists of the pleadings, proceedings, rulings, orders, and judgments, and an appeal by transcript will be dismissed where the pleadings are not included therein.—Southern Surety Co. v. Turnham, 160 P. 468.

§518(5) (Ok.) A certified copy of order of court referred to in answer as being attached, but not in fact attached, and not filed in trial court, but filed with clerk of Supreme Court and attached to transcript of record after more than a year, is not a part of the transcript.—Robert v. Mullen, 160 P. 83.

§519 (Ok.) The agreed statement of facts, not being a part of the record unless made so by bill of exceptions, cannot be considered on appeal by transcript of the record.—Southern Surety Co. v. Turnham, 160 P. 468.

§537 (Ok.) An order extending time to make and serve case-made is without force where it is not shown affirmatively by the case-made.—Berryhill v. Miller, 160 P. 67.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§544(1) (Utah) Under Comp. Laws 1907, § 3283, as to what is deemed excepted to without a bill of exceptions, and Laws 1911, c. 94, as to how the judgment roll is made up, denial of motion for change of venue will not be considered on appeal unless shown by bill of exceptions.—Broadbent v. Denver & R. G. Ry. Co., 160 P. 1185.

§545 (Ok.) A motion in county court to reinstate an appeal from a justice of the peace, which had been dismissed, does not constitute part of the record proper, and cannot be reviewed by Supreme Court on proceeding by petition in error, with transcript of record attached thereto.—O. K. Bus & Baggage Co. v. Cox, 160 P. 455.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§556 (Ok.) Rev. Laws 1910, §§ 5235-5278, contains complete provisions prescribing requirements and regulating procedure for bringing case to Supreme Court with case-made attached.—St. Louis & S. F. R. Co. v. Taliaferro, 160 P. 610.

§559 (Ok.) In proceeding by petition in error with case-made attached, only matters essential to present errors complained of need be brought up.—St. Louis & S. F. R. Co. v. Taliaferro, 160 P. 610.

§562 (Ok.) Rev. Laws 1910, § 5317, requiring orders made out of court to be forthwith entered on the journal, is directory, and compliance therewith is not essential to validity of the orders, and the case-made need not show affirmatively the recording thereof.—St. Louis & S. F. R. Co. v. Taliaferro, 160 P. 610.

§562 (Ok.) Rev. Laws 1910, § 5317, as to entry of orders on the journal of the court, is directory, and such entry and affirmative showing thereof in the case-made is not essential.—Mutual Life Ins. Co. of New York v. Buford, 160 P. 928.

§564(3) (Ok.) Recital in case-made duly certified that order was made extending time to prepare and serve case, where the substance of the order is contained in the case-made, is sufficient, and motion to dismiss for failure to show that the order of extension was entered on the journal will be overruled.—St. Louis & S. F. R. Co. v. Taliaferro, 160 P. 610.

§565 (Ok.) Where a joint judgment is brought up on error with case-made attached, case-made must be served on all parties against whom judgment is rendered.—Grounds v. Dingman, 160 P. 883.

§567(1) (Ok.) Unless waived by defendant in error, a case-made, settled and signed before expiration of time for suggesting amendments, is a nullity, and confers no jurisdiction on the Supreme Court.—Hart v. New State Bank, 160 P. 605.

§567(1) (Ok.) In absence of waiver by defendants in error, case-made signed and settled before expiration of time granted for amendments is a nullity.—Hubbard v. Meek, 160 P. 1128.

§568 (Ok.) Where no notice of settlement of case-made is given to, or waived by necessary parties, the case-made is a nullity, and no jurisdiction vests in Supreme Court to decide ques-

tion arising thereon.—*Grounds v. Dingman*, 160 P. 883.

⚡568 (Okl.) Where no notice of time of settlement of case-made is given or waived, and there is no appearance, the case-made is a nullity, and no jurisdiction is vested in the Supreme Court.—*Hubbard v. Meek*, 160 P. 1128.

(E) Abstracts of Record.

⚡586(4) (Utah) Where a judgment was in the judgment roll, but was not printed in abstract, because abstract in premature appeal not showing it was refiled by consent, a rule requiring the judgment to be printed in the abstract, but not making failure to do so a cause for dismissal is directory and sufficiently complied with to withstand a motion to dismiss.—*Lukich v. Utah Const. Co.*, 160 P. 270.

⚡586(7) (Utah) Where a record on appeal disclosed that the parties stipulated that abstract of record used in a former appeal, dismissed as premature, be used in present appeal, rule of court held substantially complied with when appellant obtained leave to refile the original abstract which contained the assignments of error.—*Lukich v. Utah Const. Co.*, 160 P. 270.

(G) Authentication and Certification.

⚡614 (Okl.) Where a case-made is signed by trial judge, and not attested by signature of clerk and seal of court as required by Rev. Laws 1910, § 5242, it is insufficient.—*Berryhill v. Miller*, 160 P. 67.

⚡614 (Okl.) The certificate of the judge to a case-made is prima facie evidence of the facts recited and cannot be impeached except as authorized by Rev. Laws 1910, § 5248.—*St. Louis & S. F. R. Co. v. Taliaferro*, 160 P. 610.

(H) Transmission, Filing, Printing, and Service of Copies.

⚡624 (Or.) Where an appeal was not perfected within 30 days under L. O. L. § 550, subd. 4, on April 19th, the trial court had no authority, under section 554, to make an order May 27th extending the time to file the transcript.—*Bell v. Fleming*, 160 P. 1150.

⚡627(2) (Utah) Though Supreme Court rules 6, 10 (97 Pac. viii), as to contents of abstract and time of filing it and serving brief, be not complied with, yet no prejudice resulting, and there be no delay in the hearing, appeal will not be dismissed.—*Grosteit v. Miller*, 160 P. 769.

⚡633 (N.M.) Where a bona fide attempt has been made to perfect appeal under Laws 1915, c. 77, a motion by appellee to docket and affirm under Code 1915, § 4490, will be denied, though the procedure should have been according to the law prior to that of 1915.—*Lukins v. T aylor*, 160 P. 349.

(I) Defects, Objections, Amendment, and Correction.

⚡639(1) (Utah) Though Supreme Court rules 6, 10 (97 Pac. viii), as to contents of abstract and time of filing it and serving brief, be not complied with, yet no prejudice resulting, and there be no delay in the hearing, appeal will not be dismissed.—*Grosteit v. Miller*, 160 P. 769.

The court may refuse to search for questions, answers, and rulings, they not being in the abstract, and neither it nor the brief stating where they can be found.—*Id.*

⚡640 (Kan.) Where no claim is made that mortgagors were not holders of legal title or that they have defense to action for foreclosure, judgment showing foreclosure will not be reversed though transcript fails to show formal proof that mortgagors owned property.—*Howard v. Tourbier*, 160 P. 1144.

(L) Matters Not Apparent of Record.

⚡715(1) (Kan.) Testimony not appearing in transcript cannot be considered for any purpose.—*Howard v. Tourbier*, 160 P. 1144.

XI. ASSIGNMENT OF ERRORS.

⚡754(3) (Okl.) Errors occurring during the trial cannot be considered, unless the ruling on motion for new trial is assigned for error.—*Witherspoon v. Smith*, 160 P. 57.

XII. BRIEFS.

⚡757(3) (Okl.) Assignments of error on admission of testimony will not be considered where the substance of such testimony, with the specific objections thereto, is not set out in the briefs, as required by Supreme Court Rule 25 (137 Pac. xi).—*Purcell Mill & Elevator Co. v. Canadian Valley Const. Co.*, 160 P. 485.

⚡762 (Wash.) Under provision of Rem. & Bal. Code, § 1730, the court need not notice contentions made in appellant's reply brief which were not made in his opening brief.—*Marshall v. Dunn*, 160 P. 298.

⚡773(3) (Utah) Though Supreme Court rules 6, 10 (97 Pac. viii), as to contents of abstract and time of filing it and serving brief, be not complied with, yet no prejudice resulting, and there be no delay in the hearing, appeal will not be dismissed.—*Grosteit v. Miller*, 160 P. 769.

⚡773(5) (Okl.) Where defendant in error fails to file briefs, and briefs of plaintiff in error reasonably sustain assignments, the judgment will be reversed.—*Braden v. Panther Creek Oil Co.*, 160 P. 317.

⚡773(5) (Okl.) Where defendant in error without excuse has failed to file brief, and the brief of plaintiff in error reasonably sustains assignments of error, judgment will be reversed.—*Missouri, K. & T. Ry. Co. v. Blue*, 160 P. 594.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

⚡796 (Cal.) Defendants in proceeding under Code Civ. Proc. § 1664, to determine heirship and right of succession, making claims antagonistic to each other, one of them appealing from judgment for plaintiff has an interest allowing him to move for dismissal of the separate appeals of other defendants.—*In re Friedman's Estate*, 160 P. 237.

⚡807 (Wyo.) Where it was not alleged that dismissal of proceedings in error was erroneous on the record as it then stood, but it was sought to amend the record, the proper procedure was by motion to reinstate, and not by petition for rehearing.—*Campbell v. Saratoga State Bank*, 160 P. 333.

It is not an "unavoidable casualty" sufficient to warrant reinstatement of proceedings in error, dismissed for defects in the record, that the clerk failed to authenticate certain papers, which the attorney of plaintiff in error must have had before him when briefing the case.—*Id.*

XV. HEARING AND REHEARING.

⚡832(1) (Ariz.) The grounds stated in the motion for rehearing, amounting to only an argument with the court as to the law applicable to the facts stated, present no grounds therefor.—*Cerro Cobre Development Co. v. Du Vall*, 160 P. 25.

⚡832(4) (Wyo.) Exception to ruling of trial court, refusing to direct defendant to elect on which cause of action of his counterclaim he sought to proceed, was waived, on petition for rehearing, where the point was not made in the original brief.—*Studebaker Corp. of America v. Hanson*, 160 P. 336.

⚡834 (Cal.App.) Judgment on appeal, like judgment of a trial court, has force from time of entry, though rehearing may be ordered, suspending its operation.—*Eaton v. Southern Pac. Co.*, 160 P. 687.

XVI. REVIEW.

(A) Scope and Extent in General.

⇒837(12) (Utah) In a law case, the Supreme Court, where evidence was excluded, has no power to pass upon its sufficiency, but can do no more than to determine whether there was error in its exclusion.—Hirsh v. Ogden Furniture & Carpet Co., 160 P. 283.

⇒843(2) (Utah) In irrigation company's suit to restrain diversion of water, question whether state engineer's certificate of appropriation issued to defendant's predecessor was conclusive or prima facie evidence, *held* immaterial.—New Era Irr. Co. v. Warren Irr. Co., 160 P. 1195.

⇒854(1) (Utah) Where under the findings the court rendered judgment for plaintiff on two theories, the judgment must, on defendant's appeal on the judgment roll without a bill of exceptions, be upheld if either theory was correct.—Swanson v. DeVine, 160 P. 872.

(C) Parties Entitled to Allege Error.

⇒882(10) (Wash.) Where defendant had deposited funds belonging to intervenor in his bank account, garnished by plaintiff, error of court in refusing to admit bank's books as immaterial *held* not an error invited by plaintiff's counsel in objecting to their offer, on the ground that checks had been issued against the account and subsequently paid.—Chase & Baker Co. v. Olmsted, 160 P. 952.

⇒882(12) (Cal.) Plaintiff, having requested it, may not complain of the giving of an instruction not within the issues.—Newby v. Times-Mirror Co., 160 P. 233.

⇒882(17) (Cal.) Plaintiff, though requesting an instruction not within the issues, may make the point that implied findings under it are not supported by evidence.—Newby v. Times-Mirror Co., 160 P. 233.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

⇒889(3) (Okl.) An amendment of a plea, which ought to have been allowed if asked for in the trial court to conform to evidence adduced without objection, will be regarded by the Supreme Court as having been made.—Harn v. Patterson, 160 P. 924.

⇒893(1) (Wash.) An action by executors for the price of notes sold the defendants is triable de novo on appeal.—Goldsworthy v. Oliver, 160 P. 4.

⇒895(2) (Wash.) Cases tried in the superior court are in a sense triable de novo in Supreme Court, and it is not bound by the findings of the trial court to the same extent that it is by the findings of a jury.—Jim v. Chicago, M. & St. P. Ry. Co., 160 P. 295.

(E) Presumptions.

⇒901 (Cal.App.) Where respondent contends that instructions refused were covered by those given, burden is on appellant to show, by setting out all the instructions, the error complained of.—Arundell v. American Oilfields Co., 160 P. 159.

⇒907(2) (Nev.) Where the evidence is not included in the transcript, the Supreme Court is bound to assume that it supports the findings.—Phillips v. Snowden Placer Co., 160 P. 786.

⇒914(1) (Wash.) In materialman's action on contractor's surety bonds, Supreme Court, in absence of anything in record showing that contractor had been personally served, could not assume that lower court had committed error in not entering personal judgment against him.—Denny-Renton Clay & Coal Co. v. National Surety Co., 160 P. 1.

⇒926(1) (Cal.App.) Where the record does not disclose the basis of witnesses' estimate of value of land, it must be assumed that they

adopted a proper criterion for estimating its value.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

⇒928(2) (Colo.) In the absence of objections to instructions given or refused, the court must presume that all matters at issue were submitted under proper instructions.—Neef Bros. Brewing Co. v. Krotter, 160 P. 1039.

⇒930(1) (Cal.App.) Refusal of instruction that jury should not be governed by sympathy, but by evidence, in absence of showing that jury acted out of sympathy, was not error.—Arundell v. American Oilfields Co., 160 P. 159.

⇒930(1) (Utah) After judgment statements of witnesses against whom jury has made findings must be taken most strongly against them.—Martindale v. Oregon Short Line R. Co., 160 P. 275.

⇒930(4) (Cal.) In railroad fireman's action for personal injuries on theory that he was struck by a signboard near track, it must be presumed after verdict for him that the jury so concluded.—Humphres v. Western Pac. Ry. Co., 160 P. 415.

⇒931(1) (Cal.) The court on appeal cannot assume that the lower court ignored rules for determining the sufficiency of the evidence.—Mellor v. Bank of Willows, 160 P. 567.

⇒932(1) (Cal.App.) The amount of damages for assault rests so largely in the discretion of the jury that in attack on a verdict as excessive the appellate court must treat every conflict in testimony as resolved in plaintiff's favor.—Riffel v. Letts, 160 P. 845.

⇒933(1) (Okl.) Where the court in granting an order specifies fully the reasons therefor, it will be presumed that the ground stated is the only one on which the court acts.—St. Louis, I. M. & S. Ry. Co. v. Lowrey, 160 P. 716.

⇒934(2) (Cal.) Where the court found that one riparian owner used irrigation waters for watering stock and for domestic purposes, and made no allotment to him for such purposes, it will be presumed in and of the judgment, that the court considered the allowance sufficient for all purposes.—Half Moon Bay Land Co. v. Cowell, 160 P. 675.

⇒934(2) (Mont.) In aid of judgment against right of dower in property *held* by husband in trust, it will, in absence of finding or request, be inferred that she had notice of the trust.—Huffine v. Lincoln, 160 P. 820.

⇒935(1) (Kan.) In replevin, it will be assumed on appeal that the purpose of ordering a correction of a judgment for defendant so as to authorize recovery of the property by him was to state the judgment actually rendered.—Stone v. Pugh, 160 P. 888.

(F) Discretion of Lower Court.

⇒977(5) (Okl.) Judgment refusing new trial will not be disturbed, unless the trial court clearly abused its discretion.—Sinopoulo Oil Co. v. Bell, 160 P. 448.

⇒979(2) (Wash.) Order granting new trial will not be disturbed, where there is no manifest abuse of discretion.—Hawn v. Yakima County, 160 P. 7.

⇒979(3) (Wash.) Refusal of new trial for insufficient evidence will not be disturbed except for abuse of discretion, though the Appellate Court believe the weight of evidence against the verdict.—Armstrong v. Modern Woodmen of America, 160 P. 946.

(G) Questions of Fact, Verdicts, and Findings.

⇒994(3) (Okl.) Where a cause is tried to the court and there is a conflict in the evidence, the Supreme Court will not determine the credibility of witnesses.—Falls City Clothing Co. v. Sweazea, 160 P. 728.

⇒1000 (Okl.) Where suit to clear title is tried without objection to a jury, the Supreme Court will weigh the evidence, and, where it is uncontroverted, render, or cause to be rendered, such judgment as should have been rendered.—*Carter v. Prairie Oil & Gas Co.*, 160 P. 319.

⇒1001(1) (Kan.) Verdicts based on sufficient evidence will not be disturbed.—*McCorkle v. Red Star Mill & Elevator Co.*, 160 P. 988.

⇒1001(1) (Kan.) A judgment consistent with and supported by findings by the jury, not contradictory to each other, will not be disturbed.—*Hladky v. Hladky*, 160 P. 992.

⇒1001(1) (Okl.) Where the evidence reasonably tends to support the verdict, it will not be disturbed.—*Kapp v. Levysen*, 160 P. 457.

⇒1001(1) (Okl.) Where the evidence reasonably tends to support a verdict, the judgment will not be reversed.—*Berryhill v. Thrailkill*, 160 P. 874.

⇒1001(1) (Utah) Where there is any substantial evidence in support of every element necessarily included in the general verdict, Supreme Court is bound thereby.—*Martindale v. Oregon Short Line R. Co.*, 160 P. 275.

⇒1001(1) (Utah) The jury's findings will not be disturbed so long as there is some substantial evidence in support thereof.—*Grosteit v. Miller*, 160 P. 709.

⇒1001(3) (Okl.) A verdict, unsupported by evidence, and based upon conjecture, cannot be upheld.—*Kansas City Southern Ry. Co. v. Langley*, 160 P. 451.

⇒1001(3) (Okl.) Where a verdict cannot be justified on any hypothesis presented by the evidence, it will not be allowed to stand.—*Earley v. Johnson*, 160 P. 432.

It is only where the verdict cannot be justified on any hypothesis presented by the evidence that it should be set aside as a compromise verdict.—*Id.*

⇒1002 (Cal.App.) A verdict on conflicting evidence sufficient to sustain it is conclusive.—*Riffel v. Letts*, 160 P. 845.

⇒1002 (Cal.App.) In civil action for rape, jury's conclusion on conflicting evidence in favor of plaintiff and against defendant's alibi is conclusive on appeal.—*Valencia v. Milliken*, 160 P. 1086.

⇒1002 (Colo.) A verdict on conflicting evidence will not be disturbed, where there is sufficient testimony to support it.—*Thomas v. Green*, 160 P. 1031.

⇒1002 (Wash.) On a primary issue of fact, where the evidence conflicts, the verdict is conclusive on the court on appeal.—*Gasch v. Rounds*, 160 P. 962.

⇒1004(1) (Wash.) In broker's action for effecting sale of property held, on the evidence, that appellate court would not disturb a verdict for plaintiff for insufficiency of evidence to establish rate of commission allowed by jury.—*Godefroy v. Hupp*, 160 P. 1056.

⇒1005(2)(Okl.) A verdict sustained by the evidence, approved by the trial court, will not be disturbed.—*Thompson v. Vaught*, 160 P. 625.

⇒1005(2) (Wash.) Positive testimony, with detail of facts and circumstances lending support to witness' memory, is substantial evidence, preventing disturbance of refusal of new trial for insufficient evidence.—*Armstrong v. Modern Woodmen of America*, 160 P. 946.

⇒1008(2) (Okl.) Where a jury is waived and a cause tried to the court, a general finding is given the same weight as a verdict.—*Falls City Clothing Co. v. Sweazea*, 160 P. 728.

⇒1010(1) (Kan.) Where there was evidence that a privilege of milling in transit would have been exercised if available, the decision of the trial court on that point is final.—*McCullough v. Missouri Pac. Ry. Co.*, 160 P. 214.

⇒1010(1) (Kan.) The trial court's findings of fact based on sufficient evidence cannot be

disturbed.—*Sarbach v. Fidelity & Deposit Co. of Maryland*, 160 P. 990.

⇒1010(1) (N.M.) A finding of fact sustained by substantial evidence will not be disturbed.—*Bradstreet v. Gill*, 160 P. 354.

⇒1010(1) (Okl.) Where there is any evidence reasonably tending to sustain the judgment on a trial to the court, it will not be disturbed on appeal.—*Falls City Clothing Co. v. Sweazea*, 160 P. 728.

⇒1010(1) (Okl.) Where the evidence reasonably tends to support the finding of a court, the judgment will not be reversed.—*Berryhill v. Thrailkill*, 160 P. 874.

⇒1011(1) (Cal.) A finding of a lower court as to facts, on conflicting evidence is conclusive on appeal.—*Half Moon Bay Land Co. v. Cowell*, 160 P. 675.

⇒1011(1) (Cal.App.) A finding of fact based upon conflicting evidence will not be disturbed on appeal.—*Reese v. G. B. Amigo Co.*, 160 P. 837.

⇒1011(1) (Cal.App.) Findings on conflicting evidence will not be disturbed.—*Waters v. Nevis*, 160 P. 1081.

⇒1011(1) (Cal.App.) Finding on substantially conflicting evidence will not be disturbed.—*Daniel v. Calkins*, 160 P. 1082.

⇒1011(1) (Kan.) Findings of triers of fact are conclusive where different conclusions can reasonably be deduced, though the evidence is conflicting.—*Fredenhagen v. Nichols & Shepard Co.*, 160 P. 997.

⇒1011(1) (Okl.) Where a cause is tried to the court and there is a conflict in the evidence, the Supreme Court will not weigh the evidence.—*Falls City Clothing Co. v. Sweazea*, 160 P. 728.

⇒1015(3) (Or.) Where trial court set aside a judgment and ordered new trial on discovery of reversible mistake of law in overruling motion for nonsuit, question on appeal from grant of new trial held to be whether evidence of alleged oral modification of original written contract was sufficient to go to jury.—*Wakefield v. Supple*, 160 P. 376.

(H) Harmless Error.

⇒1032(1) (Cal.App.) Burden is on appellant to affirmatively show prejudicial error.—*Valencia v. Milliken*, 160 P. 1086.

⇒1033(1) (Wash.) In action for injury from loose plank in sidewalk, refusal to exclude jury when plaintiff was making her offer of proof as to actual notice to defendant city favorable to herself, followed by an admonition to disregard such proof, was not prejudicial to plaintiff.—*MacBermid v. City of Seattle*, 160 P. 290.

⇒1039(2) (Cal.App.) In action by dredging company against railroad for breach of contract to pay for filling land, though facts constituting damages should have been set up in single count, stating them in two causes of action, held harmless.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.*, 160 P. 862.

⇒1040(2) (Cal.) A party cannot complain of sustaining of a demurrer to portion of his pleading where on the trial he was informed that the ruling did not affect the issues, and he fully presented his evidence.—*In re Cook's Estate*, 160 P. 553.

⇒1040(10) (Or.) Where defendant's answer supplied a defective complaint, overruling the demurrer to the complaint was harmless.—*Treadgold v. Willard*, 160 P. 803.

⇒1042(4) (Okl.) Any error in refusing to strike allegations constituting mere surplusage from the petition is harmless.—*Shawnee Life Ins. Co. v. Taylor*, 160 P. 622.

⇒1046(1) (Cal.) Where error is so grave as the unauthorized substitution of the court for a jury, the court on appeal cannot, as a gen-

eral rule, deny that justice miscarried.—In re Baird's Estate, 160 P. 1078.

⇒1047(1) (Cal.App.) In civil action for rape, error in limiting purpose for which evidence as to chastity of plaintiff could be considered held harmless.—Valencia v. Milliken, 160 P. 1088.

⇒1050(1) (Cal.App.) In civil action for rape, admission of physician's testimony as to period of gestation held harmless to defendant.—Valencia v. Milliken, 160 P. 1086.

⇒1050(1) (Kan.) Where verdict was only advisory, admission of opinions that grantor was not competent to make deed held not prejudicial error.—Hessen v. Sapp, 160 P. 220.

⇒1050(2) (Or.) Where pleadings raised issue concerning personal property of deceased, although trial court might consider an oral statement of counsel as waiver to claim to personalty made by state in its pleading, held, that an admission in evidence of an order as to distribution of personal property and findings as to the heirs of the deceased made by the county court was not prejudicial error.—State v. Finnigan, 160 P. 370.

⇒1050(4) (Cal.App.) In action by dredging company against railroad for breach of contract, admission in evidence without authentication of defendant's engineer's letters to plaintiff's president held harmless.—Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co., 160 P. 362.

⇒1050(4) (Wyo.) Admission of copies of letters, only effect of which was to explain later correspondence, originals of which had been admitted, held harmless, if erroneous.—Studebaker Corp. of America v. Hanson, 160 P. 336.

⇒1051(1) (Cal.App.) Where in condemnation action there was a pronounced conflict on the question whether the remainder of defendant's land would be damaged by the severance of the land condemned, several competent witnesses testifying that it would not be damaged, admission of incompetent evidence to the same effect was not prejudicial to defendant.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

⇒1052(6) (Cal.App.) Error in admitting incompetent evidence that the value of land condemned was \$50 an acre held not prejudicial, where the verdict assessed its value at \$265.52 an acre, since the jury obviously did not accept the incompetent testimony.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

⇒1058(2) (Utah) In passenger's action for injury, any error, in excluding question to plaintiff's witness as to whether she noticed anything in plaintiff's condition to indicate that she was hurt, held not prejudicial where defendant developed all witness heard and observed.—Sharp v. Ogden Rapid Transit Co., 160 P. 438.

Error, if any, in excluding conductor's observation of plaintiff's condition on following day, held not prejudicial, where defendant developed all that witness observed concerning plaintiff.—Id.

⇒1064(1) (Cal.) In railroad fireman's action for injury when struck by signboard 26 inches from track, error, if any, in instructions as to railroad's violation of rule, held harmless, in view of railroad's knowledge that such rule was violated.—Humphres v. Western Pac. Ry. Co., 160 P. 415.

⇒1064(1) (Ok.) It must clearly appear that instructions probably caused miscarriage of justice before reversal will be ordered.—Thompson v. Vaught, 160 P. 625.

⇒1064(1) (Utah) An erroneous instruction that an attorney's lien, relied on by plaintiff, attached upon employment, under Comp. Laws 1907, § 135, was not prejudicial to defendant, where the settlement of the cause of action by defendant took place after action had been com-

menced by the attorney.—Broadbent v. Denver & R. G. Ry. Co., 160 P. 1185.

⇒1065 (Kan.) The rule that where verdict is purely advisory an erroneous instruction is not ground for reversal unless showing misconception of law or rights of parties applies where court adopts findings of jury, as well as where it frames independent findings.—Hessen v. Sapp, 160 P. 220.

Instruction, including reasonableness of grantor's act as matter to be considered in action to set aside deed, is not prejudicial, where the findings of the jury are only advisory.—Id.

⇒1066 (Cal.App.) An instruction correctly stating the law as found in Civ. Code, § 1970, as to the liability of an employer for injuries to an employe, if not applicable, is not prejudicial to the employer.—Arundell v. American Oilfields Co., 160 P. 159.

⇒1066 (Kan.) Though a cross-petition did not allege an agreement to adopt the appellee, and there was no proof of a contract to adopt, but only to take her into their family as their child and heir, an instruction that appellee might recover if there was an agreement to adopt and make her their heir was not prejudicial.—Jacks v. Masterson, 160 P. 1002.

⇒1067 (Ok.) In an action to recover twice the interest paid on a usurious note, refusal to instruct that the action was controlled by federal statute and not by state statute was not error, where the requirements of the federal statute were fully stated.—First Nat. Bank of Wellston v. Sensebaugh, 160 P. 455.

⇒1068(4) (Ok.) Where there is no assignment of error that verdict for personal injuries is excessive, an erroneous instruction as to measure of damages is harmless.—St. Louis & S. F. R. Co. v. Walker, 160 P. 79.

⇒1068(5) (Cal.App.) Refusal of requested instruction by defendant owner in condemnation proceedings to disregard testimony as to value of land sought to be condemned because based on prices paid for other lands was not prejudicial, where the verdict assessed the value at five times the value so testified to.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

⇒1071(5) (Cal.App.) Any finding on authority of husband to contract for wife is immaterial, where the answer admits the allegation of the complaint that he on her behalf and with her knowledge and consent entered into the contract.—Pacific Mfg. Co. v. Perry, 160 P. 246.

⇒1072 (Ok.) An order, setting aside an order granting a new trial and directing judgment on the verdict on the grounds that the court was without jurisdiction at the term the new trial was granted to set aside its previous order at the same term, refusing a new trial, was prejudicial error.—St. Louis, I. M. & S. Ry. Co. v. Lowrey, 160 P. 716.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

⇒1122(2) (Utah) In a law case, the Supreme Court is powerless to make findings.—Hirah v. Ogden Furniture & Carpet Co., 160 P. 283.

(C) Modification.

⇒1151(2) (Cal.) That interest on amount of judgment was improperly allowed from a date prior to rendition of judgment does not necessitate a reversal, for error can be remedied by striking out such item from judgment.—Edwards v. Arp, 160 P. 551.

⇒1152 (Wash.) Error in judgment in broker's action for commission running against wife individually would not necessitate a reversal, but the judgment would be modified so as to run against husband and community.—Godefroy v. Hupp, 160 P. 1056.

(D) Reversal.

⚡1170(1) (Okl.) Under Rev. Laws 1910, §§ 4791, 6005, the Supreme Court in every stage of action is required to disregard any error or defect which does not affect the substantial rights of the adverse party.—*Wingate v. Render*, 160 P. 614.

⚡1170(1) (Okl.) Under Rev. Laws 1910, § 6005, no judgment will be set aside or new trial granted, unless the error has probably caused a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.—*Harn v. Patterson*, 160 P. 924.

⚡1170(7) (Cal.App.) Under Const. art. 6, § 4½, forbidding reversal for error not resulting in miscarriage of justice, a judgment in condemnation proceeding was not reversible for error in admitting or refusing to strike out testimony, valuing the land sought to be taken at \$50 an acre, based on prices paid for other lands, where the verdict assessed the value of the land at \$265.52 an acre, and there was other competent evidence, fixing the value at \$50 an acre.—*Reclamation Dist. No. 730 v. Inglin*, 160 P. 1098.

⚡1178(1) (Wash.) Where the defendant moved for and obtained judgment notwithstanding verdict, upon a finding by Supreme Court that judgment was improperly granted, case must be remanded for the trial court to pass upon motion for new trial.—*Haas v. Washington Water Power Co.*, 160 P. 954.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⚡1224 (Cal.) If there is no law requiring a stay bond on appellants' part as condition precedent to stay of proceedings in court below on judgment appealed from, any stay bond given by them is without consideration and unenforceable.—*Halsted v. First Sav. Bank*, 160 P. 1075.

⚡1232 (Okl.) A cause of action on a bond to supersede an order directing delivery of personalty to a receiver, on appeal to the Supreme Court, arises on affirmance, and it is not necessary to await termination of the main cause.—*English v. Severns*, 160 P. 893.

APPEARANCE.

See Justices of the Peace, ⚡161.

APPELLATE JURISDICTION.

See Justices of the Peace, ⚡141.

APPLIANCES.

See Master and Servant, ⚡101-113.

APPOINTMENT.

See Executors and Administrators, ⚡17-29.

APPROPRIATION.

See Waters and Water Courses, ⚡21, 133-152.

APPROVAL.

See Appeal and Error, ⚡1005.

ARGUMENT OF COUNSEL.

See Criminal Law, ⚡700, 704, 1171; Trial, ⚡109, 133.

ARREST.

See Bail; False Imprisonment.

ARSON.

See Criminal Law, ⚡371.

ASSAULT AND BATTERY.

See Appeal and Error, ⚡982.

I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Therefor.

⚡15 (Cal.App.) As much force as is necessary may be used to retain one's property, which a trespasser has taken into possession by force or fraud and is trying to carry away.—*Riffel v. Letts*, 160 P. 845.

(B) Actions.

⚡42 (Cal.App.) Whether plaintiff took money from a defendant by force, or with fraudulent intent, and whether defendant used excessive force to retake it, is for the jury in plaintiff's action in damages as for assault.—*Riffel v. Letts*, 160 P. 845.

⚡42 (Kan.) In an action for assault, where there was evidence of the striking and of physical injuries, it was not necessary, to make a case for the jury, that any witness should estimate in dollars and cents the extent of his suffering.—*Schaap v. Hayes*, 160 P. 977.

ASSESSMENT.

See Damages, ⚡206-216; Municipal Corporations, ⚡450-523, 525; Taxation, ⚡362-493.

ASSIGNMENT OF ERRORS.

See Appeal and Error, ⚡362, 754.

ASSIGNMENTS.

See Assignments for Benefit of Creditors; Corporations, ⚡116, 244; Fraudulent Conveyances; Insurance, ⚡594; Justices of the Peace, ⚡132; Landlord and Tenant, ⚡76.

I. REQUISITES AND VALIDITY.

(B) Mode and Sufficiency of Assignment.

⚡50(2) (Okl.) A written order on a third person to deliver to the maker thereof for indorsement checks against fund of the maker in the hands of another, such checks, after indorsement, to be delivered by another third person to the beneficiary of the order, is not an equitable assignment of the fund; the maker retaining control of fund.—*Day v. Charlton*, 160 P. 606.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

II. CONSTRUCTION AND OPERATION IN GENERAL.

⚡176(5) (Wash.) The assignee for the benefit of creditors, who, at the time of taking the assignment, knows of the conditional sale contract by which his assignor purchased a safe, is not, as against the seller of the safe, a bona fide purchaser.—*Sunel v. Riggs*, 160 P. 950.
The purchaser from such assignee not in possession was not an innocent purchaser.—*Id.*

ASSOCIATIONS.

See Building and Loan Associations.

ASSUMPSIT, ACTION OF.

See Account Stated; Work and Labor.

ASSUMPTION OF RISKS.

See Master and Servant, ⚡203-222, 238, 295.

ATTACHMENT.

See Bankruptcy, ¶433; Execution; Exemptions; Garnishment; Homestead.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

¶178 (Wash.) Where an attachment was levied upon community property alone, it was not necessary to name the wife as a party to attachment.—Godefroy v. Hupp, 160 P. 1056.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

¶206 (Okl.) In attachment the court does not acquire jurisdiction to pass absolutely on rights of parties until defendant has been given legal notice, either actual or constructive, to appear and defend.—Davies v. Thompson, 160 P. 75.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

¶239 (Wash.) Where no motion was made to dissolve an attachment because levied upon community property without naming the wife as a party to it, and record showed no motion to dissolve attachment for that reason, it was too late to seek such dissolution after it was carried into judgment.—Godefroy v. Hupp, 160 P. 1056.

VIII. CLAIMS BY THIRD PERSONS.

¶304 (Cal.App.) In action for amount of bank deposit, order made under Code Civ. Proc. § 386, substituting plaintiff in an attachment suit against the depositor and her husband was proper, in view of bank's liability to attaching creditor under section 544.—Youtz v. Farmers' & Merchants' Nat. Bank of Los Angeles, 160 P. 855.

XI. WRONGFUL ATTACHMENT.

¶373 (Okl.) In a petition for wrongful attachment, it is not necessary to aver want of probable cause or a determination of the action in which the attachment was issued.—Reliable Mut. Hail Ins. Co. v. Rogers, 160 P. 914.

¶375(1) (Okl.) Actual damages only for wrongful attachment may be recovered against the attachment plaintiff independent of the undertaking required by Rev. Laws 1910, § 4814, without allegation or proof of malice or want of probable cause.—Reliable Mut. Hail Ins. Co. v. Rogers, 160 P. 914.

¶377 (Okl.) If exemplary or punitive damages are sought for wrongful attachment, both malice and want of probable cause must be alleged and proved.—Reliable Mut. Hail Ins. Co. v. Rogers, 160 P. 914.

ATTEMPT.

See Rape, ¶53, 57.

ATTORNEY AND CLIENT.

See Appeal and Error, ¶1064; Champerty and Maintenance, ¶5; Criminal Law, ¶704; District and Prosecuting Attorneys; Divorce, ¶200, 222; Guardian and Ward, ¶105; Limitation of Actions, ¶50; Tender, ¶7; Trial, ¶109, 133.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

¶20 (Utah) Where claims against a railroad, which plaintiff claimed were assigned to him to sue, were assigned to another who sued the railroad, which, with knowledge of plaintiff's claim, settled with the subsequent assignee, taking an indemnity bond holding it harmless against

plaintiff's demands, the attorney for the subsequent assignee could appear for the railroad in the action against it by plaintiff; the trial chiefly involving the issue of whether plaintiff or such assignee had the better title.—Broadbent v. Denver & R. G. Ry. Co., 160 P. 1185. ¶26 (Okl.) Attorneys at law are not liable if their acts are in good faith and pertinent to the matter in question.—Waugh v. Dibbens, 160 P. 589.

(C) Suspension and Disbarment.

¶37 (N.M.) That attorneys were shown and approved before publication the body of an article, is insufficient to show improper conduct where the comments and heading of the article which constituted the objectionable portion misrepresenting the action of a court were not shown to or approved by the attorneys.—In re Marron, 160 P. 391.

¶42 (N.M.) An attorney having in his possession a document, who conceals it and replies when called upon to produce it that it is not in his possession or control, is guilty of unprofessional conduct and subject to reprimand.—In re Marron, 160 P. 391.

An attorney who offers in evidence an alleged release as constituting valid evidence of payment, and moves to instruct the jury that it constitutes a valid defense, when he knew that it was not a valid release, is subject to suspension from practice.—Id.

¶43 (Kan.) It is one of the plainest and most primary duties of an attorney to be respectful to the courts in which he practices.—In re Hanson, 160 P. 1141.

Under Laws 1913, c. 64, § 2, attorney who persists in contemptuous language addressed to court will be suspended until further order of court.—Id.

¶44(1) (N.M.) Attorneys gaining information from client adverse to his interests and afterwards using such information to secure employment by persons in adverse relations to the former client, are guilty of unprofessional conduct deserving suspension.—In re Marron, 160 P. 391.

¶44(1) (Or.) Under L. O. L. § 1092, prescribing causes for disbarment, attorney employed to collect claim, who intimated to clients matter was unsettled after debtor had offered to settle in full, asking clients the least they would compromise for, *held* to be suspended for one year.—State v. Farrin, 160 P. 124.

¶44(2) (N.M.) That attorneys contracting for one-half of recovery as compensation, settled for \$1,750 and paid client only \$450, when client refused to allow case to go to trial and was satisfied with settlement, *held* not unprofessional conduct.—In re Marron, 160 P. 391.

¶53(2) (N.M.) Evidence *held* insufficient to show unprofessional conduct of attorneys in attempting to procure additional fee from client in divorce case.—In re Marron, 160 P. 391.

Evidence *held* insufficient to sustain a charge that attorneys extorted an additional fee from a client by threats of criminal proceedings.—Id.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

¶125 (Cal.) A purchase, by the attorney for an owner of land incumbered by a mortgage, of the mortgage and note, *held* void.—McArthur v. Goodwin, 160 P. 679.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

¶143 (Okl.) A contract for attorney's fees and note and mortgage therefor, after inception of litigation, will not be set aside, in absence of allegation or proof of fraud, mistake,

or imposition.—*Spaulding v. Beidleman*, 160 P. 1120.

⇒163 (Okl.) Under Rev. Laws 1910, § 4696, where a firm of two attorneys bring action on an oral contract for services, refusal to bring in as a party another attorney who was in partnership with plaintiffs in another firm was not error.—*Grisso v. Crump*, 160 P. 453.

⇒166(2) (Cal.) To support a recovery for services rendered by an attorney upon quantum meruit, there must be evidence showing that the services were rendered with some understanding or expectation by both parties that compensation was to be made.—*In re Mumford's Estate*, 160 P. 667.

(B) Lien.

⇒183 (Utah) Under Comp. Laws 1907, § 135, as to attorney's lien, an attorney has a lien on a cause of action, not from the time when employed, but "from the commencement of an action."—*Broadbent v. Denver & R. G. Ry. Co.*, 160 P. 1185.

AUTHENTICATION.

See Evidence, ⇒348, 373, 378.

AUTHORITY.

See Principal and Agent, ⇒94-124.

AUTOMOBILES.

See Highways, ⇒184; Municipal Corporations, ⇒703-706; Negligence, ⇒22, 27; Street Railroads, ⇒99.

BAIL

II. IN CRIMINAL PROSECUTIONS.

⇒75 (Utah) In view of Comp. Laws 1907, § 4988, as to conditions of bail, where a bail bond undertook that defendant "if held for trial will appear and render herself in execution of orders" of a justice court, a default in failing to appear for arraignment in the district court was default within the bond, where the order holding her for trial and requiring her to appear and answer in the district court was an order of the justice court.—*State v. Sorensen*, 160 P. 1181.

⇒76 (Utah) The liability of sureties on a bail may not be extended by implication or presumption beyond the terms of their undertaking.—*State v. Sorensen*, 160 P. 1181.

⇒77(2) (Utah) Under Comp. Laws 1907, § 5007, as to forfeiture of bail bond for defendant's neglect to appear "without sufficient excuse," neither the ultimate nor evidentiary fact that such neglect was "without sufficient excuse" need be entered in the minutes in order to found upon the order of judgment of forfeiture an action to recover on the recognizance.—*State v. Sorensen*, 160 P. 1181.

⇒79(2) (Utah) Denial of motion of sureties on a bail bond to set aside the judgment or order of forfeiture thereof, under Comp. Laws 1907, § 5007, as to relief from such forfeiture, precludes them from attacking the validity or justice of such order or judgment of forfeiture in action to recover on their recognizance.—*State v. Sorensen*, 160 P. 1181.

⇒83 (Utah) An order or judgment of forfeiture is a prerequisite to the maintenance of an action on a recognizance or bail bond.—*State v. Sorensen*, 160 P. 1181.

⇒84 (Utah) It is no defense to an action on a recognizance that information was not filed within statutory 30 days after defendant had been examined and committed.—*State v. Sorensen*, 160 P. 1181.

⇒89(1) (Utah) In action to recover on a recognizance given for bail for one arraigned before a justice, the complaint held not defective in not averring that the complaint made before the justice was verified.—*State v. Sorensen*, 160 P. 1181.

Complaint held not insufficient in not stating the county of the crime so as to show the justice had jurisdiction.—*Id.*

Direct averments in the complaint of a preliminary hearing and a binding over before the justice, although desirable, held not essential.—*Id.*

An order or judgment of forfeiture must be alleged and proved.—*Id.*

A complaint alleging defendant failed to appear for arraignment before the district court, and that on the day fixed for arraignment and on her failure to appear "the court duly and lawfully declared said bond forfeited," etc., was sufficient to show a proper order or judgment of forfeiture was made.—*Id.*

BAILMENT.

See Depositories; Embezzlement; Larceny, ⇒15.

BANKRUPTCY.

See Assignments for Benefit of Creditors; Limitation of Actions, ⇒147.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⇒216 (Cal.App.) After adjudication in bankruptcy, the bankrupt's property cannot be resorted to in satisfaction of any judgment obtained upon an obligation created prior to the adjudication.—*Tormey v. Miller*, 160 P. 858.

(E) Actions by or Against Trustee.

⇒285 (Wyo.) Order of United States District Court, wherein bankruptcy matter of corporation was pending, authorizing trustee to prosecute suit to recover sum alleged to be due on subscription of stock, held not to have held defendant subscriber was liable.—*Natwick v. Terwilliger*, 160 P. 338.

⇒302(4) (Or.) Trustee in bankruptcy, having the right of attaching creditor, is not ipso facto a bona fide purchaser for value, and that he is such, unaffected by outstanding equities against the bankrupt, is an affirmative defense, which must be pleaded and proved.—*Coates v. Smith*, 160 P. 517.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

⇒433(2) (Cal.App.) Where plaintiff sued on attachment which was released on bond and the debtor thereafter was adjudicated a bankrupt, the attachment creditor could have judgment against the debtor as a basis for pursuing his remedies against the surety in view of federal Bankruptcy Law, §§ 16, 67c, 67d.—*Tormey v. Miller*, 160 P. 853.

Where plaintiff sued on attachment which was released on bond and the debtor thereafter was adjudicated a bankrupt, the attachment and proceedings thereunder, being released, need not appear of record, but are mere evidentiary matters in the action on the debt.—*Id.*

Where creditor sued on attachment which was released on bond and the debtor was adjudicated a bankrupt, the creditor's proper remedy was to move for judgment after trial of the issues, with perpetual stay of execution against the debtor's property.—*Id.*

BANKS AND BANKING.

See Bills and Notes, 496; Constitutional Law, 309; Courts, 489; Depositaries; Evidence, 354; Gifts, 86; Parties, 59; Taxation, 10, 11, 127, 128, 398.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(C) Stockholders.

44 (Or.) Amendment to Const. art. 11, § 3 (Laws 1913, p. 8), adding to it provision that stockholders of corporations, etc., conducting a banking business be individually liable for benefit of depositors to amount of their stock at par, in addition to par value of such shares, held not to apply to creditors other than depositors.—*Norris Safe & Lock Co. v. Weaver*, 160 P. 807.

49(7) (Or.) In an action to enforce, against alleged stockholders of a banking corporation, payment of balance due on a judgment recovered by plaintiff against bank, complaint held not to state cause of action.—*Norris Safe & Lock Co. v. Weaver*, 160 P. 807.

(E) Insolvency and Dissolution.

77(2) (Okla.) Where the bank commissioner assumes possession of a state bank, he does not take the assets for value and without notice, but subject to all claims that might have been interposed against the bank.—*State v. City of Sapulpa*, 160 P. 489.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

113 (Colo.) Where bank cashier, having great inherent powers to transact usual bank business, obtained a note, by fraud, agreeing to deliver therefor corporation stock, which he failed to do, and secured renewals without other consideration, the bank could not recover by charging his lack of power to make the agreement.—*First Nat. Bank v. Wich*, 160 P. 1036.

116(4) (Utah) Bank taking note for value before maturity, signed by its cashier and another as joint makers, was not chargeable with knowledge of agreement between cashier, representing himself, and his comaker that note was not to be delivered until signed by bank's president.—*Helper State Bank v. Jackson*, 160 P. 287.

(C) Deposits.

129 (Cal.App.) Where two parties made joint bank deposit, providing for right of survivorship, withdrawal of deposit by one, without other's consent, did not change status of parties.—*Waters v. Nevis*, 160 P. 1081.

140(3) (Kan.) Under Negotiable Instrument Law of 1906, sections 5315 and 5379, a check is a bill of exchange, and when presented to and retained by the bank and charged to the account of the maker, the bank is liable to the payee as an acceptor.—*Chamberlain Metal Weather Strip Co. v. Bank of Pleasanton*, 160 P. 1138.

Where a debtor having ample funds gives a check and the bank receives and retains it, charging his account, it is liable to the creditor and a payment to a third person on an unauthorized indorsement, does not avoid its liability.—*Id.*

IV. NATIONAL BANKS.

261(8) (Okla.) A plea of ultra vires is available to a national bank in a suit on a contract beyond its powers, under the National Banking Act, but if it has received the money or property under such a contract, not *malum in se*, and refuses to return it, the other party may recover the money or property by which the bank has actually benefited.—*Gilbert v. Citizens' Nat. Bank of Chickasha*, 160 P. 635.

270(11) (Okla.) An action against a national bank for double the amount of the usury paid is governed by Rev. St. U. S. § 5193 (Comp. St. 1913, § 9759), and not by Rev. Laws 1910, § 1005, and it is not necessary to allege and prove demand.—*Commercial Nat. Bank of Checotah v. Phillips*, 160 P. 920.

In an action against a national bank for penalty for usury paid, where the facts show a simple loan on which was collected interest greatly in excess of that allowed by law, the trial court is justified in peremptorily charging for plaintiff.—*Id.*

BAR.

See Judgment, 570-715.

BASTARDS.

I. ILLEGITIMACY IN GENERAL.

13 (Cal.) A physician attendant on birth of illegitimate child should have been permitted to testify that just after birth, while he was filling out the certificate, deceased admitted the child to be his.—*In re Baird's Estate*, 160 P. 1078.

Statements of deceased that he was the father of applicant for partial distribution, made to servants at the home of the mother, are admissible to show acknowledgment of parentage.—*Id.*

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations.

BENEFICIARIES.

See Insurance, 585-589, 780, 784.

BEST AND SECONDARY EVIDENCE.

See Evidence, 158-186.

BIAS.

See Jury, 97; Witnesses, 374.

BIDS.

See Municipal Corporations, 330, 336.

BIGAMY.

See Habeas Corpus, 49.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, 51-57.

BILLS AND NOTES.

See Alteration of Instruments; Banks and Banking, 140; Corporations, 92, 116, 414; Evidence, 373, 471; Interest, 50; Novation, 6, 7; Pleading, 8; Trial, 39.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

48 (Or.) Under L. O. L. § 6023, the maker of a note is primarily liable while the indorser is secondarily liable.—*Everding & Farrell v. Toft*, 160 P. 1160.

(E) Consideration.

92(1) (Okla.) A note in aid of construction of a railroad is not void for want of consideration, though the construction company to which it is

payable is engaged in the construction of the road when the note is given.—*Purcell Mill & Elevator Co. v. Canadian Valley Const. Co.*, 160 P. 485.

(F) Validity.

☞106 (Ok.) A note to a construction company made and delivered in Indian Territory to aid in the construction of a railroad, on condition that it be in operation in a certain town by a specified date, is not illegal or against public policy.—*Purcell Mill & Elevator Co. v. Canadian Valley Const. Co.*, 160 P. 485.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

☞167 (Wash.) Provisions respecting insurance, payment of taxes, and attorneys' fees on foreclosure, contained in a mortgage securing a contemporaneous note, are not a part of the note so as to destroy its negotiability.—*Moore & Co. v. Burling*, 160 P. 420.

(C) Transfer Without Indorsement.

☞209 (Wyo.) A negotiable instrument payable to order may be transferred by payee or holder without indorsement.—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins*, 160 P. 1171.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

☞267 (Ok.) A simple indorsement by the payee serves the purpose both of transferring title and of charging him with the obligation to pay if the maker refuses to do so.—*Mangold & Glandt Bank v. Utterback*, 160 P. 713.

☞281 (Or.) Under L. O. L. § 6023, the maker of a note is primarily liable while the indorser is secondarily liable.—*Everding & Farrell v. Toft*, 160 P. 1160.

☞283 (Kan.) Payee of note who transfers it by indorsement guaranteeing payment becomes secondarily liable within Negotiable Instruments Act, § 127.—*Farmers' & Drovers' Bank v. Bashor*, 160 P. 208.

☞293 (Kan.) Where mortgage note is assigned before maturity to one of the makers, and indorsed without recourse on the makers individually to a new obligee, the makers are relieved from personal liability to a subsequent holder.—*Security State Bank of Rosedale v. Clarke*, 160 P. 1149.

☞296 (Wash.) Under the Negotiable Instrument Act the obligation of an indorser on a secured note held a new agreement, warranting instrument as it then appeared on its face, superseding a prior agreement to accept a deed of land in satisfaction of note.—*Fidelity Nat. Bank of Spokane v. Hosea*, 160 P. 960.

☞301 (Kan.) Under Negotiable Instruments Act, § 127, a person secondarily liable is discharged by any agreement binding on the holder to extend time of payment unless with such person's assent, or unless recourse against him be expressly reserved.—*Farmers' & Drovers' Bank v. Bashor*, 160 P. 208.

"Assent," as used in Negotiable Instruments Act, § 127, means concurrence in agreement to extend time of payment when made.—*Id.*

Knowledge of extension does not alone constitute assent, and the extension need not be expressly objected to to entitle person secondarily liable to discharge.—*Id.*

After discharge of person secondarily liable by extension without assent, his liability can be revived only by a new contract or conduct creating estoppel.—*Id.*

☞301 (Or.) L. O. L. § 5953, subd. 3, declaring a person secondarily liable discharged by the discharge of a prior party, applies only to discharge of act of creditors, and not by operation of law or where note is destroyed because of

vice inherent in the transaction.—*Everding & Farrell v. Toft*, 160 P. 1160.

(D) Bona Fide Purchasers.

☞327 (Or.) Under L. O. L. § 5885, defining a holder in due course, a person is not a holder in due course if he does not take the note in good faith without notice of any infirmity in the instrument or affecting the title of the person negotiating it.—*Everding & Farrell v. Toft*, 160 P. 1160.

☞330 (Ok.) The purchaser of a negotiable note indorsed, "Payment guaranteed. Protest waived," held an "indorsee" within the rule protecting an innocent purchaser against defenses.—*Mangold & Glandt Bank v. Utterback*, 160 P. 713.

Under Rev. Laws 1910, § 4113, where the status of one placing his name on the back of a negotiable note is under consideration, the court will ordinarily resolve all doubt in favor of holding same to be a commercial indorsement in due course.—*Id.*

☞330 (Wyo.) A negotiable instrument payable to order may be transferred by payee or holder without indorsement, transferee taking only title and right of his transferor, and not becoming a holder in due course, which principle is recognized by Negotiable Instruments Law (Comp. St. 1910, § 3207).—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins*, 160 P. 1171.

☞337 (Or.) One who takes note has notice of infirmity or defect in title if he had actual knowledge of infirmity or defect or of such facts that his action amounted to bad faith.—*Everding & Farrell v. Toft*, 160 P. 1160.

☞339 (Or.) While negligence is not synonymous with bad faith, yet where a person takes a note under suspicious circumstances and, having means of knowledge, willfully abstains from making inquiries, his intentional ignorance may result in bad faith.—*Everding & Farrell v. Toft*, 160 P. 1160.

☞339 (Wash.) The taker of negotiable paper fair on its face owes the maker no active duty of inquiry, to avoid imputation of bad faith, which does not arise from mere failure to take precautions of a prudent man or from negligence.—*Citizens' Bank & Trust Co. v. Limp-right*, 160 P. 1046.

☞350 (Kan.) The owner of a note who has been fraudulently deprived of it may reclaim it against one who acquired it after maturity or without valuable consideration as security for a pre-existing debt.—*Security State Bank of Rosedale v. Clarke*, 160 P. 1149.

☞354 (Wash.) Purchase of notes at a large discount does not alone constitute bad faith, although it might put the purchaser on inquiry.—*Moore & Co. v. Burling*, 160 P. 420.

That purchaser for \$5,000 of notes for \$7,500 knew they were given for purchase of mining stock, and knew of the particular mine, held not to show bad faith in the purchase, where he was told by the maker of the notes they were all right.—*Id.*

☞357 (Wash.) In view of Rem. & Bal. Code, § 3418, the pledgee, having taken a note as collateral at 80 per cent. face value, could recover only such amount, plus legal interest, in the absence of evidence of the rate of interest its loan to the payee bore.—*Citizens' Bank & Trust Co. v. Limp-right*, 160 P. 1046.

☞359 (Utah) An assignee bank before maturity of a note signed by one as maker, and by another to enable first maker to borrow money to apply on his debt to bank, and which gave first maker credit for amount of note on delivery, was a holder for value.—*Helper State Bank v. Jackson*, 160 P. 287.

☞369 (Wash.) A collateral oral agreement, limiting the liability of maker of note containing an unqualified promise to pay, or fixing the

collateral source of payment, is no defense to an action on a note.—*Van Tassel v. McGrail*, 160 P. 1053.

⚡373 (Or.) The perpetration of fraud will not alone defeat the holder of a note, but it must be supplemented by notice to the holder.—*Everding & Farrell v. Toft*, 160 P. 1160.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

⚡402 (Colo.) Under Mills' Ann. St. 1912, §§ 5127, 5128, where makers of a note, specifying no place of payment, were not partners, presentment for payment on all the makers was a condition precedent to recovery from the indorser.—*Prior v. Simonson*, 160 P. 1035.

VII. PAYMENT AND DISCHARGE.

⚡437 (Cal.) A parol agreement by maker of note with payee, in consideration of release of note, to hold amount thereof in trust for certain minor beneficiaries, no specific sum having been appropriated therefor, was ineffectual to alter or extinguish the note under Civ. Code, § 1698.—*Molera v. Cooper*, 160 P. 231.

VIII. ACTIONS.

⚡443(3) (Okla.) Where a note in aid of railroad construction was delivered to a construction company and the railroad was duly completed and the receiver of the construction company assigned the note to the receiver of the railway company, and the assets of the railway were sold to a third party, who delivered note to plaintiff railroad, plaintiff could maintain an action thereon.—*Purcell Mill & Elevator Co. v. Canadian Valley Const. Co.*, 160 P. 485.

⚡452(3) (Wash.) Mere fact that payee of a note had agreed with his indorsee that it should be redelivered to defendants and had signed the note, would not deprive defendants of defense of failure of consideration of which the indorsee had notice, as failure of consideration avoids a note in the hands of persons purchasing with notice.—*Hornburg v. Larson*, 160 P. 11.

⚡489(6) (Okla.) In an action on an undorsed note, payable to a third person, defendants' answer that the note was executed in consideration of a conveyance of lands by plaintiff admitted plaintiff's ownership of the note, and no proof is necessary, though it was denied by the answer.—*Choate v. Stander*, 160 P. 737.

⚡489(7) (Or.) Where a complaint on a note charges a defendant as indorser in due course of business, he cannot be held liable as a maker or guarantor.—*Everding & Farrell v. Toft*, 160 P. 1160.

⚡496(3) (Wyo.) An indorsement necessary to title of one bringing suit upon a negotiable instrument, such as a certificate of deposit, must be proved to authorize presumption of ownership from fact of possession, when indorsement is put in issue by pleading.—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins*, 160 P. 1171.

Under Comp. St. 1910, §§ 3188, 3217, 3349, possession of an undorsed certificate of deposit payable to order was not evidence of title, or that it was indorsed by payee in blank or otherwise, so as to dispense with proof of such indorsement.—*Id.*

⚡497(5) (Or.) Under L. O. L. § 5892, the burden is on the holder of a note which had its origin in fraud to show that he or some one under whom he claims acquired it as a holder in due course.—*Everding & Farrell v. Toft*, 160 P. 1160.

⚡503 (Wash.) In indorsee's action against makers of note, evidence that indorsee had agreed to return note to the makers, was competent, as tending to show want of considera-

tion, or failure thereof; Rem. & Bal. Code, § 3512, relating to written renunciation of rights of holder of note not applying.—*Hornburg v. Larson*, 160 P. 11.

⚡509 (Or.) In action by indorsee on note for \$5,000, evidence that indorsee purchased it for \$4,000 was admissible with other evidence on question of bad faith of holder.—*Everding & Farrell v. Toft*, 160 P. 1160.

A person may resort to circumstantial evidence to show that the owner of a negotiable instrument is not a holder in due course.—*Id.*

⚡523 (Wyo.) In an action by the holder of a certificate of deposit, statement of plaintiff's witness that the certificate had been "negotiated with plaintiff bank" might be construed to mean that it had been transferred to the plaintiff, and did not necessarily imply that the payee had indorsed or authorized the indorsement or transfer.—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins*, 160 P. 1171.

⚡525 (Utah) In bank's action on note signed by its cashier and another, evidence held to sustain finding that when bank received note and credited amount upon cashier's debt, it had no notice that note was signed by comaker and delivered to cashier on condition that it should not become effective unless others signed it.—*Helper State Bank v. Jackson*, 160 P. 287.

⚡525 (Wash.) Evidence held insufficient to show bad faith in the holder of a note.—*Citizens' Bank & Trust Co. v. Limpricht*, 160 P. 1046.

Pledgee of payee of note held, under the evidence and in view of Rem. & Bal. Code, § 3446, a bona fide holder.—*Id.*

⚡537(3) (Wash.) In an action on a note, held, that failure of consideration was question for jury.—*Hornburg v. Larson*, 160 P. 11.

⚡537(4) (Okla.) In an action on a note, evidence held sufficient to go to the jury on the questions of fraud and whether defendant with knowledge thereof executed the note sued on.—*Wingate v. Render*, 160 P. 614.

⚡537(6) (Or.) The question of good or bad faith of the holder of a note is peculiarly for the jury and not for the court, especially when the burden rests on the holder to show that he became the holder in due course.—*Everding & Farrell v. Toft*, 160 P. 1160.

In an action by an indorser on a note, evidence held to present a question for the jury as to the good faith of the plaintiff.—*Id.*

⚡538(1) (Or.) Where a note is defended on the ground of fraud and notice, an instruction authorizing verdict for the maker, but against indorser, is error.—*Everding & Farrell v. Toft*, 160 P. 1160.

BOARD OF EQUALIZATION.

See Taxation, ⚡466-493.

BONA FIDE PURCHASERS.

See Bills and Notes, ⚡327-373; Municipal Corporations, ⚡941; Vendor and Purchaser, ⚡229-242.

BONDS.

See Appeal and Error, ⚡1224, 1232; Bail; Executors and Administrators, ⚡528; Guardian and Ward, ⚡180; Injunction, ⚡148; Mandamus, ⚡103; Mechanics' Liens, ⚡226, 317; Municipal Corporations, ⚡347, 907-941; Replevin, ⚡124; Schools and School Districts, ⚡97; Taxation, ⚡195, 218, 386.

BOOKS OF ACCOUNT.

See Evidence, ⚡354.

BOUNDARIES.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

☞33 (Wash.) The presumption is that corners of a survey have been established at places indicated by field notes.—*Reed v. Firestack*, 160 P. 292.

☞35(4) (Cal.) In boundary suit, evidence of common grantor as to marking by row of trees the supposed dividing line, and that before sale he showed defendants' predecessor the row as marking the boundary, and corroborating testimony of said predecessor of defendants, was admissible.—*Cummings v. Laughlin*, 160 P. 833.

☞37(3) (Wash.) Evidence to fix a section or quarter section corner at a point on the ground materially different from that called for by the field notes, in view of presumption of law as to its true location approximately where the law requires it to be, must be clear and certain.—*Reed v. Firestack*, 160 P. 292.

In action to establish north and south boundary lines of section 14 and to restore lost corners of United States survey, the fact that the location of the southwest corner of section 14 had probably been relied upon by owners in vicinity as true location held not a determining factor.—*Id.*

☞46(3) (Or.) Where adjoining landowners had acted for many years on survey, and an agreement establishing boundary line, and defendant took the land subject to such agreement, a proceeding by defendant, under L. O. L. § 2091, against the county surveyor to establish the line, is a nullity.—*McCully v. Heaverne*, 160 P. 1166.

BRIDGES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

☞7 (Kan.) County commissioners building a county bridge may construct railroad tracks thereon to be used for street railway interurban, and railroad cars.—*Schaake v. Brune*, 160 P. 207.

☞11 (Kan.) Under Laws 1913, c. 71, county commissioners may build bridge costing more than \$200,000 where interested parties contribute to expense so that total to be collected by taxation is reduced to \$200,000.—*Schaake v. Brune*, 160 P. 207.

II. REGULATION AND USE FOR TRAVEL.

☞37 (Kan.) Under Gen. St. 1909, §§ 658, 659, to hold a county or township responsible for a defective bridge for failure to maintain guard rails, the bridge must have been wholly or partially constructed by such county or township; mere assumption of responsibility after construction not being sufficient.—*Olsson v. Lawrence Tp. of Cloud County*, 160 P. 995.

☞37 (Ok.) County commissioners are personally liable for injuries from their negligent failure to repair a county bridge when there were sufficient public funds available therefor.—*Strong v. Day*, 160 P. 722.

☞46(5) (Kan.) Township records of the boundaries of road districts showing place of injury on a bridge to be within one of such districts are competent to indicate for whom trustees was acting in building the bridge.—*Olsson v. Lawrence Tp. of Cloud County*, 160 P. 995.

The knowledge of the county clerk as to whether a county contributed anything towards building bridge on which injury occurred is competent evidence.—*Id.*

☞46(6) (Kan.) Proof that a bridge was built by a township trustee bears the fair inference that he was acting for the township.—*Olsson v. Lawrence Tp. of Cloud County*, 160 P. 995.

BRIEFS.

See Appeal and Error, ☞627, 639, 757-773; Criminal Law, ☞1130; Master and Servant, ☞417.

BROKERS.

See Appeal and Error, ☞1004, 1152; Contracts, ☞153, 171; Customs and Usages, ☞16; Evidence, ☞424, 442.

IV. COMPENSATION AND LIEN.

☞40 (Kan.) Letter from broker and answer by banker construed as offer of services in sale of stock in expectation of compensation if successful, and qualified acceptance with the understanding that broker was to receive compensation if sale should be brought about by its efforts.—*C. C. Jones Inv. Co. v. Lowrey*, 160 P. 999.

☞43(1) (Cal.App.) An oral contract between brokers, whereby one secures the co-operation of another to sell realty, is valid; Civ. Code, § 1624, subd. 6, applying only to contracts with owner.—*Sellers v. Solway Land Co.*, 160 P. 175.

Under Civ. Code, § 1624, subd. 6, and section 2309, a direct contract to sell real estate for defendant for a commission, made by defendant's agent without written authority therefor, was invalid.—*Id.*

In action for commission for effecting sale of land under a direct contract therefor with defendant's agent, defendant on the facts shown was not estopped to plead the Statute of Frauds (Civ. Code, § 1624, subd. 6) in connection with section 2309.—*Id.*

☞43(1) (Wash.) Under Rem. & Bal. Code, § 5289, an oral contract for payment of commission for exchange of personal property for realty was void, so far as realty was concerned, and void in its entirety unless contract was divisible.—*Godefroy v. Hupp*, 160 P. 1056.

☞51 (Ok.) Where property is listed with a real estate agent who introduces a purchaser, and through such introduction negotiations are begun which result in a sale by the owner, the agent is entitled to commission.—*Harris v. Owenby*, 160 P. 596.

☞54 (Cal.App.) Plaintiff, who procured three persons, and produced them, ready, able, and willing to lease defendant's property on terms, which, by her written acknowledgment, were acceptable, held entitled to his commission, though the offer to lease specified no time for commencement.—*Merwin v. Shaffner*, 160 P. 684.

☞57(1) (Wash.) Recovery on contract for broker's services in exchange of personal property for realty, if in writing, would not be defeated because exchange did not embrace all the realty included in principal's list and included certain personal property not included therein.—*Godefroy v. Hupp*, 160 P. 1056.

☞57(2) (Cal.App.) Realty broker, authorized to sell for \$11,700 net, any excess to be commission, was entitled to commission where he found a purchaser ready, able, and willing to buy for \$12,000, which the purchaser did from owner herself, though lowest price quoted to purchaser by broker was \$12,250.—*Daniel v. Calkins*, 160 P. 1082.

☞60 (Cal.App.) Under a contract for exchange of lands and binding the parties thereto to pay commissions to a broker, the broker held not entitled to commissions where the exchange was not made.—*Jennings v. Jordan*, 160 P. 576.

☞61(1) (Cal.App.) A broker employed to procure binding agreement for exchange of property has earned his compensation when he has procured the agreement, though no exchange takes place because of defective title.—*Jennings v. Jordan*, 160 P. 576.

⚡63(1) (Cal.App.) Where defendant employed plaintiff to lease her realty, agreeing to pay \$2,500 commission "along during the first year," and she refused to lease at all, and repudiated her liability for commission, plaintiff, having procured prospective lessees on acceptable terms, was entitled to recover full commission.—*Merwin v. Shaffner*, 160 P. 684.

V. ACTIONS FOR COMPENSATION.

⚡82(4) (Cal.App.) An agent selling real property under a contract of employment invalid because not in writing, cannot recover on quantum meruit.—*Sellers v. Solway Land Co.*, 160 P. 175.

⚡88(1) (Wash.) In broker's action for commission for an exchange of stock for realty, conflicting evidence, tending to show that certain mill stock was put in at \$4,500 and certain oil stock at \$15,000, was sufficient to take valuation of such stock to jury.—*Godefroy v. Hupp*, 160 P. 1056.

⚡88(2) (Okla.) Where the evidence is conflicting as to whether the property was listed with the agent, the question is for the jury.—*Harris v. Owenby*, 160 P. 596.

⚡88(2) (Wash.) Whether contract with broker for commissions for exchange of personal property for realty was divisible in respect to personality and realty was a question of law, depending on terms of contract, but what such terms were was question of fact on the evidence.—*Godefroy v. Hupp*, 160 P. 1056.

In broker's action upon oral contract affecting an exchange of properties, *held*, on the evidence, that whether defendant agreed to pay commission on any sale or exchange, whether of stock alone, real property alone, or of stock and real property together, was for jury.—*Id.*

⚡88(3) (Okla.) Where the evidence is conflicting as to whether the agent's services were the procuring cause of the sale, the question is for the jury.—*Harris v. Owenby*, 160 P. 596.

⚡88(3) (Wash.) On evidence in broker's action for services rendered in exchange of personal property for realty, whether plaintiff through his employé, was procuring cause of exchange as finally consummated *held* for jury.—*Godefroy v. Hupp*, 160 P. 1056.

BUILDING AND LOAN ASSOCIATIONS.

⚡46(9) (Okla.) Where a foreign building and loan association loans money without requiring bids for preferences as required by Rev. Laws 1910, § 1297, it has no right to charge premiums, and premiums, dues on stocks, and fines paid will be applied to satisfaction of loan.—*Midland Savings & Loan Co. v. Summers*, 160 P. 488.

Where a loan by a foreign building association is not usurious, but loses protection as building and loan contract for failure to comply with law governing letting of loans as to premiums, the association is entitled to interest at the contract rate where it is within the legal rate.—*Id.*

BUILDING CONTRACTS.

See Damages, ⚡45.

BULK SALES ACTS.

See Fraudulent Conveyances, ⚡47.

BURDEN OF PROOF.

See Appeal and Error, ⚡1082; Criminal Law, ⚡778.

BURGLARY.

See Criminal Law, ⚡386, 412, 488, 531, 762, 784, 1171.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡3 (Colo.) Under Laws p. 334, § 1, defining burglary with explosives, to constitute the crime there must be a breaking and entering with intent to commit larceny, and larceny need not in fact have been committed.—*Howard v. People*, 160 P. 1060.

⚡7 (Colo.) If a bank actually occupied the burglarized building with its business, it is not necessary to prove ownership or legal title.—*Howard v. People*, 160 P. 1060.

II. PROSECUTION AND PUNISHMENT.

⚡22 (Colo.) Since by Banking Law, § 9, no individual or copartnership may use the word "state" applied to a bank, an indictment charging burglary of a state bank, with reference in testimony to it as a state bank, sufficiently shows that it was a corporation.—*Howard v. People*, 160 P. 1060.

⚡32 (Colo.) In a prosecution under Laws 1907, p. 334, § 1, the larceny may be shown for the purpose of showing intent with which the breaking was committed.—*Howard v. People*, 160 P. 1060.

⚡35 (Cal.App.) In prosecution for burglary where there was no direct evidence of defendant's guilt, evidence as to his presence at place of burglary in company with another, their description and movements and their footprints, etc., *held* admissible.—*People v. Martinez*, 160 P. 868.

⚡38 (Cal.App.) In prosecution for burglary where there was no direct evidence of defendant's guilt, evidence as to his presence at place of burglary in company with another, and their possession of stolen articles, etc., *held* admissible.—*People v. Martinez*, 160 P. 868.

⚡41(1) (Cal.App.) Evidence *held* to sustain a conviction of burglary in the first degree.—*People v. Martinez*, 160 P. 868.

CANCELLATION OF INSTRUMENTS.

See Reformation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

⚡6 (Kan.) Where deed was for expressed money consideration, but the real consideration was support, which was given till grantee's death, after which his widow refused to live with grantor, but offered to pay for his maintenance, such partial noncompliance with the agreement does not require cancellation.—*Simmons v. Shafer*, 160 P. 199.

⚡24(1) (Okla.) Notwithstanding Rev. Laws 1910, § 986, where a sale of stock was fraudulent, it was not error to decree rescission thereof and cancellation of deeds and mortgages given therefor, though plaintiff could not restore the stock, which was shown to be valueless.—*Shawnee Life Ins. Co. v. Taylor*, 160 P. 622.

II. PROCEEDINGS AND RELIEF.

⚡34(1) (Wash.) Plaintiff, in action to cancel contract on ground of fraud in its procurement, brought four years after contract was executed, *held* not to have acted with promptness consistent with good faith.—*Faucett v. Northern Clay Co.*, 160 P. 643.

⚡47 (Wash.) In action to cancel contract, authorizing defendant to take sublease of part of plaintiff's land, with the right of purchase at expiration thereof, on the ground of fraud in its procurement, evidence *held* not to show that defendant's representatives were guilty of any

conscious fraud upon plaintiff's rights.—*Faucett v. Northern Clay Co.*, 160 P. 643.

One seeking to set aside and cancel his formal written contract on ground of fraud, must sustain his case upon clear and satisfactory proof, as fraud is never presumed, but must be proved by the party alleging it.—*Id.*

In action to cancel contract allowing defendant to sublease part of plaintiff's land, etc., evidence held not to sustain finding that plaintiff was advanced in years, with poor sight, very hard of hearing, dull of comprehension, worn out with importunities, and did not understand contract as read to him.—*Id.*

—57 (Kan.) Where grantee in deed fulfilled agreement to support grantor during the grantee's life, but his widow refused to remain with grantor, judgment refusing cancellation, but making care of grantor a charge on the land, is proper.—*Simmons v. Shafer*, 160 P. 199.

CARRIERS.

See Appeal and Error, —1058; Courts, —489; Trial, —194, 253.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

—51 (Okla.) Under Rev. Laws 1910, § 828, a bill of lading is an instrument in writing, signed by a carrier or its agent, describing the freight so as to identify it.—*Chicago, R. I. & P. Ry. Co. v. Cleveland*, 160 P. 323.

—55 (Okla.) Under Rev. Laws 1910, §§ 828, 829, 830, it is the duty of a carrier, issuing a bill of lading for products for which it is the general custom for shippers to draw drafts with bill of lading attached, to use ordinary care as to the quantity and description of the product.—*Chicago, R. I. & P. Ry. Co. v. Cleveland*, 160 P. 323.

—57 (Okla.) A bill of lading issued on receipt of bales of grabbats, describing them as bales of cotton, is not a correct description, and an innocent person, paying money in reliance thereon and sustaining damages, may recover from the carrier.—*Chicago, R. I. & P. Ry. Co. v. Cleveland*, 160 P. 323.

—63 (Kan.) Provisions of carrier's tariff giving privilege of milling in transit "subject to conditions herein named," referred to conditions specified in preceding portions as well as in the same paragraph.—*McCullough v. Missouri Pac. Ry. Co.*, 160 P. 214.

—69(4) (Or.) Damages for breach of a carrier's contract to supply cars may be predicated with reference to all that was in the reasonable contemplation of the parties in performance of the agreement.—*Levy v. Nevada-California-Oregon Ry.*, 160 P. 808.

(D) Transportation and Delivery by Carrier.

—94(4) (Kan.) A shipper of grain, required to submit to reduction in selling price because milling in transit privilege was lost through misrouting, may recover his loss from the carrier in fault.—*McCullough v. Missouri Pac. Ry. Co.*, 160 P. 214.

Damages for loss of milling in transit privilege through misrouting, cannot be recovered where the privilege was available only where reference to it was noted on the shipping order and bill of lading, and no such notation was made.—*Id.*

III. CARRIAGE OF LIVE STOCK.

—208 (Okla.) Dipping cattle by a railroad company under quarantine laws is a part of the service required by the shipping contract, and negligence in its performance must be measured by the terms of that contract.—*Missouri, K. & T. Ry. Co. v. Skinner*, 160 P. 875.

—228(3) (Okla.) In an action against a railway for failing to water cattle before dipping

them, though plaintiff contends that the contract for dipping was an independent oral contract, exclusion of the shipping contract set up as a defense is error.—*Missouri, K. & T. Ry. Co. v. Skinner*, 160 P. 875.

—229(2) (Or.) Under contract to supply cars for shipment of live stock, which the carrier broke by delay in supplying cars, knowing that stock was intended for sale on market in distant city, the measure of damages is not amount of depreciation at point of shipment, but depreciation in market value at destination.—*Levy v. Nevada-California-Oregon Ry.*, 160 P. 808.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

—280(1) (Okla.) A carrier of persons for reward must use the utmost care and diligence for their safe carriage and provide everything necessary therefor and exercise a reasonable degree of skill.—*Chicago, R. I. & P. Ry. Co. v. Dizney*, 160 P. 880.

—318(8) (Okla.) In action for injuries to passenger alighting from train at station for lunch and injured while attempting to enter moving train, evidence held not to show negligence of carrier.—*Chicago, R. I. & P. Ry. Co. v. Reinhart*, 160 P. 51.

—321(1) (Okla.) Instruction that the negligent acts complained of are the gist of the action, and plaintiff must establish by a preponderance of the evidence that the injuries resulted from such acts, that defendant is chargeable with negligence of its employees, and defining negligence, held not objectionable for failure to cover the whole case.—*Chicago, R. I. & P. Ry. Co. v. Dizney*, 160 P. 880.

CASE-MADE.

See Appeal and Error, —511-568, 614.

CASHIERS.

See Banks and Banking, —113, 116.

CERTAINTY.

See Mines and Minerals, —79.

CERTIFICATE.

See Acknowledgment, —29, 36; Appeal and Error, —614; Corporations, —107; Evidence, —348; Schools and School Districts, —130.

CERTIFICATES OF DEPOSIT.

See Bills and Notes, —496; Gifts, —66.

CERTIORARI.

I. NATURE AND GROUNDS.

—22 (Idaho) Where state officers are invested with discretion in performance of official duties, courts have no jurisdiction by writ of review to interfere with its exercise.—*Northwest Light & Water Co. v. Alexander*, 160 P. 1106.

CHALLENGE.

See Jury, —97, 136.

CHAMPERTY AND MAINTENANCE.

—5(1) (Okla.) A contract for attorney's fees is not champertous merely because it requires client to consult with attorney before compromise of the litigation.—*Spauling v. Beidleman*, 160 P. 1120.

—7(3) (Okla.) Rev. Laws 1910, § 2260, relating to the buying or selling of pretended titles to lands adversely held but not in suit, does not prohibit the exercise of a statutory authority or

a conveyance which equity would compel.—*Warner v. Wickizer*, 160 P. 885.

Where a corporation was organized in Indian Territory to deal in realty, and a continuance of its functions is in violation of the Constitution and statutes of the state, a conveyance of realty, when made in good faith for the purpose of dissolution, is not void as to an adverse holder.—*Id.*

CHANGE OF VENUE.

See Venue, ¶66-84.

CHARACTER.

See Criminal Law, ¶376; Homicide, ¶163; Witnesses, ¶337, 344.

CHARGE.

For telephone service, see Telegraphs and Telephones.

For water service, see Waters and Water Courses, ¶257.

To jury, see Criminal Law, ¶753-829; Trial, ¶189-296.

CHARITIES.

See Perpetuities, ¶8; Religious Societies.

I. CREATION, EXISTENCE, AND VALIDITY.

¶4 (Nev.) A bequest of the income of an estate, to be paid to a fraternal order annually, if within five years from testator's death it established an orphans' home, the income to be used to maintain the home, *held* not void as imposing upon the order no imperative duty to devote the money to a charitable use.—*In re Hartung's Estate*, 160 P. 782.

¶11 (Wyo.) A hospital organized and maintained with funds donated, caring for all sick and injured persons brought to it, charging those who are able to pay and treating free of charge those who are not, operated under a board of trustees consisting of the Protestant Episcopal bishop and the rector and church wardens, is a charitable institution.—*Bishop Randall Hospital v. Hartley*, 160 P. 385.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

¶38 (Nev.) A devise conditioned on an establishment by a fraternal order of an orphans' home "worthy of its name" *held* to constitute the order itself the primary judge of such worthiness.—*In re Hartung's Estate*, 160 P. 782.

A devise conditioned upon establishing by fraternal order of an orphans' home "worthy of its name" was satisfied by the establishment of a home which, considering the general existing conditions, compared favorably with similar institutions of the order elsewhere.—*Id.*

A devise conditioned on the establishment of an orphans' home "near" a city was satisfied by its establishment within the city corporate limits.—*Id.*

¶45(2) (Wyo.) A charitable institution operating a hospital is not liable for injuries to patients due to negligence of nurses employed in the hospital, in the absence of negligence in hiring incompetent nurses.—*Bishop Randall Hospital v. Hartley*, 160 P. 385.

CHARTER.

See Counties, ¶3.

CHattel MORTGAGES.

See Usury, ¶94.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

¶49(1) (Kan.) The description of cattle in chattel mortgage is sufficient if it and inquiries suggested by it furnish a reasonable basis for identification, but the suggestions of inquiry must be from the mortgage itself, and not merely in the mind of the mortgagor or mortgagee.—*Ehrke v. Tucker*, 160 P. 985.

¶49(2) (Kan.) A description of cattle as "100 head of coming two year old native Kansas steers branded," etc., located on certain premises of the mortgagor, is insufficient to identify cattle found in other location without the brand.—*Ehrke v. Tucker*, 160 P. 985.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

¶157(1) (Kan.) In replevin by junior mortgagee against those claiming a prior lien, questions as to ownership, including claim that defendants were fraudulently endeavoring to absorb more property than necessary to payment of prior lien, may be determined.—*Moffatt v. Fouts*, 160 P. 1137.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

¶245 (Okl.) Comp. Laws 1909, § 4408, providing a penalty for failure to release satisfied mortgage, applies only to recorded mortgages, and not to chattel mortgages, which are only filed.—*Farmers' State Bank of Glencoe v. Harris*, 160 P. 317.

IX. FORECLOSURE.

¶256 (Okl.) Where it is shown by the pleading that the mortgagor has a legal counterclaim against the whole or any part of the sum claimed under a chattel mortgage, the judge has no discretion but to require that foreclosure be had in court pursuant to Comp. Laws 1909, § 4416.—*Pearson v. Glen Lumber Co.*, 160 P. 48.

Where a mortgagor is entitled to foreclosure in court pursuant to Comp. Laws 1909, § 4416, he need not tender the amount admitted to be due or offer to pay any sum found to be due before availing himself of this statute.—*Id.*

¶261 (Okl.) Under the laws of Arkansas in force in Indian Territory, chattel mortgage conveyed title to the mortgagee subject only to the right of redemption, and a mortgagee, on condition broken, could sell the mortgaged property, though it was then in adverse possession of another.—*Continental Gin Co. v. Pannell*, 160 P. 598.

¶263 (Okl.) After sale by mortgagee of mortgaged personalty out of possession, the mortgagee or the purchaser could recover possession by appropriate action.—*Continental Gin Co. v. Pannell*, 160 P. 598.

¶278 (Wash.) Where foreclosure of chattel mortgage for purchase money failed, owing to holder's disclaimer in former suit by chattel mortgagee, evidence *held* not to authorize deficiency judgment against the individual defendants.—*Lee v. Pasco Theater Co.*, 160 P. 435.

CHEAT.

See Fraud.

CHECKS.

See Interest, ¶50; Payment, ¶22; Tender, ¶12, 15.

CHEQUES.

See Banks and Banking, ¶140; Tender, ¶15.

CHILDREN.

See Bastards; Divorce, ¶222, 289; Guardian and Ward; Infants.

CHURCHES.

See Religious Societies.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, ¶552, 784; Evidence, ¶587.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CITIZENS.

See Indians.

CIVIL RIGHTS.

See Constitutional Law, ¶82.

¶1 (Or.) The natural rights of a person at common law are those of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property.—*Kosciolek v. Portland, Ry. Light & Power Co.*, 160 P. 132.

CIVIL SERVICE.

See Municipal Corporations, ¶216.

CLAIMS.

See Attachment, ¶304; Exemptions, ¶116; Garnishment; Master and Servant, ¶398.

COLLATERAL AGREEMENT.

See Corporations, ¶82.

COLLATERAL ATTACK.

See Judgment, ¶489-521.

COLOR OF TITLE.

See Adverse Possession, ¶70.

COMBINATIONS.

See Conspiracy.

COMMERCE.

See Courts, ¶97, 489.

II. SUBJECTS OF REGULATION.

¶27 (Mont.) In action under federal Employers' Liability Act, whether plaintiff's injury was incurred while he was engaged in Interstate Commerce depends on the nature of the work being done by him when injured, and not either before or immediately thereafter.—*McBain v. Northern Pac. Ry. Co.*, 160 P. 654.

Where a brakeman who was a member of a train crew engaged indiscriminately in handling interstate and intrastate freight was injured while going from his caboose to yard office for supplies for the caboose, he was not then employed in interstate commerce.—*Id.*

¶27 (Wash.) Icing a refrigerator car to receive fruit for another state is an initial movement after which, in switching, the car is engaged in interstate commerce, so as to permit an injured brakeman to recover under federal Employers' Liability Act.—*Aldread v. Northern Pac. Ry. Co.*, 160 P. 429.

¶43, 44 (Kan.) An employé engaged in collecting and delivering laundry within the state for corporation in Missouri is engaged in interstate commerce.—*Kansas City v. Seaman*, 160 P. 1139.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONS AND COMMISSIONERS.

See Banks and Banking, ¶77; Bridges, ¶37; Highways, ¶127; Mandamus, ¶81, 172; Municipal Corporations, ¶181; Public Service Commissions.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, ¶248½-270.

COMPENSATION.

See Attorney and Client, ¶143-183; Brokers; Counties, ¶72, 73; Eminent Domain, ¶134; Master and Servant, ¶335; Registers of Deeds.

COMPETENCY.

See Evidence, ¶539, 543; Jury, ¶97, 136; Master and Servant, ¶170; Witnesses, ¶146-164.

COMPLAINT.

See Criminal Law, ¶252; Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Mortgages, ¶303; Payment; Release.

¶6(2) (Colo.) Where there was a bona fide dispute as to the sum due on an insurance policy, and the insured accepted a check for less than the face value, marked as "payment in full," he took it on such terms, and there was an accord and satisfaction.—*New York Life Ins. Co. v. MacDonald*, 160 P. 193.

¶6(4) (Or.) The settlement of a foreclosure suit begun in good faith, held sufficient consideration for a promise to insure the premises, though there was no right of foreclosure.—*Butson v. Missz*, 160 P. 530.

COMPUTATION.

See Interest, ¶39, 50; Limitation of Actions, ¶50-119.

CONCLUSION.

See Criminal Law, ¶448; Evidence, ¶471.

CONCLUSIVENESS.

See Appeal and Error, ¶1008; Criminal Law, ¶1158, 1159; Evidence, ¶265.

CONCURRENT JURISDICTION.

See Courts, ¶489.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Assignments for Benefit of Creditors; Sales, ¶461-479.

CONDITIONS.

See Bail, ¶83; Cancellation of Instruments, ¶24; Charities, ¶38; Escrows; Executors and Administrators, ¶431; Insurance,

⚡310; Mortgages, ⚡414; Sales, ⚡124; Sheriffs and Constables, ⚡129; Vendor and Purchaser, ⚡117.

CONFESSION.

See Criminal Law, ⚡531, 538.

CONFLICT OF LAWS.

See Limitation of Actions, ⚡2; Wills, ⚡828.

CONSIDERATION.

See Bills and Notes, ⚡92, 854-859, 503; Compromise and Settlement, ⚡6; Contracts, ⚡50, 237; Evidence, ⚡419; Specific Performance, ⚡49.

CONSPIRACY.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

⚡43(11) (Cal.App.) Indictment under Pen. Code, § 182, subd. 5, for unlawfully, willfully, and fraudulently conspiring to obtain the release of one waiting trial on the charge of felony by presenting a worthless and void bail bond, held to state facts sufficient to constitute offense.—People v. Ambrose, 160 P. 840.

⚡47 (Cal.App.) Evidence in trial upon indictment under Pen. Code, § 182, subd. 5, for criminal conspiracy in giving a worthless and void bail bond, held not to sustain a conviction, in that it did not show that the bond as regards the party whom defendant was charged with advising to sign it, was worthless and void.—People v. Ambrose, 160 P. 840.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics. General and special laws, see Statutes, ⚡95. Partial invalidity of statutes, see Statutes, ⚡64.

Subjects and titles of statutes, see Statutes, ⚡121.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

⚡7 (Colo.) A recommendation of the General Assembly to the electors to vote at the next general election for or against a constitutional convention, made by a two-thirds vote, pursuant to Const. art. 19, § 1, is not affected by the Governor's veto; Const. art. 5, § 39, conferring veto power, not applying.—People v. Ramer, 160 P. 1032.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

⚡16 (Nev.) In construction of a constitutional provision, it is not improper to examine the debates on the subject, though they are not authoritative, as it is the text of the Constitution which was adopted.—Phillips v. Snowden Placer Co., 160 P. 788.

⚡42 (Mont.) One who is not affected by a statute may not question its validity.—Pohl v. Chicago, M. & St. P. Ry. Co., 160 P. 515.

⚡46(1) (Cal.) There being other competent evidence, sufficient to sustain the findings of the Industrial Accident Commission, admission of hearsay under Workmen's Compensation Act, § 77, as amended by St. 1915, p. 1102, § 28, would not justify writ of review to consider constitutionality of such section.—Southern Surety Co. v. Industrial Acc. Commission of State of California, 160 P. 884.

⚡47 (Mont.) In considering the constitutionality of a statute, courts look beyond the mere form of expression to the object and purpose of

the legislation.—Pohl v. Chicago, M. & St. P. Ry. Co., 160 P. 515.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

⚡63(1) (Cal.App.) The people may withdraw from local authorities the police power granted to them by the Constitution.—Ex parte Cencinino, 160 P. 167.

IV. POLICE POWER IN GENERAL.

⚡81 (Cal.App.) The police power is an attribute of sovereignty residing in the states by delegation from the people who may withdraw from local authorities the power granted to them by the Constitution.—Ex parte Cencinino, 160 P. 167.

V. PERSONAL CIVIL AND POLITICAL RIGHTS.

⚡82 (Mont.) The so-called poll tax statute is not repugnant to the provisions of Const. art. 3, § 2, declaring that the people of the state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, etc.—Pohl v. Chicago, M. & St. P. Ry. Co., 160 P. 515.

VI. VESTED RIGHTS.

⚡103 (Wash.) No one can acquire a vested right to a pension so that Laws 1915, p. 384, which fails to authorize pensions to abandoned mothers, is not objectionable because Laws 1913, p. 644, repealed thereby made such allowance.—In re Snyder, 160 P. 12.

⚡107 (Utah) The rule is general that, where time has fully run, right to invoke statute of limitations constitutes a vested right.—O'Donnell v. Parker, 160 P. 1192.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

⚡123 (Wash.) Absolute fee-simple titles of the state's grantees to second-class shore lands cannot be impaired by any act of the state after making the deeds upon which they rest.—Puget Mill Co. v. State, 160 P. 310.

⚡137 (Okla.) State public building bonds issued and sold under Act March 15, 1911 (Laws 1911, c. 89), and made nontaxable, constitute a binding contract between their owners and the state, which the latter cannot impair by taxation.—In re Assessment of First Nat. Bank of Chickasha, 160 P. 469.

The constitutional inhibitions against impairing contract obligations limit the taxing power as well as all legislation, whatever form it may assume.—Id.

(C) Contracts of Individuals and Private Corporations.

⚡154(2) (Or.) Amendment to Const. art. 11, § 3 (Laws 1913, p. 8), increasing obligations of stockholders of corporations conducting a banking business, could not impair obligation of subscription contract made before its adoption.—Norris Safe & Lock Co. v. Weaver, 160 P. 807.

XI. DUE PROCESS OF LAW.

⚡284(2) (Mont.) The so-called poll tax statute does not deprive the taxpayer of his property without due process of law, in violation of Const. U. S. Amend. 14, § 1, because it fails to provide for notice before the tax is levied or collected.—Pohl v. Chicago, M. & St. P. Ry. Co., 160 P. 515.

⚡297 (Cal.) To compel a railroad company to apply its property to the construction and operation of a line of railroad which it does not desire to construct or operate, is to take its prop-

erty.—*Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California*, 160 P. 828.
 ⚡309(1) (Cal.App.) In an action for a bank deposit an order of substitution under Code Civ. Proc. § 386, authorizing a claimant to be substituted for defendant, in view of Civ. Code, § 3302, defining the damages for breach of an obligation to pay money, *held* not unconstitutional, as denying due process of law in leaving plaintiff without right to recover damages against the original defendant.—*Youtz v. Farmers' & Merchants' Nat. Bank of Los Angeles*, 160 P. 855.

CONSTRUCTION.

See Bills and Notes, ⚡287; Carriers, ⚡51, 63; Chattel Mortgages, ⚡157; Contracts, ⚡153-214; Deeds, ⚡90-143; Evidence, ⚡450; Insurance, ⚡146; Landlord and Tenant, ⚡48; Libel and Slander, ⚡19; Mines and Minerals, ⚡74-79; Statutes, ⚡225½-248; Stipulations; Trial, ⚡295, 296, 404; Vendor and Purchaser, ⚡70.

CONSTRUCTIVE TRUSTS.

See Trusts, ⚡96, 103.

CONTEMPT.

See Attorney and Client, ⚡43; Depositions.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

⚡6 (Kan.) If language confessedly used by attorney of Supreme Court in petition for rehearing carries beyond question its own inherent significance, the user must have intended the natural consequences of use of such language.—*In re Hanson*, 160 P. 1141.

Language used by attorney in application for rehearing in the Supreme Court *held* to show utter disrespect and the plainest intent to express contempt for the court.—*Id.*

CONTEST.

See Elections, ⚡149-293; Intoxicating Liquors, ⚡37.

CONTINUANCE.

See Criminal Law, ⚡1151; Master and Servant, ⚡408.

CONTRACTORS' BOND.

See Mechanics' Liens, ⚡226.

CONTRACTS.

See Accord and Satisfaction; Account Stated; Alteration of Instruments; Assignments; Attorney and Client, ⚡143; Bills and Notes; Boundaries, ⚡46; Cancellation of Instruments; Carriers, ⚡63, 69; Champerty and Maintenance; Chattel Mortgages; Compromise and Settlement; Constitutional Law, ⚡123-154; Corporations, ⚡76, 78, 116; Counties, ⚡114; Customs and Usages; Damages, ⚡45, 124; Depositaries; Exchange of Property; Frauds, Statute of; Indemnity; Insurance; Interest; Landlord and Tenant; Limitation of Actions, ⚡21, 50; Mortgages; Municipal Corporations, ⚡330-347; Newspapers, ⚡2; Novation; Partnership; Payment; Reformation of Instruments; Release; Sales; Schools and School Districts, ⚡135; Specific Performance; Stipulations; Subrogation; Trial, ⚡250; Usury; Vendor and Purchaser; Wills, ⚡66; Work and Labor.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

⚡1 (Okla.) An "agreement" is a coming together of parties in opinion or determination;

the union of two or more minds in a thing done, or to be done; a mutual assent to do a thing.—*Carter v. Prairie Oil & Gas Co.*, 160 P. 319.

(D) Consideration.

⚡50 (Or.) "Consideration" is a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.—*Butson v. Misz*, 160 P. 530.

(E) Validity of Assent.

⚡93(5) (Nev.) A contract whereby, for payments to be made, plaintiff abandoned lands, on which she had located mining claims, *held* void as incapable of performance, and made under a mutual mistake; it contemplating that defendant who was to withdraw the land under the Carey Act could sell it, whereas he could only develop an irrigation plant and sell water to settlers.—*Miller v. Thompson*, 160 P. 775.

⚡94(1) (Okla.) Contracts induced by fraud are not void but voidable, and the defendant party may elect with knowledge of the facts to treat a contract as valid.—*Wingate v. Render*, 160 P. 614.

⚡99(2) (Okla.) Where a written instrument is attacked for fraud, all the circumstances leading up to its execution, as well as the motives of the maker, may be shown.—*Thompson v. Vaught*, 160 P. 625.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚡153 (Cal.App.) Contracts between realty brokers and owners, whereby former are given authority to sell, being made for mutual, material benefit of parties, are to be construed so as not to defeat such objects, when such construction is reasonably deducible from their terms.—*Daniel v. Calkins*, 160 P. 1082.

⚡155 (Okla.) Under Rev. Laws 1910, § 964, in contracts between a public officer or body and a private party, it is presumed that any uncertainty is caused by, and the language of the contract should be most strongly construed against, the private party.—*State v. City of Sapulpa*, 160 P. 489.

⚡171(2) (Wash.) Where there was nothing in agreement to pay commission for exchange of properties making right to commission for sale or exchange of stock dependent on sale or exchange of realty, the contract was severable.—*Godefroy v. Hupp*, 160 P. 1056.

(B) Parties.

⚡183 (Cal.App.) Where a contract for the construction of a road bound defendants without limitation to pay therefor, words after signatures of some of defendants *held* not to limit their liability.—*Shelton v. Michael*, 160 P. 578.

⚡184 (Cal.App.) Under Civ. Code, § 1659, a contract for the employment of a contractor to construct a road which would be beneficial to the persons signing the contract *held* joint and several.—*Shelton v. Michael*, 160 P. 578.

(D) Place and Time.

⚡214 (Okla.) Under a contract for execution of a note by insured to defendant for the amount of a premium and payment of a sum named by defendant to plaintiff on payment of the note, defendant does not become liable until payment of the note.—*Leeper Bros. Lumber Co. v. Gunter*, 160 P. 606.

III. MODIFICATION AND MERGER.

⚡237(1) (Okla.) Where an original contract does not contemplate a supplemental agreement, the original consideration will not support such an agreement, and the supplemental agreement is void for want of any other consideration.—*State v. City of Sapulpa*, 160 P. 489.

§238(2) (Or.) The terms of a written contract may be altered by a subsequent parol agreement of the parties.—*Wakefield v. Supple*, 160 P. 376.

§248 (Or.) In an action to recover compensation for work not contemplated by a written contract, evidence of an alleged subsequent oral agreement held insufficient to go to the jury.—*Wakefield v. Supple*, 160 P. 376.

IV. RESCISSION AND ABANDONMENT.

§274 (Okla.) A defrauded party, having elected with knowledge of the facts to treat the contract as valid, cannot then change his position and insist that it is invalid.—*Wingate v. Render*, 160 P. 614.

V. PERFORMANCE OR BREACH.

§282 (Cal.App.) Defendant's contract with plaintiff for installation of elevators to defendant's satisfaction held not to permit defendant, after he expressed dissatisfaction only with the controllers, to remove plaintiff's machines and controllers without notice to plaintiff or its consent, and to install others, so that defendant was liable for cost of installation less only cost of new controllers.—*Bryan Elevator Co. v. Law*, 160 P. 170.

§282 (Colo.) Under contract to pay certain amount to detective when he determined who took a diamond, and whether it had been stolen, to defendant's satisfaction, his professed dissatisfaction, in bad faith, after agreement had been fully performed, was no defense to action for compensation.—*McCartney v. Badovinac*, 160 P. 190.

§299(1) (Wash.) A general contract for the construction of a building, the contracts for the excavation, heating, etc., of which were let to other contractors, which required any contractor or subcontractor claiming damages on account of delay, etc., of "other contractors" to make written claims within 48 hours, does not apply to disputes between these contractors and their own materialmen or subcontractors.—*Peterman v. Goss*, 160 P. 432.

§303(5) (Cal.App.) Where dredging company, filling railroad's land, payments to be made monthly, protested against previous late payments and demanded payment on the contract date, road's failure to make a monthly payment thereon was a substantial breach, justifying dredging company in not proceeding farther.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.*, 160 P. 862.

§305(3) (Cal.App.) Where dredging company, filling in railroad's land, received without protest money on road's vouchers at dates later than contract dates for road's monthly payments, it was not estopped to deny that the road did not tender payment in time for a subsequent month, it having protested against late payments and demanded payment on contract date.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.*, 160 P. 862.

VI. ACTIONS FOR BREACH.

§337(2) (Cal.) A substantial breach of agreement of retail liquor dealers to purchase all their beer and liquors of plaintiff during the life of a lease, subject to liquidated damages for breach, held not shown by complaint, alleging merely neglect and refusal on a certain day to buy all beer of plaintiff.—*Vath v. Hallett*, 160 P. 1065.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §82-93.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Chattel Mortgages; Deeds; Fraudulent Conveyances; Homestead, §118, 128; Mortgages.

CONVICTS.

See Pardon.

CORPORATIONS.

See Banks and Banking; Cancellation of Instruments, §24; Carriers; Counties; Evidence, §419; Joint-Stock Companies; Municipal Corporations; Partnership, §41; Public Service Commissions; Quo Warranto; Railroads; Street Railroads; Taxation, §119-128, 276; Telegraphs and Telephones.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

§76 (Wyo.) Where one subscribes to corporate stock, agreeing to pay by conveying a lot of land, acceptance by the company is essential to constitute the subscription a contract at all.—*Natwick v. Terwilliger*, 160 P. 338.

§78 (Wyo.) Where one subscribes to corporate stock on special terms that company accept land in payment, after acceptance by the company, his liability is governed by the special terms of his subscription, and he is not liable to pay for the stock in money except in case of his refusal or inability to convey.—*Natwick v. Terwilliger*, 160 P. 338.

§81 (Wyo.) Subscription to corporate stock, list specifying that it was conditional, and the company's organizer having given the subscriber a written statement to that effect, held conditional on company's acceptance of land in payment.—*Natwick v. Terwilliger*, 160 P. 338.

In determining meaning of contract of subscription to corporate stock upon a condition subsequent, intention of parties is to be looked to.—*Id.*

Distinction between conditional subscription to stock and a subscription on special terms, is that a conditional subscription does not make subscriber a stockholder, nor render him liable until performance of the condition, while a subscription on special terms is absolute, rendering him liable from time subscription is accepted.—*Id.*

Where subscription to corporate stock was made conditional upon company's accepting subscriber's land in payment, and directors accepted such subscription, subscriber was not liable as stockholder, unless company took the land within reasonable time.—*Id.*

Though a subscriber to corporate stock, conditional on company's accepting land in payment, participated in organization, accepted offices of director and secretary, and acted as such with understanding that shares were to be issued as full paid for property offered by him, he did not waive condition of subscription.—*Id.*

Nor was he estopped to set up condition to escape liability as stockholder to company's trustee in bankruptcy.—*Id.*

§82 (Cal.App.) Where a stock subscription contract was executed in duplicate, the subscriber's copy containing corporation agent's agreement to return the subscriber's note if he were dissatisfied, and the corporation, before any stock was issued to him, refused to return the note, was not enforceable by another with notice, though the agent had not indorsed the agreement on the original subscription contract.—*Tidewater Southern Ry. Co. v. Vance*, 160 P. 1097.

§88 (Wyo.) Under Comp. St. 1910, § 3989, subscription to corporate stock, conditional on company's accepting in payment land of sub-

scriber, *held valid*.—*Natwick v. Terwilliger*, 160 P. 338.

Where party subscribed to corporate stock conditional upon company's accepting realty in payment, and thereafter company permitted him to vote stock and occupied his building, stock became full paid, though subscriber could be required to deliver a deed.—*Id.*

—90(6) (Wyo.) In action by trustee in bankruptcy of company to recover on subscription to stock conditional upon company's accepting realty of defendant in payment, evidence *held* to show the company declined to take the property and fulfill the condition.—*Natwick v. Terwilliger*, 160 P. 338.

—92 (Wash.) Though attached to a note given corporation in payment of stock subscription was a statement that the note should be paid from the proceeds obtained from sale of lots owned by the corporation, the unqualified promise to pay will govern.—*Van Tassel v. McGrail*, 160 P. 1053.

A note, given to a corporation in payment of stock subscription, *held* unconditional within Rem. & Bal. Code 1915, par. 3394, though declaring that payment should be made out of proceeds of sale of lots owned by corporation, and fact that there were not sufficient proceeds is no defense.—*Id.*

(C) Issue of Certificates.

—107 (Wash.) Subsequent purchasers of corporate stock, who obtained full value in the purchase of their stock, cannot question the manner in which prior stockholders obtained their stock.—*Eggleston v. Pantages*, 160 P. 425.

(D) Transfer of Shares.

—116 (Ariz.) There was no contract of transfer of corporate stock where offer to exchange it on condition was met by counter conditional offer, which was not accepted.—*Cerro Cobre Development Co. v. Duvall*, 160 P. 25.

—116 (Colo.) Where defendant deposited a note with a bank to pay for corporate stock to be furnished under agreement of the bank to return it if the stock was not delivered, the bank could not recover on note when the stock was never delivered, though several renewal notes with no consideration were given, and no interest on any notes was demanded or paid.—*First Nat. Bank v. Wich*, 160 P. 1036.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

—171 (Utah) It will be presumed that corporate stock registered in the name of deceased belonged to him.—*Rasmussen v. Sevier Valley Canal Co.*, 160 P. 444.

—190 (Wash.) Corporate stockholders *held* barred by delay of seven years from recovering for fraud in the issuance of stock, before they became stockholders, for good will instead of cash.—*Eggleston v. Pantages*, 160 P. 425.

Corporate stockholders who make no objection to receivership proceedings, of which they have full knowledge while the business is losing, cannot recover for fraud in such proceedings after the business shows a profit.—*Id.*

(D) Liability for Corporate Debts and Acts.

—244(1) (Okla.) Under Const. art. 9, § 39, the liability of one accepting corporate stock as an original shareholder for its par value to pay in full for the same is not discharged, at least so far as the corporate creditors are concerned, by transfer to an innocent holder.—*Chilson v. Cavanagh*, 160 P. 601.

—262(1) (Or.) In suit by creditor to enforce liability of stockholders of insolvent corporation upon unpaid subscriptions to its capital stock, the promoters' fraudulent representations, in-

ducing them to become stockholders, were no defense.—*Morgan v. Ruble*, 160 P. 543.

—268(1) (Okla.) A petition against a stockholder by a trustee in bankruptcy of a corporation for par value of stock for which defendant had transferred lease containing covenant against assignment, *held* insufficient to state a cause of action.—*Chilson v. Cavanagh*, 160 P. 601.

VI. OFFICERS AND AGENTS.

(D) Liability for Corporate Debts and Acts.

—342 (Wash.) If trustees, mentioned in articles of incorporation, to hold for a limited term, hold over, their acts are binding on the corporation, and they are subject to the liabilities of trustees, in view of Rem. & Bal. Code, § 3687.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 160 P. 309.

—361 (Wash.) Where corporation trustees were, in accordance with Rem. & Bal. Code, § 3679, required to manage corporate affairs for a certain period, it could not be found that they were so acting when the corporation began business or contracted the debts in suit, in the absence of a showing of when business was begun, there being, in view of the express limitation of their terms, no presumption that they thereafter continued in office.—*Barnard Mfg. Co. v. Ralston Milling Co.*, 160 P. 309.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

—414(6) (Okla.) Where manager of company authorizes agent to purchase cattle and draw on company, and on being informed that agent has purchased cattle and paid by draft directs them to be forwarded, company is liable to seller on draft.—*C. M. Keys Commission Co. v. Robinette*, 160 P. 38.

—426(7) (Cal.App.) A corporation ratified a mortgage alleged to have been executed by its president without authority when it made a deed of trust of all its property, and in that deed expressly referred to the mortgage and made the deed subject to the mortgage.—*Doerr v. Fandango Lumber Co.*, 160 P. 406.

A corporation *held* to have ratified a mortgage alleged to have been executed by its president without authority when its board of directors passed a resolution authorizing a deed of its property subject to its debts, and which resolution expressly recognized a deed of trust which recognized the mortgage as a prior and valid lien.—*Id.*

Although a resolution of defendant corporation's board of directors providing for the placing of its property in the hands of the trustee did not expressly recognize plaintiffs' mortgage, the action of the board of directors recognizing said mortgage in a trust deed of the corporate property *held* to amount to a recognition of the mortgage as effectual as if express authority had been given.—*Id.*

Where a trust deed recognizing the plaintiffs' mortgage as a valid and prior lien has been in existence for a long time, and has never been repudiated, the corporation must be deemed to have ratified all the covenants and conditions of the trust deed including any that were unauthorized.—*Id.*

Where a defendant, as trustee under a deed of trust from defendant corporation which recognized plaintiffs' mortgage and as receiver under appointment of the court, accepted the deed of trust, and, as president of the defendant corporation, executed a deed of the company's property, he admitted not only for the corporation, but for himself as trustee, the validity of the mortgage.—*Id.*

—426(10) (Cal.App.) A corporation *held* estopped from denying validity of mortgage alleged to have been executed by its president without authority by having received, retained,

and used the consideration therefor with full knowledge.—Doerr v. Pandango Lumber Co., 160 P. 406.

⚡432(12) (Cal.App.) In action against contractor corporation on its alleged assumption of subcontractor's store account, evidence of authority of foreman of defendant to supervise construction, etc., and buy supplies, and that immediately after telephoning he made the alleged assumption contract, *held* sufficient to show his authority to make the contract.—Baxter v. Chico Const. Co., 160 P. 1084.

(F) Civil Actions.

⚡518(2) (Utah) The averment in the complaint that defendant is a corporation is an issuable averment, and when put in issue must be proved.—White v. Shipley, 160 P. 441.

CORPUS DELICTI.

See Homicide, ⚡228.

COSTS.

See Divorce, ⚡200, 222; Executors and Administrators, ⚡111; Mines and Minerals, ⚡117; Municipal Corporations, ⚡1040.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⚡32(3) (Cal.App.) Under Code Civ. Proc. § 1022, subsec. 5, plaintiff, in action involving water rights in the nature of a suit to quiet title to real property, who recovered judgment for part of his demand, though defendant also recovered for part of its demand, was entitled to costs.—Stimson Canal & Irrigation Co. v. Lemoore Canal & Irrigation Co., 160 P. 845.

⚡70 (Cal.App.) General rule is that right to costs accrues when judgment is rendered, though it has not become final, or its entry has been stayed.—Eaton v. Southern Pac. Co., 160 P. 687.

VI. TAXATION.

⚡207 (Kan.) Attorney's fees will be allowed without proof of value of services where they were rendered in presence of court.—State v. Glass, 160 P. 1145.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⚡238(2) (Or.) In suit to reform note and mortgage, where specifications of a defendant's demurrer to complaint did not direct attention of trial court to point urged against it on such defendant's appeal, he could not recover costs, though successful.—Coates v. Smith, 160 P. 517.

⚡254(5) (Cal.App.) Under Code Civ. Proc. § 1027, relating to costs on appeal, where plaintiff obtained transcript of testimony to assist counsel in preparing amendments to bill of exceptions proposed by defendant on its motion for new trial in superior court, expense of transcript could not be allowed as costs on appeal.—Eaton v. Southern Pac. Co., 160 P. 687.

⚡258 (Cal.App.) Respondent, upon affirmation, was entitled to have only the costs on appeal to which she was entitled by law at rendition of judgment in her favor, and not those to which she was entitled when remittitur was sent down to superior court, despite Code Civ. Proc. § 1034, relative to costs on appeal, and she cannot recover costs of printing her brief on petition for rehearing.—Eaton v. Southern Pac. Co., 160 P. 687.

COTENANCY.

See Joint Tenancy.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Bridges, ⚡37; Depositories, ⚡6; District and Prosecuting Attorneys, ⚡7; Evidence, ⚡245; Fish, ⚡8; Registers of Deeds.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

⚡3 (Cal.App.) Amendment to charter of San Bernardino county approved by electors in November, 1914, and by Legislature by resolution filed January 30, 1915 (St. 1915, p. 1727), was fatally defective as direct repeal of any sections of original charter (St. 1913, p. 1652 et seq.).—More v. Board of Sup'rs of San Bernardino County, 160 P. 702.

Amendment to charter of San Bernardino county (St. 1915, p. 1727), providing that all county officers, other than supervisors, shall be elected, is effective as adding new section to charter (St. 1913, p. 1652, et seq.), and impliedly repealing original provisions in conflict.—Id.

There is no inconsistency between amendment to charter of San Bernardino county (St. 1915, p. 1727), providing all county officers shall be elected, and article 2, §§ 1, 2, of original charter (St. 1913, p. 1652 et seq.), designating county officers, repealing sections 1 and 2 by implication.—Id.

Sheriff of San Bernardino county, under County Charter, art. 2, § 1 (St. 1913, p. 1652 et seq.), being ex officio coroner, when performing duties of coroner is coroner as distinctly and completely as any other duly appointed or elected person would be.—Id.

Under Pol. Code, § 4013, amendment to charter of San Bernardino county (St. 1915, p. 1727), providing all county officers shall be elected and their powers and duties be such as provided by general law, did not abolish offices of county purchasing agent and county highway commissioner, created by articles 4 and 6 of the original charter (St. 1913, p. 1652 et seq.).—Id.

In view of Const., art. 11, § 7½, subd. 4, provisions of charter of San Bernardino county (St. 1913, p. 1652 et seq.), as amended by St. 1915, p. 1727, with respect to consolidation of county offices, are not superseded by Pol. Code, §§ 4017, 4018.—Id.

II. GOVERNMENT AND OFFICERS.

(C) County Board.

⚡47 (Utah) County commissioners can exercise only such powers as are conferred upon them expressly or by necessary implication of statute.—Carbon County v. Hamilton, 160 P. 765.

⚡48 (Utah) Under Comp. Laws 1907, § 511, subd. 3, authorizing county commissioners to direct prosecutions for officers' delinquencies, and section 4580 as to accusations against officers by the grand jury, or by taxpayers, the county commissioners have power to direct prosecution by individuals.—Carbon County v. Hamilton, 160 P. 765.

Even if county commissioners proceeded irregularly by directing an individual to prosecute the sheriff and county attorney for alleged delinquencies, the irregularity, if any, should have been raised in that proceeding, and not in suit by the county to recover moneys alleged to have been expended illegally therein.—Id.

⚡54 (Utah) Even if county commissioners proceeded irregularly by directing an individual

to prosecute the sheriff and county attorney for alleged delinquencies, the irregularity, if any, would not, standing alone, make the order of prosecution void and without legal effect.—*Carbon County v. Hamilton*, 160 P. 765.

§59 (Okla.) County commissioners who contracted for lumber and building material to be used in eradicating Texas fever tick, in accordance with estimate approved by the excise board of the county, which was afterward held void, are not individually liable for the value of the material.—*Carey, Lombard, Young & Co. v. Hamm*, 160 P. 878.

§59 (Utah) Since Comp. Laws 1907, § 511, subd. 3, authorizes county commissioners to direct prosecutions of officers for delinquencies, the mere fact that the county is not nominally or peculiarly interested in ouster suit by an individual, directed by the commissioners, does not make the act of the commissioners void, or warrant recovery from them of sums expended in such suit.—*Carbon County v. Hamilton*, 160 P. 765.

(D) Officers and Agents.

§72 (Kan.) Without an order from the county commissioners or a contract with the board, a county officer cannot charge for services which his predecessors had neglected to perform and which were not within the ordinary scope of his duties.—*Hill v. Board of Com'rs of Republic County*, 160 P. 987.

§73 (Kan.) A county officer has no claim for the cost of articles purchased for the use of his office without the sanction of the county commissioners.—*Hill v. Board of Com'rs of Republic County*, 160 P. 987.

§78(1) (Colo.) Rev. St. 1908, § 2838, as amended by Laws 1909, c. 167, § 5, in so far as it attempts to allow a county clerk to retain fees collected in addition to his statutory compensation, held violative of Const. art. 14, § 15.—*People v. Brown*, 160 P. 1038.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

§114 (Or.) Under Gen. Laws 1913, p. 576, and L. O. L. §§ 937, 2902, 2903, the tax collector cannot contract for the publication of delinquent tax lists at a rate exceeding that fixed by the county court.—*Coos Bay Times Pub. Co. v. Coos County*, 160 P. 532.

The provision of Gen. Laws 1913, p. 576, for the publication of tax lists in large counties, does not indicate an intent to confer on collectors of other counties authority to fix compensation for publishing tax lists.—Id.

VI. ACTIONS.

§210 (Or.) An ordinary law action is maintainable on a claim against a county involving disputed facts, since on a writ of review to the county court only questions of law can be considered.—*Coos Bay Times Pub. Co. v. Coos County*, 160 P. 532.

§223 (Utah) In action against county for services as handwriting expert called by district attorney in criminal cases, evidence as to what chairman of county board said to district or county attorney outside of board meetings, and as to what county attorney told district attorney, was inadmissible, but evidence that board ratified the employment, was admissible.—*Kytka v. Weber County*, 160 P. 111.

§224 (Utah) In an action against a county, whether services of certain class or kind are required and whether expenditures therefor are necessary are questions for court, and whether particular services rendered were actually necessary is question for the jury.—*Kytka v. Weber County*, 160 P. 111.

In action against county to recover for services as a handwriting expert in a criminal case under arrangement with district attorney,

evidence held not so conclusive as to justify directed verdict for plaintiff.—Id.

COUNTY ATTORNEYS.

See District and Prosecuting Attorneys.

COUNTY BOARDS.

See Counties, §47-59.

COUNTY CLERKS.

See Counties, §78.

COURTS.

See Appeal and Error, §185, 1122; Contempt; Criminal Law, §105; Depositions; Divorce, §289; Execution, §59; Executors and Administrators, §76; Guardian and Ward, §90; Habeas Corpus, §49; Judges; Justices of the Peace; Mandamus, §172; Prohibition.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§2 (Okla.) The elements of jurisdiction are a court created by law, authority to hear and determine causes, the power to render judgment, authority over parties and the thing adjudicated, and authority to decide the question involved.—*Roth v. Union Nat. Bank of Bartlesville*, 160 P. 505.

§4 (Okla.) Jurisdiction is the power of courts and judicial officers to take cognizance of and to hear and determine the subject-matter in controversy, and to adjust or exercise judicial power over the parties.—*Model Clothing Co. v. First Nat. Bank of Cushing*, 160 P. 450.

§24 (Okla.) Parties cannot by consent or stipulation invest a court with jurisdiction not given by law, and this rule applies to causes involving the necessary jurisdictional amount.—*Model Clothing Co. v. First Nat. Bank of Cushing*, 160 P. 450.

§35 (Utah) Although when a domestic record is silent, it will be presumed that what ought to have been done was rightly done, as Comp. Laws 1907, § 3197, makes a complaint a part of judgment roll and, where a record recites what was done to confer jurisdiction to render judgment on amended complaint, it may not be conclusively presumed that something else or additional was done.—*Thero v. Franklin*, 160 P. 1188.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§93(1) (Wash.) A decision, announcing a rule of property under which property rights have been fixed and determined, must, under the doctrine of stare decisis, be followed.—*Sunel v. Riggs*, 160 P. 950.

§97(5) (Mont.) The decisions of the United States Supreme Court are conclusive upon state courts as to what is interstate commerce.—*McBain v. Northern Pac. Ry. Co.*, 160 P. 654.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) Grounds of Jurisdiction in General.

§120 (Okla.) Under Const. art. 7, § 12, and Rev. Laws 1910, § 1816, the county courts have no jurisdiction in civil causes where the amount involved is \$200 or less.—*First National Bank of Poteau v. School District No. 49 of Hughes County*, 160 P. 68.

§120 (Okla.) Const. art. 7, § 12, and Act March 9, 1910 (Laws 1910, c. 40; Rev. Laws 1910, § 1816), vest the county court with no jurisdiction of civil cases involving \$200 or less.

—Underwood Typewriter Co. v. March, 160 P. 594.

VI. COURTS OF APPELLATE JURISDICTION.

(B) Courts of Particular States.

↪222(1) (Kan.) Under Code Civ. Proc. § 556 (Gen. St. 1909, § 6161), where the district court, though acting erroneously, was not without jurisdiction, and the amount involved was less than \$100, and no constitutional question is involved, an appeal to the Supreme Court will be dismissed.—Loope v. Chicago, B. & Q. R. Co., 160 P. 214.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(B) State Courts and United States Courts.

↪489(9) (Kan.) State courts have jurisdiction of action against carrier for misrouting an interstate shipment, by which a privilege of milling in transit was lost.—McCullough v. Missouri Pac. Ry. Co., 160 P. 214.

↪489(11) (Okl.) A suit against a national bank for penalty for usury is cognizable in a state court having general jurisdiction of suits to recover usury, and such court is not divested of jurisdiction in the absence of demand for the return of the usury by the fact that the state statute requires a demand in actions thereunder.—Commercial Nat. Bank of Checotah v. Phillips, 160 P. 920.

The word "similar," as used in Rev. St. U. S. § 5198 (U. S. Comp. Stat. 1913, § 9759), governing suits against national banks for recovery of penalties for usury, and providing that suits therefor may be brought in any state, county, or municipal court having jurisdiction in "similar cases," refers to cases of like general nature, having the same general characteristics, and does not mean cases exactly the same as that under the federal statute, although in its context the word "similar" may sometimes mean "exactly like."—Id.

COVENANTS.

See Landlord and Tenant, ↪76; Waters and Water Courses, ↪156.

COVERTURE.

See Husband and Wife.

CREDIBILITY.

See Appeal and Error, ↪994; Criminal Law, 742; Witnesses, ↪330-392.

CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

CRIMINAL LAW.

See Bail; Burglary; Conspiracy; Contempt; District and Prosecuting Attorneys; Embezzlement; Fish, ↪15; Homicide; Indictment and Information; Intoxicating Liquors, ↪215; Larceny; Lewdness; Mayhem; Par-don; Rape, ↪53, 57; Witnesses.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

↪13 (Okl.Cr.App.) The Legislature in creating an offense may define it by a particular description of the act or acts constituting it or as an act producing or calculated to produce a certain result.—Fessler v. State, 160 P. 1129.

↪42 (Okl.Cr.App.) That one is brought into court by process to give his testimony does

not render the statements in his testimony involuntary.—Choate v. State, 160 P. 34.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

↪53 (Cal.App.) Under Pen. Code, § 22, providing that no act committed by a person in a state of voluntary intoxication is less criminal by reason of such condition, a sane man who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, and to lead him to the commission of an act which in his sober senses he would have avoided.—People v. Goodrum, 160 P. 690.

↪57 (Cal.App.) Where one by long-continued indulgence in intoxicants has become so permanently diseased mentally that he cannot distinguish right from wrong and is generally insane, he is no more legally responsible for his acts than a man congenitally insane or insane from violent injury to the brain.—People v. Goodrum, 160 P. 690.

IV. JURISDICTION.

↪90(2) (Or.) A justice of the peace has jurisdiction to try one charged with cruelty to animals contrary to L. O. L. § 2103, which was sections 1 and 2 of Laws 1885, c. 45, section 8 of which survives as L. O. L. § 5642, which gives justices of the peace "jurisdiction over all offenses committed under this act."—State v. Goodall, 160 P. 595.

↪105 (Kan.) A speedy public trial by impartial jury of the county, guaranteed by Bill of Rights, § 10, when freely waived by plea of guilty in district court, it is then too late to challenge constitutionality of statute conferring jurisdiction of court which imposed judgment.—Ex parte Mote, 160 P. 223.

VII. FORMER JEOPARDY.

↪161 (Cal.App.) Once in jeopardy and former acquittal are favored pleas, and right not to be put in jeopardy the second time is guarded with care by common law and constitution.—People v. Preciado, 160 P. 1060.

↪163 (Okl.Cr.App.) Under Const. Bill of Rights, § 21, relating to former jeopardy, and Rev. Laws 1910, § 5958, when a court has pronounced judgment and it has been executed; the court cannot render a second judgment requiring commitment until costs are satisfied.—Ex parte Myers, 160 P. 939.

↪200(1) (Cal.App.) Defendant tax collector, acquitted of embezzling, on December 1, 1913, funds paid him by H., could not be convicted of embezzling, on November 1, 1913, funds paid him by M., if the money embezzled December first included in part both the H. and M. moneys.—People v. Preciado, 160 P. 1060.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

↪252(1) (Or.) Under L. O. L. § 1499, a general demurrer to a complaint before a justice of the peace charging cruelty to animals waives the objection that the complaint does not set forth the facts with sufficient particularity.—State v. Goodall, 160 P. 595.

↪252(3) (Or.) A complaint before a justice of the peace charging defendant with cruelty to animals in the language of the statute is sufficient where not specifically demurred to on the ground that it does not set out the acts constituting the cruelty with the particularity required by Cr. Code, tit. 18, c. 7 (L. O. L. §§ 1435-1460).—State v. Goodall, 160 P. 595.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

☞295 (Cal.App.) In prosecution for embezzlement, information alleging it was committed Nov. 1, 1913, while defendant tax collector had been acquitted of a like charge made as of December 1, 1913, it was error to confine defendant, in the proof in support of his plea of former jeopardy, to the face of the information on which he was acquitted.—*People v. Preciado*, 160 P. 1090.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

☞355 (Cal.App.) Under Pen. Code, § 22, as to defense of intoxication, testimony disclosing mere temporary derangement from intoxicants is admissible only where the existence of a particular purpose, motive, or intent is a necessary element of the crime, and to assist the jury in determining accused's purpose, motive, or intent.—*People v. Goodrum*, 160 P. 690.

☞361(1) (Kan.) In prosecution for attempt to rape, where defendant brought out the fact that he had visited the house of complaining witness at another time, it was not error to permit her to state that he came for the same purpose.—*State v. Covington*, 160 P. 1009.

(C) Other Offenses, and Character of Accused.

☞369(1) (Or.) As a general rule, evidence of other and distinct crimes than that charged in the indictment cannot be given.—*State v. McClard*, 160 P. 130.

☞369(8) (Kan.) It was not error to permit complaining witness, in response to cross-examination why she had not told her husband of defendant's former visit, to refer to alleged attempt on another woman; the court charging not to consider statements as evidence of such other offense.—*State v. Covington*, 160 P. 1009.

☞371(7) (Or.) The rule excluding evidence of other crimes than that charged is subject to exception in prosecutions for burning property to defraud the insurer, and evidence that accused secured insurance on other property in another place and it was burned very soon thereafter is admissible to show the intent.—*State v. McClard*, 160 P. 130.

☞376 (Okla.Cr.App.) The state cannot attack the character of defendant unless he first puts it in issue by introducing evidence of good character.—*Upton v. State*, 160 P. 1134.

(D) Materiality and Competency in General.

☞386 (Cal.App.) In prosecution for burglary, objection to cross-question to owner of stolen goods as to his powers of observation as to distances between store and a house was properly sustained, where witness could have given no more information than he did, whatever his powers of observation.—*People v. Martinez*, 160 P. 868.

(F) Admissions, Declarations, and Hearsay.

☞412(2) (Cal.App.) In prosecution for burglary, testimony of owner of stolen goods as to a conversation in Spanish he overheard between defendant and his companion while they were in jail, was admissible, where witness understood Spanish to some extent and related only the part which he clearly understood.—*People v. Martinez*, 160 P. 868.

☞419, 420(10) (N.M.) Where a witness testified as to the first difficulty a week before the homicide, proof in rebuttal that the witness had made a statement that defendant had said that the wife of deceased would be a widow within a week was hearsay.—*State v. Pruett*, 160 P. 862.

(I) Opinion Evidence.

☞448(7) (Cal.App.) In prosecution for burglary, a question on cross-examination of the owner of the stolen property as to whether he had the same power of observation as any one with him had, as to the distance between certain houses and his store, called for a conclusion.—*People v. Martinez*, 160 P. 868.

☞459 (N.M.) A witness may express an opinion on a nontechnical subject, based on data which he has observed, when he cannot reproduce the data such as opinion in regard to fingerprints of a man.—*State v. Pruett*, 160 P. 362.

(J) Testimony of Accomplices and Codefendants.

☞507(1) (Or.) Under Prohibition Act, §§ 5, 7, 9, neither a purchaser of intoxicating liquors nor his agent are accomplices of the seller, and under L. O. L. §§ 1540, 2370, a conviction may be had on the uncorroborated testimony of such persons.—*State v. Edlund*, 160 P. 534.

(K) Confessions.

☞531(1) (Cal.App.) In prosecution for burglary, where the statements of defendant and his companion in his presence made after their arrest merely explained the companion's possession of a stolen watch, it was not necessary to make the preliminary showing that the statements were voluntarily made.—*People v. Martinez*, 160 P. 868.

☞538(3) (Okla.Cr.App.) A conviction cannot be had on defendant's extrajudicial admissions alone, without independent proof of corpus delicti by direct or circumstantial evidence.—*Choate v. State*, 160 P. 34.

To prove corpus delicti in a charge against a guardian for embezzlement, it is only necessary to prove relation of guardian and ward, that guardian received funds of the ward and some fact or circumstance, independent of defendant's admission, showing that he did not have the funds or that they had been dissipated or misappropriated.—*Id.*

(M) Weight and Sufficiency.

☞552(2) (Cal.) The jury, in case of circumstantial evidence cannot rely on any circumstance as a link in the chain of circumstances establishing guilt, unless satisfied beyond reasonable doubt by proof of existence of that circumstance.—*People v. Wilt*, 160 P. 561.

☞570(2) (Cal.App.) Defense of insanity may be established by a mere preponderance of evidence.—*People v. Preciado*, 160 P. 1090.

XII. TRIAL.

(A) Preliminary Proceedings.

☞628(3) (Kan.) Permitting names of witnesses who testify as to matters admitted by defendant or of no special importance to be indorsed on information immediately before trial, was not error.—*State v. Allen*, 160 P. 795.

☞629 (Okla.Cr.App.) Announcement of ready for trial by defendant without objection to list of witnesses served on him waives defects in names and addresses.—*Galbert v. State*, 160 P. 332.

(C) Reception of Evidence.

☞683(1) (Okla.Cr.App.) Where accused attempted to create the impression that his wife had committed suicide, it was proper to admit in rebuttal evidence of a chemist that the stomach and lungs of the wife contained no poison.—*Borah v. State*, 160 P. 27.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

☞695(5) (Cal.) An objection to evidence of threats made by accused on ground of remoteness goes to the weight, rather than to the admissibility, of the evidence.—*People v. Wilt*, 160 P. 561.

(E) Arguments and Conduct of Counsel.

—700 (Okla. Cr. App.) Counsel for the state must be fair, and nothing must be relied on or resorted to to obtain a conviction except the law and the evidence and reasonable deductions therefrom.—*Borah v. State*, 160 P. 27.

—704 (Cal. App.) Accused in making a defense and proving his case is not necessarily required to remain strictly within the literal scope of the defense outlined by the counsel in his opening address to the jury.—*People v. Goodrum*, 160 P. 690.

(F) Province of Court and Jury in General.

—741(1) (Mont.) The jurors are the judges of the weight of the testimony.—*State v. Russell*, 160 P. 655.

—741(6) (Okla. Cr. App.) Sufficiency of circumstantial evidence to establish the corpus delicti beyond reasonable doubt should be submitted to the jury with other questions of fact.—*Choate v. State*, 160 P. 34.

—742(1) (Mont.) The jurors are the judges of the credibility of witnesses.—*State v. Russell*, 160 P. 655.

—747 (Or.) When the evidence is conflicting as to whether a witness is an accomplice, question is for the jury.—*State v. Edlund*, 160 P. 534.

—753(2) (Okla. Cr. App.) When the evidence fails to disclose a public offense, the court should advise the jury to return a verdict of not guilty.—*Shannon v. State*, 160 P. 1131.

—761(6) (Or.) In a prosecution for larceny by bailee committed by a real estate broker in retaining money received from prospective purchaser, a requested instruction held properly refused as assuming that certain terms offered by owner were accepted by prospective purchaser, and not submitting question to the jury.—*State v. Stiles*, 160 P. 126.

—762(1) (Cal. App.) In an assault trial, an instruction quoting from an appellate court opinion with reference to a case of temporary mental derangement voluntarily induced by drinking, held to take question of fact from jury.—*People v. Goodrum*, 160 P. 690.

—762(5) (Cal. App.) Remarks of trial judge, when jury returned and reported their inability to agree, held to invade province of jury by expressing opinion of defendant's guilt.—*People v. Carder*, 160 P. 686.

—762(5) (Cal. App.) In prosecution for burglary, instruction as to degree of crime under Pen. Code, § 460, held not objectionable as intimating that defendant was guilty of burglary.—*People v. Martinez*, 160 P. 868.

(G) Necessity, Requisites, and Sufficiency of Instructions.

—777½ (Wash.) Instructions should clearly state the law and not recite facts or evidence, although recitals of evidence are not necessarily erroneous.—*State v. Hankins*, 160 P. 307.

—778(7) (Cal. App.) In prosecution for embezzlement, defended on ground of insanity, instruction on defendant's burden of proof as to insanity, held erroneous.—*People v. Preciado*, 160 P. 1090.

—784(4) (Cal. App.) In prosecution for burglary, instruction on circumstantial evidence and the weight thereof, held not objectionable as argumentative.—*People v. Martinez*, 160 P. 868.

—798(1) (Cal.) An instruction that a juror entertaining a reasonable doubt of accused's guilt should vote to acquit and continue to so vote until convinced to the contrary, and that a juror should not hesitate to change his views when convinced that they are erroneous, held not objectionable.—*People v. Wilt*, 160 P. 561.

—814(5) (Or.) In a prosecution for larceny by bailee committed by a real estate broker in retaining money received from prospective purchaser, an instruction defining the word "bailee," although not predicated on any evidence, held not error.—*State v. Stiles*, 160 P. 126.

In a prosecution for larceny by bailee committed by a real estate broker in retaining money received from prospective purchaser, an instruction held properly given, as supported by evidence that the money was delivered to defendant conditionally.—*Id.*

—814(10) (Cal. App.) In an assault trial, instructions as to settled insanity from alcoholism were properly refused where they submitted to the jury not only the issue of settled insanity, but also of permanent insanity from any cause, there being no evidence as to insanity from other causes.—*People v. Goodrum*, 160 P. 690.

—814(18) (Kan.) Instruction that failure of complaining witness to make outcry, her concealment of defendant's attempt, and like circumstances carry a strong presumption that her testimony is false is properly refused, where there was no concealment.—*State v. Covington*, 160 P. 1009.

—814(20) (Nev.) Under conclusive evidence of permanent disfigurement, it is not error to refuse instruction permitting conviction of the lesser offense of assault, under Rev. Laws, § 6418, which applies only if permanent disfigurement is not shown.—*State v. Enkhhouse*, 160 P. 28.

—823(14) (Cal.) An instruction on circumstantial evidence held not objectionable as leaving to the jury the determination of what was necessary to constitute the crime charged, in view of other instructions on same subject.—*People v. Wilt*, 160 P. 561.

(H) Requests for Instructions.

—829(1) (Kan.) Instructions covered by those given are properly refused.—*State v. Covington*, 160 P. 1009.

—829(7) (Cal. App.) In a prosecution for assault with a deadly weapon, held, that court erroneously refused to instruct that in proving alibi it was sufficient if defendant raised a reasonable doubt as to his presence at the place of the crime when it was committed, though it had charged generally on reasonable doubt.—*People v. Visconti*, 160 P. 410.

(J) Custody, Conduct, and Deliberations of Jury.

—863(2) (Cal. App.) Where the jury after retiring returned and asked for further instructions, defendant was not entitled as matter of right to have instructions read which the jury had not called for, or to have all the instructions on a given subject read, when such as were read were satisfactory to the jury.—*People v. Finali*, 160 P. 850.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

—913(1) (Cal. App.) Under Pen. Code, § 1202, providing that, unless judgment be rendered or pronounced within time fixed by or to which it is continued under section 1191, defendant shall be entitled to new trial, where judgment was not pronounced within time limited, defendant became entitled to new trial.—*People v. Winner*, 160 P. 689.

Where judgment was not pronounced on defendant convicted of crime within time limited by Pen. Code, § 1191, defendant was entitled to new trial, under section 1202, providing that, unless judgment be pronounced within time fixed by or to which it is continued under section 1191, defendant shall be entitled to a new trial, though defendant's counsel in open court

consented to postponement of time for sentence.—*Id.*

§935(2) (Okla. Cr. App.) When the proof fails to establish the offense charged, the verdict of guilty and judgment thereon are as matter of law contrary to the evidence.—*Blake v. State*, 160 P. 30.

§942(2) (Kan.) That a witness' evidence is somewhat at variance with his previous evidence is not ground for a new trial.—*State v. Powell*, 160 P. 213.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§995(4) (Kan.) A judgment of conviction for bigamy and commitment of accused to confinement at hard labor in the state penitentiary until "discharged therefrom as by law provided" is not void for uncertainty, the duration of imprisonment being fixed by Crimes Act, §§ 225-227, and the Indeterminate Sentence Act.—*Ex parte Mote*, 160 P. 223.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§1032(7) (Colo.) Alleged defect in proof that a bank alleged to have been burglarized was a corporation, is not sufficiently presented for the first time, in the assignment of errors, but should have been raised in the lower court.—*Howard v. People*, 160 P. 1060.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

§1069(1) (Okla. Cr. App.) Appeals in misdemeanor cases must be filed within 60 days from judgment unless the trial court for good cause extends the time not to exceed 60 days additional.—*Gabbert v. State*, 160 P. 33.

§1069(6) (Okla. Cr. App.) The filing of an appeal after the time fixed by the orders of the trial court as limited by statute (Rev. Laws 1910, § 5991) is fatal.—*Gabbert v. State*, 160 P. 33.

(D) Record and Proceedings Not in Record.

§1102 (Wash.) Where defendant's statement of facts on appeal was incomplete in that it did not contain "all the material facts" or "all the facts agreed to be material by the parties," as required by Rem. & Bal. Code, § 391, *held* a motion to strike entire statement and affirm will be granted.—*State v. Hankins*, 160 P. 307.

§1104(6) (Cal. App.) Under Pen. Code, § 1247, appellant, convicted of embezzlement, who, in application to trial court for transcript of stenographer's notes, stated in general terms the "grounds" but not "points" of his appeal, complied with statute sufficiently to entitle his appeal to be heard.—*People v. Preciado*, 160 P. 1090.

§1120(1) (Or.) It is the duty of accused in his bill of exceptions to negative existence of evidence which might render admissible that which was excepted to or to negative any theory under which it might be admissible, otherwise the court cannot say that the evidence complained of was inadmissible.—*State v. McClard*, 160 P. 130.

(E) Assignment of Errors and Briefs.

§1130(4) (Okla. Cr. App.) When no briefs are filed for plaintiff in error, and no appearance made for oral argument, a motion to affirm for want of prosecution will be sustained.—*Caton v. State*, 160 P. 26.

When no briefs are filed, the court will examine the record in felony cases for fundamental error only.—*Id.*

(G) Review.

§1134(6) (Or.) On city's appeal from judgment of circuit court holding unconstitutional an ordinance under which defendant had been convicted in municipal court, Supreme Court must affirm, though the ordinance was constitutional, if facts disclose defendant was innocent.—*City of Portland v. Grahs*, 160 P. 375.

§1137(3) (Cal. App.) An argumentative instruction could not be complained of by the defendant where it was given and read to the jury at his request.—*People v. Martinez*, 160 P. 868.

§1137(5) (Or.) Where defendant's counsel on direct examination asked the owner of the property if he confirmed the sale as reported to him by the broker, error in permitting the witness on cross-examination to answer substantially the identical question, which called for a conclusion of the witness, was invited.—*State v. Stiles*, 160 P. 128.

§1151 (N.M.) The discretion of the trial court on motion for continuance will not be disturbed, in absence of injury to the complaining party.—*State v. Pruett*, 160 P. 362.

§1158(2) (Okla. Cr. App.) When plea of former jeopardy is interposed and counsel elect to submit question to jury rather than to court, the jury's finding will not be disturbed.—*Tinsley v. State*, 160 P. 331.

§1159(5) (Cal. App.) On appeal from a conviction of crime, reviewing court, under settled rule, will not interfere with verdict, whichever way the jury may have decided the issue of insanity, where expert and nonexpert testimony was introduced for and against the defense.—*People v. Preciado*, 160 P. 1090.

§1165(3) (Or.) In prosecution for sale of intoxicating liquors, *held* that seller could not complain of instruction improperly declaring buyer's agent to be an accomplice on whose uncorroborated testimony conviction could not be had because it did not declare buyer to be an accomplice; instruction being more favorable to defendant than law.—*State v. Edlund*, 160 P. 534.

§1169(1) (N.M.) The admission of immaterial evidence is not ground for reversal.—*State v. Pruett*, 160 P. 362.

§1170½(5) (Cal. App.) In prosecution for burglary, it was not prejudicial to defendant to refuse to permit his attorney to explain object of cross-examination of owner of stolen goods or for court to remark that it was immaterial.—*People v. Martinez*, 160 P. 868.

§1171(3) (Cal. App.) In a prosecution for burglary, alleged misconduct of district attorney in stating that if defendant knew where the shoes of defendant and his companion were the prosecution would attempt to get them, made in the presence of the jury, was *held* not reversible error.—*People v. Martinez*, 160 P. 868.

§1171(3) (Okla. Cr. App.) In a prosecution for wife murder, an intimation by the county attorney that if a certain witness were present he could show improper relations between defendant and a young lady, though improper, did not prejudice defendant where it was admitted that he was betrothed to another woman.—*Borah v. State*, 160 P. 27.

§1172(1) (Nev.) An instruction to convict if permanent disfigurement is shown, though failing to define permanent disfigurement, is not prejudicial, where the evidence is without conflict as to extent of the injury which manifestly was a permanent disfigurement.—*State v. Enkhhouse*, 160 P. 23.

§1172(6) (Cal.) Where accused denied the killing and did not justify, excuse, or mitigate it, a correct instruction on burden of proving mitigation, justification, or excuse, *held* not prejudicial.—*People v. Wilt*, 160 P. 561.

⚡1173(1) (Cal.App.) Refusal of instructions as having been presented too late for consideration was not prejudicial to accused, where they were not applicable to the evidence.—*People v. Finali*, 160 P. 850.

⚡1179 (Or.) On appeal from judgment in circuit court dismissing complaint against defendant convicted in municipal court of violation of city ordinance, *held*, that Supreme Court could not determine whether decision of municipal court was erroneous because of defective record.—*City of Portland v. Grabs*, 160 P. 375.

(H) Determination and Disposition of Cause.

⚡1186(4) (Cal.App.) An erroneous instruction on self-defense, where in no view of the evidence could it reasonably be said that deceased was the assailant, was not so misleading as to cause a miscarriage of justice and to call for reversal of conviction in view of Const. art. 6, § 4½.—*People v. Finali*, 160 P. 850.

Reference by district attorney to accused's failure to deny his extrajudicial statement, and other alleged prejudicial misconduct, which the court instructed the jury to disregard, *held* not such as to call for reversal in view of Const. art. 6, § 4½.—*Id.*

⚡1186(4) (Mont.) In trial for unlawful taking of fish, testimony of witness for the state that he reported to the warden because certain "boys told me that some one down the river was killing fish," being wholly immaterial, was no ground for reversal under Rev. Codes, §§ 9415, 9548.—*State v. Russell*, 160 P. 655.

CROSS-EXAMINATION.

See Evidence, ⚡558; Witnesses, ⚡267-275.

CROSSINGS.

See Railroads, ⚡324, 348; Street Railroads.

CURTESY.

See Dower.

CUSTODY.

See Infants, ⚡16.

CUSTOMS AND USAGES.

⚡16 (Wash.) Where agreement to pay broker a commission for an exchange of properties was silent as to commission to be paid, it was implied that rate should be such as was usually and customarily paid at that place.—*Godefroy v. Hupp*, 160 P. 1056.

⚡18 (Ok.) A local custom or usage applying to a special or particular class of business may not be proven to explain ambiguous terms of a contract, unless pleaded.—*Gilbert v. Citizens' Nat. Bank of Chickasha*, 160 P. 635.

DAMAGES.

See Appeal and Error, ⚡932, 1004, 1151; Attachment, ⚡875, 377; Carriers, ⚡229; Eminent Domain, ⚡134; False Imprisonment, ⚡36; Fraud, ⚡59; Insurance, ⚡514; Landlord and Tenant, ⚡223; Libel and Slander, ⚡33; Master and Servant, ⚡385; Municipal Corporations, ⚡706; Replevin, ⚡106; Sheriffs and Constables, ⚡139; Work and Labor, ⚡29.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

⚡30 (Wash.) In suit by subcontractor to recover on his contract, loss in efficiency of carpenters employed, caused by his delay was not allowable as an offset against him, where the percentage of such loss was conjectural and

rested on conclusions of witnesses which appeared too high.—*Peterman v. Goss*, 160 P. 432.

⚡36 (Wash.) In suit by subcontractor to recover on his contract, the general contractor was entitled to counterclaim for interest paid on money necessarily borrowed to carry on the work because his estimates were held up by delay by the subcontractor in furnishing material.—*Peterman v. Goss*, 160 P. 432.

⚡45 (Wash.) Where inspectors for a school building refused a quantity of material furnished by the subcontractor of a general contractor, because of lack of finish, and the general contractor was compelled to handle and refinish the defective material, he could offset this expense in suit by the subcontractor.—*Peterman v. Goss*, 160 P. 432.

In suit by subcontractor to recover on his contract, loss of overhead expense caused by his delay was not allowable as an offset against him, where the item consisted of salaries paid the managing employees of the general contractor during time when the building was not completed in other particulars, requiring the services of these employees, irrespective of the subcontractor's delay.—*Id.*

(B) Aggravation, Mitigation, and Reduction of Loss.

⚡62(4) (Kan.) In action by tenant for breach of covenant by landlord to remove personal property from premises, evidence of a threat by landlord to make trouble for the tenant if he removed the landlord's feed, absolved the tenant from obligation to lessen damages by removing feed at his own expense.—*Rull v. Rainey*, 160 P. 1016.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

⚡105 (Ok.) The measure of damages for the destruction of property is the reasonable market value, but, if it had no market value, then its value, in view of the use to which it was to be put, may be recovered.—*Kansas City Southern Ry. Co. v. Hurley*, 160 P. 910.

(C) Breach of Contract.

⚡124(1) (Cal.App.) First cause of action of dredging company suing railroad for breach of contract to pay for filling in land, *held* not to authorize jury to add, as further damages, to the contract price for filling done, an amount based on evidence that the hardest part of the work had been done when plaintiff quit on account of defendant's default.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.*, 160 P. 862.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚡130(1) (Cal.App.) The severity of injuries caused by electricity is a matter of general observation, and courts have been liberal in upholding verdicts for large amounts in such cases.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

⚡131(3) (Wash.) Twenty-four thousand dollars damages to a lineman 28 years old for injuries consisting of breaking some small bones of the left hand, sprains and cuts, and some impairment of vision, *held* grossly excessive.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 965.

⚡132(1) (Ok.) An award of \$5,000 damages for permanent injuries and disfigurement of a child 12 years old is not excessive.—*Folsom-Morris Coal Mining Co. v. De Vork*, 160 P. 64.

⚡132(4) (Wash.) Award of \$3,600 damages for causing chronic diarrhoea, which is permanent and progressive, *held* not excessive.—*Fletcher v. Carstens Packing Co.*, 160 P. 14.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(C) Proceedings for Assessment.

☞206(1) (Utah) Where it appeared that most of plaintiff's symptoms were subjective, court, after plaintiff had rested, had no power to order physical examination by physicians selected by defendant in presence of plaintiff's physician and father.—*Sharp v. Ogden Rapid Transit Co.*, 160 P. 438.

☞208(1) (Cal.App.) The amount of damages is largely left to the discretion of the jury, subject to the supervision of the trial court.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

☞216(2) (Wash.) Where a lineman sued as a competent person for personal injuries, alleging his insanity from the accident until his discharge from an insane asylum five months previously, refusal of instruction that the jury could not find that plaintiff "is now insane or has been insane at any time since he left" the asylum, was error.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 965.

Where a complaint for injuries alleged plaintiff's insanity continuously until his discharge from an asylum, an instruction, "if insanity has been established then the presumption is that insanity continues until the contrary is established," was erroneous, since the jury might have considered plaintiff insane at the time of the trial, and thus enhanced the damages.—*Id.*

DEATH.

See Abatement and Revival; Trial, ☞252, 296; Witnesses, ☞146-164.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

☞2(1) (Or.) By L. O. L. § 799, subd. 26, there is a presumption that a person, not heard from by his acquaintances or any members of his family for more than seven years, is dead.—*St. Martin v. Hendershott*, 160 P. 373.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

☞31(3) (Or.) On the death of an individual by the wrongful act of another, L. O. L. § 380, gives a cause of action to his personal representative.—*Kosciolek v. Portland Ry., Light & Power Co.*, 160 P. 132.

☞31(6) (Or.) At common law a wife could not sue for the death of her husband, whereby she lost his services and consortium.—*Kosciolek v. Portland Ry., Light & Power Co.*, 160 P. 132.

L. O. L. § 7050, repealing laws imposing or recognizing civil disabilities upon a wife, etc., held not to give widow right to recover for death of husband.—*Id.*

Widow of husband who suffered injuries, sued, and compromised, held to have no right of action after his death for consequential injury through loss of consortium and support.—*Id.*

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

DECEIT.

See Fraud.

DECLARATIONS.

See Criminal Law, ☞412; Evidence, ☞271.

DEEDS.

See Appeal and Error, ☞93; Cancellation of Instruments, ☞6; Escrows, ☞4; Estoppel, ☞22; Frauds, Statute of, ☞74; Homestead, ☞118, 128; Mortgages; Reformation of Instruments; Registers of Deeds; Taxa-

tion, ☞810; Vendor and Purchaser, ☞230; Waters and Water Courses, ☞150.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

☞5 (Utah) Written instrument, executed by husband in presence of witnesses and acknowledged by him and delivered to his wife, construed as deed of conveyance by which all his property was intended to be, and was, conveyed to her.—*Coltharp v. Coltharp*, 160 P. 121.

Written instrument, signed and acknowledged by husband, purporting to give all his real and personal property to his wife, construed, and held not a power of attorney to dispose of his real and personal property as if it were her own.—*Id.*

(B) Form and Contents of Instruments.

☞31 (Okla.) A granting clause in a deed reciting that "I, T. M. L., joined by my wife, F. L., * * * do grant," contains apt words of grant on the part of the wife sufficient to convey her title.—*Lowery v. Westheimer*, 160 P. 496.

(D) Delivery.

☞54 (Wash.) The fact that the grantor of a deed mistakenly thought that a delivery was not essential to a valid gift before her death cannot supply the place of delivery to create an operative instrument during her life.—*Showalter v. Spangle*, 160 P. 1042.

☞56(2) (Wash.) To constitute a delivery, it must clearly appear that it was the intention of the grantor that the deed should pass title at the time, and that he should then lose all control over it.—*Showalter v. Spangle*, 160 P. 1042.

☞58(2) (Wash.) It is essential to delivery of a deed that there be a giving by the grantor and a receipt by the grantee with a mutual intention to pass a present title, and delivery may be made through an agent.—*Showalter v. Spangle*, 160 P. 1042.

☞58(4) (Cal.) Where grantor delivered deed to third person to hold until payment of price by grantees, prior to payment or part thereof, delivery was nothing but offer which grantor had legal right to withdraw, her death terminating and revoking offer and authority of third person to accept payment and deliver deed on payment.—*Holland v. McCarthy*, 160 P. 1069.

☞61 (Wash.) Though a deed cannot effectually be delivered after the grantor's death, if the grantor delivers it to another in escrow for delivery to the grantee after the grantor's death, and retains no dominion or control, the delivery is valid.—*Showalter v. Spangle*, 160 P. 1042.

☞65 (Wash.) It is essential to delivery of a deed that there be a giving by the grantor and a receipt by the grantee, with a mutual intention to pass a present title, and may be accepted by an agent.—*Showalter v. Spangle*, 160 P. 1042.

(E) Validity.

☞68(1½) (Or.) Mental capacity at time of signing a conveyance sufficient to comprehend the nature of the business is the standard fixed by the law for determining grantor's competency.—*Magness v. Ditmars*, 160 P. 527.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

☞90 (Okla.) Doubtful or ambiguous words of grant in a deed are construed most strongly against the grantor and beneficially for the grantee.—*Lowery v. Westheimer*, 160 P. 496.

A construction of a deed will be avoided, if possible, which will render it frivolous and ineffectual.—*Id.*

☞93 (Utah) In construction of deeds the intention of parties as it appears from ordinary

and generally accepted meaning of language used by them when applied to subject-matter controls.—*Coltharp v. Coltharp*, 160 P. 121.

§97 (Utah) Where there are words or phrases found in different parts of a writing which are repugnant, courts must, if possible, construe the whole instrument so that all its parts may be harmonized, and given a primary or secondary meaning.—*Coltharp v. Coltharp*, 160 P. 121.

§101 (Okl.) Where terms in a deed are not clear, subsequent acts of the parties, showing their construction before the land becomes the subject of controversy, are to be looked to by the court.—*Lowery v. Westheimer*, 160 P. 496.

(D) Exceptions and Reservations.

§143 (Kan.) Under a deed reserving the rents, issues, and profits of land to the grantor for life, and after his death to his wife for her life, the widow took no title to rent wheat, harvested and placed in granaries before her husband's death, as against his executor.—*Ahnert v. Ahnert*, 160 P. 208.

IV. PLEADING AND EVIDENCE.

§196(2) (Cal.) Defendant in a suit to quiet title who pleads in a cross-complaint fraud in the execution and delivery of a deed by him and under which plaintiff claims as beneficiary of a trust created by the deed has the burden of proving the fraud.—*McArthur v. Goodwin*, 160 P. 679.

§200 (Kan.) Where a father had executed deeds to his son, the father's subsequent conduct asserting ownership of the property was competent evidence on the issue whether the deeds were to be effective when executed or only at the grantor's death.—*White v. White*, 160 P. 993.

§208(1) (Wash.) Though the law makes stronger presumptions in favor of the delivery of a deed to the grantor's children, especially minors, than in an ordinary case, the question is still one of intention, to be determined by the attending facts and circumstances.—*Showalter v. Spangle*, 160 P. 1042.

Evidence of grantees in separate deeds to husband and wife held insufficient to show delivery by the grantor.—*Id.*

§208(7) (Kan.) Evidence held to sustain a finding that a deed was intended to be delivered, and was delivered, within lifetime of grantor.—*Beckley v. Beckley*, 160 P. 999.

§211(1) (Or.) In suit involving validity of deed executed by plaintiff's father, evidence held to show that at time of execution the father was mentally competent.—*Magnus v. Ditmars*, 160 P. 527.

DEFAULT.

See Judgment, §102, 107; Mortgages, §401.

DELAY.

See Contracts, §290.

DELINQUENTS.

See Infants, §16.

DELIVERY.

See Deeds, §54-65, 200, 208; Escrows; Gifts, §18.

DEMAND.

See Mandamus, §14; Trover and Conversion, §9.

DEMURRER.

See Appeal and Error, §237, 1040; Criminal Law, §252; Limitation of Actions, §180; Pleading, §192-216, 417; Trial, §150.

DEPARTURE.

See Pleading, §180.

DEPOSITARIES.

See Escrows.

§6 (Kan.) Under Gen. St. 1909, § 2163, if no responsible bank within the county will accept the public money and pay interest thereon, the county commissioners may designate as depositaries other banks which will accept the fund, pay interest, and give bond.—*Johnson State Bank v. Raney*, 160 P. 980.

The county commissioners have power to determine the responsibility of banks offering to act as depositaries, but their determination must be in good faith and never at the mere pleasure of the board.—*Id.*

DEPOSITIONS.

§71 (Okl.) Under Rev. Laws 1910, §§ 5057, 5075, and Const. art. 7, § 1, a judge of county court, while taking depositions, has power to commit a witness for contempt for refusing to answer a material question.—*Waugh v. Dibbens*, 160 P. 589.

DEPOSITS.

See Banks and Banking, §129, 140; Gifts, §66.

DEPOSITS IN COURT.

See Tender, §24.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Indians, §18; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

§91(2) (Or.) If an administrator refuses to collect debts owing estate and properly apply the proceeds, the heirs may themselves realize upon them in the interest of estate.—*In re Marks' Estate*, 160 P. 540.

(C) Debts of Intestate and Incumbrances on Property.

§125 (Or.) The liability of an heir is confined to the real estate, with which the administrator or executor has nothing to do.—*Rainey v. Rudd*, 160 P. 1168.

DESCRIPTION.

See Carriers, §55, 57; Embezzlement, §28; Names.

DETINUE.

See Replevin.

DILIGENCE.

See New Trial, §102.

DIPPING CATTLE.

See Carriers, §208, 228.

DIRECTING VERDICT.

See Appeal and Error, §237; Criminal Law, §753; Master and Servant, §288; Trial, §168, 173.

DIRECT TAXES.

See Taxation, ¶37.

DISABILITIES.

See Insane Persons, ¶2.

DISBARMENT.

See Attorney and Client, ¶37-53.

DISCHARGE.

See Bills and Notes, ¶301, 437; Compromise and Settlement; Principal and Surety, ¶112, 126; Release.

DISCOVERY.**II. UNDER STATUTORY PROVISIONS.****(A) Interrogatories and Examination of Parties and of Other Persons.**¶70 (Wash.) An objection to answering an interrogatory as to the time defendant turned on its power, because it would enable plaintiffs to shape their evidence accordingly, *held* not sustainable.—*Haas v. Washington Water Power Co.*, 160 P. 954.Under Rem. Code 1915, § 1230, providing penalty, refusal to answer interrogatories, where plaintiffs made no motion to strike defendant's answer but only a motion for judgment, and no prejudice was shown by failure to answer until trial, *held* that court will not be put in error for refusing to grant judgment on the motion.—*Id.***DISCRETION OF COURT.**

See Appeal and Error, ¶977, 979; Criminal Law, ¶1151; Executors and Administrators, ¶76, 358; Pleading, ¶236, 367, 368; Trial, ¶68; Witnesses, ¶267.

DISMISSAL AND NONSUIT.

See Appeal and Error, ¶336, 627, 639, 773, 796, 807; Stipulations, ¶14; Trial, ¶159, 165, 419.

I. VOLUNTARY.¶26 (Or.) In an action for false imprisonment against several defendants, plaintiff could have dismissed his action as to some of the defendants without affecting the merits of the cause as to the others.—*Lane v. Ball*, 160 P. 144.**DISQUALIFICATION.**

See Judges, ¶51.

DISSOLUTION.

See Attachment, ¶289.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ¶700, 1171; Evidence, ¶245.

¶2(5) (Utah) It is not a collection of illegal fees, within Comp. Laws 1907, § 4580, providing for removal of officers for such offense, for the county attorney to charge more for stenographic work than he pays the stenographer, the statute covering only fees in excess of those fixed by law for certain services.—*Parker v. Morgan*, 160 P. 764.¶7(2) (Utah) Under Comp. Laws 1907, §§ 538, 2445x7, 2445x8, district attorney *held* authorized to incur necessary expenses in prosecution of criminal cases in district court and to make them county charges.—*Kytka v. Weber County*, 160 P. 111.

Where county board in first instance could

have authorized employment of handwriting expert in criminal case and could have agreed to pay him reasonable compensation, it might ratify, in whole or in part, an arrangement between district attorney and expert as to the expert's services and compensation.—*Id.*While district attorney is authorized under Comp. Laws 1907, §§ 538, 2445x7, 2445x8, to incur necessary expenses in prosecution of criminal cases and make them county charges, he may not bind county beyond what is reasonably necessary, or for services rendered beyond the reasonable value thereof.—*Id.*¶10 (Cal.) In view of St. 1907, p. 666, relating to highways, a complaint charging fraud on the part of the assistant district attorney in connection with the relocation of a highway *held* insufficient, and not to entitle the county to recover from him the difference between the value of the fences inclosing a newly located highway and the right of way gratuitously conveyed.—*San Diego County v. Utt*, 160 P. 657.**DISTRICTS.**

See Schools and School Districts, ¶42; Taxation, ¶909.

DITCHES.

See Drains.

DIVORCE.

See Abatement and Revival.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(A) Jurisdiction, Venue, and Limitations.**¶62(5) (Nev.) A complaint in divorce alleging plaintiff's residence in W. county, that defendant is within the jurisdiction of the court and can be served in W. county, gives the court jurisdiction under Act Feb. 23, 1915 (Laws 1915, c. 28) § 1, amending Laws 1861, c. 33, § 22, giving jurisdiction if defendant can be found in the county.—*Merritt v. Merritt*, 160 P. 22.**(C) Pleading.**¶91 (Nev.) The complaint of a husband for divorce not alleging his residence in the county, and the matrimonial domicile being in another state, *held* insufficient to give jurisdiction under St. 1915, c. 28, § 1, though alleging defendant can be found and resides in the county.—*Aspinwall v. Aspinwall*, 160 P. 253.**V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.**¶200 (Colo.) In an action for divorce, where existence of the marriage relation, destitute condition of wife, and financial ability of husband were established, *held* that court had incidental jurisdiction to grant wife court costs, attorney's fees, and alimony, pendants lite.—*Jones v. Jones*, 160 P. 87.¶222 (Wash.) Under Rem. & Bal. Code, § 988, as to allowance of suit money to wife, existent marriage status is prerequisite to allowance, and after divorce and award of custody of children when the husband moves for change of custody, the wife cannot have award for costs and attorney's fees.—*Dolby v. Dolby*, 160 P. 950.¶287 (Cal.App.) Where, before issuance of mandate by court to clerk commanding him to issue execution to enforce payment of alimony pendants lite, order granting alimony was reversed so that the wife was not entitled to the amounts, order granting writ of mandate will be reversed.—*Machado v. Machado*, 160 P. 684.**VI. CUSTODY AND SUPPORT OF CHILDREN.**

¶289 (Cal.App.) Under Civ. Code, §§ 136, 138, 214, 246, the jurisdiction of the superior court in divorce cases to award custody of

minor children is plenary, whether a divorce be granted or denied.—*Ex parte Saul*, 160 P. 695.

DOCKS.

See Wharves.

DOCUMENTS.

See Evidence, ¶332-378; Trial, ¶39.

DOMICILE.

See Divorce, ¶91; Husband and Wife, ¶3.

¶1 (Okla.) When the question of residence is doubtful, it should be so determined as best to secure the rights of creditors and others having dealings with the party.—*Jones v. Reser*, 160 P. 58.

The term "residence" means a settled or fixed abode of a character indicating permanency, at least for an indefinite time, the home to which when one is absent, he has the intention of returning.—*Id.*

¶5 (Nev.) At common law, it was a well-founded rule that a woman on her marriage lost her own domicile and acquired that of her husband.—*Merritt v. Merritt*, 160 P. 22.

¶10 (Okla.) The residence of a man having a family which he maintains is prima facie where the family dwells.—*Jones v. Reser*, 160 P. 58.

DONATIONS.

See Gifts.

DOWER.

III. RIGHTS AND REMEDIES OF WIDOW.

¶79(1) (Mont.) If under Rev. Codes, § 4539, a wife has right of dower as purchaser in property held by her husband on a trust of which she had no notice, prima facie she has no dower, and must show absence of notice.—*Huffine v. Lincoln*, 160 P. 820.

DRAINS.

See Municipal Corporations, ¶270.

I. ESTABLISHMENT AND MAINTENANCE.

¶57 (Okla.) A petition against a drainage district and county commissioners for damages by the construction of drainage ditch through plaintiff's land to which the commissioner of the district was not a party, as required by Rev. Laws 1910, § 2976, is demurrable for defect of parties.—*Niblo v. Drainage Dist. No. 3*, 160 P. 468.

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Criminal Law, ¶53, 57, 355.

DUE PROCESS OF LAW.

See Constitutional Law, ¶284-309.

DUPLICITY.

See Indictment and Information, ¶182.

EASEMENTS.

See Highways.

EJECTMENT.

See Pleading, ¶93.

ELECTION.

See Indictment and Information, ¶182.

ELECTION OF REMEDIES.

See Vendor and Purchaser, ¶122.

ELECTIONS.

See Intoxicating Liquors, ¶37; Municipal Corporations, ¶918; Schools and School Districts, ¶42, 97.

IV. QUALIFICATIONS OF VOTERS.

¶73 (Utah) Under Laws 1911, c. 106, § 60, and Comp. Laws 1907, § 812, etc., residence in a district is a necessary qualification of a voter, notwithstanding Laws 1911, c. 106, § 53, as to prior qualification.—*Beauregard v. Gunnison City*, 160 P. 815.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

¶126(4) (Cal.) Primary Act, § 5, subd. 8, did not render ineligible to Progressive party's nomination for Congress, made by writing the person's name in the blank space in the ticket of the Progressive party under Pol. Code, § 1188, a person who was a candidate for the Republican nomination at the same election, proposed under Primary Act, § 5, subd. 2, he being defeated for such nomination.—*Narver v. Jordan*, 160 P. 245.

¶126(5) (Wash.) One cannot, in view of Rem. & Bal. Code, § 4842, and the general intent of the primary election law, be nominated by stickers under section 4843 for an unexpired term of superior court judge, unless candidates announced themselves therefor, and the ballot was arranged accordingly.—*State v. Gilliam*, 160 P. 757.

¶126(7) (Okla.) Duties of the county election board in recounting ballots cast at a primary election under Rev. Laws 1910, § 3088, are ministerial, and the board has no judicial power.—*Whitaker v. State*, 160 P. 890.

The returns by precinct officials to the county election board, till impeached, are prima facie evidence of votes cast and the result of a primary election, which will be overcome when a different result appears on recount.—*Id.*

¶141 (Cal.) Under Primary Act, § 5, subd. 8, a candidate for a party nomination, defeated at the primary, may not have his name placed on the general election ballot as a candidate for the office under section 1188.—*Narver v. Jordan*, 160 P. 245.

¶149 (Okla.) Where, because of tampering with ballots at a primary election, the successful candidate is deprived of his nomination on recount under Rev. Laws 1910, § 3088, he may maintain action to try title to the nomination, whether his opponent was connected with the unlawful conduct or not.—*Whitaker v. State*, 160 P. 890.

¶151 (Wash.) Under Rem. Code 1915, § 4829, an application by a candidate for judge to have his name certified as primary nominee to the several county auditors held a "contest," which must be brought within five days from report of canvassing board.—*State v. Howell*, 160 P. 760.

¶154(10) (Okla.) As between ballots and canvass by election officers, the ballots are controlling evidence where they have been preserved as prescribed by statute, and have not been exposed to opportunity for tampering.—*Whitaker v. State*, 160 P. 890.

Where, after ballot boxes and election returns have been delivered to county election board and before recount, the boxes had been tampered with, the ballots are discredited so as to destroy their controlling weight as evidence in a contest over a nomination.—*Id.*

In a primary election contest, it is not error to reject evidence how certain voters voted.—*Id.*

☞154(11) (Ok.) Whether ballots introduced in evidence in an election contest were the identical ballots cast, whether they were in the same condition, and their weight as evidence, are questions for the jury.—Whitaker v. State, 160 P. 890.

X. CONTESTS.

☞291 (Utah) The residence of a married man is presumed to be in the voting district where his wife lives.—Beauregard v. Gunnison City, 160 P. 815.

The presumption is that one voting at a previous election in a certain voting precinct is still a resident of that voting precinct.—Id.

☞293(3) (Utah) A voter's declarations and conduct about the time of and recently before casting his ballot may not be proved, in an election contest in which he is not interested as a party, as tending to establish how he voted, unless such declarations are part of the res gestae.—Beauregard v. Gunnison City, 160 P. 815.

ELECTRICITY.

See Damages, ☞130; Master and Servant, ☞149, 235.

☞14(1) (Wash.) Those furnishing electric power, because of the extremely dangerous character of that agency, are charged with highest degree of care compatible with practical operation, especially in their relation with public to whom they sell and distribute power.—Haas v. Washington Water Power Co., 160 P. 954.

☞19(4) (Wash.) Compliance with Laws 1913, p. 397, not being evidence of proper construction of electric lines except in particulars covered by statute, evidence as to utility of lightning arrestors held admissible.—Haas v. Washington Water Power Co., 160 P. 954.

☞19(6) (Wash.) In a consumer's action against an electric power company for injuries from overcharged service wire, alleged to have been caused by broken transmission wires, evidence held sufficient to take to the jury question whether injury was caused by current turned on transmission circuit to test it.—Haas v. Washington Water Power Co., 160 P. 954.

Whether defendant was guilty of negligent operation held for the jury.—Id.

EMBEZZLEMENT.

See Criminal Law, ☞200, 295, 778, 1104; Indictment and Information, ☞110, 132.

☞11(1) (Ok.Cr.App.) To constitute embezzlement there must have been a fraudulent conversion consisting of placing the money to some other use than that for which he received it, or failure to pay over on proper demand, mere failure to pay over money alone not being sufficient.—Blake v. State, 160 P. 30.

☞11(1) (Ok.Cr.App.) A fraudulent conversion is an essential element of embezzlement.—Shannon v. State, 160 P. 1131.

☞13 (Cal.App.) Under Pen. Code, § 508, defining embezzlement by clerk, etc., permission to employé to handle money in cash register gave her authority to receive money for goods sold, and to make change if required out of money in register, since "permission" to do an act is "authority" to do it.—People v. Howard, 160 P. 697.

☞16 (Cal.App.) Where one honestly receives goods upon trust and afterwards fraudulently converts them to his own use, he is guilty of embezzlement.—People v. Howard, 160 P. 697.

☞23 (Ok.Cr.App.) That one charged with embezzlement appropriated the funds in good faith, believing the owner indebted to him, is no excuse or defense under Rev. Laws 1910, § 2678.—Choate v. State, 160 P. 34.

☞28 (Or.) An indictment under L. O. L. § 1962, for conversion by trustee of "\$10,000," held, in view of section 1448, subd. 6, as to certainty of stating the act charged as a crime, sufficient, without describing the money.—State v. Mishler, 160 P. 382.

☞39 (Kan.) In prosecution of warehouseman for embezzlement of wheat, it was error to reject evidence as to efforts to keep defendant's mill a going concern, to obtain funds to meet his obligations, a contract signed by prosecuting witness recognizing defendant as creditor instead of bailee, and other evidence of intent.—State v. Wales, 160 P. 204.

☞39 (Or.) Under L. O. L. § 1956, intent not being an element of the crime, in a prosecution for larceny by bailee, committed by a real estate broker in retaining money received from a prospective purchaser, the exclusion of testimony of owner of property tending to show intent with which money was retained by broker held not error.—State v. Stiles, 160 P. 128.

☞44(1) (Ok.Cr.App.) Evidence held insufficient to sustain a conviction of embezzlement.—Shannon v. State, 160 P. 1131.

☞44(5) (Or.) In a prosecution for larceny by bailee, committed by a real estate broker in retaining money received from a prospective purchaser, evidence held to sustain a finding that purchaser parted with title to the money conditionally.—State v. Stiles, 160 P. 128.

☞48(3) (Or.) In a prosecution for larceny by bailee committed by a real estate broker in retaining money received from prospective purchaser, a requested instruction held properly refused, there being evidence that the money was delivered conditionally.—State v. Stiles, 160 P. 128.

EMINENT DOMAIN.

See Appeal and Error, ☞1051, 1068, 1170; Evidence, ☞142; Municipal Corporations, ☞270-525.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

☞2(1) (Wash.) That the city in operating a garbage disposal plant was exercising a lawful governmental function, did not warrant its exercise in violation of any constitutional guaranty; and if such plant was a taking of private property, the city should, under Const. art. 1, § 16, have compensated therefor.—Jacobs v. City of Seattle, 160 P. 299.

Although Rem. & Bal. Code, § 8005, authorizes construction of municipal garbage disposal plants, and section 8311 provides that nothing done by express authority of statute can be deemed a nuisance, they do not prevent recovery for damage to property by erection of such plants, on the ground that it is a taking of property without just compensation.—Id.

☞47(1) (Idaho) The act of an officer of a corporation in running lines, placing stakes and blazing a part of the trails for a right of way, without corporate action of directors, was not an appropriation of land to a public use preventing its condemnation by another.—Blackwell Lumber Co. v. Empire Mill Co., 160 P. 265.

Where no legal appropriation of land for a public use has been made, a purported conveyance thereof for such use has no validity.—Id.

II. COMPENSATION.

(C) Measure and Amount.

☞134 (Cal.App.) Under Code Civ. Proc. § 1249, providing that the owner is entitled to the actual value of land sought to be condemned at the date of the issuance of summons in condemnation action, the owner is entitled to the market value of the land for the most valuable uses of which it is capable.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§171 (Idaho) Prior occupation of land by one seeking to condemn it does not preclude the condemnor from subsequent measures to condemn.—*Blackwell Lumber Co. v. Empire Mill Co.*, 160 P. 265.

§241 (Idaho) In an action to condemn land for a logging railroad, where the condemnor will require the road for not more than one year, judgment of condemnation should limit the period of use accordingly.—*Blackwell Lumber Co. v. Empire Mill Co.*, 160 P. 265.

§262(4) (Idaho) In an action to condemn land, where there is substantial conflict in the evidence as to necessity, the findings of the trial court will not be disturbed.—*Blackwell Lumber Co. v. Empire Mill Co.*, 160 P. 265.

IV. REMEDIES OF OWNERS OF PROPERTY.

§266 (Idaho) Prior occupation of land by one seeking to condemn it renders the condemnor liable in trespass.—*Blackwell Lumber Co. v. Empire Mill Co.*, 160 P. 265.

§271 (Wash.) One whose property is damaged by construction and maintenance of a municipal garbage disposal plant should seek recovery as for taking of property without just compensation, and not by way of damages for negligent operation; and, having sought recovery on the first ground, is precluded from recovering on the second.—*Jacobs v. City of Seattle*, 160 P. 299.

§293(1) (Wash.) Complaint alleging erection and maintenance of municipal garbage disposal plant, with resultant damage to plaintiffs' property, but not charging or relying on negligent operation, is sufficient, as against general demurrer, on which to base recovery of compensation for the damage on the ground that it was a taking of the property.—*Jacobs v. City of Seattle*, 160 P. 299.

EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

See Commerce, §27; Master and Servant, §111, 250½, 288, 356-419.

EMPLOYERS' LIABILITY INSURANCE.

See Insurance, §598.

ENTRY.

See Judgment, §272; Motions, §56.

EQUITABLE ASSIGNMENTS.

See Assignments.

EQUITABLE ESTOPPEL.

See Estoppel, §52-119.

EQUITY.

See Appeal and Error, §1000, 1065; Cancellation of Instruments; Discovery; Fraudulent Conveyances; Injunction; Judgment, §414, 443; Partition; Quieting Title; Reformation of Instruments; Specific Performance; Subrogation; Usury, §94.

ESCHEAT.

§6 (Or.) Where state alleged in plain terms that it was claiming personal property of deceased as well as realty, it was competent to introduce findings as to heirs of deceased and

order of distribution of county court.—*State v. Finnigan*, 160 P. 370.

Where order as to distribution of personal property of deceased and a finding as to heirs made by county court would be competent under pleadings, a binding disclaimer by state of its right to personality would not render the order and findings incompetent.—*Id.*

An instruction held not improper as requiring the state to prove that the deceased left no heirs.—*Id.*

ESCROWS.

See Deeds, §61.

§4 (Cal.) Deposit of deed with third person to be delivered to grantees upon payment of price for land fixed by grantor is not a delivery in escrow, where there was no prior or contemporaneous contract of sale of land of which delivery was to be the consummation.—*Holland v. McCarthy*, 160 P. 1069.

Where, after the grantor deposited a deed with third party for delivery to grantees upon payment of price, grantees consented that third party might retain deed until they were ready to pay, deed was not converted into valid escrow.—*Id.*

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Joint Tenancy; Landlord and Tenant; Perpetuities; Tenancy in Common; Wills.

ESTOPPEL.

See Appeal and Error, §882; Criminal Law, §1137; Executors and Administrators, §72; Judgment, §570-715; Landlord and Tenant, §63; Religious Societies; Wharves.

II. BY DEED.

(A) Creation and Operation in General.

§22(2) (Kan.) While ordinarily a mortgagee may assert invalidity of prior mortgage, he is estopped to do so where his mortgage contains recital that it is subject to the prior mortgage.—*Moffatt v. Fouts*, 160 P. 1137.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

§52 (Okla.) Waiver is the voluntary or intentional relinquishment of a known right or such conduct as warrants an inference of such intent.—*American Cent. Ins. Co. of St. Louis, Mo., v. Sinclair*, 160 P. 60.

§54 (N.M.) Where one's conduct has lead another to take a position detrimental to his interests, the former is estopped notwithstanding ignorance of his legal rights, if he had full knowledge of the facts.—*King v. Stroup*, 160 P. 367.

§56 (N.M.) Estoppel by conduct can arise only where the person setting up estoppel has been caused by conduct of the other to take a position to his detriment which he would not have taken but for reliance upon such conduct.—*Doran v. First Nat. Bank*, 160 P. 770.

§57 (N.M.) Estoppel will not arise from the mere retention of a note of a third party by a person's attorney, where no benefits are accepted therefrom and it was received by the attorney without authority.—*Doran v. First Nat. Bank*, 160 P. 770.

§62(5) (Or.) A city is not estopped by unauthorized false statements of the city recorder as to the probable cost of an improvement from enforcing the assessment for the improvement.—*Parker v. City of Hood River*, 160 P. 1158.

(B) Grounds of Estoppel.

§68(6) (Mont.) In action by assignee of judgment of justice court against lumber company,

levying on proceeds thereof as property of assignor, and defendant sheriff, who paid over proceeds to company on its execution, proof that the judgment was valid *held unnecessary inasmuch as defendants had recognized its validity.*—Kitts v. Woods, 160 P. 512.

§79 (Wyo.) Where statutory procedure was not followed in eminent domain proceeding, but parties stipulated for judgment in amount of award, upon payment of which owner would execute deed and give company immediate possession, owner could not thereafter assert claim for damages for flooding of land.—Big Horn Power Co. v. Martin, 160 P. 334.

§81 (N.M.) Where an administrator pays debts and legacies prematurely at the request of the sole beneficiary, the latter is estopped from subsequently questioning the legality of the payments.—King v. Stroup, 160 P. 367.

§94(1) (Ok.) Where a bank held a mortgage on crops and the cashier after the record of the mortgage drew a mortgage executed by the same party to plaintiff, it did not estop the bank to enforce its mortgage because the cashier failed to mention to plaintiff the bank's mortgage.—Farmers' State Bank of Jefferson v. Jordon, 160 P. 53.

(E) Pleading, Evidence, Trial, and Review.

§119 (Cal.App.) Whether in a given case the facts shown are sufficient to create an estoppel is a question for the court.—Sellers v. Solway Land Co., 160 P. 175.

§119 (Ok.) Waiver, involving intention to abandon or relinquish a right, is a question for the jury.—American Cent. Ins. Co. of St. Louis, Mo., v. Sinclair, 160 P. 60.

EVICITION.

See Landlord and Tenant, §172-178.

EVIDENCE.

See Criminal Law, §295-570; Depositions; Discovery; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, §683; Trial, §35-83.

I. JUDICIAL NOTICE.

§35 (Mont.) Courts of Montana do not take judicial notice of the statute law of a sister state.—McBain v. Northern Pac. Ry. Co., 160 P. 654.

§35 (Or.) The Supreme Court will not take judicial notice of the statutes of another state.—Rainey v. Rudd, 160 P. 1168.

II. PRESUMPTIONS.

§63 (Wash.) One is presumed sane up to the time he is shown to have become insane.—Roberts v. Pacific Telephone & Telegraph Co., 160 P. 965.

§67(1) (Cal.) Although Code Civ. Proc. § 1963, subd. 32, states rebuttable presumption that a thing once proved to exist continues, the fact that deceased worked for defendant as a day laborer at other places and times for over a year, would not raise the presumption that he was so working when injured.—Connolly v. Industrial Acc. Commission of California, 160 P. 239.

§67(2) (Wash.) Insanity of a fixed and settled nature, once shown to exist, must be presumed to continue.—Roberts v. Pacific Telephone & Telegraph Co., 160 P. 965.

§78 (Wyo.) Failure to offer proof *held* to create conclusion that proof would support the

inferences against him.—Studebaker Corp. of America v. Hanson, 160 P. 886.

§80(2) (Or.) Where the statutes of another state are not pleaded, it will be presumed that upon the questions involved the common law prevails.—Rainey v. Rudd, 160 P. 1168.

§83(1) (Or.) When the legality of a subsequent act depends upon the doing of a prior act, proof of the performance of the subsequent act may carry with it, until the contrary is shown, the presumption that the prior act was correctly done.—State v. Evans, 160 P. 140.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§114 (Cal.App.) A copy of record of reports of weather to land company from different parts of the county was not competent to disprove that it rained at the oil well where plaintiff was injured.—Arundell v. American Oilfields Co., 160 P. 159.

§116 (Colo.) Where the servant alleged agreement to pay a sum certain for services, and the master produced evidence of a 20 per cent. cut in all employee's salaries, with a collateral conditional promise to pay the servant his overdue salary if business improved, it was not error to permit servant to show that others were afterwards paid in full.—Neef Bros. Brewing Co. v. Krotter, 160 P. 1039.

(C) Similar Facts and Transactions.

§134 (Cal.App.) In an action on an account stated, evidence of previous similar transactions between the parties not included in the account, *held* admissible to show what they meant by net profits.—Fee v. McPhee Co., 160 P. 397.

§142(1) (Cal.App.) Under Code Civ. Proc. § 1249, as to ascertaining value of condemned land, the prices at which other lands of like quality and adaptation and similarly situated may have been sold cannot be accepted as a just criterion for ascertaining the actual value of the land sought to be taken.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

V. BEST AND SECONDARY EVIDENCE.

§158(15) (Ok.) An official return is the best evidence of the doings of the officer under the mandate of process, and is sufficient proof of facts which the officer is authorized to certify.—Cox v. State, 160 P. 896.

§158(27) (Ok.) If a contract of agency is in writing, the written instrument is the best evidence.—Ford Motor Co. v. Livesay, 160 P. 901.

§185(9) (Or.) Under L. O. L. §§ 712, 782, in an action against lessees, secondary evidence of an assignment to a third person *held* not admissible on notice to lessees to produce, for it must be presumed the assignment would be in possession of the assignee.—Toomey v. Casey, 160 P. 583.

§186(2) (Or.) The contents of a written instrument which the opposite party did not produce on demand cannot be established by testimony as to the witnesses' conclusion as to its legal effect, but its language must be given.—Toomey v. Casey, 160 P. 588.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§220(1) (Utah) In suit against railroad on claims assigned to plaintiff, where such assignment rested on parol, testimony of things said and done in his presence respecting the assignment *held* properly received.—Broadbent v. Denver & R. G. Ry. Co., 160 P. 1185.

(D) By Agents or Other Representatives.

§245 (Utah) In action against county for services as handwriting expert called by district

attorney in criminal cases, evidence as to what chairman of county board said to district or county attorney outside of board meetings, and as to what county attorney told district attorney, was inadmissible, but evidence that board ratified the employment, was admissible.—*Kytka v. Weber County*, 160 P. 111.

⚡252 (Wash.) Declarations of insured are admissible against the beneficiary under mutual benefit insurance.—*Armstrong v. Modern Woodmen of America*, 160 P. 946.

(E) Proof and Effect.

⚡265(2) (Wash.) Statement in proof of death of age of insured is not conclusive on, but may be controverted by, the beneficiary in an action on a contract of mutual benefit insurance, in the absence of facts creating an estoppel.—*Armstrong v. Modern Woodmen of America*, 160 P. 946.

⚡265(7) (Utah) Whatever legal presumptions might be indulged from silence, when the truth of a fact which renders a judgment void, is judicially admitted, for all purposes of cause in which it is made, and as against him who made it, it ought to be treated as void.—*Thero v. Franklin*, 160 P. 1188.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⚡271(18) (Cal.App.) In action for balance due on account of salary, stubs of checks and resolutions of defendant's board of directors, made long after making of contract with plaintiff, were self-serving declarations, and properly excluded.—*Breslauer v. McCormick-Saeltzer Co.*, 160 P. 251.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records, and Certificates.

⚡332(1) (Wash.) Where injured plaintiff sought by alleging insanity to avoid the bar of limitations, and also of a release given by him, commitment papers conforming to Rem. & Bal. Code, § 5953, in proceedings whereby he was sent to an insane asylum, were admissible to show the existence of insanity from the time of commitment until discharge, notwithstanding the proceeding was ex parte.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 965.

⚡333(1) (Wash.) Record of marriage license to insured, stating him to be over 21, is admissible on the issue of his age, a statute forbidding the recorder to issue it to him if under that age, and requiring him to state therein whether he was of age.—*Armstrong v. Modern Woodmen of America*, 160 P. 946.

(B) Exemplifications, Transcripts, and Certified Copies.

⚡348(2) (Okla.) A certified copy of foreign judgment sued on held properly authenticated under Rev. St. U. S. § 905 (U. S. Comp. St. 1913, § 1519), though no judgment is shown to have been signed by the trial judge and filed in the court.—*Shufeldt v. Bank of Mound City*, 160 P. 923.

(C) Private Writings and Publications.

⚡354(1) (Wash.) Where funds belonging to intervenor in a garnishment action had been received by defendant and deposited in his bank account, garnished by plaintiff, the bank's books are admissible to show the actual state of the account at all times during its currency.—*Chase & Baker Co. v. Olmsted*, 160 P. 952.

⚡354(12) (Wash.) Book kept by defendant showing only account with plaintiff's testate,

though defendant had been in the grocery business, was director in a bank and apparently a careful business man, when the items were apparently made at the same time, was not admissible as a shop book.—*Goldsworthy v. Oliver*, 160 P. 4.

(D) Production, Authentication, and Effect.

⚡373(1) (Wyo.) In suit on certificate of deposit by one claiming to hold it by or under an indorsement, where its indorsement was denied, proof of execution of certificate would not prove indorsement, or entitle indorsement to be admitted in evidence.—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins*, 160 P. 1171.

⚡378(1) (Cal.App.) Where not acknowledged, a private writing, such as a letter to be admissible must be proved in one of three ways provided by Code Civ. Proc. § 1940, for proving writings.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.*, 160 P. 862.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

⚡419(9) (Wash.) Evidence of different consideration from that mentioned in lease, such as an agreement to build up the business of the hotel, is inadmissible where such proof would modify or change the legal operation and effect of the lease, which was complete in itself.—*Grubb v. House*, 160 P. 421.

⚡419(11) (Wash.) Parol evidence is inadmissible to vary the expressed consideration in a written stock subscription agreement by showing a representation that the work promised was to cost more than it did.—*Eggleston v. Pantages*, 160 P. 425.

⚡424 (Wash.) In action for broker's commission for effecting sale of stock, etc., contract between defendant and party with whom he exchanged, not fixing any separate value on stock, held not conclusive on broker, who might establish its value by parol evidence.—*Godefroy v. Hupp*, 160 P. 1056.

(C) Separate or Subsequent Oral Agreement.

⚡442(4) (Cal.App.) In realty broker's action for commission, held, that court properly permitted broker to introduce evidence of oral agreement between himself and owner that he was to receive as commission all over net sum stated in written authorization to sell as purchase price.—*Daniel v. Calkins*, 160 P. 1082.

⚡442(6) (Wash.) Where an instrument is complete in itself, evidence of a parol or contemporaneous warranty is inadmissible.—*Grubb v. House*, 160 P. 421.

⚡445(2) (Cal.App.) Although a contract for sale of grapes designated a city as the place of delivery and acceptance, evidence that the person making the contract for the purchaser continued to act as the authorized agent of purchaser, and under such authority accepted certain grapes under the contract at the place of shipment, was admissible in action upon the contract.—*Reese v. G. B. Amigo Co.*, 160 P. 837.

(D) Construction or Application of Language of Written Instrument.

⚡450(5) (Okla.) Where the words expressing a condition in a contract are ambiguous, it is not error to admit parol evidence of the meaning intended by the parties.—*Gilbert v. Citizens' Nat. Bank of Chickasha*, 160 P. 635.

(E) Showing Discharge or Performance of Obligation.

⚡467 (Wash.) Evidence of waiver of the right to demand a money tender under the terms of a written contract is not inadmissible as varying the terms of the contract.—Wallace v. Babcock, 160 P. 1041.

XII. OPINION EVIDENCE.**(A) Conclusions and Opinions of Witnesses in General.**

⚡471(3) (Cal.App.) Where a witness has identified the account books and explained the items therein shown, a question as to what the books showed to have been the profits of a certain job is not objectionable as calling for a conclusion of the witness.—Fee v. McPhee Co., 160 P. 397.

⚡471(16) (Cal.App.) In action for a breach of contract to pay for filling land, testimony of plaintiff's president that two letters were received from defendant's engineer, held not a mere conclusion of the witness.—Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co., 160 P. 862.

⚡471(28) (Cal.App.) Plaintiff, suing on an alleged assumption of a debt to him, could testify that he did cancel the antecedent obligation and accepted the new promise of defendant, these being questions of fact and no one better qualified than he to testify of them.—Baxter v. Chico Const. Co., 160 P. 1084.

⚡471(29) (Wyo.) In action by indorsee of certificate of deposit issued by defendant bank, answer of plaintiff's witness that it had been "negotiated with plaintiff bank," in view of technical meaning of the word "negotiated" under Comp. St. 1910, § 3188, involved a legal conclusion.—Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins, 160 P. 1171.

⚡471(30) (Ok.) Evidence that a party is or is not an agent is a mere conclusion, but witness may state facts concerning transactions between him and principal, leaving court and jury to determine existence of agency.—Ford Motor Co. v. Livesay, 160 P. 901.

⚡472(2) (Ok.) In an action against a railway for overflowing land, the admission of testimony as to the amount of damages was error; as the witness should have been required to state the facts, and not conclusions, as to the amount of damage.—Kansas City Southern Ry. Co. v. Hurley, 160 P. 910.

(B) Subjects of Expert Testimony.

⚡509 (Kan.) In an action under the compensation act, expert testimony of physicians is admissible to show that partial disability exists.—Sillix v. Armour & Co., 160 P. 1021.

⚡514(2) (Utah) In action by one injured when he tripped over a rope connecting a dead motor car with a live one, question whether manner of moving dead car was safe is not one of expert knowledge.—Musgrave v. Studebaker Bros. Co. of Utah, 160 P. 117.

⚡528(1) (Utah) Expert medical witnesses held properly permitted to testify that injury could and probably did produce certain ailments suffered by plaintiff.—Sharp v. Ogden Rapid Transit Co., 160 P. 438.

(C) Competency of Experts.

⚡539 (Wash.) Injured brakeman testifying that injury resulted from release of air brake which defendant denied, could not testify whether it could have followed release of throttle, no qualification being shown.—Aldread v. Northern Pac. Ry. Co., 160 P. 429.

⚡543(3) (Cal.App.) A witness by declaring he had for many years been engaged in buying and selling real estate for himself and others, and that he had seen and was acquainted with the land in controversy, sufficiently qualified himself to testify upon the question of its

value.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

(D) Examination of Experts.

⚡548 (Wash.) That the testimony of physicians expressing the opinion that the sickness of plaintiff was caused by eating meat purchased from defendant, was based partly on the history of the case as detailed to them by the plaintiff is not ground for its exclusion.—Flesscher v. Carstens Packing Co., 160 P. 14.

⚡553(2) (Wash.) That a hypothetical question to an expert witness did not include matters subsequently adduced by the defendant was not a fault.—Flesscher v. Carstens Packing Co., 160 P. 14.

⚡555 (Cal.App.) While witnesses may, upon their examination in chief, give the reasons upon which they base their opinions, they should never be allowed to go into details of particular sales or transactions.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

⚡558(7) (Cal.App.) Cross-examination of a witness as to value of land by questioning him as to the fact of other sales of lands in the same district and the prices at which they were made is proper, not to fix the value of land in dispute, but to impeach his opinion.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

⚡558(8) (Cal.App.) Cross-examination of a witness as to value of land, by questioning him as to the fact of other sales of lands in the same district and the prices at which they were made, is proper, not to fix the value of land in dispute, but to test his knowledge.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

⚡558(12) (Cal.App.) Cross-examination of a witness as to value, by questioning him as to other sales of lands, does not justify redirect examination as to sales of other lands and prices paid thereon, since redirect examination often amounts, in effect, to examination in chief.—Reclamation Dist. No. 730 v. Inglin, 160 P. 1098.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

⚡582(3) (Ok.) Before the longhand transcript of the testimony of a witness at a former trial can be admitted at subsequent trial, it must be duly certified by the reporter or agreed by the parties as being the evidence, and can only be used under conditions warranting use of deposition.—St. Louis & S. F. R. Co. v. Walker, 160 P. 79.

XIV. WEIGHT AND SUFFICIENCY.

⚡587 (Cal.App.) Under Code Civ. Proc. §§ 1832, 1958, 1960, the law does not require in all cases direct evidence of a fact in dispute.—Arundell v. American Oilfields Co., 160 P. 159.

EXAMINATION.

See Criminal Law, ⚡1170½; Evidence, ⚡548-558; Witnesses, ⚡267-304.

EXCEPTIONS.

See Appeal and Error, ⚡248, 274; Vendor and Purchaser, ⚡230.

EXCEPTIONS, BILL OF.

See Appeal and Error, ⚡544, 545.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

⚡16 (Or.) A bill of exceptions consisting of a verbatim report of the testimony for both parties given at the trial in the circuit court is not a proper bill.—Douglas Creditors' Ass'n v. Hutchason, 160 P. 589.

EXCESSIVE DAMAGES.

See Damages, ¶131, 132.

EXCHANGE OF PROPERTY.

¶8(4) (Cal.) In wife's action in ejectment, wherein defendant sought specific performance of contract made by her husband to exchange her land for defendant's, evidence held insufficient to show fraudulent misrepresentations by defendant concerning value of his property.—Schader v. White, 160 P. 557.

EXECUTION.

See Attachment; Estoppel, ¶68; Exemptions; Homestead.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

¶59 (Cal.) The only way in which a judgment can be legally enforced is through the process of the court by which the judgment is given.—Jameson v. Chanslor-Canfield Midway Oil Co., 160 P. 1066.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

¶171(4) (Or.) The owner of real property may restrain sale thereof under a judgment against a third party, for payment of which owner of such realty is not liable.—Lieblin v. Breyman Leather Co., 160 P. 1167.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

¶222(2) (Okla.) Under Rev. Laws 1910, § 5166, a notice of sale under execution published once a week for six weeks in a daily edition is insufficient, and objection to confirmation of the sale should be sustained.—Cherry v. City Nat. Bank, 160 P. 896.

EXECUTORS AND ADMINISTRATORS.

See Death, ¶81; Descent and Distribution; Estoppel, ¶81; Judgment, ¶793; Jury, ¶19; Principal and Surety, ¶126; Wills; Witnesses, ¶146-164.

I. ADMINISTRATION IN GENERAL.

¶3(1) (Wash.) Since by Rem. & Bal. Code, § 1366, realty descends to heirs immediately on death of the ancestor, it need not be included in probate proceedings, unless necessary, to pay debts, and an heir cannot be estopped for failure to object to its omission to claim title thereto.—Showalter v. Spangle, 160 P. 1042.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

¶17(3) (Cal.) Under Code Civ. Proc. §§ 1850a, 1866, a brother of decedent named as beneficiary under her will not nominating an executor, may be appointed administrator with will annexed, as against surviving husband not taking anything under the will.—In re Cook's Estate, 160 P. 553.

¶20(7) (Cal.) In a proceeding to have letters of administration granted on local estate of nonresident decedent at instance of petitioning creditors, it is only necessary to make a prima facie showing that petitioners are creditors, question of validity of asserted claim being one to be determined on appropriate litigation between creditors and representatives of estate.—In re Mumford's Estate, 160 P. 667.

In proceeding by attorneys to admit to probate foreign will of deceased and for granting of letters of administration with will annexed on ground that attorneys were creditors,

evidence held insufficient to establish prima facie the indebtedness.—Id.

¶29(2) (Cal.) Bill by one heir attacking appointment of administrator held not to reveal any right to attack that appointment collaterally.—Baxter v. Boege, 160 P. 1072.

¶37(1) (Or.) Surety of former administrator is not necessarily disqualified from acting as administrator de bonis non because of potential interest which may thereafter appear; but to justify his removal something more should appear, as court cannot presume that he will fail to properly administer.—In re Marks' Estate, 160 P. 540.

III. ASSETS, APPRAISAL, AND INVENTORY.

¶72 (Kan.) Where the probate court directed an executor to correct his inventory by omitting rent wheat claimed by the widow, the executor was not estopped from claiming the wheat as assets by participating in the probate court proceeding.—Ahmert v. Ahmert, 160 P. 203.

IV. COLLECTION AND MANAGEMENT OF ESTATE.**(A) In General.**

¶76 (Or.) County courts are vested with a very large discretionary power over the conduct of executors and administrators.—In re Marks' Estate, 160 P. 540.

¶85(6) (Colo.) In a proceeding under Rev. St. 1908, § 7253, wherein an heir is cited for examination as to moneys in his hands due the estate, the court, on ascertaining that money has been concealed, cannot try controverted questions as to right to recover, but the estate may recover in a separate action.—Vick Roy v. Morgan, 160 P. 1030.

¶111(3) (Wash.) Where, on final judgment after affirmance on appeal of a judgment in a will contest, the court refused to tax costs against the unsuccessful contestants, the executrix could not charge the contestants with fees and expenses of the contest proceedings in her final account.—In re Brown's Estate, 160 P. 945.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

¶176(Cal.) Under Code Civ. Proc. §§ 1465, 1466, a widow, despite agreement with deceased husband that profits of separate property of each should be considered as community property and fact that her separate property was sufficient for her maintenance, held entitled to allowance for support out of estate of deceased husband.—In re Finch's Estate, 160 P. 556.

¶181 (Cal.) Under Code Civ. Proc. §§ 1465, 1466, a widow is entitled to have a reasonable allowance for her support made from the estate of her deceased husband, whether it be community property or separate estate and despite her ownership of property sufficient to maintain herself.—In re Finch's Estate, 160 P. 556.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.**(B) Application and Order.**

¶337 (Or.) By publication of citation to part of parties interested and personal service as to others, county court acquired jurisdiction to decide upon administrator's application for an order to sell realty.—In re Marks' Estate, 160 P. 540.

¶348 (Or.) Under L. O. L. § 59, petitioners seeking vacation of order for administrator's sale of realty would be denied relief for failure to file their answer with their petition.—In re Marks' Estate, 160 P. 540.

⚡358(4) (Or.) In absence of any direct statutory provision for setting aside an order for an administrator's sale of realty, the discretion of the court therein under L. O. L. § 103, is not reviewable except for an abuse of discretion.—In re Marks' Estate, 160 P. 540.

X. ACTIONS.

⚡431(8) (Utah) A mortgagee whose mortgage was executed by an executor under order of court need not show compliance with Comp. St. 1907, § 3858, for the statute applies only to presentation of claims arising out of transactions with deceased, and not to claims based on transactions with an executor.—Martin v. Saxton, 160 P. 441.

⚡449 (Kan.) Where trial amendment was allowed to the petition to allege that no administrator had been appointed, proof of that fact was rendered competent.—White v. City of Bonner Springs, 160 P. 1024.

XI. ACCOUNTING AND SETTLEMENT.

(C) Charges and Credits.

⚡481 (Kan.) In accounting in probate court, administratrix is not absolutely entitled to credit for payment of judgment, and the court may determine whether suit was diligently defended, or prudently compromised, or whether she subjected herself thereto by negligence, fraud, or collusion.—Sarbach v. Fidelity & Deposit Co. of Maryland, 160 P. 990.

(E) Stating, Settling, Opening, and Review.

⚡509(4) (Or.) Parties interested in an estate may surcharge an administrator's final account, if he fails to reduce its choses in action to possession.—In re Marks' Estate, 160 P. 540.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

⚡528(5) (Or.) If an administrator owes the estate, his debt will be reckoned as so much money on hand for which his sureties will be liable.—In re Marks' Estate, 160 P. 540.

EXEMPTIONS.

See Homestead; Sheriffs and Constables, ⚡129; Taxation, ⚡191-218.

II. TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY.

⚡88 (Okl.) The sale of personalty, exempt from execution or liens, does not render it subject to attachment in an action on an unsecured claim against the vendor.—Cook v. Carter, 160 P. 877.

IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

⚡114 (Okl.) It is not the duty of an officer levying a writ to select and set apart the property exempt to the judgment debtor or his family.—Sale v. Shipp, 160 P. 502.

⚡116 (Okl.) Where the wife of defendant in attachment desires to claim property as exempt to the family, she should inform the officer holding the process of the particular property claimed.—Sale v. Shipp, 160 P. 502.

EXHIBITS.

See Pleading, ⚡307, 310.

EXPERT TESTIMONY.

See Evidence, ⚡509-558.

EXPLOSIVES.

See Burglary, ⚡3.

⚡8 (Okl.) Leaving cans with small quantities of powder where infants had access to them is

the proximate cause of injury to a child, though the immediate cause was the striking of a match by a companion of the child.—Folsom-Morris Coal Mining Co. v. De Vork, 160 P. 84.

EXPRESS TRUSTS.

See Trusts, ⚡1-44.

FACTORIES.

See Master and Servant, ⚡361.

FALSE IMPRISONMENT.

See Dismissal and Nonsuit, ⚡26; Limitation of Actions, ⚡55, 118, 119; Torts, ⚡22.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

⚡3 (Or.) Where a complaint charged that defendants caused plaintiff's imprisonment under an execution order unlawfully issued by the defendant clerk of court without authority, directing the sheriff to arrest and imprison him, the gist of the action is false imprisonment, and not malicious prosecution.—Lane v. Ball, 160 P. 144.

⚡7(5) (Colo.) Where a person has pleaded guilty or has been convicted of a criminal charge or violation of municipal ordinance, he cannot recover for false imprisonment.—Hushaw v. Dunn, 160 P. 1037.

(B) Actions.

⚡20(1) (Or.) A complaint for false imprisonment, which alleged that defendants caused plaintiff to be imprisoned under an execution order issued by the defendant clerk of court without legal authority, held sufficient, although it did not aver want of probable cause.—Lane v. Ball, 160 P. 144.

⚡36 (Cal.App.) Verdict of \$2,500 to a woman in good health, who was assaulted and placed in a wagon with caged inclosure, to force payment for C. O. D. package, and thereby humiliated, excited, and nervously shocked, with serious damage to her health, was not excessive.—Riffel v. Letts, 160 P. 845.

FALSE PERSONATION.

See Dismissal and Nonsuit.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Commerce, ⚡27; Master and Servant, ⚡111, 204, 250½, 265, 288.

FEES.

See Attorney and Client, ⚡143-183; Champerty and Maintenance, ⚡5; Counties, ⚡78; Divorce, ⚡222; Intoxicating Liquors, ⚡95.

FELLOW SERVANTS.

See Master and Servant, ⚡170, 177, 216, 279.

FILING.

See Appeal and Error, ⚡773; Mechanics' Liens, ⚡132.

FINAL JUDGMENTS AND DECREES.

See Appeal and Error, ⚡79, 82.

FINDINGS.

See Appeal and Error, ⚡1000-1015, 1122; Criminal Law, ⚡1158, 1159.

FISH.

See Game.

☞8 (Cal.App.) Under Const. art. 4, § 25½, art. 11, § 11, St. 1911, p. 425, St. 1915, p. 589, Penal Code, § 628f, enacted by St. 1915, p. 112, held that ordinance of county board of supervisors making it a misdemeanor to ship or transport crabs or clams taken in the county to points outside the county was void.—*Ex parte Cencinino*, 160 P. 167.

Fish and game constitute the property of the people of the state in their collective capacity, and the regulation of their pursuit is within the police power.—*Id.*

☞15 (Mont.) In trial for unlawfully taking fish from a stream, prohibited by Laws 1913, c. 79, § 2, evidence that accused deposited in a river fishberries ground up with meat which were eaten by the fish and at least one fish so stupefied was taken by accused from the river, was sufficient.—*State v. Russell*, 160 P. 655.

FLOWAGE.

See Waters and Water Courses, ☞171.

FOOD.

See Sales, ☞274.

☞25 (Wash.) In action for injuries from unwholesome food purchased for immediate consumption, it is not necessary to aver in terms existence of relation casting duty on vendor, or that he knew of the injurious quality of the food.—*Flessner v. Carstens Packing Co.*, 160 P. 14.

In an action for injuries from unwholesome meat sold to plaintiff for immediate consumption, evidence held to present a question for the jury as to the unwholesomeness of the meat and whether it caused plaintiff's sickness.—*Id.*

Where meat sold for immediate consumption was in fact unwholesome and caused the purchaser's sickness, scienter on the part of the dealer is presumed as a matter of law, especially where the vendor is not only the dealer, but also the manufacturer.—*Id.*

FORECLOSURE.

See Chattel Mortgages, ☞256-278; Mortgages, ☞401-474.

FOREIGN CORPORATIONS.

See Building and Loan Associations.

FOREIGN JUDGMENTS.

See Judgment, ☞938.

FOREIGN LAWS.

See Evidence, ☞35, 80; Statutes, ☞226.

FORFEITURES.

See Bail, ☞77-89; Insurance, ☞310-400; Mines and Minerals, ☞78, 79; Sales, ☞477, 479.

FORMER JEOPARDY.

See Criminal Law, ☞161-295.

FRAUD.

See Bills and Notes, ☞373; Contracts, ☞94; District and Prosecuting Attorneys, ☞10; Exchange of Property; Frauds, Statute of; Fraudulent Conveyances; Judgment, ☞443; Limitation of Actions, ☞100; Mandamus, ☞172; Mortgages, ☞78; Plead-

ing, ☞8; Public Lands, ☞158½; Sales, ☞88; Vendor and Purchaser, ☞122.

I. DECEPTION CONSTITUTING FRAUD AND LIABILITY THEREFOR.

☞9 (Okl.) To constitute actionable fraud there must be false material misrepresentation, made knowingly or recklessly, with intent that it be acted upon, and which is acted on to the injury of the party.—*Wingate v. Render*, 160 P. 614.

☞11(1) (Okl.) An assignee of a leasehold cannot predicate fraud on representations of his assignor, constituting mere expressions of opinion, especially where he personally views the premises and makes independent inquiry relative thereto.—*Clift v. Hart*, 160 P. 912.

☞13(2) (Okl.) A party is guilty of deceit under Rev. Laws 1910, §§ 903, 905, 993, and 994, where he induces another to enter into a contract by a positive material assertion which is false, though the party making it believed it to be true.—*Kelly v. Robertson*, 160 P. 46.

☞13(3) (Okl.) A party is guilty of deceit under Rev. Laws 1910, §§ 903, 905, 993, and 994, where he induces another to enter into a contract by a positive material assertion not warranted by his information.—*Kelly v. Robertson*, 160 P. 46.

☞23 (Okl.) A vendee in exchange of property has a right to act on the positive representations of material facts made by a vendor, though means of knowledge were open to him.—*Kelly v. Robertson*, 160 P. 46.

II. ACTIONS.**(C) Evidence.**

☞55 (Idaho) While the purchaser of realty may rely on representations by the vendor as to boundary lines, it is not error to admit evidence that it is customary for timber cruisers to definitely locate the boundaries and that it would be easy to do so, as affecting the probability of the testimony as to the representations.—*Taylor v. Lytle*, 160 P. 942.

☞58(1) (Okl.) Circumstances altogether inconclusive, separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, constitute conclusive proof of fraud.—*Wingate v. Render*, 160 P. 614.

☞58(1) (Okl.) Fraud, though in equity it may be inferred from circumstances, must be shown and brought home to the opposite party by clear and convincing proof.—*Ely Walker Dry Goods Co. v. Smith*, 160 P. 898.

(D) Damages.

☞59(1) (Wash.) In an action for damages for false representations as to the value of land for which plaintiff traded his equity in certain lots, the measure of damage was the actual loss sustained, measured by value of plaintiff's interest therein.—*Bouckaert v. Burwell & Morford*, 160 P. 7.

☞59(3) (Colo.) In action for damages from misrepresentations as to value of premises purchased, plaintiff's measure of damages is difference between contract price and reasonable market value of land.—*Walker v. MacMillan*, 160 P. 1062.

FRAUDS, STATUTE OF.

See Appeal and Error, ☞173; Brokers, ☞43.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCARriage OF ANOTHER.

☞32 (Cal.App.) Where a storekeeper released a subcontractor on his indebtedness, upon

the contractor's assuming his bill, and thereafter looked only to the contractor, agreeing, as consideration of such assumption, to furnish the subcontractor necessary supplies for the work, this was a novation, excepted from the statute of frauds by Civ. Code, § 2794, subd. 3.—*Baxter v. Chico Const. Co.*, 160 P. 1084.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§58(1) (Or.) In an action for rent on five-year lease, where defendant sought to recoup damages from false representation of plaintiff that another party desired the lease at a higher price, inducing defendant to execute the lease at such higher price, the oral negotiations of the parties concerning the lease were inadmissible under statute of frauds (L. O. L. § 808).—*Caples v. Morgan*, 160 P. 1154.

§74(3) (Wash.) A parol agreement contemporaneous with indorsement of a secured note, to be bound by a previous agreement that a deed to land would be accepted in full payment held void under statute of frauds.—*Fidelity Nat. Bank of Spokane v. Hosea*, 160 P. 960.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§108(4) (Cal.) A deed, deposited with a third person for delivery to grantees upon their payment of the price for the land, which recited consideration of \$10, was not a memorandum of the grantor's oral contract to sell for \$3,000 sufficient to satisfy statute of frauds.—*Holland v. McCarthy*, 160 P. 1069.

§116(5) (Cal.) By Civ. Code, § 1624, subd. 5, agent's authority to make contract to sell his principal's land is not valid, unless in writing and signed by principal.—*Holland v. McCarthy*, 160 P. 1069.

IX. OPERATION AND EFFECT OF STATUTE.

§129(3) (Wash.) Building up the good will of a leased hotel is not such permanent improvement of the freehold by the lessee as will remove his lease, invalid because not acknowledged, from the operation of the statute of frauds.—*Grubb v. House*, 160 P. 421.

§130(1) (Wash.) Where several stipulations of single contract are so interdependent that parties cannot reasonably be considered to have contracted but with a view to performance of the contract as a whole, and any part of contract violates statute of frauds, there can be no recovery on any part of contract, though it is otherwise where contract is divisible.—*Godefroy v. Hupp*, 160 P. 1056.

§139(2) (Kan.) Where plaintiff pleaded oral antenuptial agreement to marry and care for husband, she to have his property if she survived, and the proof failed to show any agreement for care except as implied from the marriage, the marriage and care for him while he lived did not remove operation of statute of frauds.—*Breen v. Davis*, 160 P. 997.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§153 (Okla.) A general denial raises the question of the statute of frauds.—*Render v. Lillard*, 160 P. 705.

§157 (Okla.) Under Rev. Laws 1910, § 941, invalidity of oral promise to answer for the debt of another is waived where oral evidence thereof is admitted without objection and the statute is not interposed as a defense.—*Harn v. Patterson*, 160 P. 924.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(B) Nature and Form of Transfer.

§27 (Wash.) A mortgage by defendant held fraudulent as to a creditor.—*Union Securities Co. v. Smith*, 160 P. 804.

(C) Property and Rights Transferred.

§43(1) (Okla.) A debtor in disposing of property can commit a fraud on creditors only by disposing of such property as the creditor has a legal right to look to for his pay.—*Cook v. Carter*, 160 P. 877.

§47 (Utah) The property and appliances of one engaged in shoe repairing held not to constitute a stock of merchandise within the Bulk Sales Act Comp. Laws 1907, § 2063x.—*Swanson v. De Vine*, 160 P. 872.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(G) Evidence.

§273 (N.M.) To show invalidity of conveyance attacked as fraudulent, fraudulent intent of grantor must be shown.—*Ward v. Buchanan*, 160 P. 356.

§282 (N.M.) To show invalidity of conveyance attacked as fraudulent, fraudulent intent of grantor and knowledge thereof and participation therein by grantee must be shown.—*Ward v. Buchanan*, 160 P. 356.

§301(1) (N.M.) Grantee's knowledge of fraudulent intent of grantor may be shown by circumstances.—*Ward v. Buchanan*, 160 P. 356.

GAME.

See Fish.

§3½ (Cal.App.) Fish and game constitute the property of the people of the state in their collective capacity, and the regulation of their pursuit is within the police power.—*Ex parte Cencinino*, 160 P. 167.

GARBAGE DISPOSAL PLANTS.

See Eminent Domain, §2, 271, 293.

GARNISHMENT.

See Attachment; Evidence, §354; Justices of the Peace, §87.

VIII. CLAIMS BY THIRD PERSONS.

§203 (Wash.) If a garnished bank account includes proceeds of insurance on intervenor's property, the fact that intervenor did not know until after loss of her property while in defendant's possession that defendant had insured the property for her benefit, or that she did not pay premiums, is immaterial.—*Chase & Baker Co. v. Olmsted*, 160 P. 952.

§218 (Wash.) Where intervenor claimed title to portion of defendant's bank account garnished by plaintiff, as proceeds of insurance paid defendant on account of property belonging to intervenor, and destroyed by fire while in defendant's possession, evidence held sufficient to sustain a finding that property was separate property of intervenor.—*Chase & Baker Co. v. Olmsted*, 160 P. 952.

GAS.

See Mandamus, §8.

GIFTS.

See Charities; Husband and Wife, §49½.

I. INTER VIVOS.

§6 (Okla.) A married man may during his lifetime give away his separate property, and

such gift will be valid against his widow, where she is not a creditor within the statute against fraudulent conveyance.—*Garrison v. Spencer*, 160 P. 493.

⚡18(1) (Cal.) Where owner of land, to effect gift of money, made deed to land and deposited it with her prospective donee under instructions to deliver to grantees only upon payment of \$3,000 for the land, which donee should keep, previously to payment or tender by grantees, no right vested in donee to the money.—*Holland v. McCarthy*, 160 P. 1089.

⚡18(1) (Okl.) A gift of chattels is valid as an executed gift by deed alone without actual delivery.—*Garrison v. Spencer*, 160 P. 493.

⚡45 (Colo.) In an action to recover money alleged to have been loaned by plaintiff to defendant, where defendant admitted ownership of property but pleaded general denial to every other allegation, *held*, that defendant could introduce evidence to show that defendant advanced the money as a gift, not being confession and avoidance.—*Payne v. Williams*, 160 P. 196.

⚡47(1) (Colo.) In an action to recover money alleged to have been loaned by plaintiff to defendant under an oral contract, and claimed by defendant to have been a gift, the burden *held* on plaintiff to prove the alleged oral agreement to repay.—*Payne v. Williams*, 160 P. 196.

⚡49(4) (Nev.) Evidence in a suit to quiet title to land occupied by a joss house, *held* to show a gift of such land to a joss house society.—*Su Lee v. Peck*, 160 P. 18.

II. CAUSA MORTIS.

⚡60 (Cal.) That the donor, who at the time was suffering intensely and in his last illness, did not use elaborate words indicating a gift, cannot be construed as against a claim to gift causa mortis.—*Mellor v. Bank of Willows*, 160 P. 567.

⚡66(2) (Cal.) The intention to give need not be manifested solely by the particular words of the donor, but they need only be susceptible of that meaning, and the words: "Here are the certificates of deposit. Take them to C. and they will be all right"—are sufficient to create a gift causa mortis.—*Mellor v. Bank of Willows*, 160 P. 567.

The mere fact that certificates of deposit alleged to be a subject of a gift causa mortis were not indorsed would not defeat the gift or raise a presumption against the validity of the transfer, where at the time of the gift the donor was suffering intensely from his fatal illness.—*Id.*

⚡83 (Cal.) It is a question for the jury whether a gift is one causa mortis.—*Mellor v. Bank of Willows*, 160 P. 567.

GOOD FAITH.

See Municipal Corporations, ⚡941.

GRAND JURY.

See Indictment and Information.

GRANTS.

See Public Lands.

GUARANTY.

See Indemnity.

GUARDIAN AND WARD.

See Insane Persons, ⚡80.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

⚡56 (Okl.) Where the guardian of a minor takes notes with personal security without authority from the county court, and without approval of the loan made, a tender of the

notes in settlement with his successor, who refuses them and institutes suit, is insufficient.—*Cabell v. McLish*, 160 P. 592.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

⚡90 (Okl.) The county court can acquire no jurisdiction under Laws 1895, c. 1, as amended by Laws 1901, c. 1, as amended by Laws 1905, c. 12, and under Act Cong. May 27, 1908, to determine whether allotted lands of Cherokee Indian minor of one-eighth Indian blood should be mortgaged to pay existing claim; and an order, authorizing such mortgage, and the mortgage itself are void and subject to collateral attack without proof of fraud.—*Roth v. Union Nat. Bank of Bartlesville*, 160 P. 505.

Where a guardian's application for authority to mortgage allotted lands of Cherokee Indian minor under Rev. Laws 1910, § 6364, shows the total indebtedness of the estate, a judgment, authorizing mortgage for a greater sum, and the mortgage in pursuance thereof, is void and subject to collateral attack without proof of fraud.—*Id.*

An order, authorizing a guardian to mortgage his ward's estate to pay existing indebtedness to which it is liable, under Rev. Laws 1910, § 6364, made on the same day that application thereof was filed and without notice, though irregular, is not void, and is not subject to collateral attack without proof of fraud.—*Id.*

Where a guardian applies, under Rev. Laws 1910, § 6364, for authority to mortgage his ward's estate, an order, granting the application, but erroneously describing the land, may be corrected nunc pro tunc two years later.—*Id.*

⚡105(1) (Okl.) Under Rev. Laws 1910, § 4696, in a suit to set aside a conveyance of a guardian, it was not error to make parties defendant the attorneys of the guardian who received a portion of the price.—*Brook v. Wertz*, 160 P. 903.

⚡109 (Okl.) Where a purchaser in good faith at a void guardian's sale pays the price to the guardian, the guardian holds it in trust for the purchaser, and when the title fails he must refund the money, and party receiving it with knowledge of the trust acquires no title against the true owner.—*Brook v. Wertz*, 160 P. 903.

⚡113 (Okl.) A guardian, who has executed an oil and gas lease under the order and with the approval of the county court, cannot modify the terms of the lease without the approval of the court.—*Ardizzone v. Archer*, 160 P. 446.

VIII. LIABILITIES ON GUARDIANSHIP BONDS.

⚡180 (Okl.) Where the county court finds a guardian indebted to his ward and directs payment, and directs a newly appointed guardian to bring suit against the former guardian and his bondsmen, the judgment in such suit is binding on the guardian and his sureties, and cannot be collaterally attacked when no appeal has been taken.—*Cabell v. McLish*, 160 P. 592.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

⚡26 (Colo.) The facts in an action against petitioner for slander not being sufficient to authorize writ of ne exeat, as an exception to the rule that it is a mesne process of equity, which writ has not been enlarged under Code Civ. Proc. § 469, petitioner *held* entitled to discharge from custody under such writ, under the habeas corpus act (chapter LXI, Colo. St. Ann.).—*In re Nash*, 160 P. 189.

⚡30(2) (Mont.) Under Rev. Codes, §§ 9203, 9204, relative to proceedings on demurrer to

information, defendant in felony case *held* not entitled to release from custody on habeas corpus for irregularities in the procedure below on demurrer to the information.—*Ex parte Palm*, 160 P. 348; *Ex parte Hill*, *Id.* 349.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§49 (Kan.) The constitutionality of Gen. St. 1909, § 6640 (Code Cr. Proc. § 66), authorizing prosecution of a bigamist in the county where he may be apprehended, cannot be raised in habeas corpus by one who has pleaded guilty in the district court of the county in which he was apprehended.—*Ex parte Mote*, 160 P. 223.

§99(1) (Mont.) Under the facts, *held*, the proceedings for trial of a juvenile delinquent under Act March 7, 1911 (Laws 1911, c. 122), were invalid, and afforded no justification for retention of the child, against habeas corpus.—*In re Satterthwaite*, 160 P. 346.

HANDWRITING.

See Witnesses, §164.

HARBORS.

See Navigable Waters, §14.

HARMLESS ERROR.

See Appeal and Error, §1032-1072; Criminal Law, §1165-1173.

HEALTH.

See Food.

HEARSAY EVIDENCE.

See Criminal Law, §419, 420.

HEIRS.

See Descent and Distribution; Escheat.

HIGH SCHOOLS.

See Schools and School Districts, §42, 110.

HIGHWAYS.

See Bridges; Contracts, §183, 184; Municipal Corporations, §703-706; Railroads, §324, 348; Street Railroads.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§45 (Kan.) Under Gen. St. 1909, § 2254, a statutory survey of a section line is not conclusive on the state in an action to determine position of highway established thereon.—*State v. Manny*, 160 P. 1014.

In action to determine position of highway along section line, evidence *held* to make true location a question of fact for the trial court.—*Id.*

§47 (Kan.) Laws 1887, c. 215, declaring a section line a highway 60 feet wide, road being already in use under proceedings establishing it as a highway 40 feet wide, but traveled over a width of 60 feet, created a 60-foot highway without further order of the road overseer.—*State v. Manny*, 160 P. 1014.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§127(1) (Idaho) Under Rev. Codes, § 882, it is the mandatory duty of county commissioners to levy a property road tax to be paid into the county road fund, and under Laws 1913, c. 58, § 99, they must levy annually a tax for general county purposes, and also a tax for general road purposes not exceeding 25 cents on each \$100.—*Potlatch Lumber Co.*

v. Board of Com'rs of Latah County, 160 P. 256.

County commissioners in making a general levy for road purposes need not consider petitions for special levies under Laws 1913, c. 153, § 901.—*Id.*

§127(2) (Idaho) Under Rev. Codes, § 886, as amended by Laws 1911, c. 60, where county commissioners use their best judgment in making annual estimate of probable amount necessary for general road purposes, their action is not subject to review on citation to show cause why they should not be punished for contempt in not complying with previous mandate of Supreme Court.—*Potlatch Lumber Co. v. Board of Com'rs of Latah County*, 160 P. 260.

Evidence in contempt proceedings against county commissioners for violation of writ of mandate to fix levy for general road purposes *held* to show that board used their best judgment and did not willfully disobey such mandate.—*Id.*

§130 (Idaho) Rev. Codes, § 882, subd. 6, requires at least 25 per cent. of fund collected in any road district to be expended within that district.—*Potlatch Lumber Co. v. Board of Com'rs of Latah County*, 160 P. 256.

Under Laws 1913, c. 155, § 900, a tax for general road purposes must be levied when the tax is levied for county purposes, and collected in the same manner, except that 25 per cent. of the portion collected within a city, town, or village must be apportioned thereto, and the portion levied on property within a taxing district must be applied as provided in such law.—*Id.*

§138 (Idaho) Where resident taxpayers of a road district desire a special road levy in addition to the general levy for road purposes, they may petition the county commissioners therefor, and under Laws 1913, c. 153, § 901, the granting of such petition is discretionary with the commissioners.—*Potlatch Lumber Co. v. Board of Com'rs of Latah County*, 160 P. 256.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§184(3) (Kan.) In action for damages sustained by driver of team and wagon on the left side of the road in collision with automobile coming from behind, where the driver did not have time to turn after he heard the automobile, question of contributory negligence is one of fact.—*Pens v. Kreitzer*, 160 P. 200.

HOLIDAYS.

See Sunday.

HOMESTEAD.

See Exemptions.

I. NATURE, ACQUISITION, AND EXTENT.

(C) Acquisition and Establishment.

§32 (Okla.) A purchase of a homestead in good faith with intent of residing on it when a temporary obstacle to the residence is removed is equivalent to actual occupancy, and the property is exempt from lien, levy, or forced sale.—*Illinois Life Ins. Co. v. Rogers*, 160 P. 56.

§57(3) (Okla.) In action to subject certain property to an execution, evidence *held* to show the property exempt as a homestead.—*Illinois Life Ins. Co. v. Rogers*, 160 P. 56.

(D) Property Constituting Homestead.

§66 (Okla.) Under Williams' Const. § 302, the limitation in value to \$5,000 on urban homestead does not apply to rural homestead.—*Hedgpath v. Hudson*, 160 P. 604.

(E) Liabilities Enforceable Against Homestead.

⚡90 (Okla.) Williams' Const. § 308, protects homestead of family from forced sale for payment of debts and judgment liens, except for purchase money, taxes, and work and materials, and a debt created by mortgage executed by husband and wife.—Hedgpath v. Hudson, 160 P. 604.

II. TRANSFER OR INCUMBRANCE.

⚡118(4) (Okla.) A granting clause in a deed reciting that "I, T. M. L., joined by my wife, F. L., * * * do grant," is sufficient to satisfy Rev. Laws 1910, § 1143, as indicating consent of husband to the sale of the wife's interest in the homestead.—Lowery v. Westheimer, 160 P. 496.

⚡118(5) (Cal.App.) Under Civ. Code, § 1242, as to homestead incumbrances, a written offer, accepted in writing made and signed by only the husband, for an exchange of land of the wife upon which a homestead has been declared by her, was invalid and unenforceable by the husband and wife.—Ainsworth v. Morrill, 160 P. 1089.

⚡128 (Okla.) The homestead may be conveyed by husband and wife jointly, and purchasers take title free from judgment liens or debts, except those enumerated in Williams' Const. § 303.—Hedgpath v. Hudson, 160 P. 604.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

⚡162(3) (Kan.) A homestead is not abandoned by its owner where he, intending to return, moves with his family to another county to educate his children, though later he sells the homestead and never returns.—Friedenhagen v. Nichols & Shepard Co., 160 P. 997.

HOMICIDE.

See Criminal Law, ⚡829, 1171.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

⚡112(1) (Cal.App.) One may not by his own willful act create a situation giving rise to appearances which he may interpret as endangering his life, and thereupon kill the person he is in fact assailing.—People v. Finali, 160 P. 850.

⚡112(2) (Cal.App.) Where accused, while trying, with revolver in hand, to force his way into a warehouse through a door, which was being held by deceased to prevent his entrance, shot deceased, *held*, he was clearly the aggressor, and not justified by self-defense.—People v. Finali, 160 P. 850.

VI. INDICTMENT AND INFORMATION.

⚡129 (Kan.) Under Code Cr. Proc. §§ 110, 293 (Gen. St. 1909, §§ 6886, 6867), an information charging that defendant unlawfully, feloniously, willfully, deliberately, with premeditation and with malice aforethought with a deadly weapon shot at deceased, and with the weapon killed deceased, is sufficient, though it omits to repeat the words "purposely" and "maliciously" as to the killing.—State v. Allen, 160 P. 795.

VII. EVIDENCE.**(B) Admissibility in General.**

⚡158(1) (N.M.) Evidence of communication to deceased of threat of defendant is relevant, where evidence for prosecution is entirely circumstantial and the action of the deceased is to be determined without direct proof except by testimony of defendant.—State v. Pruett, 160 P. 362.

⚡158(4) (Cal.) Where accused assaulted decedent and a third person, and the latter was

injured by a shot fired by accused, evidence of threats made by accused against the third person was admissible.—People v. Wilt, 160 P. 561.

⚡163(2) (Kan.) Exclusion of evidence of former general reputation of deceased, of which defendant had no information till after homicide, was not error.—State v. Allen, 160 P. 795.

⚡166(7) (Okla.Cr.App.) In a prosecution for wife murder, where the husband attempts to explain improper relations with another woman by an agreement with his wife that they should be divorced, a letter written by the wife showing that she had no thought of a divorce proceeding was competent.—Borah v. State, 160 P. 27.

⚡193 (N.M.) Evidence that deceased knew he would meet defendant at a certain place and went there armed is material and competent to show his state of mind and probable conduct.—State v. Pruett, 160 P. 362.

(E) Weight and Sufficiency.

⚡228(2) (Okla.Cr.App.) That a father made no effort to rescue his child from a burning building and prevented another from going in to the building to rescue it, warranted the jury in believing that the child had been killed before it was touched by flames.—Borah v. State, 160 P. 27.

⚡250 (Okla.Cr.App.) Evidence *held* to sustain a conviction of murder.—Borah v. State, 160 P. 27.

⚡250 (Okla.Cr.App.) Evidence of eyewitnesses to the shooting and of finding revolver with empty shells on the person of accused *held* to sustain conviction of murder.—Galbert v. State, 160 P. 832.

⚡253(1) (Cal.) Evidence *held* to justify conviction of murder in first degree.—People v. Wilt, 160 P. 561.

VIII. TRIAL.**(B) Questions for Jury.**

⚡270 (Cal.App.) In an assault trial, where there was some evidence of settled insanity induced by long-continued use of intoxicants, whether accused's mental condition was such that he was not legally responsible was for the jury.—People v. Goodrum, 160 P. 690.

(C) Instructions.

⚡297 (Wash.) Instructions as to excusable homicide and the burden upon accused to justify his act *held* abstractly correct.—State v. Hankins, 160 P. 307.

⚡300(3) (Cal.App.) An instruction *held* erroneous, as inconsistent with the doctrine of apparent danger.—People v. Finali, 160 P. 850.

⚡300(7) (Cal.App.) An instruction on right of self-defense of one seeking altercation, *held* applicable to the facts, where the evidence showed that whatever necessity defendant believed to exist for the killing was created by his fault.—People v. Finali, 160 P. 850.

⚡308(5) (Kan.) Where counsel for defendant requested court not to submit instructions except on murder in first degree, and evidence shows that defendant was guilty of murder in first or second degree or was innocent, omission to instruct as to less than the second degree, was not error.—State v. Allen, 160 P. 795.

⚡309(6) (Cal.) Evidence *held* not to justify instruction on manslaughter.—People v. Wilt, 160 P. 561.

HOSPITALS.

See Charities, ⚡11, 45.

HOURS OF SERVICE ACTS.

See Master and Servant, ⚡13.

HUSBAND AND WIFE.

See Attachment, ¶178; Death, ¶81; Divorce; Dower; Executors and Administrators, ¶176, 181; Exemptions, ¶116; Gifts, ¶6; Marriage; Sheriffs and Constables, ¶113; Trusts, ¶103; Witnesses, ¶146.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

¶3(1) (Nev.) A wife may acquire and maintain a domicile separate from that of her husband.—*Merritt v. Merritt*, 160 P. 22.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

¶49½(8) (Cal.) Evidence held sufficient to support finding that a gift made during the last illness was a gift in view of death.—*Mellor v. Bank of Willows*, 160 P. 567.

Where a wife alleged that her deceased husband made a gift causa mortis to her, but no other was present at time of making, her testimony should be viewed with caution.—Id.

Where the donor and his wife had lived together for many years, and he had made no other provision for her future and no will, and had no other relatives whom he had seen for many years, the law will presume that his nanding her certificates of deposit and telling her to take them to the cashier and that it would be all right was a gift causa mortis.—Id.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

¶131(3) (N.M.) Property acquired by the wife under Desert Land Laws of the United States is conclusively presumed in favor of incumbrancer in good faith and for valuable consideration to be her separate property.—*Lukins v. Traylor*, 160 P. 849.

¶133(1) (Wash.) Evidence held to establish an oral post nuptial agreement that property inherited by wife from her father and whatever she acquired should be hers, which was continuously acted upon.—*Union Securities Co. v. Smith*, 160 P. 304.

¶133(7) (Wash.) Where defendant father made a valid agreement with wife that property she inherited and acquired should remain her separate property, evidence held to justify a finding that property purchased for her by son with her money and money which he owed her, was her separate property.—*Union Securities Co. v. Smith*, 160 P. 304.

(B) Rights and Liabilities of Husband.

¶138(9) (Cal.) Execution of deed by wife, with knowledge, held acceptance and ratification of husband's executory contract to exchange her land, executed in his own name under power of attorney, authorizing execution only in name of wife.—*Schader v. White*, 160 P. 557.

VI. ACTIONS.

¶209(4) (Or.) At common law, a wife could not maintain an action for an injury to her husband whereby she lost his services and consortium.—*Kosciulek v. Portland Ry., Light & Power Co.*, 160 P. 132.

L. O. L. § 7050, repealing laws imposing or recognizing civil disabilities of a wife, etc., held not to give wife right to recover for injuries to husband.—Id.

VII. COMMUNITY PROPERTY.

¶248½ (Wash.) Where property at the time of marriage is the wife's separate property, it remains so unless changed by deed, due process of law, or by the working of some form of estoppel.—*Graves v. Columbia Underwriters*, 160 P. 420.

¶255 (Wash.) Under Rem. & Bal. Code, §§ 5915-5917, money borrowed on the joint note of husband and wife on the security of her separate property, and designed solely for the protection and improvement of such property, does not acquire the status of community property by the joinder of the husband in the note and mortgage given for the loan.—*Graves v. Columbia Underwriters*, 160 P. 436.

¶262(1) (Wash.) The presumption that property acquired during the marital relation is community property is rebuttable.—*Graves v. Columbia Underwriters*, 160 P. 436.

¶264 (Wash.) Evidence held sufficient to establish an oral post nuptial agreement that property inherited by wife from her father and whatever she acquired should be hers, and that whatever the husband acquired should be his, which was continuously acted upon.—*Union Securities Co. v. Smith*, 160 P. 304.

Evidence held to support a finding that an undivided one-half of land purchased by the defendants father and son, title to which was taken in the name of defendant father's wife, was the community property of defendant father and his wife.—Id.

¶268(6) (Wash.) Where a husband purchased stock with money earned by himself, and his wife was not concerned in purchase, and signed a bond guaranteeing a company debt, there being a valid agreement between husband and wife that his earnings should be his separate property, his act in signing did not create a community obligation.—*Union Securities Co. v. Smith*, 160 P. 304.

A judgment against the maker of bond, guaranteeing a debt, binds the community property of the maker and his wife.—Id.

¶270(10) (Wash.) Where a husband made a contract with a broker to pay commission for an exchange of property, a judgment broad enough to be considered as a personal judgment against the wife individually was erroneous.—*Godefroy v. Hupp*, 160 P. 1056.

HYPOCRISY.

See Libel and Slander, ¶6.

HYPOTHETICAL QUESTIONS.

See Evidence, ¶553.

IDEM SONANS.

See Names, ¶16.

ILLEGALITY.

See Bills and Notes, ¶106.

ILLEGITIMATE CHILDREN.

See Bastards.

IMMUNITY.

See Criminal Law, ¶42.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, ¶123-154.

IMPEACHMENT.

See Criminal Law, ¶942; Witnesses, ¶330-392.

IMPLIED CONTRACTS.

See Account Stated.

IMPRISONMENT.

See Habeas Corpus.

IMPROVEMENTS.

See Mechanics' Liens; Municipal Corporations, **270-525**.

IMPUTED NEGLIGENCE.

See Negligence, **93**.

INCOMPETENT PERSONS.

See Insane Persons.

INCUMBRANCES.

See Homestead, **128**; Partition, **85**.

INDECENCY.

See Lewdness.

INDEMNITY.

See Mechanics' Liens, **226, 317**.

3 (Okl.) Contracts to pay legal liabilities differ from indemnity contracts in that action cannot be maintained on the latter till the liability is discharged, while the right of action on the former is complete when liability attaches.—*Curtis & Gartside Co. v. Aetna Life Ins. Co.*, 160 P. 465.

INDEMNITY INSURANCE.

See Insurance, **514**.

INDIANS.

See Guardian and Ward, **90**; Jury, **14**.

15(1) (Okl.) A decree in a suit for alimony allowing a portion of the rents and profits of a restricted allotment and appointing a receiver is a charge on the land and invalid under Act Cong. May 27, 1908, § 4.—*Burney v. Burney*, 160 P. 85.

15(1) (Okl.) Deeds of land by citizen of Creek Nation on same consideration, executed, respectively, before and after removal of restrictions imposed by Act Cong. April 26, 1906, § 19, held part of a single transaction and void.—*Carter v. Prairie Oil & Gas Co.*, 160 P. 319.

15(1) (Okl.) Under Act Cong. May 27, 1908, c. 199, § 4, relating to removal of restrictions on alienation of lands of Indian allottees, such lands cannot be held liable to any form of personal claim against a Cherokee Indian minor allottee of one-eighth Indian blood, arising before July 27, 1908.—*Roth v. Union Nat. Bank of Bartlesville*, 160 P. 505.

15(1) (Okl.) The state courts have no power to authorize a conveyance of restricted Indian lands in contravention of the treaties and acts of Congress relating thereto.—*Brown v. Anderson*, 160 P. 724.

15(1) (Okl.) Under Acts Cong. June 28, 1898, July 1, 1902, Jan. 21, 1903, and April 26, 1906, a conveyance by a member of Cherokee Tribe of growing timber upon his allotment is not void.—*Mitchell-Crittenden Tie Co. v. Crawford*, 160 P. 917.

15(2) (Okl.) An attempted assignment, by a full-blood Cherokee, of accruing royalties under a departmental oil and gas lease on his allotment, is void, unless approved by the Secretary of the Interior.—*Day v. Charlton*, 160 P. 606.

18 (Okl.) Under Rev. Laws 1910, §§ 8417, 8418, 8427, where a Choctaw Indian duly enrolled died January 29, 1913, intestate, after receiving allotment, leaving no father nor mother, his brothers and sisters of the whole blood take to the exclusion of those of the half blood.—*Hill v. Hill*, 160 P. 1116.

27(2) (Okl.) A full-blood Indian, being a citizen of the United States and of the state, has a right to sue in the state courts, and may have his rights growing out of treaties and acts of Congress relating to his land adjudicated, and such rights as may be protected at suit of the executive department of the federal government may also be enforced in state courts by an action by the Indian.—*Brown v. Anderson*, 160 P. 724.

27(6) (Okl.) Evidence held to show that deeds executed before and after removal of restriction on alienation by Creek Indian were part of a single transaction.—*Carter v. Prairie Oil & Gas Co.*, 160 P. 319.

INDICTMENT AND INFORMATION.

See Burglary, **22**; Conspiracy, **43**; Criminal Law, **1082**; Embezzlement, **28**; Habeas Corpus, **80**; Homicide, **129**; Larceny, **40**; Lewdness; Mayhem, **4**.

III. FORMAL REQUISITES OF INDICTMENT.

32(2) (Cal.App.) Although Pen. Code, §§ 809, 951, require an indictment to conclude by alleging that the offense was contrary to statute, etc., an information in three counts, each stating a different offense, ending with such conclusion, was sufficient.—*People v. Howard*, 160 P. 697.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

110(3) (Nev.) An information charging mayhem in the language of Rev. Laws, § 6416, without charging permanent disfigurement, which, under section 6418, is necessary to conviction, is good in the absence of demurrer.—*State v. Enkhouse*, 160 P. 23.

110(13) (Or.) An indictment for wrongful conversion by trustee in the language of L. O. L. § 1962, denouncing the crime, held sufficient.—*State v. Mishler*, 160 P. 382.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

132(5) (Cal.App.) Under Pen. Code, § 954, an information in three counts, charging larceny of money, embezzlement of such money, and the receiving of such money knowing it to have been stolen, it was not necessary for district attorney, before offering proof, to elect on which count he intended to rely for a conviction.—*People v. Howard*, 160 P. 697.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

202(5) (Colo.) It is too late after trial and conviction to present for the first time objections to an indictment under Laws 1907, p. 334, § 1, relating to burglary by use of explosives, in that it used the word "for" instead of "with," and failed to allege corporate existence of the burglarized bank.—*Howard v. People*, 160 P. 1060.

INDORSEMENT.

See Bills and Notes, **209-378**; Criminal Law, **628**.

INFANTS.

See Divorce, **222, 289**; Guardian and Ward; Habeas Corpus, **99**; Master and Servant, **13, 356**.

II. CUSTODY AND PROTECTION.

12 (Wash.) No one can acquire a vested right to pension, so that Laws 1915, p. 364,

which fails to authorize pensions to abandoned mothers, is not objectionable because Laws 1913, p. 644, which, if repealed, made such allowance.—In re Snyder, 160 P. 12.

☞16 (Mont.) Petition in proceeding under Act March 7, 1911 (Laws 1911, c. 122), for trial of a juvenile delinquent, *held*, in view of section 5, insufficient, in not alleging parents were unfit guardians, or unwilling or unable, or consent to the child being taken from them.—In re Satterthwaite, 160 P. 346.

Citation to the parents, in a proceeding under Act March 7, 1911 (Laws 1911, c. 122), for trial of an alleged juvenile delinquent, required by section 5, is necessary.—Id.

Right of jury trial, in a proceeding under Act March 7, 1911 (Laws 1911, c. 122), for trial of an alleged juvenile delinquent, secured by section 3 to the parent or child unless waived, can be waived only in the manner provided by law.—Id.

Before a juvenile delinquent can in proceeding under Act March 7, 1911 (Laws 1911, c. 122), be taken from its parents and given to custody of the state, unfitness or inability or unwillingness of parents must, under section 14, be adjudicated.—Id.

INFORMATION.

See Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Appeal and Error, ☞488; Chattel Mortgages, ☞256; Execution, ☞171; Taxation, ☞608, 611; Usury, ☞94.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

☞16 (Okla.) The remedy of appeal from the county commissioners to the district court, given by Laws 1915, c. 117, § 1, being plain, speedy, and adequate, equitable relief by injunction against apprehended action of commissioners cannot be had.—Board of Com'rs of Muskogee County v. Dudding, 160 P. 109.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

☞139 (Okla.) Const. art. 7, § 12, authorizes a county judge, in the absence of the district judge from the county, to issue injunction where the district judge would have been authorized to issue same.—Pearson v. Glen Lumber Co., 160 P. 48.

☞148(1) (Okla.) In an undertaking given under Rev. Laws 1910, § 4877, for a temporary restraining order, running to "defendants" instead of parties injured, the term "defendants" includes all parties against whom injunctive relief is asked and obtained to their direct and immediate or necessary and natural injury.—Boyd v. Lambert, 160 P. 586.

In a bond for a temporary restraining order given under Rev. Laws 1910, § 4877, where the order is made against named defendants, their agents, employees, or any person or persons acting by, through, or under them, and is obeyed by independent contractors, the Supreme Court following the construction of the parties themselves, will hold the independent contractors within the terms of the order.—Id.

INSANE PERSONS.

See Criminal Law, ☞570, 778; Damages, ☞216; Deeds, ☞68; Evidence, ☞63, 67,

332; Homicide, ☞270; Release, ☞15; Wills, ☞55.

I. DISABILITIES IN GENERAL.

☞2 (Or.) Evidence *held* not to show one incapable of conducting his own affairs within L. O. L. § 1319, as to guardians.—In re Northcutt, 160 P. 801.

☞2 (Wash.) Rational conduct and acts and business transactions at a given time may be shown to establish lucidity at such time; the only test being that at such times the actor was able to know and comprehend the nature of his acts and able to transact with understanding ordinary business.—Roberts v. Pacific Telephone & Telegraph Co., 160 P. 965.

III. GUARDIANSHIP.

☞30 (Or.) A person incapable of conducting his own affairs, within L. O. L. § 1319, as to guardians, is one unable without assistance properly to manage and take care of his property, and who would be likely to be deceived, dominated, or imposed on by artful or designing persons.—In re Northcutt, 160 P. 801.

IX. ACTIONS.

☞95 (Or.) Under L. O. L. § 55, subd. 4, before a court has jurisdiction to render a judgment against a person judicially declared of unsound mind, and for whom a guardian has been appointed, summons must be served upon guardian as well as upon ward.—Lieblin v. Breyman Leather Co., 160 P. 1167.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Banks and Banking, ☞77.

INSTRUCTIONS.

To jury, see Criminal Law, ☞753-829; Trial, ☞189-296.

INSURANCE.

See Accord and Satisfaction, ☞10, 11; Evidence, ☞252, 265; Mortgages, ☞201; Pleading, ☞8; Statutes, ☞95, 121; Taxation, ☞40, 276.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

☞138(1) (Or.) In action for breach of executory oral contract to insure property, amended complaint, stating that plaintiff accepted the policy issued by defendant through his ignorance of its legal effect, was insufficient to state a cause of action.—Greenberg v. German-American Ins. Co., 160 P. 536.

(B) Construction and Operation.

☞146(3) (Okla.) A life policy which is fairly open to construction should be construed, if possible, to sustain rather than forfeit the contract.—Friend v. Southern States Life Ins. Co., 160 P. 457.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(C) Matters Relating to Person Insured.

☞289 (Okla.) An insurer cannot cancel a life policy against objections of insured by declaring it canceled for false representations as to family history, occupation, residence, and use of intoxicants, and tendering back the premiums paid, in absence of provision in policy.—Mutual Life Ins. Co. of New York v. Buford, 160 P. 928.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(A) Grounds in General.

⚡310(2) (Okl.) A clause making a policy incontestable except for failure to pay premiums, and providing that on payment of policy the company may deduct any sums due it, does not authorize forfeiture of the policy for failure to pay an annual premium when due, but the insurance continues subject to the right of the company to determine it after notice.—*Friend v. Southern States Life Ins. Co.*, 160 P. 457.

(B) Nonpayment of Premiums or Assessments.

⚡349(1) (Okl.) A life policy without qualifying provisions is not a contract of insurance for a single year with a privilege of renewal from year to year, but is an indivisible continuous contract of insurance subject to forfeiture for nonpayment of premium.—*Friend v. Southern States Life Ins. Co.*, 160 P. 457.

The consequence of default in payment of one annual premium under an indivisible and continuous contract of insurance is determined by common-law principles, where the contract does not otherwise provide.—*Id.*

Ordinarily the payment of an annual premium on a life policy after it has become effective is not a condition precedent to its continuance, but a condition subsequent, the nonperformance of which may or may not incur a forfeiture, according to circumstances.—*Id.*

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

⚡400 (Okl.) Where a life policy provides that it shall be incontestable after two years from date of issue, such provision is not a waiver, but a condition.—*Mutual Life Ins. Co. of New York v. Buford*, 160 P. 928.

Where a life policy contains a condition of incontestability after two years from date of issue, breach of warranty pleaded more than two years after date of issue is not a valid defense.—*Id.*

An insurer cannot cancel a life policy for breaches of warranties in the application except with the consent of the insured and beneficiary, except as provided in the policy, unless proper legal action is taken before the policy by its terms becomes incontestable.—*Id.*

XII. RISKS AND CAUSES OF LOSS.

(D) Life Insurance.

⚡448 (Okl.) A beneficiary in a life policy who murders the assured is barred from collecting the insurance money.—*Equitable Life Assur. Soc. of the United States v. Weightman*, 160 P. 629.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(C) Guaranty and Indemnity Insurance.

⚡514 (Okl.) A clause indemnifying assured against loss from liability for injuries to employees, and undertaking to defend proceedings against assured unless insurer elects to settle them or pay the indemnity, does not make the contract one of guaranty, where another clause forbids action against insurer except for loss actually sustained and paid.—*Curtis & Gartside Co. v. Aetna Life Ins. Co.*, 160 P. 465.

XVI. RIGHT TO PROCEEDS.

⚡585(1) (Okl.) A policy on the lives of two persons held a several policy on the life of each, so that their interest is not a joint tenancy, giving the right of survivorship, but that the survivor takes, if at all, under the contract.—*Equi-*

table Life Assur. Soc. of the United States v. Weightman, 160 P. 629.

Where no alternative beneficiary is designated in a life policy and the designated beneficiary is barred by wrongful act, a trust arises in favor of the estate of assured by virtue of which the representative of assured is entitled to the fund.—*Id.*

⚡587 (Colo.) Provision in will of insured as to application of sum due his estate from insurer, held not to constitute change of beneficiaries named in policies, nor legal or equitable transfer of fund arising therefrom.—*German-American Trust Co. v. Ten Winkel*, 160 P. 188.

⚡589 (Colo.) Where surviving wife died intestate before she actually had possession of her share of insurance fund arising from her deceased husband's policies, her administrator had the right to sue for and collect it.—*German-American Trust Co. v. Ten Winkel*, 160 P. 188.

⚡594 (Okl.) An insurance policy being a non-negotiable instrument, an assignee of the beneficiary has no better claim to the proceeds than the assignor.—*Equitable Life Assur. Soc. of the United States v. Weightman*, 160 P. 629.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

⚡598 (Okl.) Under policy indemnifying employer against loss not exceeding \$5,000 from liability for injuries to employees, the insurer is not liable for interest on a judgment for \$5,000, pending appeal by the insurer, who conducts the litigation.—*Curtis & Gartside Co. v. Aetna Life Ins. Co.*, 160 P. 465.

An insurer's liability under a liability policy, which limits the liability to \$5,000 and expense of defending action against assured, does not include interest on judgment for \$5,000 pending appeal therefrom.—*Id.*

XVIII. ACTIONS ON POLICIES.

⚡631 (Okl.) Where, in an action on a life policy, a copy of the policy is attached to the petition and made a part thereof, it should be considered when construing the petition on demurrer.—*Friend v. Southern States Life Ins. Co.*, 160 P. 457.

⚡631 (Okl.) Where a life policy provides that it shall be incontestable after two years from date of issue, such provision is not a waiver, but a condition, and is sufficiently pleaded where a copy of the policy is attached to the petition as an exhibit.—*Mutual Life Ins. Co. of New York v. Buford*, 160 P. 928.

⚡665(3) (Okl.) In an action on insurance policies, evidence held to warrant an inference of waiver of the iron-safe, books, and inventory clause.—*American Cent. Ins. Co. of St. Louis, Mo., v. Sinclair*, 160 P. 60.

⚡668(4) (Okl.) Where the petition and evidence show a cause of action on a life policy which is incontestable after two years from date of issue, and the only defense is breach of warranties pleaded more than two years after its date, the court should direct a verdict for plaintiff.—*Mutual Life Ins. Co. of New York v. Buford*, 160 P. 928.

XX. MUTUAL BENEFIT INSURANCE.

(E) Beneficiaries and Benefits.

⚡780 (Okl.) A member of a mutual benefit insurance has a right to change his beneficiary by complying with the laws of the association.—*Janeway v. Norton*, 160 P. 908.

⚡784(7) (Okl.) The rule that insured must comply with the law of the society to effect a change of beneficiary does not apply where the society during the lifetime of the member has waived compliance, or it is beyond his power to comply literally, or the member has done all

that is required, and there remains only a ministerial act of the insurer.—*Janeway v. Norton*, 160 P. 908.

(F) Actions for Benefits.

§815(2) (Okla.) In an action on a mutual benefit certificate, an answer alleging generally that assured complied with all requirements to effect a change of beneficiary held to state a defense as against a general demurrer.—*Janeway v. Norton*, 160 P. 908.

INTENT.

See Burglary, §32; Criminal Law, §355, 371; Deeds, §93; Embezzlement, §39; Fraudulent Conveyances, §273, 301; Gifts, §60, 66; Homestead, §162; Trover and Conversion, §3.

INTEREST.

See Appeal and Error, §1151; Insurance, §598; Municipal Corporations, §518; Usury.

I. RIGHTS AND LIABILITIES IN GENERAL.

§19(3) (Cal.) Where the amount defendant was to pay for walnut trees on land purchased was uncertain until judgment, interest prior to the time that the amount was ascertained should not be allowed.—*Edwards v. Arp*, 160 P. 551.

III. TIME AND COMPUTATION.

§39(5) (Cal.App.) Under Civ. Code, §§ 1917, 3287, plaintiff in an action on account stated is not limited to interest from the date of the judgment.—*Fee v. McPhee Co.*, 160 P. 897.

§50 (Cal.) Under Civ. Code, § 1504, tender of interest due after maturity of note, on which both principal and interest were owing, did not stop running of interest upon principal, but only on interest tendered.—*Molera v. Cooper*, 160 P. 231.

§50 (Utah) A tender of the amount due on an account for goods sold, made by check, without objection thereto, was sufficient to prevent the creditor from recovering interest.—*Hirsh v. Ogden Furniture & Carpet Co.*, 160 P. 233.

INTERMEDIATE COURTS.

See Criminal Law, §1179.

INTERROGATORIES.

See Depositions; Discovery.

INTERSTATE COMMERCE.

See Commerce.

INTERVENTION.

See Parties, §42.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Criminal Law, §507.

III. LOCAL OPTION.

§37 (Utah) In an election contest on the sole issue of allowing sale of intoxicating liquors, the presumption is that a voter who had previously affiliated and acted with the "drys" voted such ticket at the election.—*Beauregard v. Gunnison City*, 160 P. 815.

In a city election contest on the issue of allowing sale of intoxicating liquors, where the city authorities refused to defend the election, a resident and elector of the city was allowed to do so on his own behalf, in view of the

statute providing that an elector may file a contest, and that "any proposition submitted to the vote of the people may be contested."—*Id.*

IV. LICENSES AND TAXES.

§95 (Nev.) Under Revenue Act 1915 (St. 1915, c. 178) §§ 3, 6, 8-11, half the fees for county and state licenses to persons disposing of liquor in less quantity than a quart in a city is payable to the city.—*State v. Hill*, 160 P. 772.

VI. OFFENSES.

§150 (Or.) Necessary elements of crime of selling intoxicants without license, in violation of L. O. L. § 4938, as amended by Laws 1913, p. 605, are that defendant must have sold intoxicants, outside the limits of any incorporated city or town, and without a license.—*State v. Aplin*, 160 P. 538, 539.

VIII. CRIMINAL PROSECUTIONS.

§215 (Or.) Indictment for selling beer without license held insufficient to charge offense denounced by L. O. L. § 4938, as amended by Laws 1913, p. 505, as failing to allege the necessary element of the crime that the sale was outside the limits of an incorporated town.—*State v. Aplin*, 160 P. 538, 539.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

§249 (Okla.) Under Rev. Laws 1910, § 3617, an officer is required to make return, setting forth a particular description of liquor and property seized, and of the place where it was seized.—*Cox v. State*, 160 P. 895.

Where an automobile was seized by an officer without warrant as being used in violation of prohibition laws, the officer's return is of itself incompetent to show unlawful characteristics thereof, or to that its use was illegal or prohibited.—*Id.*

X. ABATEMENT AND INJUNCTION.

§265 (Kan.) An injunction will lie against owner of premises who knowingly permits liquor nuisance to be maintained thereon.—*State v. Glass*, 160 P. 1145.

§271 (Kan.) In an action to abate liquor nuisance, the petition need not show in the title that the action is prosecuted by the state on the relation of any person or officer.—*State v. Glass*, 160 P. 1145.

§274 (Kan.) In action to abate liquor nuisance, petition alleging that at the place described a nuisance, as defined in the statute, was maintained with knowledge, permission, and consent of defendants, who owned the property, stated a cause of action.—*State v. Glass*, 160 P. 1145.

§275 (Kan.) Evidence held to sustain judgment abating liquor nuisance.—*State v. Glass*, 160 P. 1145.

§277 (Kan.) Injunction against liquor nuisance should be broad enough to preclude every possibility of continuance or reopening of nuisance by persons enjoined or any one acting for them or with their permission.—*State v. Glass*, 160 P. 1145.

INTOXICATION.

See Criminal Law, §53, 57, 355.

INVENTORY.

See Executors and Administrators, §72.

INVITED ERROR.

See Appeal and Error, §832; Criminal Law, §1137.

IRRIGATION.

See Waters and Water Courses, §49, 256-258.

JOINDER.

See Homestead, ¶118.

JOINT ADVENTURES.

See Banks and Banking, ¶129; Insurance, ¶585; Tenancy in Common.

JOINT DEFENDANTS.

See Process, ¶66.

JOINT LIABILITIES.

See Torts.

JOINT-STOCK COMPANIES.

¶19 (Utah) Comp. Laws 1907, § 2927, as amended by Laws 1911, c. 58, allowing action against a joint-stock company in its common name, does not aid one suing such a company as a corporation, when the fact that it is a joint-stock company appears from the answer.—*White v. Shipley*, 160 P. 441.

JOINT TENANCY.

¶1 (Okla.) To the existence of a joint tenancy, four unities must exist in the tenants, viz.: (1) Unity of interest; (2) unity of title; (3) unity of time, and (4) unity of possession.—*Equitable Life Assur. Soc. of the United States v. Weightman*, 160 P. 629.

JOSS HOUSE SOCIETIES.

See Religious Societies, ¶16.

JUDGES.

See Appeal and Error, ¶186; Depositions; Justices of the Peace.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

¶7 (Wash.) Under Const. art. 4, § 5, one appointed to vacancy in the office of superior court judge holds till one is elected to the vacancy, or, if there is no such election, till one is elected to the next term and regularly qualifies.—*State v. Gilliam*, 160 P. 757.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

¶36 (Okla.) An action will not lie against a judicial officer for a judicial act, where there is jurisdiction of the person and subject-matter, though it was done maliciously, or even corruptly.—*Waugh v. Dibbens*, 160 P. 539.

The same protection extends to judges of inferior and limited, as well as to those of general, jurisdiction as to liability for official acts.—*Id.*

IV. DISQUALIFICATION TO ACT.

¶51(1) (Cal.) One filing an affidavit alleging the disqualification of a judge to sit, while entitled, under Code Civ. Proc. § 170, to have counter affidavits by the judge filed before hearing, may waive that right.—*Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co.*, 160 P. 545.

Where appellants' counsel, who filed an affidavit setting forth the disqualification of the judge to proceed with the hearing, agreed that the counter affidavit of the judge might be filed at any time, the right to insist on the strict statutory procedure requiring the filing of counter affidavits before hearing was waived.—*Id.*

¶51(3) (Cal.) Under Code Civ. Proc. § 170, allegations in an affidavit, in support of a motion to refer a case to another judge, contradicted by the affidavit of the judge, held insufficient to show disqualification.—*Mercantile Trust*

Co. of San Francisco v. Sunset Road Oil Co., 160 P. 545.

JUDGMENT.

See Courts, ¶97; Evidence, ¶848; Execution; Pleading, ¶343-350.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

I. NATURE AND ESSENTIALS IN GENERAL.

¶17(1) (Wash.) In materialman's action on surety bond given by contractor, the court, unless the contractor was personally served, had no jurisdiction to enter a personal judgment against him.—*Denny-Renton Clay & Coal Co. v. National Surety Co.*, 160 P. 1.

¶28 (Okla.) If a judgment or decree includes a decision of a separable subject-matter within, and another beyond, its jurisdiction, it is valid as to the former and a mere nullity as to the latter.—*Roth v. Union Nat. Bank of Bartlesville*, 160 P. 505.

IV. BY DEFAULT.**(A) Requisites and Validity.**

¶102 (Utah) Under Comp. Laws 1907, § 2964, where court, after a default judgment, void because the complaint was not verified as required by Rev. St. 1898, § 3179, was rendered and entered, permitted plaintiff without notice to amend complaint, and entered judgment, held, that it acted without authority and judgment did not constitute a valid lien on property of defendant.—*Thero v. Franklin*, 160 P. 1188.

¶107 (Okla.) There can be no judgment of default where there is on file an answer or other pleading raising an issue of law or fact.—*Oklahoma State Bank of Cushing v. Buzzard*, 160 P. 462.

Before a default judgment can be properly entered, the answer or other plea must be disposed of by motion, demurrer, or in some other manner.—*Id.*

Where defendant, granted time to plead, filed a proper pleading presenting question of jurisdiction, a judgment by default without disposal of pleading is premature.—*Id.*

VI. ON TRIAL OF ISSUES.**(A) Rendition, Form, and Requisites in General.**

¶199(3) (Wash.) In passing upon sufficiency of evidence challenged by motion for judgment non obstante veredicto, it is only where the court can say as a matter of law that there is neither evidence nor reasonable inference from evidence to sustain verdict that motion can be granted.—*Godefroy v. Hupp*, 160 P. 1056.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

¶248 (Or.) Pleadings are the formal written allegations by the parties of their respective demands and defenses, and afford the foundation upon which a judgment or decree must necessarily rest.—*Treadgold v. Willard*, 160 P. 803.

VII. ENTRY, RECORD, AND DOCKETING.

¶272 (Utah) Where an appeal was taken after granting of a nonsuit in September, 1913, and no final judgment was attempted to be entered until August, 1915, held the trial court did not lose jurisdiction to enter final judgment by the premature appeal.—*Lukich v. Utah Const. Co.*, 160 P. 270.

X. EQUITABLE RELIEF.**(A) Nature of Remedy and Grounds.**

⚖414 (Or.) Where a trial court had jurisdiction to render a judgment, in order to assail it, although irregular or voidable, it would be necessary to allege fraud or unfairness.—*Lieblin v. Breyman Leather Co.*, 160 P. 1167.

⚖443(1) (Ok.) Ordinarily it is fraud which prevents a party from fairly presenting his case, or fraud upon the court, or its process, and not fraud in the cause of action, which will authorize the setting aside of a final judgment.—*Ely Walker Dry Goods Co. v. Smith*, 160 P. 898.

XI. COLLATERAL ATTACK.**(B) Grounds.**

⚖489 (Ok.) Where the record affirmatively discloses that the court is without power to make the order or decree it assumes to make, such order or decree is void and subject to collateral attack.—*Roth v. Union Nat. Bank of Bartlesville*, 160 P. 505.

An order or decree of a court of general jurisdiction or of such jurisdiction of the particular subject in question, imports absolute verity, and is not subject to collateral attack except for fraud, unless it affirmatively appears from the record that the court was without jurisdiction.—*Id.*

⚖490(1) (Ok.) Proceedings for the sale of property of one not a party to the action and not served in any way do not bind the owner and are subject to collateral attack.—*Davies v. Thompson*, 160 P. 75.

⚖490(2) (Or.) A defect in the form or matter of a summons not absolutely destructive of its validity, although material and sufficient to cause a reversal of the judgment, does not deprive the court of jurisdiction, and therefore does not expose the judgment to collateral impeachment.—*Lane v. Ball*, 160 P. 144.

⚖495(1) (Utah) In a collateral proceeding, every presumption is indulged in favor of the district court's jurisdiction and the regularity of its proceedings.—*State v. Sorensen*, 160 P. 1181.

(C) Proceedings.

⚖521 (Or.) A suit to cancel a judgment and enjoin enforcement thereof upon execution against land of which plaintiff claims to be owner is a direct, and not a collateral, attack.—*Lieblin v. Breyman Leather Co.*, 160 P. 1167.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.**(A) Judgments Operative as Bar.**

⚖570(4) (Idaho) A plea of *res adjudicata* cannot be supported by evidence of another trial upon which nothing was determined, nor can the record of such trial have any weight as evidence at a subsequent trial.—*Berlin Mach. Works v. Dehlbom Lumber Co.*, 160 P. 746.

XIV. CONCLUSIVENESS OF ADJUDICATION.**(B) Persons Concluded.**

⚖668(1) (Wash.) Where, in mechanic's lien foreclosure, lot owners claimed title to building and fixtures, and chattel mortgagee of furniture and equipment intervened, and purchase-money mortgagees of such furniture and equipment, disclaimed interest, the judgment, awarding the property to various claimants, not appealed from by the purchase-money mortgagees, could not be questioned in their subsequent foreclosure.—*Lee v. Pasco Theater Co.*, 160 P. 435.

⚖707 (Ok.) Notices being limited to debtor, attached property being proceeded against as his, and the judgment being against it only as his property, the debtor and his privies are concluded, but no other persons.—*Davies v. Thompson*, 160 P. 75.

(C) Matters Concluded.

⚖713(1) (Nev.) Where plaintiff was party to former action, and matter adjudicated was that sought to be presently adjudicated, plaintiff is bound by former judgment, and cannot seek relief, against successors to its beneficiaries, inconsistent with it.—*Bernard v. Metropolis Land Co.*, 160 P. 811.

⚖713(2) (Ok.) A regular judgment, while it remains in force, is conclusive not only as to matters litigated, but as to every ground of recovery or defense which might have been litigated.—*Ely Walker Dry Goods Co. v. Smith*, 160 P. 898.

⚖715(3) (Wash.) A judgment reinstating a city employé on the ground that unqualified employes were retained in the service while the plaintiff was dismissed although qualified, *held* not *res judicata* in a later suit for reinstatement where it appeared that all the employes were qualified, and on reduction of the force he was selected for suspension because of his shorter service.—*Kessler v. City of Seattle*, 160 P. 423.

XV. LIEN.

⚖793(5) (Wyo.) Under Comp. St. 1910, § 4684, and sections 4759 and 4760, as amended by Laws 1915, c. 104, a petition in an action against grantee of deceased judgment debtor *held* an action to enforce a judgment lien, in view of section 5629.—*Stephenson v. Lichtenstein*, 160 P. 1170.

Where property had been conveyed by a deceased judgment debtor after lien of a judgment attached, presentation of judgment to administratrix as a claim against estate *held* not necessary, before bringing an action against grantee to enforce judgment lien.—*Id.*

XXI. ACTIONS ON JUDGMENTS.**(B) Foreign Judgments.**

⚖938 (Ok.) Petition in action on foreign judgment *held* not subject to demurrer.—*Shufeldt v. Bank of Mound City*, 160 P. 923.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⚖948(1) (Or.) Estoppel by a former decree is an affirmative defense which must be pleaded in order to be available.—*McCully v. Heaverne*, 160 P. 1166.

⚖949(2) (Nev.) In action to enjoin diversion of water, allegations of defendant's affirmative answer *held* sufficient to constitute a proper pleading of former judgment affecting the parties.—*Bernard v. Metropolis Land Co.*, 160 P. 811.

⚖958(2) (Nev.) Truth of sufficiently alleged plea of former judgment affecting same parties and same subject-matter as present case was for trial court, if plea was denied.—*Bernard v. Metropolis Land Co.*, 160 P. 811.

JUDICIAL NOTICE.

See Evidence, ⚖35.

JUDICIAL SALES.

See Execution, ⚖222; Executors and Administrators, ⚖337-358; Guardian and Ward, ⚖90-113; Subrogation.

JURISDICTION.

See Appeal and Error, ⚖185; Courts; Criminal Law, ⚖90, 105; Depositions; Divorce, ⚖62, 91, 289; Execution, ⚖59; Executors and Administrators, ⚖76; Guardian and Ward, ⚖90; Habeas Corpus, ⚖49; Judgment, ⚖489-495; Justices of the Peace, ⚖141, 161; Mandamus, ⚖172.

JURY.

See Criminal Law, ¶863; Infants, ¶16.

II. RIGHT TO TRIAL BY JURY.

¶14(2) (Okl.) Under Rev. Laws 1910, §§ 4989-4991, 4993, 4994, issues of fact in an action for recovery of money only must be tried to a jury, unless jury trial is waived or reference ordered.—Avery v. Hays, 160 P. 712.

Where issue was joined by answer to a supplemental petition for recovery of a money judgment for use and occupation, rents, or damages, and a jury was not waived, defendant was entitled to trial by jury.—Id.

¶14(9) (Okl.) A suit by a citizen of the Creek Nation to clear title to part of allotment on the ground that her deed was procured by fraud, in violation of Act Cong. April 26, 1906, § 19, is, under Rev. Laws 1910, § 4994, triable by the court, subject to its power to order issues tried by jury.—Carter v. Prairie Oil & Gas Co., 160 P. 319.

¶19(7) (Cal.) The right to jury trial in probate proceedings was not given by common law.—In re Baird's Estate, 160 P. 1078.

Under Code Civ. Proc. §§ 1312, 1716, as to jury trial, and probate proceedings, in any probate proceeding in which section 1312 authorizes formation of issues, either party at his option, is entitled to jury trial.—Id.

Under Code Civ. Proc. §§ 1312-1318 inclusive, 1658-1660, 1716, formation of issues on trial of application for partial distribution is authorized, so that either party may, on demand, have jury trial.—Id.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

¶70(8) (Kan.) Where the court discharges the panel because the original names in the jury box have not been properly selected from the assessment roll, it is the judge's duty, under Gen. St. 1909, § 4624, to select jurors for the term, and he need not summon the township trustees and require them to select jurors.—State v. Allen, 160 P. 795.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

¶97(4) (Cal.App.) Denial of challenges to jurors for implied bias in that they would not give defendant benefit of the presumption of innocence and their acceptance held not an abuse of discretion.—People v. Martinez, 160 P. 868.

¶136(8) (Cal.App.) Under Pen. Code, § 1070, defendant, charged by one count with larceny of money, by another with embezzlement of it, and by the third with receiving it knowing it to have been stolen, was not entitled to exercise ten peremptory challenges on each count, but only ten in all.—People v. Howard, 160 P. 697.

JUSTICES OF THE PEACE.

See Criminal Law, ¶90, 252.

III. CIVIL JURISDICTION AND AUTHORITY.

¶43(3) (Okl.) A justice's court has no jurisdiction in replevin where the amount in controversy exceeds \$200.—Matheny v. Bank of Nashville, 160 P. 92.

¶44(6) (Okl.) In determining amount in controversy in replevin in justice's court as affecting jurisdiction, the value of the property and damages sought for detention must be considered together.—Matheny v. Bank of Nashville, 160 P. 92.

¶44(9) (Nev.) Under Const. art. 6, § 8, enacted when St. 1861, c. 15, was in force, Rev.

Laws, §§ 2224, 5714, and section 2227 as amended by St. 1907, c. 90, held, that the justice's court had no jurisdiction of a suit to foreclose mechanics' liens, where the total amount of the liens of different claimants involved exceeded \$300.—Phillips v. Snowden Placer Co., 160 P. 786.

IV. PROCEDURE IN CIVIL CASES.

¶87(3) (Kan.) Under Gen. St. 1909, § 3654, where cause arose and wages were earned and payable outside the state, a justice of the peace had no right to entertain a garnishment proceeding against a railroad not personally served.—Loope v. Chicago, B. & Q. R. Co., 160 P. 214.

¶90 (Colo.) In an action in a justice court, there being no pleadings, the plaintiff is entitled to recover if the evidence establishes an indebtedness, regardless of the form of action.—Records v. Eaves, 160 P. 1126.

¶132 (Mont.) Assignee of judgment of justice court for value, before levy of attachment against assignor, owned proceeds of the judgment, and was entitled to recover it of lumber company to which it had been paid.—Kitts v. Woods, 160 P. 512.

V. REVIEW OF PROCEEDINGS.**(A) Appeal and Error.**

¶141(2) (Nev.) The general rule is that the District Court acquires no jurisdiction to try a cause on appeal from a justice's court, where the justice's court was without jurisdiction to entertain the case and render judgment therein.—Phillips v. Snowden Placer Co., 160 P. 786.

¶141(2) (Okl.) The jurisdiction of the county court on appeal from justice's court is limited by the jurisdiction of the justice's court.—Matheny v. Bank of Nashville, 160 P. 92.

¶141(5) (Nev.) Where justice's court had no jurisdiction of suit to enforce mechanics' liens involving over \$300, but the parties, on appeal to district court having concurrent jurisdiction of subject-matter, submitted without question to its jurisdiction, they were thereafter estopped from questioning its jurisdiction.—Phillips v. Snowden Placer Co., 160 P. 786.

¶141(5) (Okl.) A remittitur in county court on appeal from a justice, reducing amount involved to within jurisdiction of justice's court, cannot invest county court with jurisdiction.—Matheny v. Bank of Nashville, 160 P. 92.

¶161(5) (N.M.) Where appellee moves to dismiss appeal from a justice and by oversight moves to "dismiss the cause," but bases the motion on grounds for dismissal of appeal, the latter motion is not a general appearance, waiving irregularities in taking appeal.—Simon v. El Paso & S. W. Co., 160 P. 352; Shipp v. Same, Id. 354.

JUSTIFICATION.

See Homicide, ¶112; Libel and Slander, ¶54, 56.

LACHES.

See Cancellation of Instruments, ¶34.

LANDLORD AND TENANT.

See Cancellation of Instruments, ¶47; Damages, ¶62; Evidence, ¶419; Frauds, Statute of, ¶58; Guardian and Ward, ¶113; Mechanics' Liens, ¶78; Pleading, ¶259, 403; Wharves, ¶9.

II. LEASES AND AGREEMENTS IN GENERAL.**(B) Construction and Operation.**

¶48(1) (Kan.) A petition for breach of covenant by a landlord to remove personal property, alleging that defendant had refused to re-

move feed in one of the silos, whereby plaintiff had been deprived of its use, though he had sufficient feed to fill it, on account of which he claimed \$500 damages, sufficiently alleged special damages.—*Rull v. Rainey*, 160 P. 1016.

In an action by tenant for breach of covenant by landlord to remove personal property, evidence held to sustain verdict for special damages to plaintiff.—*Id.*

⇒48(2) (Kan.) In action against landlord for breach of covenant to remove personal property, special damages which may be the natural and contemplated result of breach may be recovered where facts are pleaded.—*Rull v. Rainey*, 160 P. 1016.

III. LANDLORD'S TITLE AND REVERSION.

(B) Estoppel of Tenant.

⇒63(3) (Or.) A tenant's estoppel to deny his landlord's title ceases when he surrenders to the landlord possession of the demised premises.—*Treadgold v. Willard*, 160 P. 803.

⇒63(4) (Or.) Tenant's relinquishment of possession to the landlord, which will terminate his estoppel to deny the landlord's title, must be complete and made in good faith.—*Treadgold v. Willard*, 160 P. 803.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

⇒76(1) (Ok.) A clause in a lease, restricting right of lessee to assign or sublet the premises, is for the benefit of the lessor, and can be set up alone by him.—*Chilson v. Cavanagh*, 160 P. 601.

(C) Extensions, Renewals, and Options to Purchase or Sell.

⇒85 (Or.) Lessees cannot, under L. O. L. § 705, be held to have exercised option to extend lease by reason of acts of their alleged assignee, where assignment was not established.—*Toomey v. Casey*, 160 P. 583.

Where lessees sublet under instrument giving sublessee right to hold over for extended period, in case lessees should exercise their option to extend the lease, the sublessee cannot exercise the option and bind the lessees for the period of the extension.—*Id.*

(D) Termination.

⇒94(2) (Kan.) To terminate the rights of a sublessee, it is not necessary to give notice to quit, where the original lessee holds under written lease, fixing termination of tenancy.—*Edwards v. American Land & Cattle Co.*, 160 P. 205.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(F) Eviction.

⇒172(1) (Kan.) To constitute constructive eviction, the acts complained of must be those of the landlord or those for which he is responsible.—*Eagle v. Matthews*, 160 P. 211.

⇒173 (Kan.) Acts of third persons do not amount to eviction unless committed under direction or at instance of landlord or with his consent.—*Eagle v. Matthews*, 160 P. 211.

⇒178 (Kan.) Where conditions were the same before and after execution of lease and lessee retained possession 11 months, he waived any claim of eviction.—*Eagle v. Matthews*, 160 P. 211.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

⇒199½ (Or.) Tenant who enters into possession pursuant to lease can escape liability for rent only by eviction by holder of paramount title or by compulsory attornment to him, or, when notified of assertion of such su-

perior right, by surrendering possession to his landlord.—*Treadgold v. Willard*, 160 P. 803.

(B) Actions.

⇒223(3) (Or.) Where a tenant was induced to take a five-year lease of an apartment house at \$10 instead of \$8 per room per month by false representation as to another party's offer, and set up such claim in recoupment in action by the landlord for rent, the measure of his damages was the difference between the agreed rent and the reasonable value of the premises as of the date the contract was made.—*Caples v. Morgan*, 160 P. 1154.

⇒223(4) (Or.) In action by landlord for rent installments, that the tenant, by false representations of the landlord's agent that another party was seeking a lease of the premises at a higher price; was induced to execute the lease at such higher price, was a good defense by way of recoupment.—*Caples v. Morgan*, 160 P. 1154.

⇒231(6) (Ok.) In an action for rent on a building located on defendant's land, evidence held insufficient to show an express promise to pay rent.—*Welsh v. Church*, 160 P. 922.

⇒233(1) (Kan.) In action for rent, where defense is constructive eviction, general verdict for defendant will be set aside, where special findings show that none of the grounds on which defendant claims right to abandon premises resulted from wrongdoing of plaintiff or by his direction or consent.—*Eagle v. Matthews*, 160 P. 211.

⇒233(2) (Or.) In action for rent, where defendant sought to recoup damages for being induced by false representation to execute the lease for a higher rental than he would otherwise, the issue whether the false representation did induce defendant to agree to the higher price was for the jury's determination.—*Caples v. Morgan*, 160 P. 1154.

(C) Lien.

⇒243 (Ok.) The lien given to a landlord by Rev. Laws 1910, § 3806, on crops grown on the rented farm exists independently of seizure by attachment or other process.—*Willmering v. Hinkle*, 160 P. 60.

⇒252(3) (Ok.) The lien given to a landlord is paramount to the rights of one who purchases from the tenant a crop on the leased premises, since the purchaser takes with constructive notice of the lien.—*Willmering v. Hinkle*, 160 P. 60.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

⇒318(1) (Kan.) In action for dispossessing plaintiff from land leased to him by defendant through its agents, it is proper to introduce in evidence leases to another person at the same time, and by such other person to plaintiff, where the answer alleges that defendant did not lease to plaintiff, nor authorize any one to do so.—*Edwards v. American Land & Cattle Co.*, 160 P. 205.

In an action for dispossessing plaintiff of land, instruction that defendants claim that the lands were leased to a third person under written leases, specifying date of expiration, and that the plaintiff was a subtenant under such third person under verbal lease, held a correct statement of the position of defendants.—*Id.*

X. RENTING ON SHARES.

⇒331(6) (Kan.) Where dispute arises between landlord and tenant over amount of grain rent due, testimony of witness who threatened the grain was not incompetent merely because he admitted he was not sure all the grain was raised on that tract.—*White v. White*, 160 P. 993.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, ¶761, 814; Embezzlement; Indictment and Information, ¶182.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

¶14(1) (Cal.App.) To constitute an act of taking the money of an employer larceny, it must appear that the possession of the money was obtained by the employé fraudulently, or by means of some trick, conspiracy, or artifice, with the felonious intent of converting it to his own use.—People v. Howard, 160 P. 697.

¶15(1) (Cal.App.) Where one obtains possession of goods fraudulently with intent to convert the same to his own use, and the owner does not part with the title, the offense is larceny.—People v. Howard, 160 P. 697.

II. PROSECUTION AND PUNISHMENT.**(A) Indictment and Information.**

¶40(4) (Cal.App.) Under Pen. Code, § 971, abolishing distinction between accessory before the fact and principal, defendant could only be made out a principal in the larceny charged by showing that he aided and abetted its commission, and could not be convicted if he aided and abetted an embezzlement or some other offense.—People v. Howard, 160 P. 697.

In prosecution for grand larceny committed in aiding and abetting defendant's wife in her taking money from her employer, accused could not be convicted on evidence that her offense was embezzlement, within Pen. Code, § 508.—Id.

In prosecution as principal in grand larceny by reason of aiding his wife in its commission, proof that the crime committed by the wife was that of embezzlement, as defined by Pen. Code, § 508, was a fatal variance.—Id.

(C) Trial and Review.

¶68(1) (Cal.App.) Whether the circumstances indicating that defendant aided and abetted his wife in the felonious taking of her employer's money, together with their flight, warranted an inference that he did so *held* for the jury.—People v. Howard, 160 P. 697.

LAUNDRIES.

See Licenses, ¶13.

LAW OF THE ROAD.

See Municipal Corporations, ¶708.

LAWYERS.

See Attorney and Client.

LEAKAGE.

See Waters and Water Courses, ¶208.

LEASE.

See Cancellation of Instruments, ¶47; Evidence, ¶419; Frauds, Statute of, ¶88; Guardian and Ward, ¶113; Landlord and Tenant; Mines and Minerals, ¶74-79; Wharves.

LEAVE OF COURT.

See Bankruptcy, ¶285.

LETTERS.

See Evidence, ¶378.

LEVY.

See Exemptions, ¶114; Highways, ¶127.

LEWDNESS.

¶5 (Okl.Cr.App.) An information *held* to state an offense under Rev. Laws 1910, § 2793, forbidding disturbing the public peace or outraging decency.—Fessler v. State, 160 P. 1129.

LIBEL AND SLANDER.

See Pleading, ¶345.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

¶6(1) (Cal.) It is libelous per se to falsely charge that a person is a hypocrite.—Newby v. Times-Mirror Co., 160 P. 233.

¶9(1) (Wash.) Poster, stating that theaters employing incompetent help endangered patrons' lives; that those having competent help displayed a union card, and asking, "Do you know that the A. and M. theaters cannot show" such card?—is libelous per se, as intended to injure another's business, within Rem. Code 1915, §§ 2424, 2425.—Cyclohome Amusement Co. v. Hayward-Larkin Co., 160 P. 1051.

¶10(6) (Colo.) Employer's statement that his employé and confidential clerk was short in his accounts was actionable per se.—Jackisch v. Quine, 160 P. 186.

¶19 (Cal.) An implied finding in libel that a newspaper cartoon could not to an ordinary reader bear the meaning that plaintiff was a hypocrite posing as a reformer *held* unwarranted.—Newby v. Times-Mirror Co., 160 P. 233.

¶33 (Wash.) If a publication is actionable per se, plaintiff need not prove actual damage; damages in such case being presumed.—Cyclohome Amusement Co. v. Hayward-Larkin Co., 160 P. 1051.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

¶46(1) (Cal.) A libelous newspaper article is not privileged within Civ. Code, § 47, subd. 3, merely because about a person active in promoting his own political views.—Newby v. Times-Mirror Co., 160 P. 233.

¶49 (Cal.) A libelous newspaper article cannot be excused on the ground that the occasion is privileged.—Newby v. Times-Mirror Co., 160 P. 233.

III. JUSTIFICATION AND MITIGATION.

¶54 (Cal.) As regards truth of an assertion in alleged libel that plaintiff was accused of felony in altering a public record, intent with which plaintiff had the clerk strike out a satisfaction of judgment is, under Pen. Code, §§ 113, 114, immaterial.—Newby v. Times-Mirror Co., 160 P. 233.

¶56(1) (Cal.) That a libelous newspaper article tends to cause merriment or is a facetious rejoinder to adverse criticism by others does not justify it.—Newby v. Times-Mirror Co., 160 P. 233.

IV. ACTIONS.**(A) Evidence.**

¶112(3) (Cal.) Evidence in libel *held* insufficient to support any implied finding that plaintiff was a hypocrite or in the habit of altering public records.—Newby v. Times-Mirror Co., 160 P. 233.

LICENSES.

See Evidence, ¶333.

I. FOR OCCUPATIONS AND PRIVILEGES.

¶13 (Kan.) An employé collecting and delivering laundry in Kansas City, Kan., for a corporation in Missouri, is not subject to a license tax under an ordinance of such city imposing such tax on each laundry operated within the city.—*Kansas City v. Seaman*, 160 P. 1139.

LIENS.

See Attorney and Client, ¶183; Chattel Mortgages, ¶157; Judgment, ¶793; Landlord and Tenant, ¶243, 252; Mechanics' Liens; Mines and Minerals, ¶113, 117; Railroads, ¶159.

LIFE ESTATES.

See Dower.

LIFE INSURANCE.

See Insurance, ¶289, 448, 585.

LIGHTS.

See Municipal Corporations, ¶703.

LIMITATION OF ACTIONS.

See Adverse Possession; Appeal and Error, ¶339-356; Cancellation of Instruments, ¶34; Constitutional Law, ¶107; Mechanics' Liens, ¶317; Taxation, ¶805.

I. STATUTES OF LIMITATION.

(A) *Nature, Validity, and Construction in General.*

¶2(4) (Okl.) An action in the state court on a judgment rendered in a United States commissioner's court in the Indian Territory, is governed as to limitations by the laws in force when the judgment was rendered.—*Maine v. Edmonds*, 160 P. 483.

(B) *Limitations Applicable to Particular Actions.*

¶21(1) (Or.) In action between cotenants to partition real property, where defendants claimed for half taxes paid by them, allowance, as set-off to plaintiff, of half the sum expended by her in securing patent more than six years before, was error.—*St. Martin v. Hendershott*, 160 P. 373.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) *Accrual of Right of Action or Defense.*

¶50(3) (Nev.) Where, by an attorney's contract, he was entitled to be paid \$100 per year for legal services, he had a cause of action for each year's services so rendered, and recovery by him for more than four years prior to action was barred.—*Warren v. Glasgow & Western Exploration Co., Ltd.*, 160 P. 793.

¶55(1) (Or.) The statute of limitation began to run against an action for false imprisonment under void process on the date of the order for plaintiff's discharge.—*Lane v. Ball*, 160 P. 144.

¶62 (Or.) The statute of limitations cannot be urged against a mere defense.—*Caples v. Morgan*, 160 P. 1154.

(F) *Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.*

¶100(5) (Wash.) Action for fraud against a lessor of hotel for false representations as to the purity, etc., of the well on the premises, could not be brought by the lessee considerably more than three years after taking possession, since he must have discovered the condition of

the well soon after taking possession.—*Grubb v. House*, 160 P. 421.

(H) *Commencement of Action or Other Proceeding.*

¶118(2) (Or.) Under L. O. L. § 8, providing that an action for false imprisonment must be commenced within two years, and section 15, providing that an attempt to commence an action shall be deemed equivalent to the commencement thereof, an action for false imprisonment was commenced where a complaint was filed and summons for several defendants, but only one copy of the complaint was delivered to the sheriff.—*Lane v. Ball*, 160 P. 144.

¶119(3) (Or.) Under L. O. L. § 14, an action for false imprisonment against joint defendants was not deemed commenced against defendants who were only served with summons by proper service of summons and copy of complaint on one defendant.—*Lane v. Ball*, 160 P. 144.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

¶147 (Utah) Where a complaint in an action for goods sold alleged acknowledgment of debt in bankruptcy proceedings, on demurrer on ground that action was barred by Comp. Laws 1907, § 2376, *held*, that defendant did not waive claim of limitations under section 2898 by scheduling the debt in the bankruptcy proceedings.—*O'Donnell v. Parker*, 160 P. 1192.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶180(1) (Utah) Under statute a defendant may demur on ground that an action is barred by limitations.—*O'Donnell v. Parker*, 160 P. 1192.

¶180(2) (Okl.) Where a petition in an action to recover for fraud on its face does not show that the cause of action is barred by limitations under Rev. Laws 1910, § 4657, a demurrer on that ground should be overruled.—*Shawnee Life Ins. Co. v. Taylor*, 160 P. 622.

¶195(4) (Wash.) Where injured employé, to avoid the bar of limitations, alleged insanity during at least four months after the accident, he had the burden of showing insanity, rendering him incapable of transacting ordinary business during the time alleged.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 965.

¶200(1) (Wash.) In an action by employé for injuries where, to avoid the bar of limitations, he alleged insanity from the time of the accident until shortly before bringing suit, an instruction as to burden of proving insanity, and presumption of its continuance, *held* proper.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 965.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Carriers, ¶208-229; Railroads, ¶405.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOANS.

See Guardian and Ward, ¶56, 90.

LOCAL OPTION.

See Intoxicating Liquors, ¶37.

LOGGING RAILROADS.

See Eminent Domain, ¶241.

LOGS AND LOGGING

See Quo Warranto, ¶55.

¶3(11) (Okl.) A conveyance of standing timber specifying no time for removal, grants a terminable estate which may end when a reasonable time for removal, depending on the facts and circumstances of the particular case, expires.—*Mitchell-Crittenden Tie Co. v. Crawford*, 160 P. 917.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINES.

See Negligence, ¶22.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

See Homicide, ¶129, 158.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

¶3(8) (Kan.) Under Laws 1911, c. 238, § 20, a controversy between a city and gas company as to repair and maintenance of service pipes must be submitted to the Public Utilities Commission before action of the gas company will be controlled by mandamus.—*City of Seaman v. American Gas Co.*, 160 P. 318.

¶3(8) (Mont.) In view of Rev. Codes, § 9486, authorizing county attorney to issue subpoena, he is not entitled to mandamus commanding judge of district court to authorize clerk to issue subpoenas for attendance of witnesses.—*State v. District Court in and for Phillips County*, 160 P. 346.

¶11 (Wash.) Where an application for mandamus is filed too late, the Supreme Court will not examine on their merits other questions raised by the application in order to settle disputed questions of law.—*State v. Howell*, 160 P. 760.

¶14(1) (Cal.) Under San Francisco charter, requiring its police commissioners to pay certain death pensions and authorizing them to hold hearings for that purpose, mandamus will not lie to compel the granting of a pension prior to a proper demand upon the police commissioners.—*French v. Cook*, 160 P. 411.

¶15 (Mont.) Mandamus is not a writ of right, but issues only in the discretion of the court, and if the conduct of the party applying therefor has been such as to render it inequitable to grant the writ, relief may be refused.—*State v. Miller*, 160 P. 513.

¶16(1) (Okl.) Where plaintiff filed original petition in Supreme Court for mandamus directing judge of the district court to render judgment in pending litigation, and after issue joined plaintiff dismissed her action in the district court, the petition for mandamus will be dismissed.—*State v. Crump*, 160 P. 454.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

¶79 (Okl.) Under Laws 1913, c. 219, art. 6, § 20, mandamus lies to require mayor of city to call election to raise fund to purchase school site pursuant to request of board of education.—*Cook v. Board of Education of Independent*

School Dist. No. 15 of Atoka County, 160 P. 1124.

¶81 (Cal.) Where the police commissioners' power over death pension applications was purely ministerial, the claimant's right to a judicial determination of the facts is not dependent upon whether the evidence supporting such right was uncontradicted at the hearing before the police commissioners.—*French v. Cook*, 160 P. 411.

¶85 (Mont.) Since Laws 1909, c. 147, § 43, entitles a purchaser of public lands to a certificate of purchase signed by the Governor as president of the state board of land commissioners, in signing such certificate the Governor performs a mere ministerial duty and if he refuses to perform it, mandamus will lie.—*State v. Miller*, 160 P. 513.

¶103 (Kan.) The state may maintain mandamus to compel city officers to issue bonds which have been voted for waterworks plant.—*State v. Francisco*, 160 P. 217.

¶119 (Utah) Under ordinances of Salt Lake City, held, that city treasurer could be compelled to collect whole tax for sewer betterment to discharge coupon warrants issued to the contractor, when but one installment of the tax was delinquent, in view of the provision of ordinances and Comp. Laws 1907, § 282x7, as amended by Laws 1909, c. 41.—*Stinson v. Godbe*, 160 P. 280.

Holder of interest-bearing coupon warrant drawn upon special fund to be raised through assessment made for sewer improvement, may, by mandamus, compel city treasurer to proceed with collection of warrant by sale of delinquent property.—*Id.*

III. JURISDICTION, PROCEEDINGS, AND RELIEF

¶168(8) (Cal.) In mandamus proceedings to compel police commissioners to grant a death pension, evidence is not inadmissible because it had not been introduced at a previous hearing before the commissioners.—*French v. Cook*, 160 P. 411.

¶172 (Mont.) In view of Laws 1909, c. 147, § 48, providing that the board of land commissioners may cancel a certificate for fraud within three years from its date of issue, the formal approval of a sale is not conclusive, and in mandamus to compel issuance of certificate, the court may investigate the question of fraud if raised by the pleadings.—*State v. Miller*, 160 P. 513.

¶187(7) (Cal.) In a mandamus action, the admission of testimony cannot be regarded as prejudicial error, where the record does not disclose its nature.—*French v. Cook*, 160 P. 411.

MANDATE.

See Mandamus.

MANSLAUGHTER.

See Homicide.

MARK.

See Wills, ¶111.

MARRIAGE.

See Divorce; Evidence, ¶333; Husband and Wife.

¶22 (Kan.) Persistence of the matrimonial relations after asserted disability of one of the parties was removed, made them husband and wife under the common law.—*Haywood v. Nichols*, 160 P. 982.

¶39 (Cal.) In proceeding under Code Civ. Proc. § 1664, to establish heirship, wherein plaintiff alleged she was decedent's widow at his death, and defendants denied her marriage to

and her status as decedent's widow, their reliance upon presumption that proven marriage was valid until proof of a prior unrevealed marriage, was not a variance.—*In re Hughson's Estate*, 160 P. 548.

§40(1) (Cal.) A ceremonial marriage having been proven is to be presumed lawful and valid until strong proof to the contrary.—*In re Hughson's Estate*, 160 P. 548.

§40(11) (Cal.) In proceeding under Code Civ. Proc. § 1664, to establish plaintiff's status as widow of a decedent, *held*, that she had the burden of proving that decedent's second marriage, which she attacked, was void, and that her own earlier marriage to him had not been set aside by divorce or annulment.—*In re Hughson's Estate*, 160 P. 548.

The person asserting invalidity of a marriage by reason of a former marriage has the burden of proving that the first marriage had not ended before the second marriage.—*Id.*

§50(1) (Cal.) In a proceeding under Code Civ. Proc. § 1664, to determine plaintiff's status as widow of a decedent whose estate was in administration, opposed by another claiming to be his surviving wife, evidence *held* to sustain finding that plaintiff was not decedent's wife at his death.—*In re Hughson's Estate*, 160 P. 548.

§50(1) (Kan.) Evidence *held* insufficient to overcome the presumption that no legal impediment to a second marriage existed when the marriage was contracted.—*Haywood v. Nichols*, 160 P. 982.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Appeal and Error, §930, 1064, 1066; Commerce, §27; Evidence, §67, 116, 509; Insurance, §598; Municipal Corporations, §216, 218; Negligence, §141; Trial, §191, 242, 296; Work and Labor.

I. THE RELATION.

(B) Statutory Regulation.

§13 (Cal.) St. 1911, pp. 282, 910, limiting hours of employment of minors, does not forbid employment by a railroad company of a minor as watchman at a tunnel.—*Williams v. Southern Pac. Co.*, 160 P. 660.

St. 1911, pp. 282, 910, providing that no minor under 18 shall be permitted to work between 10 p. m. and 5 a. m., forbids employment of any minor under 18 in any occupation between 10 p. m. and 5 a. m.—*Id.*

A statute forbidding employment of minors for more than a specific number of hours per day, or during specified hours, is violated only by the illegal time of employment, and not merely by an illegal contract of employment.—*Id.*

§16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of number sections 340-420, at the end of this topic, where the matter in this and future index digests will be found.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§80(10) (Cal.App.) In action by clerk of corporation to recover balance alleged to be due on account of salary at rate of \$175 per month, where defendant claimed that salary was \$150 per month and had been fully paid, evidence *held* to sustain judgment for plaintiff.—*Breslauer v. McCormick-Saeltzer Co.*, 160 P. 251.

§80(10) (Colo.) Evidence *held* to support judgment for servant who alleged contract to pay a sum certain, while the master alleged a conditional promise.—*Neef Bros. Brewing Co. v. Krotter*, 160 P. 1069.

§83 (Idaho) Laws 1911, c. 170, providing for protection of employes discharged without having received their wages, is limited to employers, and does not embrace an owner of property on which labor is performed when he is not the employer.—*Fenn v. Latour Creek R. Co.*, 160 P. 941.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

(B) Tools, Machinery, Appliances, and Places for Work.

§101, 102(1) (Cal.) It has always been the law that it is the master's duty to furnish his servant a safe place to work, and if for any reason the place was unsafe the master was liable for resultant injuries.—*Kimbol v. Industrial Accident Commission*, 160 P. 150.

§101, 102(8) (Cal.) An employer is not required to furnish an absolutely safe place for work, but only one which is reasonably safe.—*Spivok v. Independent Sash & Door Co.*, 160 P. 568.

§101, 102(8) (Idaho) A master must exercise ordinary care to provide reasonably safe working places, machinery, and appliances, and to maintain them in a reasonably safe condition.—*Wiesner v. Bonners Ferry Lumber Co.*, 160 P. 647.

§111 (Wash.) Since federal Employers' Liability Act governs rights of the parties employed in interstate commerce, a servant so injured is entitled to benefit of a showing of the master's negligence without showing violation of federal Safety Appliance Act.—*Aldread v. Northern Pac. Ry. Co.*, 160 P. 429.

§143(1) (Cal.) A railroad must so construct its roads, and so protect its ways, and provide proper appliances, that its employes will have a reasonably safe place to work.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

(C) Methods of Work, Rules, and Orders.

§133 (Idaho) The duty to give proper signals is not a nondelegable duty of a master.—*Wiesner v. Bonners Ferry Lumber Co.*, 160 P. 647.

§137(4) (Cal.) An engineer operating a train need not watch for employes conversant with tracks and their traffic, and need only adopt reasonable precautions to avoid injuring them on discovering them on the track.—*Williams v. Southern Pac. Co.*, 160 P. 666.

§144 (Cal.) Railroad's knowledge of violation of rule as to distance of structures from main track, adopted for the protection of its employes in consequence of violation of which a fireman was injured, constituted negligence on its part.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

§149(1) (Cal.App.) It is negligence to direct an employe to insert a fuse in electrical connections without warning him that the switch had been changed so as not to cut the current entirely off.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

(E) Fellow Servants.

§170 (Idaho) A master must use due diligence in the employment of competent servants.—*Wiesner v. Bonners Ferry Lumber Co.*, 160 P. 647.

§177 (Idaho) Where the master used due diligence in selection of competent servant to give warning signals and adopted a safe signal system, he is not liable for negligence of a fel-

low servant in failing to give a proper signal.—*Wiesner v. Bonners Ferry Lumber Co.*, 160 P. 647.

(F) Risks Assumed by Servant.

⇒203(1) (Cal.App.) "Ordinary risks" assumed by a servant are such as may not be avoided by reasonable care by the master, or by his servant, who is superior to the injured servant.—*Arundell v. American Oilfields Co.*, 160 P. 159.

⇒204(1) (Okla.) In an action under the federal Employers' Liability Act, where the alleged negligence of the master did not constitute a violation of federal Safety Appliance Acts the common-law defense of assumption of risk is open to the master.—*Chicago, R. I. & P. Ry. Co. v. Jackson*, 160 P. 736.

⇒205(2) (Cal.) Railroad fireman, with knowledge of rule that no structure should be nearer than 8 feet of the main track, had a right to rely upon such rule, and to work with assurance that no structure was close enough to the track to imperil his safety.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⇒205(2) (Okla.) It is the duty of a railroad to so construct its yard tracks as to make them reasonably safe for employes, and an employe may assume that this obligation has been discharged.—*Missouri, O. & G. Ry. Co. v. Overmyre*, 160 P. 933.

⇒216(1) (Idaho) Where servants are employed for hazardous business, they assume the risks from negligence of coemployes, unless the master has been negligent in the latter's selection.—*Wiesner v. Bonners Ferry Lumber Co.*, 160 P. 647.

⇒216(3) (Cal.App.) A tool dresser does not assume the risk of injury by the falling of a pipe, due to the negligence of the driller under whom he worked, in leaving the pipe suspended where the tools would interfere with it.—*Arundell v. American Oilfields Co.*, 160 P. 159.

⇒217(21) (Okla.) Notice of danger and appreciation of risk from moving one engine past another cannot be imputed to a hostler's helper solely from his knowledge of the location of the switch tracks and his having been informed generally of dangers of the service.—*Missouri, O. & G. Ry. Co. v. Overmyre*, 160 P. 933.

⇒217(23) (Utah) Where it required only ordinary knowledge, skill, and prudence to know and appreciate the dangers to employe in ore-sampling plant, the law assumes that he must have known and appreciated whatever danger there was.—*Virend v. Utah Ore-Sampling Co.*, 160 P. 115.

⇒219(5) (Okla.) An employe does not assume risk not naturally incident to occupation from failure of employer to exercise due care to provide safe place to work until he knows of the defect and risk, unless they are so obvious that an ordinarily prudent person would have appreciated them.—*Missouri, O. & G. Ry. Co. v. Overmyre*, 160 P. 933.

⇒222(2) (Utah) In an action for death of plaintiff's son, killed in performance of a portion of his usual duties, in prying down a mass of rock and earth on a 45-degree incline, pursuant to the orders of defendant's foreman, held, that deceased assumed the risk.—*Lukich v. Utah Const. Co.*, 160 P. 270.

(G) Contributory Negligence of Servant.

⇒235(4) (Cal.App.) A rigger employed in a plant operated by electricity is entitled to rely on the superior knowledge of the engineer under whose immediate supervision he was inserting a fuse.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

⇒235(7) (Cal.App.) An employe held not negligent for failing to discover that an electrical switch had been changed so as not to cut the current off from the connection in which he was

directed to insert a fuse.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

⇒236(15) (Cal.) A railroad watchman struck by a train while walking with his back to it, held guilty of contributory negligence.—*Williams v. Southern Pac. Co.*, 160 P. 660.

⇒238(2) (Cal.App.) Act of tool dresser in tying rope about pipe to be hoisted at direction of driller, through whose negligence the pipe slipped from the rope and fell, did not show contributory negligence, barring recovery for injuries to the tool dresser.—*Arundell v. American Oilfields Co.*, 160 P. 159.

⇒238(3) (Cal.) Where an employer furnishes adequate appliances and methods, and an employe, for his own convenience, adopts other methods involving a needless risk and consequent injury, the employer is not liable.—*Spivok v. Independent Sash & Door Co.*, 160 P. 565.

⇒240(1) (Cal.) The test of railroad fireman's contributory negligence in leaning outside while cooling a hot box was whether a prudent man in the exercise of due care would have done so under similar circumstances.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⇒243(2) (Cal.) Where master adopts reasonable rules which are brought to the knowledge of the servant, such rules constitute an element of the contract of hiring, disregard of which on the part of the servant will preclude his recovery for resulting injury.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⇒245(4) (Cal.App.) It is not negligence for an employe to obey orders to insert a fuse after a switch had been changed so as to make the attempt more dangerous, but not inevitably or imminently dangerous.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

(H) Actions.

⇒250¼ [New, vol. 15 Key-No. Series]

(Okla.) In an action under the federal Employers' Liability Act, that provision of the Oklahoma Constitution (Const. art. 23, § 6) requiring submission to the jury of the defense of assumption of risk does not apply.—*Chicago, R. I. & P. Ry. Co. v. Jackson*, 160 P. 736.

⇒250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ⇒ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

⇒258(18) (Okla.) It was not error to refuse to strike from a petition an allegation of general custom among others in the same business as to places for work or methods, as bearing on master's exercise of due care.—*Missouri, O. & G. Ry. Co. v. Overmyre*, 160 P. 933.

⇒264(14) (Cal.) In railroad fireman's action for injury when struck by signboard, held, on the issues, that evidence that he had not been warned of or instructed as to the proximity of the signboard was admissible.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⇒265(1) (Mont.) In an action brought under the federal Employers' Liability Act plaintiff assumes the burden of pleading and proving that at the time of injury he was engaged in interstate commerce.—*McBain v. Northern Pac. Ry. Co.*, 160 P. 654.

⇒270(10) (Okla.) In action for death of employe, it is competent to inquire into manner of construction and location of tracks of railroad, though inquiry involves engineering question.—*Missouri, O. & G. Ry. Co. v. Overmyre*, 160 P. 933.

⇒276(14) (Wash.) It was error to admit plaintiff's evidence, on the issue whether cars were in a train movement or switching movement, that company rules required green flags on rear of trains, and that they were not displayed at

the time of plaintiff's injury.—*Aldread v. Northern Pac. Ry. Co.*, 160 P. 429.

It being admitted that cars were not coupled with air when plaintiff brakeman was injured, proof of rule requiring such coupling is not admissible; the only inquiry being whether failure so to couple caused the injury.—*Id.*

§278(7) (Okl.) Proof that switch tracks in railroad yard were located so closely together as not to afford sufficient space for hostler's helper to properly discharge his duties, resulting in his death, sufficiently shows primary negligence of company.—*Missouri, O. & G. Ry. Co. v. Overmyre*, 160 P. 933.

§278(18) (Wash.) It was error to admit train bulletin on another division, requiring cars moving on main track to be coupled with air, the manner of moving trains on another division having no bearing on the issue whether injury resulted from failure to couple with air.—*Aldread v. Northern Pac. Ry. Co.*, 160 P. 429.

§278(20) (Wash.) In action of an intelligent and experienced servant for injury from explosion of dynamite cap in use of which he was inexperienced, evidence held to sustain finding that his foreman was not negligent in failing to instruct him as to dangers incident to handling caps and in seeing that he did not let unused cap remain in his pocket.—*Jim v. Chicago, M. & St. P. Ry. Co.*, 160 P. 295.

§279(5) (Cal.App.) In an action for injuries to a tool dresser, evidence held to justify finding that the driller under whom the tool dresser worked was negligent in raising a pipe by rope rather than by elevator, and in leaving pipe suspended where the tools, when elevated, would interfere with it.—*Arundell v. American Oilfields Co.*, 160 P. 159.

Evidence held to show that driller had the right to control, or direct the services of tool dresser, who was injured, within Civ. Code, § 1970.—*Id.*

§285(2) (Utah) Where the real cause of a fatal accident to employé in an ore-sampling plant while operating an ore crusher was a mere matter of conjecture, so that different persons reading the evidence might suggest different causes, a nonsuit and a judgment dismissing the action were proper.—*Virend v. Utah Ore-Sampling Co.*, 160 P. 115.

§286(1) (Wash.) In servant's action for injury, tried without a jury, question whether master's alleged negligence entitled the servant to judgment became a question of fact for the court.—*Jim v. Chicago, M. & St. P. Ry. Co.*, 160 P. 295.

§286(33) (Wash.) Evidence held to present jury question whether in switching cars, due care for safety of employé demanded that the air brakes to the cars be coupled.—*Aldread v. Northern Pac. Ry. Co.*, 160 P. 429.

§286(35) (Idaho) In an action for injuries to a servant, evidence held insufficient to authorize an instruction submitting to the jury the question whether employer used reasonable care to see that its rules were enforced.—*Wiesner v. Bonners Ferry Lumber Co.*, 160 P. 647.

§288(1) (Okl.) In an action under the federal Employers' Liability Act, where all the evidence, including that of plaintiff, showed a clear case of assumption of risk, it is improper to deny motion for directed verdict.—*Chicago, R. I. & P. Ry. Co. v. Jackson*, 160 P. 736.

§288(11) (Utah) In an action for death of plaintiff's son, that deceased was only 19 years of age, standing alone, held not to prevent a finding that as a matter of law he assumed risk.—*Lukich v. Utah Const. Co.*, 160 P. 270.

§291(12) (Cal.App.) Instruction that plaintiff employé cannot recover, unless he has preponderance of evidence that he did not fail to exercise ordinary care, which proximately contributed to his injury, was properly refused.—*Arundell v. American Oilfields Co.*, 160 P. 159.

§295(1) (Utah) Where there is no dispute regarding the material facts, and the risk of injury is of such a character that one of ordinary prudence and intelligence ought to have known and appreciated it, there is no question of assumption of risk for the jury.—*Virend v. Utah Ore-Sampling Co.*, 160 P. 115.

§295(3) (Cal.) In railroad fireman's action for injury when struck by signboard, instruction on assumption of risk held not improper, where it appeared that obstruction was an inherent and permanent condition of the way.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§304 (Okl.) The negligence of a "powder monkey," employed by mining company at powder house, who did not object to removal of cans containing small quantities of powder by children is the negligence of the company.—*Folsom-Morris Coal Mining Co. v. De Vork*, 160 P. 64.

(C) Actions.

§332(5) (Okl.) Where a railroad and a conductor are sued for an injury to a passenger, from the alleged negligence of the conductor, a verdict exonerating the conductor must necessarily exonerate the carrier.—*Chicago, R. I. & P. Ry. Co. v. Reinhart*, 160 P. 51.

VI. WORKMEN'S COMPENSATION ACTS.

(A) Nature and Grounds of Master's Liability.

§356 (Cal.) Where the employer was without fault and the injury to an employé occurred solely through his own negligence in using other appliances than those furnished, the case was not within Roseberry Act.—*Spivok v. Independent Sash & Door Co.*, 160 P. 565.

§356 (Cal.) Under Workmen's Compensation Act (St. 1911, p. 796), an employer who violates a statute for the safety of employé is deprived of defense of contributory negligence only where the violation contributed to the employé's injury.—*Williams v. Southern Pac. Co.*, 160 P. 660.

Violation by railroad company of St. 1911, p. 282, in employing a boy under 18 to work until midnight, held not to contribute to an injury to him, and it was not deprived by Workmen's Compensation Act, St. 1911, p. 796, of defense of contributory negligence.—*Id.*

§361 (Kan.) Premises wherein no mechanical power is used and workmen are employed in making and repairing barrels, each workman using only his own tools, are not a "factory" within Workmen's Compensation Law, § 9.—*Menke v. Hauber*, 160 P. 1017.

The term "power," as used in Laws 1911, c. 218, § 9(b), defining a "factory to be any premises wherein power is used for manufacturing," etc., does not include hand power, but has reference only to mechanical power, developed by machinery.—*Id.*

§371 (Cal.) Within Workmen's Compensation Act, § 12, an injury arises out of the employment if there is a causal connection between the working conditions and the injury, but not in the absence of such connection, nor if the injury is common to persons regardless of the work.—*Kimbol v. Industrial Accident Commission*, 160 P. 150.

If the employment necessarily increases danger to a higher degree than that to which persons generally are subjected, there is such special exposure to such danger as warrants a conclusion that the accident arose out of the employment, even though unexpected or unusual, and in no way actually anticipated.—*Id.*

Under the old law the employer's exemption from liability where he was not negligent existed solely because he was not negligent, and not because injury did not arise out of employment,

and even under Workmen's Compensation Act the injury, to create liability, must result from a risk reasonably incident to the work.—Id.

⚡372 (Cal.) In determining whether injury arises out of the employment it is immaterial whether the danger was anticipated, or the employer was free from fault, or the injury resulted from the act of a third party.—*Kimbol v. Industrial Accident Commission*, 160 P. 150.

⚡373 (Cal.) A restaurant dishwasher, upon whom, while at work, the ceiling fell, due to overload of stored goods on the upper floor, over which the master had no control, received an injury "arising out of the employment."—*Kimbol v. Industrial Accident Commission*, 160 P. 150.

⚡375(1) (Cal.App.) Workmen's Compensation Act, § 12a, does not cover injuries at night in a hotel fire to a salesman whom his employer directed to go to the city of the accident and remain indefinitely.—*Forman v. Industrial Acc. Commission*, 160 P. 857.

⚡378 (Kan.) Refusal of injured employé to accept offer under Compensation Act of one-half his average earnings until he is able to return to work, will not bar recovery under the act where at the time of the offer there is a dispute as to whether disability is permanent or only temporary.—*Sillix v. Armour & Co.*, 160 P. 1021.

(B) Compensation.

⚡385(20) (Kan.) In proceedings under the Workmen's Compensation Act, rendition of judgment in a lump sum is within the discretion of the trial court.—*McCorkle v. Red Star Mill & Elevator Co.*, 160 P. 983.

(C) Proceedings.

⚡398 (Kan.) An oral statement within the prescribed time is a sufficient compliance with Compensation Act, § 22, as amended by Laws 1913, c. 216, § 6, requiring employé to present claim for compensation within three months of injury.—*Sillix v. Armour & Co.*, 160 P. 1021.

⚡403 (Cal.) Burden of showing jurisdiction of the Industrial Accident Commission rests on claimant.—*Connolly v. Industrial Acc. Commission of California*, 160 P. 239.

⚡404 (Cal.) Hearsay testimony is not admissible to prove relation of master and servant.—*Connolly v. Industrial Acc. Commission of California*, 160 P. 239.

⚡405(1) (Cal.) Where the only evidence of jurisdiction of the Industrial Accident Commission admitted is hearsay, it has no jurisdiction to make an award.—*Connolly v. Industrial Acc. Commission of California*, 160 P. 239.

⚡405(2) (Cal.) There is no force, as determining whether deceased was an employé or an independent contractor, in the mere fact that the work was such that alleged contract price was inadequate.—*Connolly v. Industrial Acc. Commission of California*, 160 P. 239.

Mere fact that defendant was to furnish lumber for building is not conclusive that his relation with deceased was not that of owner and independent contractor.—Id.

The mere fact that defendant requested a workman to construct a building in a certain way is not conclusive that his relation with deceased was not that of owner and independent contractor.—Id.

⚡408 (Kan.) In an action under the Workmen's Compensation Act, it is not error to refuse a continuance to ascertain whether the injuries are permanent, where more than a year has passed between the injury and the trial.—*McCorkle v. Red Star Mill & Elevator Co.*, 160 P. 983.

⚡412 (Kan.) The refusal to strike from the petition averments having no proper place in an action under Compensation Law is not

prejudicial where no evidence of the extraneous matters was admitted, the court charged not to consider them, and the case was tried as a compensation case.—*Sillix v. Armour & Co.*, 160 P. 1021.

That petition in workman's compensation case does not allege presentation of claim is not ground for reversal where it was shown that the claim was in fact presented.—Id.

In a workman's compensation case, failure to allege average earnings of employé or other facts from which they may be computed, held not prejudicial in the absence of motion to make more definite and certain.—Id.

⚡417(5) (Cal.) Where applicant for compensation for personal injuries was a party to a petition for review, the Industrial Accident Commission cannot waive, so far as he is concerned, time for filing briefs and concede the invalidity of the award.—*First Christian Church of Fresno v. Industrial Accident Commission of State of California*, 160 P. 675.

⚡419 (Kan.) Application by defendant to modify lump sum judgment under Workmen's Compensation Act, because impairment of earning capacity proved was not as great as found, is in nature of petition for new trial for newly discovered evidence, and under Code Civ. Proc. § 308 (Gen. St. 1909, § 5902) cannot be entertained unless made within one year.—*Roberts v. Charles Wolff Packing Co.*, 160 P. 221.

Where judgment under Workmen's Compensation Act is modified on appeal, the proceedings in the Supreme Court did not extend the time for application in trial court for modification because subsequent developments show that impairment of earning capacity was not so great as found.—Id.

Laws 1911, c. 218, §§ 29, 32, authorizing subsequent increase or decrease in amount allowed under Workmen's Compensation Act, applies only to proceedings based on agreement or arbitration, and not to judgments under section 36.—Id.

MAYHEM.

See Criminal Law, ⚡814, 1172; Indictment and Information, ⚡110.

⚡4 (Nev.) Under Rev. Laws, § 6416, defining mayhem to include slitting the ear of a human being, and in view of section 6417, stating that it is immaterial how the injury is inflicted, an information charging that accused bit off a portion of an ear of one C. is sufficient.—*State v. Enkhous*, 160 P. 23.

⚡5 (Nev.) Evidence held to show permanent disfigurement so as to support conviction of mayhem.—*State v. Enkhous*, 160 P. 23.

⚡7 (Nev.) Since Rev. Laws, § 6416, providing a maximum punishment for mayhem of 14 years, does not provide a minimum, the judge may fix the minimum at 5 years, under section 7260, as amended by St. 1915, c. 157, providing that if no minimum is fixed, the court may fix it at 1 to 5 years.—*State v. Enkhous*, 160 P. 23.

MEASURE OF DAMAGES.

See Damages, ⚡105, 124, 216.

MEAT.

See Food, ⚡25.

MECHANICS' LIENS.

See Judgment, ⚡17; Justices of the Peace, ⚡44; Mines and Minerals, ⚡113, 117; Railroads, ⚡159.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

⚡72 (Or.) Under L. O. L. § 7416, giving a lien for materials, labor, etc., on work done at

instance of owner or his agent, a lessee required to make permanent improvements on the property and who caused such improvements to be made became the lessor's agent.—*Myers v. Joseph A. Strowbridge Estate Co.*, 160 P. 185.

☞73(1) (Kan.) Notes taken for building material cannot, in the absence of materialman's lien, be made a lien on the premises.—*De Soto State Bank v. Randall*, 160 P. 207.

☞78 (Cal.App.) To secure protection of Code Civ. Proc. § 1200, repealed by Act May 1, 1911 (St. 1911, p. 1819), limiting amount of liens of materialmen and laborers, where contract was abandoned by contractor, it being valid and recorded, the owner need not give notice of nonresponsibility under section 1192.—*Pacific Mfg. Co. v. Perry*, 160 P. 246.

☞78 (Or.) Under L. O. L. § 7419, premises held under lease requiring lessee to make permanent improvements as agent or contractor held subject to liens of subcontractors, notwithstanding owner's notice of nonliability.—*Myers v. Joseph A. Strowbridge Estate Co.*, 160 P. 185.

(B) Subcontractors' and Contractors' Workmen and Materialmen.

☞96 (Cal.App.) Under Const. art. 20, § 15, and Code Civ. Proc. § 1183, in pursuance thereof, providing for filing of bond of contractor to protect other mechanic's lien claimants, if the owner fails to require such bond, he is liable to pay all liens to the value of the work done and materials furnished.—*Boscut v. Waldmann*, 160 P. 180.

☞98 (Or.) Agreement of subcontractors to accept stock of contractor in part compensation did not amount to a waiver of their right to a lien to that extent, where the stock was never delivered or tendered as security or payment.—*Myers v. Joseph A. Strowbridge Estate Co.*, 160 P. 185.

☞103 (Or.) Stipulation in contract by lessee, as agent of lessor, and contractor for making improvements on the premises that lessor would not be responsible for any claims arising out of improvements, held not binding upon subcontractors who did not agree to be bound thereby.—*Myers v. Joseph A. Strowbridge Estate Co.*, 160 P. 185.

Under L. O. L. §§ 7416, 7417, and 7419, posting of notices of nonliability by owner and lessor whose lessee, as contractor, was to improve leased premises, held not to affect matter of a waiver of subcontractors' liens, or to prevent a lien upon premises.—*Id.*

Reference in first page of specifications for lessee's improvement of premises that owner and lessor should not be responsible for work or labor, where unattached pages of specifications were given to and signed by subcontractors, held to furnish only the specifications for work.—*Id.*

In view of statute giving direct lien for material and labor in alteration, etc., of building, original contractor's agreement to protect owner against liens, is not an agreement of subcontractors to look exclusively to original contractor for compensation.—*Id.*

☞111(1) (Cal.App.) The amount applicable under Code Civ. Proc. § 1200, repealed by Act May 1, 1911 (St. 1911, p. 1819), to liens of materialmen and laborers, in case of a valid contract abandoned by the contractor, is the part of the contract price proportional to the part of the work done, less payments made thereon.—*Pacific Mfg. Co. v. Perry*, 160 P. 246.

Relative to right of lien of materialmen and laborers, where contractor abandoned contract, the contract was not rendered void by alterations of plans, during construction, at owner's direction, as authorized by contract, providing for fair change in contract price.—*Id.*

III. PROCEEDINGS TO PERFECT.

☞132(7) (Cal.App.) Under Code Civ. Proc. § 1187, as to mechanic's liens, held, that the re-

quirement as to notice of completion applies to statutory completion, and the owner who fails to file such notice is estopped to defend for failure to file lien in time.—*Boscut v. Waldmann*, 160 P. 180.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

(B) Bond or Deposit to Prevent or Discharge Lien.

☞226 (Kan.) Where a contract for building a schoolhouse required the contractor to give bond for its faithful performance and a bond for indemnity against mechanics' liens, the bond against liens having been given no lien attached, regardless of failure of board of education to comply with terms of the other bond.—*Southern Surety Co. v. Hudson*, 160 P. 200.

VII. ENFORCEMENT.

☞271(1) (Cal.App.) Complaint of subcontractor claiming mechanic's lien held sufficient to state a cause of action.—*Boscut v. Waldmann*, 160 P. 180.

☞271(10) (Cal.App.) Complaint of subcontractor claiming mechanic's lien, alleging that the building was completed according to the terms of the contract, "on or about October 26th" and that lien claim was filed November 19th, is sufficient to warrant proof of exact date of completion, nor is such allegation objectionable for alleging completion of building rather than completion of contract.—*Boscut v. Waldmann*, 160 P. 180.

☞281(2) (Cal.App.) Finding that building was completed on October 26th is justified by the owner's statement that the last work was that of the painter who on that date worked two hours, especially in view of averment, undenied by the owner, that such date was the date of completion.—*Boscut v. Waldmann*, 160 P. 180.

☞290(2) (Cal.App.) Finding that building was completed "on or about October 26th," is sufficiently definite, in view of record admission that such was the date; "on or about" meaning the day mentioned or one in close proximity thereto; one or two days either before or after being implied.—*Boscut v. Waldmann*, 160 P. 180.

VIII. INDEMNITY AGAINST LIENS.

☞317 (Kan.) The time for commencing an action under Laws 1909, c. 183, § 1, on a bond to prevent mechanics' liens is not fixed by Gen. St. 1909, § 6257 (Code Civ. Proc. § 662).—*Capital Iron Works Co. v. Maryland Casualty Co.*, 160 P. 1006.

An action for the cost of extras can be maintained on a building contractor's bond against liens, and to comply with Gen. St. 1905, § 5577, where the contract provides for alterations and for increasing or decreasing cost in accordance with changes.—*Id.*

MEMORANDA.

See *Franda*, Statute of, ☞108, 116.

MENTAL CAPACITY.

See Criminal Law, ☞53, 57, 355; *Deeds*, ☞68.

MINES AND MINERALS.

See *Guardian and Ward*, ☞113.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

☞74 (Okla.) An assignee of an oil and gas lease, containing a stipulation that all covenants should be binding on assignees of both parties, is liable for the rental payments so long as he retains the lease.—*Ardizzone v. Archer*, 160 P. 446.

☞77 (Okla.) Under an oil and gas lease reserving to the lessee the right, on payment of \$1

and all obligations then due, to surrender the lease, the lessor also had the right to compel surrender of the lease.—*Brown v. Wilson*, 160 P. 94.

Where an oil and gas lessor, after forfeiture incurred by lessees, brought suit to have it judicially declared, and executed a second lease, a refusal of the relief asked was error.—*Id.*

§77 (Okl.) Where an oil and gas lease specified the mode of surrender, it cannot be surrendered in any other way without the consent of the lessor, and where the lease is on the lands of a minor, the approval of the county court is necessary to validate a surrender not in accordance with the terms of the lease.—*Ardizzone v. Archer*, 160 P. 446.

§78(2) (Kan.) In oil and gas lease providing for forfeiture on failure to commence well within 90 days unless lessee pay a stipulated rental, payment at any reasonable time, or on reasonable demand, avoids forfeiture.—*Bloom v. Rugh*, 160 P. 1135.

§78(5) (Kan.) Under oil and gas lease, providing for forfeiture in case of failure to commence well within 90 days, unless lessee pay for delay at \$1 per acre per annum, failure of lessor to assert right of forfeiture promptly and unequivocally waives that right.—*Bloom v. Rugh*, 160 P. 1135.

§78(7) (Kan.) Evidence as to oral agreement at time of written oil and gas lease that lessor was to get rent in 90 days if well was not commenced does not support adjudication of forfeiture, when lessee during term of lease put down producing well, and lessor's rights can otherwise be adequately protected.—*Bloom v. Rugh*, 160 P. 1135.

§79(3) (Kan.) Oil and gas lease providing for forfeiture on failure to commence well within 90 days unless lessee shall pay for delay at \$1 per acre per annum, is not void for uncertainty as to time for payment of rental.—*Bloom v. Rugh*, 160 P. 1135.

§79(6) (Okl.) Oil and gas lease in consideration of \$1, the completion of a well within four months, and payment of royalties for delay, rental in advance, was subject to forfeiture at option of the lessor on failure to make the advance payments when due.—*Brown v. Wilson*, 160 P. 94.

§79(7) (Okl.) Evidence held to show that the assignee of an oil and gas lease was in default in payment of stipulated delay rental, attempted payment having been made by check on bank in which there were no funds.—*Brown v. Wilson*, 160 P. 94.

Evidence held to show default of assignee of oil and gas lease in payment of delay rental, authorizing forfeiture at option of lessor.—*Id.*

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

§143 (Nev.) Under Rev. Laws, § 2221, owner's posting of notice of nonliability at collar of mine shaft, which he knew would be destroyed by contractor's operations, held not binding upon parties employed by contractor, as a notice must be posted to remain a reasonable length of time, though a notice in lead pencil is good.—*Phillips v. Snowden Placer Co.*, 160 P. 786.

§117 (Nev.) In a suit to foreclose mechanics' liens for work done under a contractor for mining work, brought in a justice's court, the allowance of costs to plaintiff in that court was erroneous.—*Phillips v. Snowden Placer Co.*, 160 P. 786.

MINORS.

See Infants; Master and Servant, §13.

MISDEMEANOR.

See Criminal Law, §1069.

MISREPRESENTATION.

See Fraud; Insurance, §289.

MISTAKE.

See Account Stated, §11; Contracts, §98.

MODIFICATION.

See Appeal and Error, §1151, 1152; Contracts, §237-248; Trial, §267.

MORTGAGES.

See Acknowledgment, §20, 36; Attorney and Client, §125; Bills and Notes, §167; Chattel Mortgages; Compromise and Settlement, §6; Estoppel, §22, 94; Fraudulent Conveyances, §27; Guardian and Ward, §90; Subrogation, §16.

I. REQUISITES AND VALIDITY.

(D) Validity.

§78 (Okl.) A person signing a mortgage is presumed to know its contents, and if able to read and understand, and having an opportunity to read, he neglects to do so, he cannot escape liability on the ground of false representations as to its contents.—*Ely Walker Dry Goods Co. v. Smith*, 160 P. 898.

§82 (Okl.) When the consideration of a mortgage includes one or more distinct transactions that are illegal and one or more that are legal, and the legal part can be separated from the illegal, it may be upheld as to the legal part.—*Roth v. Union Nat. Bank of Bartlesville*, 160 P. 505.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§201 (Or.) The proceeds of insurance which a mortgagor was bound to carry as further security, when collected by the mortgagor, are held in trust for the mortgagee.—*Butson v. Misz*, 160 P. 530.

An oral agreement to insure mortgaged premises ordinarily requires the proper amount of a policy upon the building.—*Id.*

Where an insurance policy is taken out by the mortgagor who had agreed to insure for the benefit of the mortgagee, equity will treat the policy as payable to the mortgagor as his interest may appear.—*Id.*

Equity has jurisdiction to enforce a mortgagee's right to the proceeds of insurance on the mortgaged building, the remedy at law being inadequate.—*Id.*

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§278 (Cal.) A deed, reciting that it is made subject to a mortgage on the land conveyed, does not impose any personal liability on the grantees to pay the mortgage.—*McArthur v. Goodwin*, 160 P. 679.

§283(1) (N.M.) As between vendor of mortgaged premises and vendee who assumes debt, the latter becomes principal and the former his surety; but as to the mortgagee they both remain principals.—*Bradstreet v. Gill*, 160 P. 354.

VII. PAYMENT OR PERFORMANCE OF OBLIGATION, RELEASE, AND SATISFACTION.

§303 (Wash.) An agreement by holder of a secured note with grantee of mortgagor, who was not obligated to pay debt, to dismiss fore-

closure proceedings in consideration of grantee's promise to convey land if he did not pay interest before a certain date, *held* not an express agreement to take deed in satisfaction of note.—*Fidelity Nat. Bank of Spokane v. Hosea*, 160 P. 960.

X. FORECLOSURE BY ACTION.

(A) Nature and Form of Remedy.

§381 (Kan.) Code Civ. Proc. § 498 (Gen. St. 1909, § 6093), which is part of act revising procedure in sale of real estate on execution (Laws 1893, c. 109), does not repeal general provision of section 266 (section 5860), authorizing receivers in foreclosure actions.—*Howard v. Tourbier*, 160 P. 1144.

(B) Right to Foreclose and Defenses.

§401(2) (Cal.App.) Suit to foreclose mortgage securing a note, providing that on default in interest payable semiannually, the payee could declare the whole sum due and foreclose the mortgage securing it, is not premature if brought more than six months after date of note; no interest having been paid.—*Colton v. Anderson*, 160 P. 843.

§414 (Kan.) While mortgagee in possession must account for reasonable rental value, this does not necessarily precede foreclosure, but is to be disposed of on final decree and distribution.—*Marion County Bank v. Myers*, 160 P. 979.

§415(1) (Cal.App.) Defense that purchaser from mortgagor inquired of mortgagee before purchasing, and was told that interest was not yet due, is of no avail in foreclosure for default in interest, where, at the time of purchase, the interest was actually in default.—*Colton v. Anderson*, 160 P. 843.

§415(1) (Kan.) While mortgagee in possession must account for reasonable rental value, this does not prevent foreclosure, but is to be disposed of on final decree and distribution.—*Marion County Bank v. Myers*, 160 P. 979.

(F) Pleading and Evidence.

§458 (N.M.) It was not error to allow plaintiff in foreclosure to file a supplemental complaint after a semiannual interest date, where the mortgagor was in default when the original bill was filed.—*Bradstreet v. Gill*, 160 P. 354.

§459(1) (Kan.) It is not error to permit the claim of the assignor of a note to recover it because of fraud in obtaining it from him to be litigated in an action by a subsequent holder to foreclose a mortgage securing it, where all the persons affected are parties, and the issue is submitted to a jury.—*Security State Bank of Rosedale v. Clarke*, 160 P. 1149.

(G) Injunction and Receiver.

§474 (Kan.) Receiver appointed under Code Civ. Proc. § 266 (Gen. St. 1909, § 5860), before sale in foreclosure case should be discharged when sale is confirmed, and it is error to continue receivership after sale without a showing under section 493 (section 6093) that receiver is necessary to prevent waste.—*Howard v. Tourbier*, 160 P. 1144.

MOTHERS' PENSIONS.

See Infants, §12.

MOTIONS.

See Appeal and Error, §237; New Trial, §110-151; Pleading, §343-368, 428.

§49 (Okla.) Where a motion is made during the term and continued to another term, when it is decided, it is the same as if decision was made at the term when it was filed.—*St. Louis, I. M. & S. Ry. Co. v. Lowrey*, 160 P. 718.

§56(1) (Okla.) Rev. Laws 1910, § 5317, as to entry of orders on the journal of the court, is directory, and such entry thereof is not essential.—*Mutual Life Ins. Co. of New York v. Buford*, 160 P. 928.

§59(2) (Okla.) A court of record has inherent power on its own motion to vacate or modify its orders, however conclusive, during the term of their rendition or entry.—*St. Louis, I. M. & S. Ry. Co. v. Lowrey*, 160 P. 718.

MOTIVE.

See Homicide, §166.

MOTOR VEHICLES.

See Municipal Corporations, §703-706.

MUNICIPAL CORPORATIONS.

See Appeal and Error, §1083; Counties; Eminent Domain, §2, 271, 293; Estoppel, §62; Evidence, §514; Mandamus, §14, 79, 81, 103, 119; Schools and School Districts; Statutes, §64; Street Railroads; Towns; Trial, §251; Waters and Water Courses, §208.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§59 (Wash.) Corporation exercising powers of state possesses only those powers expressly granted, or such as are necessarily or fairly implied in or incidental to those expressly granted, and those essential to its objects and purposes.—*State v. Superior Court of Washington in and for King County*, 160 P. 755.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(B) Municipal Departments and Officers Thereof.

§181 (Cal.) San Francisco charter, requiring its police commissioners to pay certain death pensions and authorizing them to examine witnesses and hold hearings for that purpose, confers no judicial powers upon them.—*French v. Cook*, 160 P. 411.

(C) Agents and Employees.

§216(1) (Wash.) Certain Seattle employees appointed without civil service examination before the charter was changed on March 3, 1908, *held* not affected by the change which required appointments under civil service rules to vacancies and new positions.—*Kessler v. City of Seattle*, 160 P. 423.

§218(6) (Wash.) A city council has power to reduce the number of city employees in the interest of economy.—*Kessler v. City of Seattle*, 160 P. 423.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Thereof.

§270 (Idaho) Rev. Codes, § 2353, subd. 4, as amended by Laws 1911, c. 80, relating to repairing and maintaining sewerage system or disposal works, does not apply to construction of new system.—*Veatch v. Gibson*, 160 P. 1112.

Rev. Codes, § 2238, as amended by Laws 1915, c. 97, gives general authority to cities and villages to construct sewers and sewerage systems, including disposal works.—*Id.*

§283 (Idaho) In construction of sewerage system, city may follow procedure prescribed by Pol. Code, commencing with section 2342, or that prescribed by Rev. Codes, § 2238, as amended by Laws 1915, c. 97.—*Veatch v. Gibson*, 160 P. 1112.

Mayor and council of city may, under Rev. Codes, § 2238, as amended by Laws 1915, c. 97, proceed in construction of sewerage system without appointment of sewer committee.—*Id.*

(B) Preliminary Proceedings and Ordinances or Resolutions.

⇒303(1) (Idaho) In ordinance ordering improvements to be made and assessments of lots and tracts within the district, description must be by proper subdivision.—*Veatch v. Gibson*, 160 P. 1112.

⇒314(1) (Idaho) Under Rev. Codes, § 2238f, subds. 15, 16, specifications for a public improvement must be made so definite that any bidder may be compelled to perform contract and liability on his bond will result from failure to do so.—*Seysler v. Mowery*, 160 P. 262.

(C) Contracts.

⇒330(1) (Idaho) Rev. Codes, § 2238f, subds. 15, 16 (Laws 1915, c. 97), relating to contracts for improvements by cities and villages, is intended to procure competitive bidding and safeguard public funds.—*Seysler v. Mowery*, 160 P. 262.

⇒336(1) (Idaho) Under Rev. Codes, § 2238f, subds. 15, 16 (Laws 1915, c. 97), a contract for public improvements must not be let to any other than the lowest bidder unless facts exist by reason of which another bid, though higher, is by the best responsible bidder.—*Seysler v. Mowery*, 160 P. 262.

Facts showing that a bidder other than the lowest bidder is the best responsible bidder must be weighed by the mayor and council or board of trustees while in session and the facts entered in the clerk's minutes.—*Id.*

⇒347(1) (Okla.) A claim for rentals for trenching machines let to a contractor in charge of construction of a waterworks system for a city is not labor and materials furnished in the construction of the public improvement, protected by the bond required by Rev. Laws 1910, § 3881.—*Southern Surety Co. v. Municipal Excavator Co.*, 160 P. 617.

⇒347(1) (Wash.) A city's legal acceptance of a street improvement as finally completed, binding as between it and the principal contractor, is binding also upon a materialman, seeking recovery on bond.—*Denny-Renton Clay & Coal Co. v. National Surety Co.*, 160 P. 1.

Under Rem. & Bal. Code, § 1161, a materialman is not required to wait for the completion or acceptance of the work, but may file his claim as soon as he finishes furnishing material.—*Id.*

⇒347(2) (Wash.) Under Rem. & Bal. Code, § 1161, action of city council on engineer's estimates held a final acceptance of the work as completed, so that materialman's claim filed against surety on the contractor's bond more than 30 days thereafter, was too late.—*Denny-Renton Clay & Coal Co. v. National Surety Co.*, 160 P. 1.

(E) Assessments for Benefits, and Special Taxes.

⇒450(2) (Idaho) The ordinance of intention permitting sewerage district bounded by the corporate limits of the city is sufficiently specific as to boundaries.—*Veatch v. Gibson*, 160 P. 1112.

⇒451 (Idaho) The assessing board is the proper tribunal to first determine what property is assessable for benefits, subject to protest to city council and right of appeal from decision of council to courts.—*Veatch v. Gibson*, 160 P. 1112.

⇒460 (Or.) The amount paid for superintendence of a public improvement and for an abstract of property owners and the clerical work of preparing the assessment, held not assessable against the property owners under a charter not specifically providing therefor.—*Giles v. City of Roseburg*, 160 P. 543.

⇒463 (Or.) An assessment of \$485.44 for a street improvement, the estimated cost of which was \$255, is so unreasonable an excess as to

invalidate it.—*Parker v. City of Hood River*, 160 P. 1158.

⇒484(1) (Or.) Under Charter of Portland, declaring that an assessment for street improvement shall be presumed regular, it cannot be presumed that the executive board did not, as authorized, regularly extend time for completing the improvement.—*Cormack v. Cormack*, 160 P. 880.

⇒485(1) (Utah) While interest-bearing warrants of a city issued to a sewer contractor partake of negotiability, they do not in law have the same protection as negotiable instruments.—*Stinson v. Godbe*, 160 P. 280.

⇒511(1) (Idaho) Under Rev. Codes, § 2353, subd. 3, after assessments are made for a sewerage system or sewerage disposal plant, the property owner is given opportunity to be heard, and decision of city council is subject to appeal.—*Veatch v. Gibson*, 160 P. 1112.

⇒514(7) (Or.) An express waiver of irregularities in assessment, in bond given under L. O. L. § 3245 et seq., does not affect supplemental assessment levied long after.—*Parker v. City of Hood River*, 160 P. 1158.

⇒518(1) (Or.) Interest on warrants given the contractors for public improvement until the assessment was levied, held not chargeable against the property owners under a city charter providing for interest on delinquent taxes.—*Giles v. City of Roseburg*, 160 P. 543.

⇒523(1) (Or.) Where plaintiff voluntarily paid a benefit assessment, under an agreement with city treasurer to return it if illegal, and City Charter of City of Salem, § 52, was amended to authorize return of assessment to then record owners, held, that the agreement was invalid, and plaintiff's grantees, record owners at time of amendment, were entitled to receive money.—*Moffitt v. City of Salem*, 160 P. 1152.

⇒523(2) (Or.) Where plaintiff paid a benefit assessment in order to have the lien on his lots discharged so that he might make a sale of the property, his payment held voluntary.—*Moffitt v. City of Salem*, 160 P. 1152.

(F) Enforcement of Assessments and Special Taxes.

⇒525 (Utah) Though interest upon delinquent installments of special tax for sewer improvement is increased from 6 to 8 per cent., nevertheless payment of delinquent installments should be enforced by sale of the property to pay interest-bearing coupon warrants issued the contractor.—*Stinson v. Godbe*, 160 P. 280.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.**(A) Streets and Other Public Ways.**

⇒703(1) (Utah) Laws 1909, c. 113, § 4, subd. 2, providing that every motor vehicle while in use shall be equipped with front lamps showing white lights and a red tail light, applies only to vehicles in use and not to a dead motor car being hauled through the streets by another car.—*Musgrave v. Studebaker Bros. Co. of Utah*, 160 P. 117.

⇒705(1) (Cal.App.) Whether an automobile driver, in driving his car around the end of a standing street car, was negligent, and liable for damages when he struck a pedestrian, depends on the character of the machine as to size, weight, speed, and noise, and the condition of the streets.—*Bellinger v. Hughes*, 160 P. 838.

⇒706(1) (Utah) That defendants, sued for driving into a person, were on the wrong side of the street because of an excavation, and desired to deliver to house there, is not new or affirmative matter required to be alleged in the

answer, but is admissible under the general issue.—*White v. Shipley*, 160 P. 441.

⇒706(4) (Utah) In action by one who tripped over a rope as he attempted to pass in front of a dead motor car which was being drawn by a live one, evidence that defendant was negligent in moving the cars without arranging for a system of signals between drivers, *held* properly excluded.—*Musgrave v. Studebaker Bros. Co. of Utah*, 160 P. 117.

⇒706(6) (Utah) The law does not fix any particular degree of care to be exercised in moving a dead motor car along the street, but requires only exercise of ordinary care under the circumstances, which is a question for jury.—*Musgrave v. Studebaker Bros. Co. of Utah*, 160 P. 117.

⇒706(6) (Utah) Merely driving on the wrong side of the street in violation of ordinance is not negligence per se, but the question of negligence depends on the facts and circumstances.—*White v. Shipley*, 160 P. 441.

⇒706(7) (Cal.App.) In a pedestrian's action for injuries when struck by an automobile at a street crossing, whether she was warranted, after seeing the automobile a short distance away and knowing that it would cross her line of travel, in not further watching its approach, is a question for the jury.—*Ballinger v. Hughes*, 160 P. 838.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

⇒790 (Wash.) In action for injury from stepping upon loose plank in sidewalk near municipal bathing beach under supervision of park commissioners, their actual notice of the defect was not notice to the board of public works having charge of streets generally.—*MacDermid v. City of Seattle*, 160 P. 290.

⇒800(1) (Okl.) Where a runaway horse did not run into a ditch at the side of a city street and the buggy was not overturned, but driver was thrown into the ditch by a sudden turn, the city is not liable.—*Tallaferrero v. Atchison, T. & S. F. Ry. Co.*, 160 P. 69.

⇒808(3) (Wash.) The maintenance of trapdoors in the sidewalk in such condition that one will give sufficiently to permit a person's toe to catch in the crack between them, is negligence.—*De Lor v. Symons*, 160 P. 424.

⇒821(4) (Kan.) In action against city for injuries from defective streets, the court and jury are not required as matter of law to give controlling weight to judgment of city officials in planning the improvement when it is so doubtful whether the improvement was dangerous that different minds might entertain different opinions.—*Klipp v. City of Hoyt*, 160 P. 1000.

Evidence *held* to present question for the jury as to negligence of city in failing to keep improved street in condition reasonably safe for public use.—*Id.*

⇒821(20) (Kan.) Evidence *held* to present question for jury as to contributory negligence of plaintiff in action for injuries from dangerous condition of street.—*Klipp v. City of Hoyt*, 160 P. 1000.

⇒822(2) (Wash.) In action for injury from loose plank in sidewalk, instruction that degree of care in maintaining streets was in proportion to the danger to be apprehended from their use, and that the degree of care would be greater as to more traveled streets, *held* not erroneous.—*MacDermid v. City of Seattle*, 160 P. 290.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

⇒860 (Wash.) Under Laws 1913, c. 62, creating port of Seattle as municipal corporation to

build and operate wharves, harbor improvements, etc., the port commissioners have no implied authority to spend public funds of port district raised by taxation to defeat Laws 1915, c. 48, a referendum measure limiting port district's bonded indebtedness.—*State v. Superior Court of Washington in and for King County*, 160 P. 756.

(C) Bonds and Other Securities, and Sinking Funds.

⇒907 (Kan.) Laws 1906, c. 101, as amended, relating to city bonds for waterworks, is not repealed by Laws 1913, c. 124, § 7, except so far as the two acts conflict.—*State v. Francisco*, 160 P. 217.

⇒918(4) (Kan.) An election under Laws 1906, c. 101, as to issuance of bonds for waterworks, is not vitiated because polling places were open from 7 o'clock a. m. to 7 o'clock p. m.—*State v. Francisco*, 160 P. 217.

⇒921(1) (Okl.) A proposition to buy municipal bonds at their face value, not including accrued interest, construed by the city as an offer to purchase at par and accepted as such, constitutes a complete contract, leaving nothing for future negotiations.—*State v. City of Sapulpa*, 160 P. 489.

Where a person purchases bonds from a city, not including coupons for accrued interest, and the coupons are wrongfully delivered with the bonds, such delivery does not convey any interest, and the city is not estopped to deny liability as against the purchaser or other person with notice.—*Id.*

⇒941 (Okl.) Where coupons for accrued interest on municipal bonds are wrongfully delivered to purchaser, that a tax was levied for their payment does not estop the city to deny liability to a holder with notice.—*State v. City of Sapulpa*, 160 P. 489.

Where at the time a bank acquired coupons for interest on municipal bonds they were detached and past due, the bank took them subject to any existing defense.—*Id.*

XV. ACTIONS.

⇒1034 (Kan.) In action for unliquidated damages against city of third class, costs cannot be recovered unless previously presented, as required by Gen. St. 1909, § 1559, and petition avers such presentation.—*White v. City of Bonner Springs*, 160 P. 1024.

⇒1040 (Kan.) In action for unliquidated damages against city of third class, costs cannot be recovered unless previously presented, as required by Gen. St. 1909, § 1559, and petition avers such presentation.—*White v. City of Bonner Springs*, 160 P. 1024.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, ⇒780-815.

MUTUALITY.

See Specific Performance, ⇒32.

NAMES.

⇒3 (Okl.) The law does not generally recognize a middle name, but looks rather to the identity of the individual, and when this identity is established, this is all that the law requires.—*Maine v. Edmonds*, 160 P. 483.

⇒6 (Okl.) Omission of or a mistake in an initial does not affect the jurisdiction of the court, where the right party is served and has appeared.—*Maine v. Edmonds*, 160 P. 483.

⇒16(1) (Okl.) Two names, though spelled differently, if they sound alike or so nearly alike that the attentive ear finds difficulty in distin-

guishing them, are regarded as the same.—*Maine v. Edmonds*, 160 P. 483.
 ¶16(2) (Okl.) "Edmonds" and "Edmunds" are regarded as the same name.—*Maine v. Edmonds*, 160 P. 483.

NATIONAL BANKS.

See Banks and Banking, ¶261, 270; Taxation, ¶10, 11, 386.

NAVIGABLE WATERS.

See Constitutional Law, ¶123; Waters and Water Courses; Wharves.

I. RIGHTS OF PUBLIC.

¶14(1) (Wash.) Under Rem. & Bal. Code, § 6769, and Acts 1913, p. 667, joint action of Commissioner of Public Lands and Harbor Line Commission in making plats and entering an order establishing harbor lines designated thereon for second-class shore lands on Lake Washington held a lawful establishment of harbor lines though Const. art. 15, and Rem. & Bal. Code, § 6744, provides a different method in respect to first-class shore lands.—*Puget Mill Co. v. State*, 160 P. 310.

The designation of a "pierhead line" alone upon the state's plats of second-class shore lands on Lake Washington is not the establishing of "harbor lines" and "harbor areas."—*Id.*

II. LANDS UNDER WATER.

¶37(4) (Wash.) Where state authorities convey second-class tide and shore lands to private parties by deeds absolute in form, they vest in the grantees an absolute fee-simple title to such lands.—*Puget Mill Co. v. State*, 160 P. 310.

Despite limitations of Const. art. 15, state's grantees of second-class shore lands on Lake Washington, outer boundaries of which remained undefined by their deeds, except as defined by law as the line of navigability, acquired title to such line as it existed or might be moved further out by lowering of lake.—*Id.*

Where the state established harbor lines in front of second-class shore lands before conveying to private parties, the grantees acquired title only to the lands above the harbor lines.—*Id.*

Conveyance by state of second-class shore lands on Lake Washington before the establishment of harbor lines in front thereof does not prevent the state from establishing harbor lines.—*Id.*

Where the state conveyed second-class shore lands on Lake Washington, leaving outer boundaries undefined, when the lake was lowered the state and municipalities were entitled to claim the added shore land in front of and abutting upon the end of existing streets running transversely to the shore line.—*Id.*

NEGLIGENCE.

See Bridges, ¶87, 46; Carriers; Charities, ¶45; Death, ¶31; Electricity; Explosives; Food, ¶25; Highways, ¶184; Master and Servant, ¶101-532; Municipal Corporations, ¶705, 706, 790-822; Railroads, ¶214-405; Street Railroads.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

¶1 (Om.) To constitute actionable negligence, there must be a duty on defendant to protect plaintiff, failure to perform the duty, and resulting injury to plaintiff.—*Chicago, R. I. & P. Ry. Co. v. Reinhart*, 160 P. 51.

¶1 (Okl.) Three elements are essential to constitute actionable negligence: The existence of a duty; failure to perform that duty; injury proximately resulting from such failure.—*Kan-*

sas City Southern Ry. Co. v. Langley, 160 P. 451.

¶4 (Okl.) The term "ordinary care" denotes such degree of care as is commensurate with the dangers to be encountered, and is determined by the jury in fixing the standard of conduct reasonably to be expected from ordinary, prudent persons under similar circumstances.—*Talliaferro v. Atchison, T. & S. F. Ry. Co.*, 160 P. 69.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

¶22 (Okl.) An automobile is not an inherently dangerous machine, and the rules of law applicable to dangerous instrumentalities do not apply.—*Ford Motor Co. v. Livesay*, 160 P. 901.

¶27 (Okl.) As a general rule, a manufacturer or vendor of an automobile is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the machine.—*Ford Motor Co. v. Livesay*, 160 P. 901.

(C) Condition and Use of Land, Buildings, and Other Structures.

¶32(2) (Wash.) Invitation, as distinguished from mere license, is implied by law only when the visitor comes for some purpose connected with the business in which the owner or occupant is there engaged, or which he permits there to be carried on, and there must be some real or supposed mutuality of interest in the subject to which the visitor's business relates.—*Gasch v. Rounds*, 160 P. 962.

¶33(1) (Wash.) The owner of a building owes a technical trespasser no duty except to refrain from wantonly or willfully injuring him.—*Gasch v. Rounds*, 160 P. 962.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

¶82 (Wash.) Where a technical trespasser went into a building in course of construction when it was dark and without a light, and fell into a furnace pit, his own negligence was the proximate cause of his injury, and he took the risk of the attending peril.—*Gasch v. Rounds*, 160 P. 962.

(C) Imputed Negligence.

¶93(1) (Utah) Even if driver of wagon in which deceased who had accepted the invitation of other young people with her to attend a dance was riding without any direction over the driver or team was negligent, it could not be imputed to her.—*Martindale v. Oregon Short Line R. Co.*, 160 P. 275.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

¶119(7) (Utah) Plaintiff must recover if he recovers at all upon the acts of negligence pleaded.—*Martindale v. Oregon Short Line R. Co.*, 160 P. 275.

(B) Evidence.

¶134(1) (Cal.App.) Negligence may be inferred from a preponderance of evidence, and plaintiff need not prove case beyond reasonable doubt.—*Arundell v. American Oilfields Co.*, 160 P. 159.

¶134(2) (Cal.App.) Negligence may be inferred from a preponderance of evidence, whether circumstantial or direct.—*Arundell v. American Oilfields Co.*, 160 P. 159.

¶134(3) (Wash.) Evidence held to show that plaintiff, in going upon defendant's premises, was a technical trespasser and not an invitee.—*Gasch v. Rounds*, 160 P. 962.

(C) Trial, Judgment, and Review.

⌚136(26) (Cal.App.) Where the injured party's contributory negligence is pleaded, and evidence thereon is introduced, it is a question for the jury.—*Bellinger v. Hughes*, 160 P. 838.

⌚138(1) (Utah) A charge that plaintiff must by preponderance of evidence establish one or more of particular acts of negligence set forth in complaint, where more than one is pleaded, and that such act must be proximate cause of injury complained of, is proper.—*Martindale v. Oregon Short Line R. Co.*, 160 P. 275.

⌚138(2) (Okla.) An instruction that defendant must prove contributory negligence by a preponderance of the evidence is not objectionable, where no inference of plaintiff's negligence could be drawn from the evidence on his behalf.—*Chicago, R. I. & P. Ry. Co. v. Dizney*, 160 P. 880.

⌚141(12) (Cal.) In railroad fireman's action for injury, instruction as to apportionment of damages in case of contributory negligence following *Roseberry Act*, § 1, held sufficiently definite.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Municipal Corporations, ⌚485.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, ⌚942.

NEWSPAPERS.

See Counties, ⌚114; Work and Labor, ⌚9.

⌚2 (Or.) A contract for publishing delinquent tax lists at the specified rate is made by the appointment of the official newspapers and fixing of compensation by the county court and the doing of the work by a newspaper with knowledge of the rate fixed.—*Coos Bay Times Pub. Co. v. Coos County*, 160 P. 532.

NEW TRIAL.

See Appeal and Error, ⌚281, 302, 933, 977, 979, 1015, 1072, 1178; Criminal Law, ⌚913-942.

II. GROUNDS.

(F) Verdict or Findings Contrary to Law or Evidence.

⌚65 (Okla.) In replevin, evidence held not to show an abuse of discretion in granting a new trial on the ground that the verdict was contrary to the evidence and contrary to law.—*Shields v. Colonial Trust Co.*, 160 P. 719.

⌚70 (Wash.) The trial court is vested with discretion to order a new trial on the ground of insufficiency of the evidence to justify the verdict.—*Hawn v. Yakima County*, 160 P. 7.

(G) Surprise, Accident, Inadvertence, or Mistake.

⌚93 (Okla.) Miscarriage of case-made, in transmission from one firm of attorneys to another, preventing appeal, is not an unavoidable casualty and misfortune preventing parties from prosecuting or defending, and does not authorize new trial.—*Bucy v. Ardmore Brick & Tile Co.*, 160 P. 1128.

(H) Newly Discovered Evidence.

⌚102(2) (Okla.) A new trial will not be granted for newly discovered evidence, cumulative in its nature, where the parties offering it have not diligently endeavored to procure the evidence for the trial.—*Sinopoulos Oil Co. v. Bell*, 160 P. 448.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

⌚110 (Okla.) The district courts have the inherent power on their own motion to set aside

a verdict and grant a new trial for prejudicial error at the same term at which verdict or judgment was rendered.—*Shields v. Colonial Trust Co.*, 160 P. 719.

The grant of a new trial on court's own motion, when verdict is rendered in the absence of counsel, exceptions and rights of appeal being saved, does not show an abuse of discretion.—*Id.*

⌚151 (Wash.) Denial of motion for new trial on ground of newly discovered evidence held not an abuse of discretion, where truth of considerable part of such evidence and appellant's diligence in discovering it was challenged by counter affidavits.—*Marshall v. Dunn*, 160 P. 293.

NOMINATION.

See Elections, ⌚128-154.

NON OBSTANTE VEREDICTO.

See Judgment, ⌚199.

NONSUIT.

See Dismissal and Nonsuit.

NONUSER.

See Waters and Water Courses, ⌚49.

NOTARIES.

See Intoxicating Liquors, ⌚265; Principal and Agent, ⌚94.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, ⌚414-430, 568; Bills and Notes, ⌚337, 339; Dower; Estoppel, ⌚54; Evidence, ⌚185; Execution, ⌚222; Guardian and Ward, ⌚109; Insurance, ⌚310; Landlord and Tenant, ⌚94; Master and Servant, ⌚144, 217, 398; Mechanics' Liens, ⌚78, 132; Mines and Minerals, ⌚113; Municipal Corporations, ⌚790; Principal and Surety, ⌚126; Sheriffs and Constables, ⌚129; Vendor and Purchaser, ⌚229-231.

NOVATION.

See Frauds, Statute of, ⌚32.

⌚6 (Cal.) Agreement by maker of note with the payee to hold the amount thereof in trust for beneficiaries named does not constitute a novation under Civ. Code, § 1531; no new obligation being created and no new creditor being substituted.—*Molera v. Cooper*, 160 P. 231.

⌚7 (Cal.) Under Civ. Code, § 1531, defining a novation, agreement by maker of note with payee to hold amount thereof in trust for minor beneficiaries in consideration of release of note was not effective as a novation, where the minor beneficiaries did not accept arrangement or agree to it.—*Molera v. Cooper*, 160 P. 231.

OBJECTIONS.

See Appeal and Error, ⌚185-237; Criminal Law, ⌚695; Pleading, ⌚417; Trial, ⌚83.

OBLIGATION OF CONTRACTS.

See Constitutional Law, ⌚123-154.

OFFICERS.

See Banks and Banking, ⌚113, 116; Bridges, ⌚37; Corporations, ⌚342, 361; District and Prosecuting Attorneys; Embellishment; Exemptions, ⌚114; Judges; Justices of the Peace; Municipal Corporations, ⌚181, 790; Public Service Commissions; Quo War-

rants; Railroads, ¶9; Registers of Deeds; Sheriffs and Constables; Taxation, ¶486-498.

OPEN AND CLOSE.

See Trial, ¶25.

OPINION EVIDENCE.

See Criminal Law, ¶448, 459; Evidence, ¶471-558.

OPINIONS.

See Fraud, ¶11.

ORDERS.

See Master and Servant, ¶149, 222, 245.

ORDINANCES.

See Fish, ¶8; Municipal Corporations, ¶303.

ORPHANS' HOMES.

See Charities, ¶38.

PARDON.

¶4 (Kan.) Under the Indeterminate Sentence Act, the granting or withholding of a parole is within the sound official discretion of prison board, subject to limitations of statute. —Garvey v. Brown, 160 P. 1027.

PARENT AND CHILD.

See Bastards; Divorce, ¶222, 289; Guardian and Ward; Infants.

PAROCHIAL SCHOOLS.

See Schools and School Districts, ¶4, 161.

PAROL.

See Pardon, ¶4.

PAROL AGREEMENTS.

See Contracts, ¶238.

PAROL EVIDENCE.

See Evidence, ¶419-467.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.
For parties to particular proceedings or instruments, see also the various specific topics.

III. NEW PARTIES AND CHANGE OF PARTIES.

¶42 (Cal.App.) In view of Code Civ. Proc. § 387, permitting intervention "at any time before trial," a pledgee of stock in litigation, with full knowledge of it, may not stand by until judgment rendered against his representative in interest, and then by intervention compel a retrial. —Mack v. Eummelen, 160 P. 1096.

¶59(2) (Cal.App.) In wife's action to recover amount in bank deposited in her name and attached as belonging to her husband, order substituting plaintiff in the attachment suit as defendant instead of the bank, on its payment of the amount in court, was properly made, under Code Civ. Proc. § 386. —Youts v. Farmers' & Merchants' Nat. Bank of Los Angeles, 160 P. 855.

¶59(2) (Okla.) Where the interest of a party in the subject-matter of an action is transferred, it is not error to permit the transferee to be substituted for the original party. —Purcell Mill & Elevator Co. v. Canadian Valley Const. Co., 160 P. 485.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

¶75(7) (Okla.) "Defect of parties," within the statute making it a ground of demurrer, means too few and not too many parties, and is not synonymous with "misjoinder of parties," which means an excess of parties. —Niblo v. Drainage Dist. No. 3, 160 P. 468.

PARTITION.

See Limitation of Actions, ¶21.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

¶85 (Or.) In suit to partition real property, plaintiff, who built an addition to the house thereon, which was burned, could derive no benefit therefrom. —St. Martin v. Henderahott, 160 P. 878.

In suit to partition the land, no allowance will be made plaintiff for trivial improvements. —Id.

PARTNERSHIP.

I. THE RELATION.

(A) Creation and Requisites.

¶12 (Cal.App.) A contract between a contracting corporation and its superintendent, whereby the latter was to share profits and losses, held not to create a copartnership. —Fee v. McPhee Co., 160 P. 397.

(B) As to Third Persons.

¶41 (Kan.) All who participate in project to found corporation are liable as partners when the project is abandoned before completion. —Hall Lithographing Co. v. Crist, 160 P. 198.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(D) Actions for Dissolution and Accounting.

¶345 (Kan.) Under Gen. St. 1909, §§ 3490, 3522, 3587, where the individual estate of a decedent is insolvent, having no assets except decedent's share of partnership estate after partnership debts are paid, an individual creditor has such interest in the partnership accounting as to entitle him to appeal from allowance of claims. —Sarbach v. Fidelity & Deposit Co. of Maryland, 160 P. 990.

PART PAYMENT.

See Accord and Satisfaction, ¶7-11.

PART PERFORMANCE.

See Frauds, Statute of, ¶129.

PASSENGERS.

See Carriers, ¶280-321.

PAYMENT.

See Accord and Satisfaction; Adverse Possession, ¶92; Compromise and Settlement; Corporations, ¶88; Frauds, Statute of, ¶74; Insurance, ¶598; Master and Servant, ¶83; Mortgages, ¶283, 303; Principal and Surety, ¶112; Subrogation; Tender; Vendor and Purchaser, ¶181.

I. REQUISITES AND SUFFICIENCY.

¶22 (Utah) Tender by check on a bank in which there was always a sufficient fund to meet it, in the absence of timely objection, was good. —Hirsh v. Ogden Furniture & Carpet Co., 160 P. 283.

¶35 (Or.) Under L. O. L. § 876, attorney employed to collect claims, who kept clients

advised of true state of business, and promptly, on receipt of their money from the debtor, paid them what was due them under the agreement for collection, was entitled to a receipt for the money.—*State v. Farrin*, 160 P. 124.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§74(2) (Cal.App.) In action by clerk of corporation for balance of salary at \$175 per month, fact that plaintiff, who claimed \$150 a month and \$25 per month out of a secret fund, signed a receipt each month in full was not conclusive that he had been paid full agreed compensation.—*Breslauer v. McCormick-Saeltzer Co.*, 160 P. 251.

PENALTIES.

See Banks and Banking, §270; Usury, §138-142.

PENSIONS.

See Infants, §12; Municipal Corporations, §181.

PERPETUITIES.

§8(7) (Nev.) A bequest of the income of the residue of an estate to a fraternal order, if the order established an orphans' home, as provided therein, did not violate the common-law rule against perpetuities; the charity being a public one, not confining the use of the home to any special class.—*In re Hartung's Estate*, 160 P. 782.

PERSONAL INJURIES.

See Bridges, §37, 46; Carriers, §280-321; Charities, §45; Damages, §130-132; Electricity; Evidence, §509-528, 539; Explosives; Food; Highways, §184; Master and Servant, §101-419; Municipal Corporations, §706, 790-822; Negligence; Railroads, §324, 348, 356-401.

PHYSICAL EXAMINATION.

See Damages, §206.

PHYSICIANS AND SURGEONS.

See Evidence, §509, 528.

PIERS.

See Wharves.

PLEADING.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

§8(7) (Cal.) Where defense to action on note by executor was that defendant agreed on release by testator of obligation on note to hold amount of note and interest in trust for two beneficiaries, allegation that defendant had, ever since agreement, "held and does now hold said amount of money upon trust proposed" held conclusion of pleader.—*Molera v. Cooper*, 160 P. 231.

§8(7) (Or.) In action for breach of executory contract to insure property, amended complaint, averring that policy tendered by defendant did not conform to oral contract between parties and was not a complete performance, held insufficient, as pleading a mere conclusion of law.—*Greenberg v. German-American Ins. Co.*, 160 P. 536.

§8(15) (Cal.) Fraud cannot be charged epithetically, but the facts showing the fraud, and not a mere conclusion, must be pleaded.—*San Diego County v. Utt*, 160 P. 657.

§9 (Wash.) Where plaintiff pleaded facts raising implied warranty of food purchased, it was not necessary to plead the warranty as a legal conclusion.—*Fleisher v. Carstens Packing Co.*, 160 P. 14.

§37 (Cal.) A pleading cannot be aided by reason of facts not averred.—*San Diego County v. Utt*, 160 P. 657.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§52(1) (Ok.) Under Rev. Laws 1910, §4739, each of several causes of action in the same petition should constitute a separate count or paragraph, separately stated and numbered, proceeding on a single definite theory, and presenting a complete cause of action.—*Chupco v. Chapman*, 160 P. 88.

§52(2) (Kan.) Where the chief aim of petition by tenants in common against cotenant is partition, allegations asserting right to accounting and to rents need not be separately stated and numbered unless so required by trial court.—*Cribb v. Hudson*, 160 P. 1019.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§93(2) (Cal.) In ejectment, defendant had right to plead, in separate counts: First, that contract of sale to him was executed by plaintiff's husband under written authority from plaintiff; second, on parol contract with plaintiff and execution thereof satisfying statute of frauds; and, third, that property was owned by plaintiff's husband and was community property.—*Schader v. White*, 160 P. 557.

(C) Traverse or Denials and Admissions.

§129(1) (Cal.App.) An averment of the complaint not denied in the answer stands as an admitted fact.—*Boscos v. Waldmann*, 160 P. 180.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§166 (Idaho) New matter in answer in avoidance or constituting a defense or counterclaim is deemed controverted by the opposite party.—*Drumbeller v. Dayton*, 160 P. 844.

§177 (Nev.) Under St. 1915, c. 158, providing that each material allegation of new matter in the answer, uncontroverted by the reply, must be taken as true, an allegation of the answer, undenied by the replication, must be taken as true.—*Bernard v. Metropolis Land Co.*, 160 P. 811.

§180(4) (Or.) Where complaint to quiet title sets up ownership generally, and answer sets up ownership in defendant, reply alleging boundary agreement settling title in plaintiff is not a departure.—*McCully v. Heaverne*, 160 P. 1166.

V. DEMURRER OR EXCEPTION.

§192(2) (Or.) In a suit to restrain the enforcement of a judgment because plaintiff's rights will be injuriously affected, if defendant desired a more detailed statement of derivation of plaintiff's title to land, he should have proceeded by motion, or in some other manner than by demurrer.—*Lieblin v. Breymann Leather Co.*, 160 P. 1107.

§204(1) (Nev.) A demurrer may be made to a whole pleading, or to the statement of any of the grounds embodied therein.—*Bernard v. Metropolis Land Co.*, 160 P. 811.

§204(2) (Ok.) Where general demurrer is filed to petition as a whole, if any paragraph is good, the demurrer should be overruled.—*Chupco v. Chapman*, 160 P. 88.

§204(5) (Nev.) Where demurrer is filed to whole pleading, it may be overruled if any of

the statements are held to be good in furtherance of the purpose of the pleading, whether establishing a cause of action or interposing a defense; the rule applying not only as to a complaint, but equally to an answer and its affirmative allegations.—*Bernard v. Metropolis Land Co.*, 160 P. 811.

A demurrer directed to an entire plea or entire answer, which plea or answer contains several separable parts, must be overruled if any one of the parts is in itself good.—*Id.*

⚡216(2) (Okl.) In considering demurrers to separate causes of action, the court is not confined to allegations in particular subdivision, but may supplement them with general allegations applicable alike to the different causes, though this could not be done if separate causes are separately stated and numbered, except where allegations are incorporated by reference.—*Chupco v. Chapman*, 160 P. 88.

⚡216(2) (Okl.) A petition challenged by general demurrer must be construed with exhibits attached.—*Southern Surety Co. v. Municipal Excavator Co.*, 160 P. 617.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⚡236(2) (Or.) The allowance of an amendment to the complaint after the expiration of ten days allowed in which to amend is within the discretion of the trial court.—*McCully v. Heaverne*, 160 P. 1166.

⚡236(6) (Kan.) The granting of permission to amend petition to ask for additional attorney's fees is within the sound discretion of the trial court.—*State v. Glass*, 160 P. 1145.

⚡237(3) (Nev.) Under Rev. Laws, § 5081, allowing in case of an immaterial variance, a finding according to the evidence, or an immediate amendment, there may be an amendment of the prayer at the close of plaintiff's case.—*Miller v. Thompson*, 160 P. 775.

⚡237(6) (Okl.) Where the evidence to refute plaintiff's theory would sustain a judgment against defendant on a theory which might have been presented by plaintiff in another count amendment, introducing such other theory ought to be allowed.—*Harn v. Patterson*, 160 P. 924.

⚡252(2) (Or.) Where original complaint was supplanted by amended complaint, on which action was tried, original complaint cannot be considered in aid of plaintiff's case.—*Greenberg v. German-American Ins. Co.*, 160 P. 536.

⚡259 (Or.) In action by landlord for rent installments, where defendant counterclaimed damages for being induced by false representations to execute a lease of the premises for enhanced rental, allowing defendant during trial, over plaintiff's objection, to amend his answer so as to call his claim set-off and recoupment instead of counterclaim, and to change the prayer to one that plaintiff take nothing and defendant be dismissed, was not error; it not being shown that plaintiff was surprised or her rights prejudiced thereby.—*Caples v. Morgan*, 160 P. 1154.

VII. SIGNATURE AND VERIFICATION.

⚡292 (Kan.) Under Civ. Code, § 110 (Gen. St. 1909, § 5703), the failure to deny under oath a verified account admits only its accuracy, and not its legality.—*Hill v. Board of Com'rs of Republic County*, 160 P. 987.

VIII. PROFERT, OYER, AND EXHIBITS.

⚡307 (Okl.) A written demand for the return of usury is not a "written instrument as evidence of indebtedness" which would be required by Rev. Laws 1910, § 4769, to be attached to the petition as an exhibit.—*Texmo Cotton Exch. Bank v. Liston*, 160 P. 82.

⚡310 (Kan.) A cross-petition, alleging an agreement between decedent and wife and the cross-petitioner's father for her benefit, "evidenced by a written instrument" attached to cross-petition, showing that it was executed only by the father, was properly construed as stating cause of action founded on parol agreement.—*Jacks v. Masterson*, 160 P. 1002.

XI. MOTIONS.

⚡343 (Okl.) Where petition seeks cancellation of conveyance because never executed by plaintiffs, and that being a full-blood conveyance of inherited lands, it was never approved by the county court, and answer contained general denial and allegations of execution and approval of conveyance, judgment on the pleadings should not be entered for failure to reply.—*Robert v. Mullen*, 160 P. 83.

⚡345(1) (Okl.) In an action for slander, sustaining of defendant's motion for judgment on the pleadings on the ground that the complaint did not state a cause of action held erroneous.—*Jackisch v. Quine*, 160 P. 186.

Where issue has been joined by the filing of a complaint, answer, and replication, the defendant's motion for judgment on the pleadings should not be granted unless the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced.—*Id.*

⚡345(1) (Okl.) Under Rev. Laws 1910, § 4759, where a copy of a negotiable note sued on and attached to the petition shows an undated indorsement, and defendant indorsee does not deny the indorsement under oath or plead facts showing that plaintiff took with knowledge of infirmities, plaintiff is entitled to judgment on the pleadings.—*Mangold & Glandt Bank v. Utterback*, 160 P. 713.

⚡350(3) (Kan.) On motion for judgment on averments in petition and opening statement of counsel, they should be liberally interpreted.—*Moffett v. Fouts*, 160 P. 1187.

⚡350(3) (Kan.) Where a question of fact is involved, it is proper for the court to set aside its judgment on the pleadings.—*Chamberlain Metal Weather Strip Co. v. Bank of Pleasanton*, 160 P. 1138.

⚡367(1) (Okl.) Where a motion to make more definite and certain a paragraph of the petition raises a question presentable only by demurrer, it should be overruled.—*Shawnee Life Ins. Co. v. Taylor*, 160 P. 622.

⚡367(6) (Kan.) Under Code Civ. Proc. § 122 (Gen. St. 1909, § 5715), allowance of motion to make petition more definite and certain is ordinarily within the discretion of trial court.—*Cribb v. Hudson*, 160 P. 1019.

⚡368 (Kan.) Under Code Civ. Proc. § 122 (Gen. St. 1909, § 5715), allowance of motion to separately state and number causes of action is ordinarily within the discretion of the trial court.—*Cribb v. Hudson*, 160 P. 1019.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡403(2) (Or.) An averment of defendant's answer, denied by plaintiff's reply, is of no effect by way of aid to the defects of the complaint.—*Greenberg v. German-American Ins. Co.*, 160 P. 536.

⚡403(2) (Utah) Averment in the complaint of corporate existence of defendant, held not a misnomer, cured by the answer showing it to be a joint-stock company.—*White v. Shipley*, 160 P. 441.

⚡403(8) (Or.) In action for rent, where the complaint, in describing the premises, was defective, but the answer gave a complete description, such answer remedied the defective

state of the complaint.—*Treadgold v. Willard*, 160 P. 803.

⌚412 (Colo.) Where defendant proceeds with trial as if the issues had been regularly formed, and by introducing evidence to prove the affirmative of the allegations in his answer has treated them as controverted and put in issue, he waives want of replication.—*Paulson v. Bergman*, 160 P. 189.

⌚417 (Okla.) Where a demurrer is sustained with leave to amend, an amendment pursuant thereto is a waiver of the demurrer.—*Cabell v. McLish*, 160 P. 592.

⌚426(2) (Colo.) Where petition to disconnect territory from a town was quashed because there was no process running in the name of the people, as required by Const. art. 6, § 30, amendment of the petition in accordance with the views of the court, waived any error in sustaining the motion to quash.—*Adams v. Town of Gunnison*, 160 P. 1033.

⌚426(3) (Colo.) Where no replication was filed to an amended answer and defendant moved for judgment on the pleadings after plaintiff had rested, but proceeded with the trial, after the motion was overruled, he waived the motion.—*Paulson v. Bergman*, 160 P. 189.

POISONS.

See Railroads, ⌚405.

POLICE.

See Municipal Corporations, ⌚181.

POLICE COMMISSIONERS.

See Mandamus, ⌚81.

POLICE POWER.

See Constitutional Law, ⌚81; Game.

POLICY.

See Insurance.

POLL TAXES.

See Constitutional Law, ⌚82, 284; Taxation, ⌚55.

PORTS.

See Municipal Corporations, ⌚860.

POSSESSION.

See Adverse Possession; Burglary, ⌚7, 38; Landlord and Tenant, ⌚318.

POWER OF ATTORNEY.

See Deeds, ⌚5.

POWER OF SALE.

See Chattel Mortgages, ⌚261-263.

POWERS.

See Husband and Wife, ⌚138.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRE-EXISTING DEBT.

See Bills and Notes, ⌚359.

PREMIUMS.

See Insurance, ⌚349.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESENTMENT.

See Bills and Notes, ⌚402.

PRESUMPTIONS.

See Appeal and Error, ⌚901-935; Death, ⌚2; Evidence, ⌚63-83.

PRIMARIES.

See Elections, ⌚128-154.

PRINCIPAL AND AGENT.

See Attorney and Client; Banks and Banking, ⌚113, 116; Brokers; Corporations, ⌚414-432; Deeds, ⌚5, 58, 65; Evidence, ⌚158, 471; Frauds, Statute of, ⌚116; Mechanics' Liens, ⌚96.

I. THE RELATION.

(A) Creation and Existence.

⌚17 (Okla.) Person employed as clerk or sub-agent does not become agent of the principal without the latter's consent.—*Ely Walker Dry Goods Co. v. Smith*, 160 P. 898.

⌚22(2) (Wyo.) It is not an attempt to prove agency by declarations of the agents, where sufficient independent circumstantial evidence is introduced for that purpose, and their declarations introduced are confined to admissions of a defective condition of an article involved in the suit.—*Studebaker Corp. of America v. Hanson*, 160 P. 336.

⌚23(1) (Okla.) In an action on notes payable to plaintiffs' agent, evidence held insufficient to establish an agency to substitute other notes for those given by defendants.—*Choate v. Stand-er*, 160 P. 737.

⌚23(5) (Colo.) In replevin for automobile given as part of price for realty, evidence held not to justify a conclusion that a defendant was plaintiffs' agent to sell the automobile.—*Walker v. MacMillan*, 160 P. 1062.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

⌚94 (Okla.) The mere employment of a notary public solely to take an acknowledgment does not constitute him the agent of the person paying him to make representations as to the nature of the instrument.—*Ely Walker Dry Goods Co. v. Smith*, 160 P. 898.

⌚124(1) (N.M.) Where there is a conflict in evidence as to actual authority of agent, it is error to direct a verdict if the case turns on that point.—*Doran v. First Nat. Bank*, 160 P. 770.

(B) Undisclosed Agency.

⌚143(2) (Or.) Though a contract was made by an agent who did not disclose his principal, the principal was the proper party to sue for breach.—*Levy v. Nevada-California-Oregon Ry.*, 160 P. 808.

(D) Ratification.

⌚164(1) (Idaho) Where unauthorized act of an agent was at the time a personal transaction, and was not intended by the third party or the agent to be made on behalf of the principal, there can be neither express ratification nor implied ratification by retention of benefits.—*Blackwell v. Kercheval*, 160 P. 741.

⌚166(1) (Idaho) Ratification of unauthorized acts of an agent, to be effectual, must have been made with full knowledge of all material facts.—*Blackwell v. Kercheval*, 160 P. 741.

A principal does not ratify unauthorized act by accepting proceeds if knowledge of it did not come in time to enable him to repudiate the entire transaction without essential injury, or where the parties cannot be placed in statu quo.—*Id.*

⚡169(1) (N.M.) Where a principal does nothing except to assert his original rights, ignoring unauthorized acts of his agent, there is no ratification of such acts.—*Doran v. First Nat. Bank*, 160 P. 770.

⚡174 (Idaho) Whether certain letters disclosed ratification of an unauthorized act of an agent, in the absence of ambiguity or a tendency to establish ratification, is primarily for the court, not for the jury.—*Blackwell v. Kercheval*, 160 P. 741.

(F) Actions.

⚡183(2) (Okla.) A principal may maintain in his own name an action upon a written contract made in the name of the agent.—*Choate v. Stander*, 160 P. 737.

⚡189(4) (Or.) Under an averment that plaintiff himself made a contract with defendant railway, he could show that it was made through his agent, though the agent did not disclose that plaintiff was the principal.—*Levy v. Nevada-California-Oregon Ry.*, 160 P. 808.

PRINCIPAL AND SURETY.

See Bail; Bankruptcy, ⚡433; Bills and Notes, ⚡283; Indemnity; Municipal Corporations, ⚡347.

III. DISCHARGE OF SURETY.

⚡112 (Wash.) Where a deed was tendered to plaintiff bank as payment of a secured note, letter written by bank, returning deed, stating that bank did not wish deed made to it, held not an agreement to accept deed in satisfaction of the note, which would release sureties.—*Fidelity Nat. Bank of Spokane v. Hosea*, 160 P. 960.

⚡126(6) (N.M.) Failure of a creditor to present his claim against the estate of a deceased principal or to bring suit against the principal on demand of the surety, does not relieve the surety from liability.—*Kemp Lumber Co. v. Stanley*, 160 P. 351.

PRIORITIES.

See Chattel Mortgages, ⚡157.

PRIVATE SCHOOLS.

See Schools and School Districts, ⚡4, 160, 161.

PRIVILEGE.

See Process, ⚡118; Witnesses, ⚡304.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, ⚡48, 49.

PROBATE.

See Wills, ⚡207-833.

PROBATE PROCEEDINGS.

See Jury, ⚡19.

PROCESS.

See Appeal and Error, ⚡914; Attachment, ⚡206; Execution; Executors and Administrators, ⚡337; Garnishment; Injunction; Insane Persons, ⚡95; Judgment, ⚡17, 490; Mandamus; Prohibition; Quo Warranto.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

⚡45 (Or.) Under L. O. L. § 60, construed with section 56, subd. 2, and section 57, relating to a summons issued by a plaintiff or his attorney in courts of record, in an action against joint defendants, where plaintiff failed to have copies of the complaint served upon defend-

ants except one, he had the right to issue another summons without a return of not found.—*Lane v. Ball*, 160 P. 144.

II. SERVICE.

(A) Personal Service in General.

⚡66 (Or.) Under L. O. L. § 55, subd. 5, where summons in due form were served on joint defendants in a law action, but the sheriff delivered copy of complaint to only one defendant, no jurisdiction of the persons of the other defendants was secured.—*Lane v. Ball*, 160 P. 144.

(B) Privileges and Exemptions.

⚡118 (Wash.) Defendant, a nonresident, coming into state to redeem land from foreclosure sale, but who in fact exchanged his equity of redemption, etc., and who remained over for day longer than was reasonably necessary to complete transaction, was not privileged from personal service of summons and complaint.—*Groundwater v. Town*, 160 P. 1055.

(C) Return and Proof of Service.

⚡149 (Okla.) Return of sheriff reciting that certified copy of summons was left with defendant's wife at his usual place of residence makes out a prima facie case of residence.—*Jones v. Reser*, 160 P. 58.

⚡149 (Okla.) An official return is sufficient proof of facts which the officer is authorized to certify.—*Cox v. State*, 160 P. 895.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚡152 (Or.) In an action against several defendants, where summons in due form was served on each, but a copy of the complaint was only served on one, the service on this defendant was not rendered void in consequence of the direction given the sheriff to deliver a copy of the complaint to him only.—*Lane v. Ball*, 160 P. 144.

⚡158 (Or.) As the power of a court to quash a summons must rest upon the assumption that it is void, and authority to set aside attempted service of summons is upon the theory that exhibition of original or delivery of certified copy was ineffectual, a defect in the return of a summons is not reached by a motion to quash, but must be assailed by an application to set aside the service.—*Lane v. Ball*, 160 P. 144.

PROHIBITION.

See Intoxicating Liquors.

I. NATURE AND GROUNDS.

⚡3(5) (Utah) Where an accusation against the county attorney charged acts not prohibited by Comp. Laws 1907, § 4579, under which it was brought, and the court, therefore, had no jurisdiction, the officer's remedy under section 4577 by appeal was inadequate, so that he could maintain prohibition to prevent removal under such accusation.—*Parker v. Morgan*, 160 P. 764.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

⚡9 (Cal.App.) Under Code Civ. Proc. § 1963, subd. 32, proof that title to land was in one person held to create presumption that title so remained at time of performance of contract by third person to convey the land less than a year later.—*Jennings v. Jordan*, 160 P. 576.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROXIMATE CAUSE.

See Explosives.

PUBLICATION.

See Newspapers.

PUBLIC DEBT.

See Municipal Corporations, ¶¶807-841.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, ¶¶270-525.

PUBLIC LANDS.

See Mandamus, ¶¶85, 172; Navigable Waters, ¶¶37; Statutes, ¶¶167.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

¶39(8) (Okla.) A petition to recover lands patented by the Town-Site Commission of the Creek Nation to a school board *held* to state a cause of action.—*Padgett v. Trent*, 160 P. 38.

A patent issued through the Town-Site Commission of the Creek Nation is not subject to attack in equity unless the Commission was induced to issue it through error of law or by gross or fraudulent mistake of fact.—*Id.*

III. DISPOSAL OF LANDS OF THE STATES.

¶158½ [New, vol. 24 Key-No. Series]

(Mont.) Since Laws 1909, c. 147, as to state lands, fails to require a purchaser to give bond securing deferred payments, although sections 41, 43, and 45 refer to a purchaser's bond, the courts cannot supply the deficiency.—*State v. Miller*, 160 P. 513.

Ratification by the wife of her husband's fraudulent acts in bidding for state lands *held* equivalent to prior authorization in view of Rev. Codes, § 5422.—*Id.*

Where the husband of the purchaser of public lands agreed with another bidder that one of them should bid and toss a coin to determine which should have the land, and after the property was knocked down to the husband he offered the other \$150 for his chance, which was accepted, and the wife then made her check for \$150 to the other bidder, such facts constituted an unlawful agreement.—*Id.*

Since under Laws 1909, c. 147, § 38, all sales of state lands must be at public auction, which means a sale to the highest and best bidder with absolute freedom for competitive bidding, any agreement to stifle competition or chill bidding is a fraud upon the principle upon which the sale is founded.—*Id.*

Where the purchaser of state lands in two parcels was guilty of fraud as to purchase of the first, but the second purchase revealed no fraud, she could maintain mandamus to compel issuance of certificate for the second parcel but not the first.—*Id.*

PUBLIC POLICY.

See Bills and Notes, ¶¶106.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE COMMISSIONS.

See Railroads, ¶¶9, 83; Taxation, ¶¶466, 485; Telegraphs and Telephones, ¶¶26½; Waters and Water Courses, ¶¶256, 257.

¶29 (Idaho) If the value of property found by public utilities commission was not correct, an appeal is provided from its findings.—*Northwest Light & Water Co. v. Alexander*, 160 P. 1106.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Eminent Domain.

PUBLIC UTILITIES.

See Public Service Commissions.

PUNISHMENT.

See Mayhem, ¶¶7; Pardon.

PURE FOOD LAWS.

See Food.

QUALIFICATIONS.

See Elections, ¶¶78.

QUANTUM MERUIT.

See Work and Labor.

QUASHING.

See Process, ¶¶158.

QUIETING TITLE.

See Jury, ¶¶14; Taxation, ¶¶805, 810.

I. RIGHT OF ACTION AND DEFENSES.

¶15 (Cal.) Defendant in a suit to quiet title brought by a beneficiary of a trust created in a deed executed by defendant to a third person as trustee *held* not entitled to attack finding that the plaintiff is the owner of and entitled to the possession of the land.—*McArthur v. Goodwin*, 160 P. 679.

II. PROCEEDINGS AND RELIEF.

¶51 (Cal.) Defendant in a suit to quiet title who had made outlays as an involuntary trustee within Civ. Code, § 2275, could not complain because the judgment quieting title in plaintiff did not require repayment to him of the outlays.—*McArthur v. Goodwin*, 160 P. 679.

QUO WARRANTO.

I. NATURE AND GROUNDS.

¶1 (Or.) By L. O. L. § 363, writ of quo warranto and information in nature of quo warranto have been abolished, but the remedies obtainable thereunder are still available by an action at law, prosecuted in the name of the state as prescribed by section 363.—*State v. Evans*, 160 P. 140.

¶10 (Okla.) Where plaintiff was shown by the canvass of precinct returns to have been nominated for county commissioner, and on recount under Rev. Laws 1910, § 3038, defendant was shown to have received the nomination, plaintiff can by quo warranto try title to the nomination.—*Whitaker v. State*, 160 P. 890.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

¶49 (Or.) In action in nature of quo warranto questioning legality of consolidation of school and high school districts, *held*, that de-

pendant district boundary board must allege all facts necessary to show that the school district was legally annexed, burden of proof resting upon them to show a legal consolidation.—*State v. Evans*, 160 P. 140.

⇒55 (Or.) In quo warranto questioning legality of consolidation of school and high school districts complainants held entitled to offer evidence dehors record to show that petition for election was not signed by the requisite number of voters in district.—*State v. Evans*, 160 P. 140.

RAILROAD COMMISSION.

See Railroads, ⇒9.

RAILROADS.

See Bills and Notes, ⇒108; Bridges, ⇒7; Commerce, ⇒27; Constitutional Law, ⇒297; Evidence, ⇒539; Master and Servant; Street Railroads; Taxation, ⇒890, 391; Waters and Water Courses, ⇒171.

I. CONTROL AND REGULATION IN GENERAL.

⇒9(1) (Cal.) The function of the Railroad Commission, like that of the Interstate Commerce Commission, is to regulate public utilities, and to compel the enforcement of their duty to the public, and not to compel them to carry out their contract obligations to individuals.—*Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California*, 160 P. 828.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

⇒53 (Idaho) Power of a railroad to locate a right of way is vested in its directors and official corporate action is necessary to a valid location, the act of an officer of the company in making a preliminary survey not being sufficient.—*Blackwell Lumber Co. v. Empire Mill Co.*, 160 P. 265.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

⇒83 (Cal.) Under section 36 Public Utilities Act, the railroad commission has no jurisdiction to order a new railway line to be built or an existing one to be extended, since a railroad company does not undertake to supply the transportation needs of territory not reached by its lines.—*Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California*, 160 P. 828.

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

(A) Nature and Extent of Liabilities.

⇒159(4) (Cal.App.) Contract between dredging company and railroads, whereby dredging company agreed to fill in land of one road, held not within Mechanics' Lien Law (Code Civ. Proc. § 1183), relating to construction, alteration, addition to, or repair of any railroad.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.*, 160 P. 862.

⇒159(4) (Idaho) There is no provision of the statutes of Idaho for lien against property of a railroad for board to employees of a contractor, or in favor of a third party for horses hired by the contractor, or for horse feed furnished to the contractor.—*Fenn v. Latour Creek R. Co.*, 160 P. 941.

X. OPERATION.

(A) Duty to Operate.

⇒214 (Cal.) Where a railway line had been destroyed and service discontinued for about 20 years, there was no duty to operate, the line being abandoned; it being immaterial whether under Civ. Code, § 468, or not.—*Atchi-*

son, T. & S. F. Ry. Co. v. Railroad Commission of State of California, 160 P. 828.

(B) Statutory, Municipal, and Official Regulations.

⇒223 (Cal.) The supervision of service rendered by a railroad company is a proper matter for public regulation and control.—*Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California*, 160 P. 828.

(F) Accidents at Crossings.

⇒324(1) (Utah) Deceased, without knowledge of railroad crossing, who, at invitation of other young people, was riding in wagon drawn by a gentle team with a competent driver who had no opportunity to warn others or protect herself, and who was killed at a crossing, was not negligent.—*Martindale v. Oregon Short Line R. Co.*, 160 P. 275.

⇒348(1) (Utah) In action for death of plaintiff's minor daughter, killed when wagon in which she was riding was struck by defendant's passenger train at crossing, brought on ground that defendant negligently failed to keep diligent lookout, evidence held to sustain verdict for plaintiff.—*Martindale v. Oregon Short Line R. Co.*, 160 P. 275.

(G) Injuries to Persons on or near Tracks.

⇒356(3) (Kan.) No public way is established across a railway switchyard merely because pedestrians for many years had so frequently trespassed thereon as to wear a beaten path.—*Malott v. Union Pac. R. Co.*, 160 P. 978.

⇒359(1) (Kan.) One who crosses a railway switchyard where engines and cars are likely to be moving at any time is a trespasser, and the railroad's only duty is not to willfully injure him.—*Malott v. Union Pac. R. Co.*, 160 P. 978.

One injured in crossing railway switchyard notwithstanding warning sign against trespassing and the existence of a safe public highway over a viaduct nearby is not entitled to recover in absence of willful negligence of defendant.—*Id.*

⇒360(2) (Okla.) A railway must exercise ordinary care not to injure a person crossing its tracks at a public crossing, and its liability for injuries in a runaway caused by a horse taking fright from steam escaping from the engine is based on lack of ordinary care.—*Talliaferro v. Atchison, T. & S. F. Ry. Co.*, 160 P. 69.

Where noises from escaping steam from a locomotive would endanger a person at a public crossing, which could be avoided by temporarily suspending the noise without materially interfering with operation of the train, ordinary care would require that it be done.—*Id.*

⇒389(1) (Okla.) While it is gross negligence to run a train at night without headlight, there can be no recovery for death caused by being struck by such train unless such negligence was the proximate cause of the death.—*Kansas City Southern Ry. Co. v. Langley*, 160 P. 451.

⇒396(1) (Okla.) The burden of proving that negligence in running train without headlight was the proximate cause of death is on plaintiff, seeking recovery therefor.—*Kansas City Southern Ry. Co. v. Langley*, 160 P. 451.

⇒401(3) (Okla.) In action against railroad and city for injuries in runaway at public crossing, instruction that, if place where accident occurred was necessarily more dangerous than ordinary street and by ordinary care this condition could have been known to plaintiff, and was known to him, he was required to use more than ordinary care to avoid the accident was erroneous as to the railroad.—*Talliaferro v. Atchison, T. & S. F. Ry. Co.*, 160 P. 69.

(H) Injuries to Animals on or near Tracks.

↪405 (Okl.) Where a railway has notice that arsenic dip, a poisonous fluid in appearance resembling water, is escaping from one of its tank cars and collecting in a pool on its right of way, it is liable for injuries to animals from drinking out of the pool.—Missouri, K. & T. Ry. Co. v. Rose, 160 P. 734.

RAPE.

See Appeal and Error, ↪1002, 1047, 1050; Criminal Law, ↪361, 369, 814.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

↪53(1) (Kan.) Evidence held sufficient to show overt acts with intent to commit the crime, coupled with actual or apparent present ability to complete offense.—State v. Covington, 160 P. 1009.

(C) Trial and Review.

↪57(1) (Cal.App.) Weight to be given testimony in prosecutions for rape, even if uncorroborated, is for the jury, unless inherently improbable.—Valencia v. Milliken, 160 P. 1086.

↪57(5) (Kan.) In prosecution for attempt to rape, the character and extent of woman's resistance are for the jury.—State v. Covington, 160 P. 1009.

III. CIVIL LIABILITY.

↪66 (Cal.App.) In civil action for rape, less stringent rule relative to sufficiency of evidence is applicable than in criminal prosecution, since in a civil action a preponderance of evidence establishes a fact.—Valencia v. Milliken, 160 P. 1086.

Weight to be given conflicting evidence relative to commission of act held for jury.—Id. Where there was no controversy as to birth of plaintiff's child, it was competent for plaintiff to testify that defendant was its father.—Id.

Question whether jury could be asked to compare plaintiff's child with defendant was peculiarly within court's province to determine.—Id.

Evidence as to chastity of plaintiff was not only material on question of damages, but as tending to show probability or nonprobability of resistance by plaintiff.—Id.

Instruction relative to compensatory damages held not improper, as telling jury that damages should be awarded to plaintiff whether she consented or not.—Id.

Questions to plaintiff held proper not only as tending to show damages, but as bearing on question of plaintiff's power to resist.—Id.

Plaintiff's testimony that she weighed 140 to 145 pounds when the act was committed, whereas at time of trial she weighed 215 pounds, held proper.—Id.

Plaintiff's testimony that she remained on friendly terms with defendant after he raped her because he always promised to come and marry her was admissible.—Id.

Court properly struck from the testimony of a witness for the defense his statement that last summer he saw a man and plaintiff at "Urbita Springs," as the fact was immaterial.—Id.

RATE.

See Waters and Water Courses, ↪257.

RATIFICATION.

See Corporations, ↪426; Evidence, ↪245; Principal and Agent, ↪164-174.

REAL ACTIONS.

See Partition; Quieting Title.

REBUTTAL.

See Criminal Law, ↪683; Trial, ↪62.

RECEIPTS.

See Payment, ↪85, 74.

RECEIVERS.

See Mortgages, ↪474.

RECEIVING STOLEN GOODS.

See Indictment and Information, ↪132.

RECITALS.

See Estoppel, ↪22; Vendor and Purchaser, ↪230.

RECORDS.

See Appeal and Error, ↪494-715, 837-1072; Criminal Law, ↪1102-1120; Evidence, ↪332, 333; Judgment, ↪668; Taxation, ↪428; Vendor and Purchaser, ↪231.

RECOUPMENT.

See Set-Off and Counterclaim.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

↪7 (Cal.App.) A void agreement has no standing in law and cannot be reformed.—Ainsworth v. Morrill, 160 P. 1089.

↪16 (Or.) Equity will exercise jurisdiction for correction or reformation of a written instrument on ground of mutual mistake.—Coates v. Smith, 160 P. 517.

↪28 (Or.) Reformation of written instrument on ground of mutual mistake will be decreed in equity as between original parties or those claiming under them in privity, such as judgment creditors.—Coates v. Smith, 160 P. 517.

II. PROCEEDINGS AND RELIEF.

↪36(1) (Or.) In suit to reform note and mortgage against mortgagors and trustee in bankruptcy of one, complaint held insufficient against demurrer as not stating facts sufficient to constitute cause of action.—Coates v. Smith, 160 P. 517.

↪36(3) (Or.) In a suit to reform a deed or written contract on the ground of mistake, plaintiff should plead the particular circumstances constituting the mistake.—Coates v. Smith, 160 P. 517.

↪44 (Or.) Equity will receive parol testimony for the purpose of correcting or reforming a written instrument on ground of mutual mistake.—Coates v. Smith, 160 P. 517.

REFUNDING.

See Guardian and Ward, ↪109; Municipal Corporations, ↪523.

REGISTERS OF DEEDS.

↪3 (Kan.) A register of deeds cannot charge the county for a typewriter purchased for his office without the sanction of the county commissioners.—Hill v. Board of Com'rs of Republic County, 160 P. 987.

A register of deeds cannot, in the absence of an order from the county board or a contract with the board, recover for the indexing of several thousand chattel mortgages which had accumulated in the office for over 20 years.—Id.

REHEARING.

See Appeal and Error, ↪682, 684; New Trial.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Payment.

I. REQUISITES AND VALIDITY.

⚡15 (Wash.) Notice of the injured party's mental condition when a release is procured from him is imputed to the party securing the release.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 985.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡55 (Wash.) Where injured employé, to avoid his release, alleged insanity, he had the burden of showing insanity, rendering him incapable of transacting ordinary business during the time alleged.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 985.

⚡57(2) (Colo.) In an action for personal injuries, evidence held not to sustain plaintiff's burden of showing that his settlement and release were without binding effect.—*Arkansas Valley Ry. Light & Power Co. v. Ebeling*, 160 P. 1034.

⚡59 (Wash.) In an employé's action for injuries where, to avoid his written release, he alleged insanity caused by the accident, an instruction as to burden of proving insanity, and presumption of continuance, held proper.—*Roberts v. Pacific Telephone & Telegraph Co.*, 160 P. 985.

RELEVANCY.

See Evidence, ⚡114.

RELIGIOUS SOCIETIES.

⚡16 (Nev.) An unincorporated joss house society can take title to real estate in Nevada, under the common-law rule that land may be given to pious uses before there is a grantee competent to take.—*Su Lee v. Peck*, 160 P. 18.

Where a lot was given to a joss house society in consideration that Chinese inhabitants would locate in its vicinity and of the society's improvement of the lot, the donor and his grantee are estopped to assert the society's incapacity to take title.—*Id.*

REMOVAL.

See District and Prosecuting Attorneys, ⚡2; Executors and Administrators, ⚡37; Homestead, ⚡162; Municipal Corporations, ⚡218.

RENEWAL.

See Landlord and Tenant, ⚡85.

RENT.

See Landlord and Tenant, ⚡199½-252.

REOPENING CASE.

See Trial, ⚡68, 69.

REPEAL.

See Statutes, ⚡167.

REPLEVIN.

See Appeal and Error, ⚡935; Justices of the Peace, ⚡43, 44.

IV. PLEADING AND EVIDENCE.

⚡68 (Okla.) It is not error to allow an amendment in replevin, changing allegations of absolute ownership to allegations of special ownership based on notes and chattel mortgages, and by adding a count for conversion and praying for the value if delivery cannot be had.—*Continental Gin Co. v. Pannell*, 160 P. 598.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⚡91 (Okla.) An instruction that if the plaintiff was the owner of property, describing it, he was entitled to recover, and if defendant took the property under instructions from a third person who was the owner, the verdict should be for defendant, was not error, notwithstanding mistake in description of property.—*Simpson v. Mauldin*, 160 P. 481.

⚡106 (Colo.) In replevin, the measure of damages, in the absence of specific recovery, is the value of the thing sought to be recovered.—*Walker v. MacMillan*, 160 P. 1062.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

⚡124(1) (Kan.) A redelivery bond in the ordinary form, by two defendants in replevin, with no other signer, binds each to perform any judgment against either or both of them.—*Kendall v. Black*, 160 P. 1015.

REPLY.

See Pleading, ⚡166.

REPUGNANCY.

See Criminal Law, ⚡942; Deeds, ⚡97; Trial, ⚡143, 398; Witnesses, ⚡382, 392.

REQUESTS.

See Estoppel, ⚡81.

RESCISSION.

See Cancellation of Instruments; Contracts, ⚡274; Sales, ⚡124; Vendor and Purchaser, ⚡117, 122.

RESERVATIONS.

See Deeds, ⚡148.

RESIDENCE.

See Domicile; Elections, ⚡78; Venue, ⚡24.

RES JUDICATA.

See Judgment, ⚡570-715.

RETURN.

See Evidence, ⚡158; Intoxicating Liquors, ⚡249; Process, ⚡149.

REVENUE.

See Taxation.

REVIEW.

See Certiorari; Criminal Law, ⚡1134-1179.

REVIVAL.

See Abatement and Revival.

RIPARIAN RIGHTS.

See Waters and Water Courses, ⚡39-49.

RISKS.

See Insurance, ⚡448; Master and Servant, ⚡203-222, 288, 295.

ROADS.

See Highways.

RULES.

See Master and Servant, ⚡144, 243.

SAFE PLACE TO WORK.

See Master and Servant, ¶101-113.

SALES.

See Assignments for Benefit of Creditors, ¶176; Chattel Mortgages, ¶261-263; Corporations, ¶116; Evidence, ¶442, 445; Execution, ¶222; Executors and Administrators, ¶337-358; Exemptions, ¶88; Guardian and Ward, ¶105, 109; Intoxicating Liquors; Logs and Logging; Municipal Corporations, ¶921; Public Lands, ¶158½; Subrogation; Trial, ¶296; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

¶38(4) (Okla.) Representations by a sewing machine agent to purchaser that an order contained certain agreements which were not included therein, though the cause moving the purchaser to sign the contract, do not constitute fraud in its procurement.—White Sewing Mach. Co. v. McCarty Furniture Co., 160 P. 495.

III. MODIFICATION OR RESCISSION OF CONTRACT.**(C) Rescission by Buyer.**

¶124 (Cal.) Under facts, held a buyer, who had, at the seller's instance, transferred some of the articles, could not maintain suit for rescission, for fraud, without restoration of the articles; the transferee not being made a party.—Lupton v. Domestic Utilities Mfg. Co., 160 P. 241.

IV. PERFORMANCE OF CONTRACT.**(C) Delivery and Acceptance of Goods.**

¶182(4) (Okla.) Where evidence as to a sale was undisputed, and plaintiff testified that the goods were not returned, but defendant offered a letter which recited that they had been returned, the question of return was for the jury.—Records v. Eaves, 160 P. 1126.

V. OPERATION AND EFFECT.**(A) Transfer of Title as Between Parties.**

¶199 (Cal.App.) Loss of elevator machinery, which, after defendant contracted to sell it for \$1, receipting therefor, plaintiff took possession of, removing it to its shops, where it was destroyed by fire and earthquake, held upon plaintiff, though he intended to use parts in elevator in defendant's new building.—Bryan Elevator Co. v. Law, 160 P. 174.

VI. WARRANTIES.

¶274 (Wash.) The implied warranty of the wholesomeness of food placed on sale, where it exists, arises as an implication of the common law.—Fletcher v. Carstens Packing Co., 160 P. 14.

On a retail sale of food selected by dealer directly to consumer for immediate consumption, the law implies a warranty of wholesomeness, especially where dealer also manufactures or prepares the food.—Id.

¶288(6) (Okla.) Payments by a purchaser of part of the price after discovery that the goods were not of the kind or quality purchased, sale of a part of the goods, and execution of a note for balance of price waived the defense of fraud.—Marks v. Stein, 160 P. 818.

VII. REMEDIES OF SELLER.**(B) Actions for Price or Value.**

¶359(1) (Okla.) In an action for the price of four head of cattle, evidence held to support a verdict for plaintiff.—Earley v. Johnson, 160 P. 482.

¶365 (Utah) In action upon account for goods sold and delivered, findings that on a date nam-

ed defendant was indebted to plaintiffs on an open account in a certain sum, with legal interest from that date, entitled plaintiff to judgment for both interest and costs.—Hirah v. Ogden Furniture & Carpet Co., 160 P. 283.

(F) Actions for Damages.

¶383 (Wash.) Evidence held to justify the jury in finding a waiver of legal tender of the price by a buyer of grain.—Wallace v. Babcock, 160 P. 1041.

VIII. REMEDIES OF BUYER.**(A) Recovery of Price.**

¶396 (Cal.App.) Action by seller of quarry mortgage bonds for breach of sale contract, which provided for part payment in royalties after foreclosure, on account of the purchaser's breach by giving a prior lien and refusing to operate the quarry, held not in damages, so as to require finding of amount thereof, but for purchase price.—Grant v. Warren, 160 P. 847.

IX. CONDITIONAL SALES.

¶461 (Wash.) A conditional sale contract, consisting of an order addressed to the seller by the purchaser, signed by the purchaser and by the seller, and filed for record by the seller, is valid between the parties.—Sunel v. Riggs, 160 P. 950.

¶477(1) (Wash.) Enforcement of forfeiture under conditional sale, covering automobile, against buyer who relied on seller's manager's offer to find some plan for disposing of the car so that the buyer would get his money out of it, held unconscionable.—Breaks v. Spokane Auto Co., 160 P. 291.

¶479(2) (Wash.) The seller of goods under a conditional sale contract may, upon default in the payments as provided therein, retake the goods at any time.—Sunel v. Riggs, 160 P. 950.

SATISFACTION.

See Accord and Satisfaction; Chattel Mortgages, ¶245; Compromise and Settlement; Payment.

SCHOOLS AND SCHOOL DISTRICTS.

See Mechanics' Liens, ¶226; Quo Warranto, ¶49.

I. PRIVATE SCHOOLS AND ACADEMIES.

¶4 (Kan.) Gen. St. 1909, § 7736, relating to truancy, does not prescribe the courses of study in private, denominational, or parochial schools, nor concern itself with them except to require that they be taught by competent instructors.—State v. Will, 160 P. 1025.

II. PUBLIC SCHOOLS.**(B) Creation, Alteration, Existence, and Dissolution of Districts.**

¶42(2) (Kan.) In a petition for election to vote on establishing rural high school under Laws 1915, c. 311, a recital that proposed school was to be located "within or close to the village of R." is not so indefinite as to invalidate the organization or bonds issued pursuant to the vote.—Rantoul Rural High School Dist. No. 2, Franklin County, v. Davis, 160 P. 1008.

¶42(2) (Kan.) Rural high school districts created under Laws 1915, c. 311, are not within Barnes High School Law, and are not entitled to share in the fund from a levy under that law.—Fisher v. Beck, 160 P. 1012.

¶42(2) (Or.) Order calling election on question whether school district be annexed to high school district is void if district boundary board had no information as to number of voters in school district, except statements in petition and remonstrance, and later it is re-

vealed the petition did not contain names of the necessary one-third.—*State v. Evans*, 100 P. 140.

Under L. O. L. § 4194, election on question whether a school district be annexed to a union high school district was void, and the attempted annexation came to naught, unless the petition from the school district was signed by not less than one-third the legal voters.—*Id.*

(E) District Debt, Securities, and Taxation.

§97(4) (Kan.) The authority of county commissioners to call an election to vote bonds for a county high school is governed by Gen. St. 1909, §§ 7784-7789, and not by section 2078, conferring power to determine necessity for county buildings and to call an election to vote bonds therefor.—*Board of Com'rs of Greeley County v. Davis*, 160 P. 581.

Under Gen. St. 1909, §§ 7802, 7803, a petition of 25 per cent. of the legal voters of a county for an election on a proposed bond issue to build a county high school is a condition precedent to the calling of such an election.—*Id.*

§110 (Kan.) Rural high school districts created under Laws 1915, c. 811, are not within Barnes High School Law, and are not entitled to share in the fund from a levy under that law.—*Fisher v. Beck*, 160 P. 1012.

(G) Teachers.

§130 (Cal. App.) Preliminary elementary school certificate authorizing holder to do practice and cadet teaching without salary in elementary schools of county, as referred to in Pol. Code, § 1775, subd. 1 (c), and section 1771, subd. 3 (c), held a teacher's certificate within section 1585, requiring fee of \$2 from applicant.—*Blanchard v. Keppel*, 160 P. 690.

§135(3) (Cal.) Where a city school superintendent was appointed under mistaken view of the law for a year's probationary period, but claimed a four-year tenure under Pol. Code, § 1792, subd. 2, the contract, having been made by the board of education under misapprehension, was void for reasons of public policy.—*Armstrong v. Board of Education of City of Vallejo*, 160 P. 414.

(H) Pupils, and Conduct and Discipline of Schools.

§160 (Kan.) A parent who takes his child out of the public school and sends it regularly to a private, denominational, or parochial school for such period as it is in session is not subject to penalties of the truancy law.—*State v. Will*, 160 P. 1025.

§161 (Kan.) A child who attends a private, denominational, or parochial school is not a truant.—*State v. Will*, 160 P. 1025.

SEARCH.

See Intoxicating Liquors, §249.

SECONDARY EVIDENCE.

See Evidence, §158-186.

SECURITY.

See Appeal and Error, §475.

SEIZURE.

See Intoxicating Liquors, §249.

SELF-DEFENSE.

See Homicide, §112, 193, 300.

SELF-SERVING DECLARATIONS.

See Evidence, §271.

SENTENCE.

See Criminal Law, §995.

SEPARATE ESTATE.

See Husband and Wife, §131-138.

SERVANTS.

See Master and Servant.

SERVICE.

See Appeal and Error, §565; Process, §66-140.

SERVICES.

See Work and Labor.

SET-OFF AND COUNTERCLAIM.

See Damages, §45; Landlord and Tenant, §223; Limitation of Actions, §21.

I. NATURE AND GROUNDS OF REMEDY.

§6 (Or.) "Recoupment" is the keeping back or stopping something which is due, and, under the principles of the common law, recoupment could be invoked when defendant sustained damages from plaintiff's nonperformance of the contract sued on.—*Caples v. Morgan*, 154 P. 1154.

SETTLEMENT.

See Account Stated; Compromise and Settlement; Executors and Administrators, §481, 509; Payment.

SEWERS.

See Drains; Municipal Corporations, §270.

SHERIFFS AND CONSTABLES.

III. POWERS, DUTIES, AND LIABILITIES.

§113(1) (Okla.) An officer who wrongfully levies attachment on and sells the separate property of a wife in an action against her husband is guilty of conversion and liable in damages.—*Sale v. Shipp*, 160 P. 502.

§129 (Okla.) An action for conversion will not lie for the sale of exempt property by an officer, unless the property is claimed as exempt and notice of the claim is given to the officer in a reasonable time.—*Sale v. Shipp*, 160 P. 502.

§138(2) (Okla.) In an action against a sheriff for levy, on the property of a wife, of an attachment against her husband, it is not error to permit proof that the sheriff required plaintiff to indemnify him against loss and afterwards sold the property.—*Sale v. Shipp*, 160 P. 502.

§139(4) (Okla.) Where an officer broke into plaintiff's house in her absence, and under attachment against her husband removed everything, including all furniture and household supplies, personal wearing apparel of plaintiff and family, all of plaintiff's separate property, and all the chickens on the place, an award of exemplary damages was proper.—*Sale v. Shipp*, 160 P. 502.

SHIPPING.

See Wharves.

SIDEWALKS.

See Municipal Corporations, §790-822.

SIGNALS.

See Master and Servant, **§**183.

SIGNATURES.

See Wills, **§**111; Witnesses, **§**164.

SILENCE.

See Evidence, **§**220.

SITUS.

See Taxation, **§**276.

SLANDER.

See Libel and Slander.

SPECIFICATION OF ERRORS.

See Appeal and Error, **§**362.

SPECIFICATIONS.

See Municipal Corporations, **§**314.

SPECIFIC PERFORMANCE.**II. CONTRACTS ENFORCEABLE.**

§32(1) (Cal.App.) Where defendant in suit for specific performance would not be entitled to have the contract reformed and enforced against plaintiffs, it cannot be reformed and enforced by them against him.—*Ainsworth v. Morrill*, 160 P. 1089.

§32(3) (Cal.) Fact that wife, whose husband contracted to exchange her land, could sue or be sued as undisclosed principal, though she had not herself signed, was sufficient to give mutuality of obligation essential to entitle other party to specific performance against wife.—*Schader v. White*, 160 P. 557.

§49(2) (Cal.) In relation to specific performance, adequacy of price does not mean equality of price; equity will find adequacy or inadequacy of consideration after considering all the circumstances in each case.—*Schader v. White*, 160 P. 557.

Where purchaser contracted to give value of but \$11,500 for property worth \$12,500 above mortgage for \$1,500, there was no inadequacy of consideration justifying refusal of specific performance.—*Id.*

SPEEDY TRIAL.

See Criminal Law, **§**105.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

STATE BOARD OF EQUALIZATION.

See Taxation, **§**466, 493.

STATE BOARD OF TAX COMMISSIONERS.

See Taxation, **§**390.

STATE COURTS.

See Indians, **§**27.

STATES.

See Public Lands, **§**158½; Taxation, **§**191, 193, 195, 218, 386.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§64(5) (Or.) A provision in a city charter for personal liability on an assessment for municipal improvements, if invalid, does not vitiate the charter in other respects.—*Parker v. City of Hood River*, 160 P. 1158.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§95(1) (Kan.) Laws 1905, c. 276, amending Laws 1885, c. 132, relating to situs of property of mutual fire insurance companies, is not violative of Const. art. 2, § 17, forbidding special legislation.—*Freedom Tp. of Republic County v. Douglas*, 160 P. 1147.

III. SUBJECTS AND TITLES OF ACTS.

§121(1) (Kan.) The title to Laws 1905, c. 276, amending Laws 1885, c. 132, relating to situs of property of mutual fire insurance companies for taxation, is broad enough to cover the provisions of the act, and does not violate Const. art. 2, § 16.—*Freedom Tp. of Republic County v. Douglas*, 160 P. 1147.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§167(1) (Mont.) Laws 1909, c. 147, being a complete code of laws on control and disposition of state lands, revises the whole subject-matter of earlier statutes, and repeals all acts and parts of acts in conflict with it, superseding all prior and existing statutes upon the same subject.—*State v. Miller*, 160 P. 513.

VI. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§225½ (Kan.) Failure to follow the procedure prescribed by a series of statutes dealing with a particular subject cannot be remedied by general statutes not pertaining to that particular subject.—*Board of Com'rs of Greeley County v. Davis*, 160 P. 581.

§226 (Utah) Where Comp. Laws 1907, § 3301, touching time for appeal, was taken from the California Code, a California case construing the section is decisive of a question under the statute.—*Lukich v. Utah Const. Co.*, 160 P. 270.

(C) Time of Taking Effect.

§248 (N.M.) Const. art. 4, § 23, merely limits right of Legislature to provide shorter period than 90 days within which laws shall become effective, and provision of Laws 1915, c. 57, relating to depositories of county funds, that the act shall go into effect January 1, 1917, is valid.—*State v. Montoya*, 160 P. 359.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. 14, § 1.....	515
Art. 1, §§ 2, 9.....	515

STATUTES AT LARGE.

1894, Aug. 18, ch. 301, 28	
Stat. 372.....	775
1898, June 28, ch. 517, 30	
Stat. 495.....	917
1898, July 1, ch. 541, §§	
18, 67c, d, 30 Stat. 550,	
564.....	858
1902, July 1, ch. 1375, 32	
Stat. 716.....	917
1903, Jan. 21, ch. 195, 32	
Stat. 774.....	917
1906, April 26, ch. 1876,	
34 Stat. 137.....	917
1906, April 26, ch. 1876, §	
19, 34 Stat. 144.....	319
1908, April 22, ch. 149, 35	
Stat. 65.....	429, 654, 736
1908, May 27, ch. 199, 35	
Stat. 812.....	505
1908, May 27, ch. 199, § 4,	
35 Stat. 312.....	85, 505

REVISED STATUTES.

§ 905.....	923
§ 5198.....	455, 920
§ 5219.....	225, 469

COMPILED STATUTES
1918.

§ 1519.....	923
§ 4647.....	1052
§§ 8605-8650.....	429
§§ 8657-8665.....	429, 654, 736
§§ 9600, 9651.....	858
§ 9759.....	455, 920
§ 9784.....	225, 469

CALIFORNIA.

CONSTITUTION.

Art. 4, § 25½.....	167
Art. 6, § 4½.....	850, 1098
Art. 11, § 7½, subsec. 4...	702
Art. 11, § 11.....	167
Art. 13, § 1.....	225
Art. 13, § 14.....	225, 231
Art. 20, § 15.....	180

CIVIL CODE.

§ 47, subsec. 3.....	233
§ 136, 138, 214, 246.....	695
468.....	828
866.....	673
1242.....	1089
1313.....	682
§ 1504, 1531.....	231
1624, subsec. 5.....	1069
1624, subsec. 6.....	175
1650, subsec. 6.....	578
1698.....	231
1917.....	397
1970.....	159, 415
2275.....	679
2309.....	175
2794, subsec. 3.....	1084
3287.....	397
3302.....	855

CODE OF CIVIL PROCEDURE.

170.....	545
318.....	574
321.....	841
322.....	574, 841
323.....	574, 841
323, subsec. 3.....	841
325.....	574, 841
386.....	855
387.....	1096
396.....	834
544.....	855
583.....	844
§ 942-945.....	1066, 1075
§ 946, 948.....	1066
949.....	1075
954.....	1066
963.....	858
963, Amended by Laws	
1915, p. 209.....	545
1022, subsec. 5.....	845
§ 1027, 1034.....	687
1183.....	180
1187.....	180
1192.....	246
1200, Repealed by Laws	
1911, p. 1319.....	246
1249.....	1098
§ 1312-1318.....	1078
1350a, 1365.....	553
1465, 1466.....	556
1658-1660.....	1078
1664.....	237, 548
1716.....	1078
1832.....	159
1940.....	862
§ 1958, 1960.....	159
§ 1963, subsec. 32....	239, 576

PENAL CODE.

§ 22.....	690
§ 113, 114.....	233
182, subsec. 5.....	840
460.....	868
628f.....	167
§ 508, 809, 951, 954, 971,	
1070.....	697
§ 1191, 1202.....	689
1247.....	1090

POLITICAL CODE.

§ 1188.....	245
1565.....	690
1771, subsec. 3c.....	690
1775, subsec. 1c.....	690
1792, subsec. 2.....	414
3731.....	574
§ 4013, 4017, 4018.....	702

CITY CHARTERS.

San Bernardino. Laws	
1913, p. 1652 et seq....	702
San Bernardino. Laws	
1913, p. 1652 et seq....	
Amended by Laws 1915,	
p. 1727.....	702
San Bernardino, art. 2, §§	
1, 2. Laws 1913, p.	
1656.....	702
San Bernardino, arts. 4, 6,	
Laws 1913, pp. 1657,	
1660.....	702

LAWS.

1907, p. 666.....	657
1911, p. 282.....	660

1911, p. 425.....	167
1911, p. 556, § 32.....	231
1911, p. 796.....	565, 660
1911, p. 796, § 1.....	415
1911, p. 910.....	660
1911, p. 1319.....	246
1911 (Ex. Sess.) p. 35, § 31	
1911 (Ex. Sess.) p. 36, § 36	
1913, p. 84.....	228
1913, p. 283, § 12.....	150
1913, p. 283, § 12a.....	857
1913, p. 1390, § 5, subsecs.	
2, 8.....	245
1913, p. 1652 et seq....	702
1913, p. 1652 et seq.	
Amended by Laws 1915,	
p. 1727.....	702
1913, p. 1656, art. 2, §§ 1,	
2.....	702
1913, pp. 1657, 1660, arts.	
4, 6.....	702
1915, p. 112.....	167
1915, p. 209.....	545, 858
1915, p. 589.....	167
1915, p. 1102, § 28.....	884
1915, p. 1727.....	702

COLORADO.

CONSTITUTION.

Art. 5, § 39.....	1032
Art. 6, § 30.....	1033
Art. 14, § 15.....	1038
Art. 19, § 1.....	1032

CODE OF CIVIL PROCEDURE.

§ 237.....	195
§ 469.....	189

MILLS' ANNOTATED
STATUTES 1912.

§§ 5127, 5128.....	1035
--------------------	------

REVISED STATUTES 1908.

§ 2838, Amended by Laws	
1909, ch. 167, § 5.....	1038
§ 7253.....	1030

LAWS.

1907, p. 834, § 1.....	1060
1909, p. 390, § 5.....	1038
1911, p. 174, § 9.....	1060

IDAHO.

CONSTITUTION.

Art. 7, § 12.....	1106
-------------------	------

POLITICAL CODE 1901.

§ 2342.....	1112
-------------	------

REVISED CODES.

§ 882.....	256
882, subsec. 6.....	256
896, Amended by Laws	
1911, ch. 60.....	260
§ 2238, Amended by Laws	
1915, ch. 97.....	1112
2238f, subsecs. 15, 16...	262
2353, subsec. 3.....	1112
2353, subsec. 4, Amend-	
ed by Laws 1911, ch. 80...	1112

LAWS.

1911, ch. 60.....	260
1911, ch. 80.....	1112
1911, ch. 170.....	941
1913, ch. 58, §§ 99.....	256
1913, ch. 61, §§ 66, 86.....	1106
1913, ch. 61, §§ 33, 34, 63a 751	
1913, ch. 153, 901.....	256
1913, ch. 155, 900.....	256
1915, ch. 97.....	262, 1112

KANSAS.

CONSTITUTION.

Bill of Rights, § 10.....	223
Art. 2, §§ 16, 17.....	1147

CODE OF CIVIL PROCEDURE.

110	987
122	1019
266	1144
285	993
308	221
498	1144
556	214
662	1006

CODE OF CRIMINAL PROCEDURE.

§ 66	223
§§ 110, 293.....	795

GENERAL STATUTES 1905.

§ 5577	1006
--------------	------

GENERAL STATUTES 1909.

§§ 658, 659.....	995
1559	1024
2078	581
2163	980
2254	1014
§§ 2711-2713	223
§§ 3490, 3522, 3587.....	990
3654	214
4220	1147
4624	795
5243 et seq.....	1138
5315	1138
5373	208
5379	1138
5703	987
5715	1019
5860	1144
5879	993
5902	221
6093	1144
6161	214
6257	1006
6640	223
6686	795
§§ 6837-6845	1027
6867	793
7736	1025
7736 et seq.....	1025
§§ 7784-7789, 7802, 7803..	581
§ 9229	971

LAWS.

1885, ch. 132. Amended by Laws 1905, ch. 276..	1147
1887, ch. 215.....	1014
1893, ch. 109.....	1144
1905, ch. 101.....	217
1905, ch. 276.....	1147
1905, ch. 397.....	1012
1909, ch. 183, § 1.....	1006
1911, ch. 218.....	221
1911, ch. 218. Amended by Laws 1913, ch. 216..	983, 1021

1911, ch. 218, § 9. Amend- ed by Laws 1913, ch. 216	1017
1911, ch. 218, § 9b.....	1017
1911, ch. 218, § 22. Amended by Laws 1913, ch. 216, § 6.....	1021
1911, ch. 218, §§ 29, 32, 36	221
1911, ch. 238, § 20.....	316
1913, ch. 64, § 2.....	1141
1913, ch. 71.....	207
1913, ch. 124, § 7.....	217
1913, ch. 216, 983, 1017, 1021	
1913, ch. 216, § 6.....	1021
1915, ch. 311.....	1008, 1012

MONTANA.

CONSTITUTION.

Art. 3, § 2.....	515
Art. 10, § 5.....	515
Art. 12, § 6.....	515

REVISED CODES.

§§ 1068, 2692-2714.....	515
§§ 4539, 5373.....	820
5422	513
§§ 9203, 9204.....	348
9415	655
9486	346
9548	655

LAWS.

1909, ch. 147.....	513
1909, ch. 147, §§ 38, 41, 43, 45, 48.....	513
1911, ch. 122.....	346
1911, ch. 122, §§ 3, 5, 14..	346
1913, ch. 79, § 2.....	655

NEVADA.

CONSTITUTION.

Art. 6, § 8.....	786
------------------	-----

REVISED LAWS.

§§ 2221, 2224.....	786
§ 2227. Amended by Laws 1907, ch. 90.....	786
5081	775
5714	786
§§ 6416-6418	23
7260. Amended by Laws 1915, ch. 157.....	23

LAWS.

1861, ch. 33, § 22. Amend- ed by Laws 1915, ch. 28, § 1.....	22
1881, ch. 15.....	786
1915, ch. 28, § 1.....	22, 253
1915, ch. 157.....	23
1915, ch. 158.....	811
1915, ch. 178, §§ 3, 6, 8-11	772

NEW MEXICO.

CONSTITUTION.

Art. 4, § 23.....	359
-------------------	-----

CODE 1915.

§ 4490	349
--------------	-----

LAWS.

1915, ch. 57.....	359
1915, ch. 77.....	349

OKLAHOMA.

CONSTITUTION.

Art. 2, § 21.....	939
Art. 5, § 50.....	469
Art. 7, § 1.....	590
Art. 7, § 12.....	48, 68, 594
Art. 9, § 39.....	601
Art. 10, § 6.....	469
Art. 12, §§ 1, 2.....	604
Art. 23, § 6.....	736

COMPILED LAWS 1909.

§ 4408	317
§ 4416	48

REVISED LAWS 1910.

§§ 828-830	328
§§ 903, 905.....	46
§ 941	924
§ 964	489
§ 986	622
§§ 993, 994.....	46
1005	82, 920
1143	496
1297	488
1816	68, 594
2260	885
§§ 2405, 2406.....	36
2678	34
2793	1129
2976	468
3038	890
3617	895
3806	60
3881	617
4113	713
4657	622
4673	621
4696	453, 903
4739	88
4759	713
4769	82
4791	614
4814	914
4877	586
§§ 4989, 4991, 4993.....	712
4994	319, 712
§§ 5057, 5075.....	590
5166	896
§§ 5235-5278	610
5236	88
5242	67
5317	610, 928
5953	939
5991	33
6005	614, 924
6364	505
7318	727, 906
7449	906
§§ 8417, 8418, 8427.....	1116

LAWS.

1895, ch. 1. Amended by Laws 1901, ch. 1.....	505
1901, ch. 1.....	505
1901, ch. 1. Amended by Laws 1905, ch. 12.....	505
1905, ch. 12.....	505
1910, ch. 16, §§ 7, 9. Amended by Laws 1911, ch. 89.....	469
1910, ch. 40.....	594
1911, ch. 89.....	469
1913, ch. 219, art. 6, § 20..	1124
1915, ch. 117, § 1.....	109

OREGON.

CONSTITUTION.

Art. 11, § 3.....	807
-------------------	-----

LORD'S OREGON LAWS.

§ 8, 14, 15.....	144	§ 988	950
55, subsec. 4.....	1167	1913, p. 576.....	532
55, subsec. 5.....	144	1913, p. 617, § 1.....	124
56, subsec. 2.....	144	1915, pp. 151, 154, 155, §§	
57	144	5, 7, 9.....	534
59	540		
60	144		
103	540		
§ 363, 366.....	140		
380	132		
488	1168		
541	124		
550	1151		
550, Amended by Laws			
1913, p. 617, § 1.....	124		
550, subsec. 4.....	1150		
554	1150		
§ 705, 712, 782.....	583		
798, subsec. 5.....	803		
799, subsec. 26.....	373		
808	1154		
876	124		
937	532		
1092	124		
1319	801		
§ 1435-1460.....	595		
1448, subsec. 6.....	382		
1499	595		
1540	534		
1956	126		
1962	382		
2103	595		
2370	534		
§ 2902, 2903.....	532		
2991	1166		
3245 et seq.....	1158		
4194	140		
4938, Amended by Laws			
1913, p. 505.....	538		
5642	595		
§ 5885, 5892.....	1160		
5953, subsec. 8.....	1160		
6023	1160		
7050	132		
7109	517		
§ 7416, 7417, 7419.....	135		

CITY CHARTER.

Salem, § 52.....	1152
------------------	------

LAWS.

1885, p. 45, §§ 1, 2, 8....	595
1913, p. 8.....	807
1913, p. 505.....	538

§ 988	950
1913, p. 576.....	532
1913, p. 617, § 1.....	124
1915, pp. 151, 154, 155, §§	
5, 7, 9.....	534

UTAH.**REVISED STATUTES 1898.**

§ 3179	1188
--------------	------

COMPILED LAWS 1907.

135	1185
282x7, Amended by	
Laws 1909, ch. 41.....	280
511, subsec. 3.....	765
538	111
812 et seq.....	815
912	815
2063x	872
2445x7, 2445x8.....	111
2876, 2898.....	1192
2927, Amended by Laws	
1911, ch. 58.....	441
2964	1188
3197	1188
3283	1185
3301	270
§ 3347, 3487.....	283
3858	441
§ 4577, 4579.....	764
4580	764, 765
§ 4988, 5007.....	1181

LAWS.

1909, ch. 41.....	280
1909, ch. 113, § 4, subsec.	
2	117
1911, ch. 58.....	441
1911, ch. 94.....	1185
1911, ch. 106, §§ 53, 60...	815

WASHINGTON.**CONSTITUTION.**

Art. 1, § 16.....	299
Art. 4, § 5.....	757
Art. 15	310

REMINGTON & BALLINGER'S CODE.

§ 162	946
§ 391	307

§ 1161	1
1211	4, 1042
1366	1042
§ 1730, 2290.....	298
§ 3418, 3446.....	1046
3512	11
3679, 3687.....	309
4842, 4843.....	757
5289	1056
§ 5915-5917	435
5953	965
6744, 6769.....	310
§ 8005, 8311.....	299

REMINGTON'S CODE 1915.

§ 1230	954
§ 2424, 2425.....	1051
3394	1053
4829	780
6333	1052
6721	1048
6844	1052

LAWS.

1899, p. 340.....	960
1907, pp. 132-140.....	8
1907, p. 132, § 2, subsec. §	
1907, p. 139, § 12.....	8
1907, p. 536.....	8
1911, p. 538, § 92, Amend-	
ed by Laws 1913, p. 665	
1913, p. 202.....	755
1913, p. 397.....	954
1913, p. 438.....	8
1913, p. 644.....	12
1913, p. 665.....	8
1913, p. 667.....	310
1915, p. 148.....	755
1915, p. 864.....	12

WYOMING.**COMPILED STATUTES 1910.**

§ 3188, 3207, 3217, 3349...	1171
3989	338
4684	1170
§ 4759, 4760, Amended	
by Laws 1915, ch. 104...	1170
§ 5629	1170

LAWS.

1915, ch. 104.....	1170
--------------------	------

STAY.

See Appeal and Error, ¶460-488.

STIPULATIONS.

See Appeal and Error, ¶519; Mortgages, ¶401.

¶14(6) (Cal.App.) Under Code Civ. Proc. § 583, as to dismissal, where action is not brought to trial within five years after answer, a stipulation that a case be "continued, to be dropped from the calendar, to be reset on notice," held not to take a case which had been at issue over 17 years out of the operation of the statute.—Central Pac. R. Co. v. Riley, 160 P. 844.

STOCK.

See Corporations, ¶76-116.

STOCKHOLDERS.

See Banks and Banking, ¶44, 49; Corporations, ¶171-268.

STOLEN GOODS.

See Burglary, ¶38.

STREET RAILROADS.

See Bridges, ¶7.

II. REGULATION AND OPERATION.

¶99(13) (Kan.) An automobile driver at a street intersection who, on avoiding pedestrians, advanced the speed of his car, which was then under control, when he could readily have seen an approaching street car if he had looked, was guilty of contributory negligence barring recovery for collision with the car.—Shelton v. Union Traction Co., 160 P. 977.

STREETS.

See Highways; Municipal Corporations, ¶703-706, 790-822.

STRIKING OUT.

See Criminal Law, ¶1102.

SUBCONTRACTORS.

See Mechanics' Liens, ¶96-111.

SUBLETTING.

See Landlord and Tenant, ¶76, 85.

SUBROGATION.

¶16 (Okla.) A grantee of a purchaser at a void sale on mortgage foreclosure, where both acted in good faith and without notice of irregularities in the proceedings, becomes the equitable assignee of the mortgagee, and on taking possession is subrogated to the rights of the mortgagee.—*Babcock v. Orcutt*, 160 P. 729.

Where grantee of purchaser at void mortgage foreclosure sale goes into actual possession in good faith and redeems the land from a prior mortgage, he is subrogated to all the rights of the prior mortgagee.—*Id.*

SUBSCRIPTION.

See Corporations, ¶76-92; Wills, ¶111.

SUBSTITUTION.

See Novation, ¶6; Parties, ¶59.

SUFFRAGE.

See Elections.

SUMMONS.

See Process.

SUNDAY.

¶1 (Okla. Cr. App.) The Sabbath law proceeds on the theory that the physical, intellectual, and moral welfare of mankind requires a periodical day of rest from labor, the day selected being that regarded as sacred by the greatest number of citizens.—*Krieger v. State*, 160 P. 36.

¶8 (Okla. Cr. App.) Rev. Laws 1910, § 2406, exempts from the penalties of the Sabbath law those who uniformly, conscientiously, and religiously keep another than the first day of the week as holy time, provided they work on the first day of the week in such manner as not to disturb others observing that day.—*Krieger v. State*, 160 P. 36.

"Servile labor," as used in Sunday statutes (Rev. Laws 1910, § 2405) means secular labor.—*Id.*

The holding that to require Sabbatarians to keep Sunday does not prevent them from also keeping the seventh day overlooks the portion of the divine commandment that they work six days as well as that they rest on the seventh.—*Id.*

SUPERSEDEAS.

See Appeal and Error, ¶479, 488.

SURETYSHIP.

See Principal and Surety.

SURVEYS.

See Railroads, ¶53.

TAXATION.

See Adverse Possession, ¶86-95; Constitutional Law, ¶284; Counties, ¶114; Highways, ¶127-138; Intoxicating Liquors, ¶95; Licenses; Mandamus, ¶119; Municipal Corporations, ¶450-523, 525; Newspapers, ¶2; Statutes, ¶95, 121; Waters and Water Courses, ¶256, 257.

I. NATURE AND EXTENT OF POWER IN GENERAL.

¶10 (Cal.) The state may, under Rev. St. U. S. § 5219 (U. S. Comp. St. 1913, § 9784), tax the shares of state banks owned by national

banks.—*Bank of California, National Ass'n v. Roberts*, 160 P. 225.

¶11 (Okla.) The taxation of shares of stock in national banks is permitted by U. S. Rev. St. § 5219 (U. S. Comp. St. 1913, § 9784), provided they are taxed in the city or town where the bank is located, at no greater rate than other moneyed capital in the hands of individuals.—*In re Assessment of First Nat. Bank of Chickasha*, 160 P. 469.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

¶37 (Mont.) Const. U. S. art. 1, §§ 2, 9, declaring that direct taxes, if laid, shall be apportioned among the several states according to population, have no application to the states, but are merely limitations upon the power of Congress.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 160 P. 515.

¶40(11) (Kan.) Laws 1905, c. 276, amending Laws 1885, c. 132, relating to situs of property of mutual fire insurance companies, is not violative of the constitutional provision for uniform and equal rate of assessment and taxation.—*Freedom Tp. of Republic County v. Douglas*, 160 P. 1147.

¶47(1) (Cal.) In the absence of express constitutional provision, there is no necessary or inherent objection to taxing the same property twice to different persons, so long as there is some kind of estate or right in both persons taxed to the taxed property.—*Bank of California, National Ass'n, v. Roberts*, 160 P. 225.

¶47(6) (Cal.) Although Const. art. 13, § 1, originally provided that all property must be taxed in proportion to its value, as it now stands, providing that it must be taxed according to its value except as otherwise provided, it does not limit the power under art. 13, § 14, to tax bank stock in the hands of the holders and also as against the bank.—*Bank of California, National Ass'n, v. Roberts*, 160 P. 225.

¶55 (Mont.) The so-called poll tax statute is valid.—*Pohl v. Chicago, M. & St. P. Ry. Co.*, 160 P. 515.

The so-called poll tax statute, making certain exemptions, together with section 1068, Rev. Codes, making a further exemption, do not, because of this lack of uniformity, conflict with Const. art. 12, § 3, forbidding release of any municipal corporation or the inhabitants thereof from proportionate share of state taxes, since the tax imposed is not devoted to maintaining the state.—*Id.*

The so-called poll tax statute is a valid police regulation to carry into effect section 5, art. 10, Const., providing that the counties shall provide as prescribed by law for the poor or unfortunate, and the exaction imposed thereby is not a "tax" and therefore not subject to the uniformity rule or other restrictions on the taxing power.—*Id.*

III. LIABILITY OF PERSONS AND PROPERTY.**(B) Corporations and Corporate Stock and Property.**

¶119 (Kan.) Gen. St. 1909, § 9229, requires taxes to be paid on actual value of shares of corporate stock outstanding, less amounts assessed against specific property, even where corporation is engaged only in renting realty for which it has expended the whole amount paid in by stockholders, and the stock is appraised at greater value than the realty.—*Harvester Bldg. Co. v. Hartley*, 160 P. 971.

¶127 (Cal.) Under Const. art. 13, § 14, as to taxation of bank stock, the proper procedure is to tax the stock in the hands of the holder, and it may also be taxed against the bank.—*Bank of California, National Ass'n, v. Roberts*, 160 P. 225.

¶128 (Cal.) Under Const. art. 13, § 14, as to taxation of personality and bank stock, the proper procedure is to tax the stock in the hands

of the holder, and it may also be taxed against the bank.—*Bank of California, National Ass'n. v. Roberts*, 160 P. 225.

(D) Exemptions.

☞191 (Ok.) The power to exempt from taxation is generally included in the right to apportion taxes, and exists in the supreme legislative power, unless expressly forbidden by constitutional limitations.—*In re Assessment of First Nat. Bank of Chickasha*, 160 P. 469.

The statutory rule that the rate of taxation on shares in national bank should be no greater than on moneyed capital of individuals, does not limit power of Legislature to exempt state bonds from taxation.—*Id.*

The issuance of state building bonds authorized by Act March 15, 1911 (Laws 1911, c. 89) for a governmental purpose was an exercise of sovereignty, and the bonds could be exempted from taxation.—*Id.*

☞193 (Ok.) Sess. Laws 1910, c. 18, §§ 7, 9, as amended by Sess. Laws 1911, c. 89, exempting state public building bonds from taxation, is constitutional.—*In re Assessment of First Nat. Bank of Chickasha*, 160 P. 469.

☞195 (Ok.) Const. art. 5, § 50, prohibiting laws exempting property from taxation, except such as is named in article 10, § 6, does not prohibit exemption of state bonds issued in aid of governmental functions.—*In re Assessment of First Nat. Bank of Chickasha*, 160 P. 469.

☞218 (Ok.) Under Sess. Laws 1911, c. 89, state building bonds cannot be taxed under any circumstances, no matter what may be the character of the owner or the statute under which the tax is assessed.—*In re Assessment of First Nat. Bank of Chickasha*, 160 P. 469.

The contract between the state and bank holding state building bonds as to exemption of bonds from taxation, extends to the bank's shares of stock in the hands of individual stockholders, entitling them to deduct from the value of their shares that proportion invested in the bonds.—*Id.*

IV. PLACE OF TAXATION.

☞276 (Kan.) The Legislature can provide (Gen. St. 1909, § 4220) that moneys, etc., in the hands of treasurer of a mutual fire insurance company shall be listed where he resides, and other property of the company where the secretary resides.—*Freedom Tp. of Republic County v. Douglas*, 160 P. 1147.

V. LEVY AND ASSESSMENT.

(C) Mode of Assessment in General.

☞362 (Ok.) The authority conferred by Rev. Laws 1910, § 7449, on county commissioners to contract for assistance in listing property for taxation applies only to property omitted from assessment, and does not authorize revaluation or reassessment of property already assessed.—*J. W. Wolverton Hardware Co. v. Porter*, 160 P. 906.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

☞386(2) (Ok.) State building bonds being nontaxable and the state not having power to tax capital and surplus of national bank shareholders are entitled to deductions on account of the bank's ownership of the bonds.—*In re Assessment of First Nat. Bank of Chickasha*, 160 P. 469.

☞390(1) (Wash.) Under Laws 1907, p. 536, Laws 1911, p. 538, § 92, as amended by Laws 1913, p. 665, Laws 1907, p. 132, § 2, subd. 3, and section 12, and Laws 1913, p. 438, state board of tax commissioners had no authority to reclassify railroad property as nonoperating property after it had been classified by Public Service Commission as operating property.—*Northern Pac. Ry.*

Co. v. King County, 160 P. 8; *Great Northern Ry. Co. v. Same*, *Id.* 11.

☞391 (Wash.) Under Laws 1907, c. 78, providing for the assessment of operating property of railroads, and section 2, subd. 3, and section 12, thereof, realty adjoining terminals and occupied by side track and by telegraph line was to be assessed as operating property.—*Northern Pac. Ry. Co. v. King County*, 160 P. 8; *Great Northern Ry. Co. v. Same*, *Id.* 11.

☞406 (Ok.) Under Rev. Laws 1910, § 7318, where a corporation has disposed of all of its capital stock and invested proceeds in property on which taxes have been paid, assessment of the capital stock to the corporation as omitted property is illegal.—*J. W. Wolverton Hardware Co. v. Porter*, 160 P. 906.

Where a corporation has invested the proceeds of sale of its capital stock and paid tax on the property acquired, a judgment listing as omitted property the difference between the par value of the stock plus a sum borrowed by the corporation on mortgage and the value of its property as assessed is not authorized.—*Id.*

(E) Assessment Rolls or Books.

☞428 (Cal.App.) Failure of auditor to enter taxes in book under Pol. Code, § 3731, is no part of levy and assessment of taxes within Code Civ. Proc. § 325, rendering taxes levied illegal.—*People's Water Co. v. Boromeo*, 160 P. 574.

(G) Review, Correction, or Setting Aside of Assessment.

☞466 (Idaho) Bases of valuation for taxation and for rate making are not necessarily identical, and state board of equalization may take into consideration property not considered by the public utilities commission.—*Northwest Light & Water Co. v. Alexander*, 160 P. 1106.

☞485(2) (Idaho) Laws 1913, pp. 290, 291, § 66, relating to findings of public utilities commission as to valuation of property, does not apply to state board of equalization.—*Northwest Light & Water Co. v. Alexander*, 160 P. 1106.

Findings as to value made by public utilities commission are not made conclusive on the state board of equalization, but are admissible and may be regarded as prima facie just, reasonable, and correct.—*Id.*

☞493(1) (Idaho) Under Const. art. 7, § 12, and Laws 1913, p. 199, § 86, the state board of equalization may exercise a fair discretion as to valuation of property, and, when no fraud or abuse of discretion is shown, its action is not reviewable by the courts.—*Northwest Light & Water Co. v. Alexander*, 160 P. 1106.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(C) Remedies for Wrongful Enforcement.

☞608(2) (Ok.) A tax for 1913 on that portion of the capital and surplus of a state bank invested in public building bonds under Rev. Laws 1910, § 7318, will be enjoined, where no question is raised as to its legality or the applicability of the statute.—*Miami Trust & Savings Bank v. Botts*, 160 P. 727.

☞611(6) (Kan.) Evidence held insufficient to authorize a finding of arbitrary conduct of an assessor in valuing corporate stock for taxation.—*Harvester Bldg. Co. v. Hartley*, 160 P. 971.

XI. TAX TITLES.

(C) Actions to Confirm or Try Title.

☞805(1) (Kan.) Where a purchaser of land also purchased outstanding tax title and held possession for more than five years, action by widow of former owner, who lived apart from her hus-

band and had not joined in his deed, was barred by limitations.—*Despain v. Despain*, 160 P. 219.

⚡805(1) (Wash.) An action to quiet title against a tax deed is governed by Rem. & Bal. Code, § 162, limiting to three years from issuance of such a deed action to set aside or cancel it, or for recovery of the land sold for delinquent taxes.—*Keller v. Davis*, 160 P. 946.

⚡810(3) (Cal.) A party, in a suit to quiet title, who relies on tax titles, but who fails to offer any deed to the state, fails to prove a chain of title.—*McArthur v. Goodwin*, 160 P. 679.

XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

⚡909 (Cal.) A city is not a "district" within Const. art. 13, § 14, providing that the Legislature shall reimburse districts for loss by withdrawal of property from local taxation, when taxed for state purposes only, or within St. 1911, p. 556, § 32, effectuating such provision.—*City of San Bernardino v. Horton*, 160 P. 231.

TAXATION OF COSTS.

See Costs, ⚡207.

TEACHERS.

See Schools and School Districts, ⚡130, 135.

TECHNICAL ERRORS.

See Appeal and Error, ⚡1170; Criminal Law, ⚡1186.

TELEGRAPHS AND TELEPHONES.

II. REGULATION AND OPERATION.

⚡26½ [New, vol. 17 Key-No. Series]
(Idaho) Under Public Utilities Act, § 63a, a finding of the Public Utilities Commission that the charges by a telephone company are not unreasonable, must be regarded on application for writ of review as prima facie just and correct.—*City of Cœur d'Alene v. Public Utilities Commission of Idaho*, 160 P. 751.

Where two telephone systems are consolidated and poor service is occasioned by remodeling of central station, and breaking in new help, a decision of the Public Utilities Commission that the company will overcome the service difficulties will not be disturbed on writ of review.—*Id.*

Where the Public Utilities Commission has taken evidence of a city as to the value of a telephone plant for rate-making purposes, a finding, that the plant is in first-class condition, capable of rendering 100 per cent. efficient service, and in denying deduction for depreciation, will not be disturbed.—*Id.*

Where, before the consolidation of two telephone companies, a four-party service had been given, which was eliminated and a two-party service established, the Public Utilities Commission properly refused to reinstate the four-party service without proof of necessity therefor.—*Id.*

The Public Utilities Commission has full authority, under Public Utilities Act, §§ 33, 34, on proper showing, to order four-party telephone service discontinued and two-party service installed.—*Id.*

Where telephone company pays excessive salaries to its officers out of the rate of interest that might properly be paid on the fixed value of the plant, a city has no cause for complaint.—*Id.*

TENANCY IN COMMON.

See Joint Tenancy; Limitation of Actions, ⚡21.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

⚡13 (Or.) Possession by one tenant in common is presumed to have been in the interest

of all others.—*St. Martin v. Hendershott*, 160 P. 373.

⚡15(1) (Utah) Acts of defendant, one of several cotenants entitled to stock in an irrigation company, held not adverse to his cotenants so as to ripen into title, there being no repudiation until he had the certificate issued to himself about a year before suit.—*Rasmussen v. Sevier Valley Canal Co.*, 160 P. 444.

⚡15(10) (Kan.) Where a defendant tenant in common has agreed to purchase the interest of his cotenants, all the circumstances, including a deed of such interest on the payment of price, are competent on question whether defendant was recognizing the rights of cotenants or holding adversely.—*Cribb v. Hudson*, 160 P. 1019.

Possession by one cotenant is the possession of all, and the rights of the other can only be extinguished by clear proof of open, notorious, exclusive, adverse possession for 15 years.—*Id.*

⚡15(10) (Or.) In suit between cotenants to set aside a decree and to partition real property, evidence held insufficient to substantiate defendants' allegation of title by adverse possession with the degree of certainty required between tenants in common.—*St. Martin v. Hendershott*, 160 P. 373.

TENDER.

See Payment, ⚡22.

⚡7 (Utah) A tender to an attorney who has authority to collect an account is the same as though made to the creditor himself.—*Hirsh v. Ogden Furniture & Carpet Co.*, 160 P. 283.

⚡12(4) (Utah) Under Comp. Laws 1907, § 3347, interest on amount due on account for goods sold, tendered by check, held waived, where there had been no demand therefor.—*Hirsh v. Ogden Furniture & Carpet Co.*, 160 P. 283.

⚡15(3) (Utah) Under Comp. Laws 1907, § 3487, held that, where tender was made by check and neither the person to whom it was tendered nor his attorney specified any objection thereto, all objections thereto were waived.—*Hirsh v. Ogden Furniture & Carpet Co.*, 160 P. 283.

⚡15(6) (Utah) Objection that defendant's tender by check was not kept good, held waived, where plaintiff to whom it was tendered made no objection thereto and led defendant to believe that the production of the money in court would not be required.—*Hirsh v. Ogden Furniture & Carpet Co.*, 160 P. 283.

⚡24 (Utah) Where a tender is made in a law case which, if accepted, is intended to operate as a payment of the debt, and is rejected, it must nevertheless be kept good by bringing or depositing the money into court.—*Hirsh v. Ogden Furniture & Carpet Co.*, 160 P. 283.

⚡28 (Utah) In action on an account for goods sold, defendant's mailing of a check for the amount to plaintiff, its return, defendant's statement to plaintiff's attorney that the account had been paid, and the check itself, etc., were admissible, and their exclusion was reversible error.—*Hirsh v. Ogden Furniture & Carpet Co.*, 160 P. 283.

TESTAMENTARY CAPACITY.

See Wills, ⚡55.

THEFT.

See Larceny.

TIMBER.

See Logs and Logging.

TIME.

See Appeal and Error, ⚡339-356, 425, 537, 564, 567, 624, 627, 639, 773; Attorney and Client, ⚡183; Contracts, ⚡214; Criminal Law, ⚡1089; Interest, ⚡39, 50; Judg-

ment, Ⓒ272; Mechanics' Liens, Ⓒ132, 317; Mines and Minerals, Ⓒ78, 79; Statutes, Ⓒ248; Trial, Ⓒ173.

TITLE.

See Banks and Banking, Ⓒ77; Bills and Notes, Ⓒ443; Brokers, Ⓒ61; Burglary, Ⓒ7; Escheat; Navigable Waters, Ⓒ37; Property; Sales, Ⓒ199; Taxation, Ⓒ905, 810.

TORTS.

See Action, Ⓒ27; Assault and Battery; Attachment, Ⓒ373-377; Death, Ⓒ31; Dismissal and Nonsuit; Electricity; Explosives; False Imprisonment; Food; Fraud; Highways, Ⓒ184; Husband and Wife, Ⓒ209; Libel and Slander; Limitation of Actions, Ⓒ55; Master and Servant, Ⓒ101-332; Municipal Corporations, Ⓒ790-822; Negligence; Sheriffs and Constables, Ⓒ113; Rape, Ⓒ66; Trover and Conversion.

Ⓒ22 (Or.) In an action for false imprisonment against several defendants, plaintiff had an election to proceed against any or all of them, as one joint wrongdoer cannot complain that others, equally guilty, are not united with him.—Lane v. Ball, 160 P. 144.

TOWNS.

See Counties; Municipal Corporations.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

Ⓒ9 (Colo.) On petition to disconnect territory from a town, conflicting evidence for respondent town that the town had maintained a street on a boundary of the territory during the three years last preceding, *held* sufficient to enable the town to retain such territory.—Adams v. Town of Gunnison, 160 P. 1033.

TOWN SITES.

See Public Lands, Ⓒ39.

TRANSCRIPTS.

See Appeal and Error, Ⓒ624, 640; Criminal Law, Ⓒ1104.

TRAP DOORS.

See Municipal Corporations, Ⓒ808.

TREES.

See Logs and Logging.

TRESPASS.

See False Imprisonment; Negligence, Ⓒ33; Railroads, Ⓒ359.

TRIAL.

See Costs; Criminal Law, Ⓒ628-863; Jury; Motions, Ⓒ49; New Trial; Stipulations; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

Ⓒ1 (N.M.) That a demurrer by one defendant, attacking sufficiency of complaint as against him alone, is undisposed of when the other defendant is put to trial, furnishes no ground of complaint to the latter.—Kemp Lumber Co. v. Stanley, 160 P. 351.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

Ⓒ25(6) (Kan.) Under Code Civ. Proc. § 285 (Gen. St. 1909, § 5879), when a case involves two causes of action and the burden in the first is on plaintiff and in the second on defendant, it is not important which litigant opens and closes so long as each has a fair opportunity to argue his side.—White v. White, 160 P. 993.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

Ⓒ35 (Kan.) The statement at the trial by carrier's attorney that it admitted that it did misroute but denied loss, dispenses with proof that the carrier was in fault, even if it was not liable for misconduct of a connecting carrier.—McCullough v. Missouri Pac. Ry. Co., 160 P. 214.

Ⓒ39 (Wyo.) In action by indorsee and holder of unpaid certificate of deposit issued by defendant bank, where certificate itself was offered in evidence, indorsement thereon *held* neither received nor offered in evidence.—Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins, 160 P. 1171.

Ⓒ45(3) (Wash.) Offer of defendant to show actual fact whether stock was community or separate property, without any offer of specific evidence or any statement as to what witness would testify to, or any showing that testimony would not have been corroborative, was insufficient as predicate for error in its rejection.—Godefroy v. Hupp, 160 P. 1056.

Ⓒ48 (Ok.) Where counsel offering an instrument in evidence states the purpose thereof, and it is inadmissible for that purpose, its rejection is not reversible error, though it might have been admissible for another purpose.—Spaulding v. Beidleman, 160 P. 1120.

Ⓒ48 (Or.) Where findings and order of county courts were inadmissible to prove heirship to realty but were nevertheless competent to prove ownership of personality of deceased, its incompetency for one purpose did not destroy or affect its competency for the other.—State v. Finnigan, 160 P. 370.

(B) Order of Proof, Rebuttal, and Reopening Case.

Ⓒ62(1) (Ok.) Where plaintiff testified that steam was escaping from the top and bottom of defendant's engine and defendant's witness testified that steam could not escape from below on account of the mechanical construction of the engine, it was error to exclude testimony in rebuttal that steam could escape from below.—Talliaferro v. Atchison, T. & S. F. Ry. Co., 160 P. 69.

Ⓒ62(2) (Utah) In action for injuries by motor car, evidence as to location of accident, offered after defendant had introduced evidence contradicting that of plaintiff on the matter, is not rebuttal.—Musgrave v. Studebaker Bros. Co. of Utah, 160 P. 117.

Ⓒ68(1) (Utah) Whether a case shall be reopened so as to allow introduction of testimony which should have been introduced in chief, rests in discretion of trial court.—Musgrave v. Studebaker Bros. Co. of Utah, 160 P. 117.

In action by one struck by motor car, it was not an abuse of discretion to refuse to allow plaintiff to reopen his case to introduce further evidence as to location of accident, though defendant had introduced testimony contradicting plaintiff's evidence on that point.—Id.

Ⓒ68(1) (Wash.) In broker's action for commission for an exchange of properties, court's action in opening case and permitting plaintiff to prove community character of stock exchanged after evidence had been closed was not

an abuse of its discretion.—*Godefroy v. Hupp*, 160 P. 1056.

⚡69 (Cal.App.) It is discretionary with the court to allow evidence to meet objections made by the motion for nonsuit for lack of proof on certain matters.—*Fee v. McPhee Co.*, 160 P. 397.

(C) **Objections, Motions to Strike Out, and Exceptions.**

⚡83(2) (Okla.) An objection to evidence of a local custom or usage, not pleaded, that it is "incompetent, irrelevant, and immaterial," is sufficient in absence of inquiry by court or counsel as to the specific grounds.—*Gilbert v. Citizens' Nat. Bank of Chickasha*, 160 P. 635.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

⚡109 (Kan.) On motion for judgment on averments in petition and opening statement of counsel, they should be liberally interpreted.—*Moffatt v. Fouts*, 160 P. 1137.

⚡133(8) (Wash.) Statements outside the record which the jury were instructed to disregard, held not to require the reversal of a judgment not so large as to show passion or prejudice.—*De Lor v. Symons*, 160 P. 424.

⚡133(8) (Wash.) Misconduct of counsel, in action for breach of contract to sell wheat, in commenting on advance in price of wheat was not prejudicial, where court on objection admonished counsel that the argument was improper and instructed jury to disregard it.—*Wallace v. Babcock*, 160 P. 1041.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) **Questions of Law or of Fact in General.**

⚡139(1) (Idaho) Where the evidence supports findings for plaintiff, a nonsuit was properly denied.—*Snyder v. Conn*, 160 P. 654.

⚡139(1) (Kan.) Where plaintiff's testimony as to how injury occurred was susceptible of two constructions, the granting of a new trial after direction of verdict for defendant was not error.—*Stothard v. Junior Coal & Mining Co.*, 160 P. 213.

⚡139(1) (Or.) When a cause is finally submitted, if it appears from the evidence received that one of the parties is entitled, as a matter of law, to a particular finding of fact, it is incumbent on the court, when so requested, to direct a verdict to that effect.—*Treadgold v. Willard*, 160 P. 803.

⚡139(1) (Wash.) In passing upon sufficiency of evidence challenged by motion for nonsuit, it is only where the court can say as a matter of law that there is neither evidence nor reasonable inference from evidence to sustain verdict that motion can be granted.—*Godefroy v. Hupp*, 160 P. 1056.

⚡143 (Wash.) A vital and positive contradiction by a party of his own witness, whom he introduces as worthy of belief, raises such conflict as to take the question to the jury.—*Gasch v. Rounds*, 160 P. 962.

(B) **Demurrer to Evidence.**

⚡150 (Okla.) Where the evidence introduced by plaintiff when viewed in its strongest aspect fails to establish plaintiff's case, the court should sustain a demurrer thereto.—*Farmers' State Bank of Jefferson v. Jordon*, 160 P. 53.

⚡150 (Okla.) Where the evidence of plaintiff, viewed in its strongest aspect, fails to establish plaintiff's case, the court should sustain a demurrer thereto.—*New York Plate Glass Ins. Co. v. Wright*, 160 P. 54.

(C) **Dismissal or Nonsuit.**

⚡159 (Idaho) Where plaintiff fails to make out a case for a jury, the court should dismiss

the action and grant nonsuit.—*Blackwell v. Kercheval*, 160 P. 741.

⚡165 (Nev.) On a motion for a nonsuit the evidence should be construed in favor of the plaintiff.—*Su Lee v. Peck*, 160 P. 18.

(D) **Direction of Verdict.**

⚡168 (Utah) There was no error in overruling a motion for a directed verdict, where no ground whatever was stated to support it.—*Kytka v. Weber County*, 160 P. 111.

⚡173 (Cal.App.) In broker's action for commission for sale under oral contract with defendant's agent, where court at conclusion of plaintiff's case denied defendant's motion for a nonsuit when the facts in support of plaintiff's plea of estoppel had appeared, subsequent granting of defendant's motion for directed verdict was not error.—*Sellers v. Solway Land Co.*, 160 P. 175.

⚡173 (Colo.) It is error to direct a verdict for defendant over objection of plaintiff's counsel that they have not rested their case.—*Records v. Eaves*, 160 P. 1128.

VII. INSTRUCTIONS TO JURY.

(A) **Province of Court and Jury in General.**

⚡189 (Cal.App.) An instruction beginning, "If you believe from evidence that," etc., does not assume the existence of any facts.—*Arundell v. American Oilfields Co.*, 160 P. 159.

⚡191(2) (Idaho) An instruction assuming that the value of property was as alleged in the answer, constituting defense or counterclaim, was erroneous.—*Drumbheller v. Dayton*, 160 P. 944.

⚡191(7) (Wash.) Instruction that if jury from any evidence in the case thought that plaintiff was negligent, and that her negligence contributed to the injury, she could not recover, held not objectionable as assuming plaintiff's negligence.—*MacDermid v. City of Seattle*, 160 P. 290.

⚡191(10) (Cal.) In railroad fireman's action for injury from being struck by a signboard, instructions held not objectionable as invading jury's province to determine whether maintenance of signboard 55 inches from track was actionable negligence.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⚡194(18) (Okla.) An instruction that if trapdoor in floor of vestibule was open while train was in motion and by the utmost diligence the carrier could have had it closed, and plaintiff without negligence fell through, it is sufficient to raise a presumption of negligence of the carrier does not invade the province of the jury.—*Chicago, R. I. & P. Ry. Co. v. Diney*, 160 P. 880.

(C) **Form, Requisites, and Sufficiency.**

⚡228(3) (Utah) Where the instructions cover the case and are correct, they are not subject to criticism because of their mere phraseology.—*Musgrave v. Studebaker Bros. Co. of Utah*, 160 P. 117.

⚡232(5) (Cal.App.) The court, having correctly stated the circumstances under which an arrest or imprisonment is justifiable, was not in error in defining unlawful imprisonment as trespass rendering the trespasser liable in damages, without explanation of "unlawful imprisonment."—*Riffel v. Letts*, 160 P. 845.

⚡233(2) (Cal.App.) It is not error for the court to state plaintiff's claim in the language of the complaint, instead of using equivalent phraseology.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

⚡242 (Cal.) In railroad fireman's action for injury when struck by sign near the track, instruction on contributory negligence substantially in the language of Civ. Code, § 1970, held not misleading.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⚡244(1) (Utah) Though court refused 15 of plaintiff's 22 requests, and 7 of the 15 instructions given which correctly covered case concluded with direction to jury, in event of finding certain facts, to find for defendant, instructions are not open to objection that defendant's theory of case was unduly emphasized.—*Musgrave v. Studebaker Bros. Co. of Utah*, 160 P. 117.

(D) Applicability to Pleadings and Evidence.

⚡250 (Cal.App.) It is not reversible error to refuse a requested instruction not applicable to the evidence or presenting an erroneous theory of the case.—*Shelton v. Michael*, 160 P. 578.

⚡250 (Okla.) The refusal of a special instruction requested by defendant was not error where the answer and evidence thereunder did not raise the question involved in the instruction.—*Grisso v. Crump*, 160 P. 453.

⚡251(2) (Cal.) Instruction authorizing verdict for defendant, if it was proved plaintiff was a hypocrite, was not within the answer merely denying the published cartoon was susceptible of the imputation that he was a hypocrite.—*Newby v. Times-Mirror Co.*, 160 P. 233.

⚡251(8) (Wash.) In action for injury from defective sidewalk, wherein defendant city pleaded contributory negligence as a defense, an instruction on that issue was properly given.—*MacDermid v. City of Seattle*, 160 P. 290.

⚡252(12) (Cal.App.) In an action on a joint and several contract, a requested instruction on the question of conditional delivery held properly refused, because too broad under the evidence.—*Shelton v. Michael*, 160 P. 578.

⚡252(20) (Utah) Where deceased's children were of advanced age, married and living apart from him, submission of loss by them of society and companionship of deceased as damages is of an element having no evidence to support it.—*White v. Shipley*, 160 P. 441.

⚡253(4) (Cal.App.) Instruction in pedestrian's action for injuries in crossing accident, held erroneous as premitting contributory negligence.—*Bellinger v. Hughes*, 160 P. 838.

(E) Requests or Prayers.

⚡255(4) (Or.) Although refusal of an instruction limiting evidence to the single issue as to which it was competent would be an error, held no error can be predicated upon court's failure in that respect in the absence of a request.—*State v. Finnigan*, 160 P. 370.

⚡260(1) (Okla.) The refusal of an instruction covered by instructions given by the court in another form is not error.—*Simpson v. Mauldin*, 160 P. 481.

⚡267(1) (Utah) Striking from a requested instruction matter which is but repetition or restatement of other matter therein is not error.—*Broadbent v. Denver & R. G. Ry. Co.*, 160 P. 1185.

(G) Construction and Operation.

⚡295(1) (Idaho) Though certain instructions may not accurately state the law, yet if, in the light of the entire charge, they are not misleading, they do not constitute reversible error.—*Taylor v. Lytle*, 160 P. 942.

⚡296(2) (Okla.) Instructions in action for price, construed together, held not objectionable as authorizing recovery against two of the defendants on the ground of use alone.—*Harn v. Patterson*, 160 P. 924.

⚡296(6) (Cal.) In railroad fireman's action for injury when struck by signboard, instruction on assumption of risk, viewed with proper instructions on contributory negligence, held not objectionable as conveying the impression that he was not guilty of contributory negligence, unless he fully appreciated the result of

his own act.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⚡296(11) (Cal.) In railroad fireman's action for injury, instruction as to measure of damages, considered with instructions as to diminution on account of contributory negligence, held not misleading.—*Humphres v. Western Pac. Ry. Co.*, 160 P. 415.

⚡296(11) (Cal.App.) A general instruction as to the amount of damages held not misleading when supplemented by specific directions as to the elements for which plaintiff could recover.—*Earl v. San Francisco Bridge Co.*, 160 P. 570.

IX. VERDICT.

(B) Special Interrogatories and Findings.

⚡355(1) (Cal.App.) Where any one of the several answers to interrogatories or special verdicts was unsupported by the evidence, the general verdict, based on such special verdicts, could not stand.—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co.*, 160 P. 862.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

⚡397(5) (Idaho) The trial court must make findings on every material issue on which proof is offered, and on failure to do so the cause will be remanded for additional findings unless they would not affect the judgment.—*Berlin Mach. Works v. Dehlbohm Lumber Co.*, 160 P. 746.

⚡398 (Cal.App.) A finding that a wife never made or entered into a contract in writing is not inconsistent with the fact that her husband entered into it on her behalf and with her knowledge and consent.—*Pacific Mfg. Co. v. Perry*, 160 P. 246.

⚡404(2) (Cal.) A finding, in a suit to quiet title, of ownership, title, or interest, is a finding of ultimate fact, and not a conclusion of law.—*McArthur v. Goodwin*, 160 P. 679.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

⚡419 (Or.) The denial of a motion for nonsuit at the close of plaintiffs' case will not be disturbed when the omission, if any, is subsequently supplied by either party.—*McCully v. Heaverne*, 160 P. 1186.

TROVER AND CONVERSION.

See Embezzlement, ⚡11.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

⚡3 (Colo.) Where one locked up by town marshal for disturbing the peace was searched and his money taken from him by the officer and returned the next day when he pleaded guilty, the officer was not guilty of conversion.—*Hushaw v. Dunn*, 160 P. 1037.

⚡9(5) (Okla.) Where the original taking was wrongful and the property is wrongfully detained, demand is not necessary before suit for conversion.—*Sale v. Shipp*, 160 P. 502.

TRUANTS.

See Schools and School Districts, ⚡4, 160, 161.

TRUST DEEDS.

See Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

See Charities; Dower.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

⌘1 (N.M.) Express trusts are those created by direct acts of parties by some writing, deed, or will, or by words either expressly or impliedly evincing a desire to create a trust.—*Ward v. Buchanan*, 160 P. 356.

⌘35(1) (Cal.) A mere promise to obtain money and thereupon hold it in trust does not create a trust until it is at least so far executed that the money has been obtained in accordance with the promise.—*Molera v. Cooper*, 160 P. 231.

⌘41 (Cal.) Plaintiffs have the burden of showing by evidence that a bequest was on a secret trust, notwithstanding intimacy between testator and legatee.—*Garner v. Purcell*, 160 P. 682.

⌘44(1) (Cal.) That in a prior will testatrix attempted to give more than allowed by law to a charity is not evidence that a bequest to an individual was given on a secret trust to evade such law.—*Garner v. Purcell*, 160 P. 682.

Evidence in a suit to establish a secret testamentary, to evade Civ. Code, § 1313, as to amount which may be bequeathed for charity, held insufficient, being consistent with legatee's position of a legatee not bound to carry out a trust.—*Id.*

(C) Constructive Trusts.

⌘96 (Mont.) It is a fraud, from which a trust arises, for one to obtain a conveyance of property on promise to devise it, and then revoke the will.—*Huffine v. Lincoln*, 160 P. 820.

⌘103(3) (Mont.) Where one induces his wife to convey to him property which she designed to convey to her daughter, on his promise to devise it and his property to the daughter and a son, the trust arising from his broken promise, is under Rev. Codes, § 5373, in favor of the daughter.—*Huffine v. Lincoln*, 160 P. 820.

The trust arising from the broken promise is, under Rev. Codes, § 5373, for the daughter alone, though the son was without fault, where one, designing to convey her property to her daughter, conveyed to her husband on his promise to devise it and his property to the daughter and a son.—*Id.*

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(B) Right to Follow Trust Property or Proceeds Thereof.

⌘349 (Wash.) The right of a beneficiary to reclaim a trust fund is based upon his right of property, and not upon any right as a preferred creditor of trustee.—*Chase & Baker Co. v. Olmsted*, 160 P. 952.

(C) Actions.

⌘372(1) (Wash.) The burden is on a cestui que trust of money blended by trustee with his own in a bank account, to prove his title as against creditors.—*Chase & Baker Co. v. Olmsted*, 160 P. 952.

⌘374 (Wash.) Cestui que trust of money blended by trustee with his own in a bank account cannot recover more than lowest balance to which blended account has been reduced pending its currency as shown by the bank's books.—*Chase & Baker Co. v. Olmsted*, 160 P. 952.

ULTRA VIRES.

See Banks and Banking, ⌘261.

UNDISCLOSED AGENCY.

See Principal and Agent, ⌘148.

UNIFORMITY.

See Taxation, ⌘40.

UNITED STATES.

See Courts, ⌘489; Indians; Public Lands, ⌘39.

USAGES.

See Customs and Usages.

USURY.

See Appeal and Error, ⌘1067; Banks and Banking, ⌘270.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

⌘94 (Okl.) Under Comp. Laws 1909, § 4416, held that, where it was shown that usurious interest was reserved in the note secured, the judge should enjoin foreclosure by advertisement, of the chattel mortgage securing the note, and direct that further proceedings for foreclosure be had in court.—*Pearson v. Glen Lumber Co.*, 160 P. 48.

⌘102(1) (Okl.) A written demand for the return of usury is in substantial compliance with Rev. Laws 1910, § 1005, though the amount for which the party is liable is incorrectly stated.—*Texmo Cotton Exch. Bank v. Liston*, 160 P. 82.

⌘111(3) (Okl.) A written demand for the return of usury is a condition precedent to a suit therefor under Rev. Laws 1910, § 1005, and must be alleged and proven.—*Texmo Cotton Exch. Bank v. Liston*, 160 P. 82.

II. PENALTIES AND FORFEITURES.

⌘138 (Okl.) Where usury is proven, the amount actually loaned must be credited with double the amount of interest charged or reserved in the note given for the loan.—*Pearson v. Glen Lumber Co.*, 160 P. 48.

⌘141 (Okl.) Where the maker of a note containing usury pays it in full to the transferee, the right of action to recover double the interest paid, under Rev. St. U. S. § 5198 (U. S. Comp. Stat. 1913, § 9759), is against the transferee, and the payee is not a necessary party defendant.—*First Nat. Bank of Wellston v. Sensebaugh*, 160 P. 455.

⌘142(3) (Okl.) In an action for twice the interest paid on a usurious note, petition held sufficient as against demurrer.—*First Nat. Bank of Wellston v. Sensebaugh*, 160 P. 455.

VACATION.

See Appeal and Error, ⌘807; Executors and Administrators, ⌘348, 358, 509; Guardian and Ward, ⌘105, 109; Motions, ⌘59.

VALUE.

See Courts, ⌘222; Evidence, ⌘142, 543; Justices of the Peace, ⌘141.

VENDOR AND PURCHASER.

See Champerty and Maintenance, ⌘7; Exchange of Property; Executors and Administrators, ⌘337-358; Guardian and Ward, ⌘105, 109; Homestead, ⌘128; Logs and Logging; Public Lands, ⌘158½; Sales; Specific Performance.

I. REQUISITES AND VALIDITY OF CONTRACT.

⌘3(3) (Cal.) A writing addressed to brokers, agreeing to sell a lot for \$3,000, was not a valid contract to sell, merely authorizing the brokers at most to find a suitable purchaser, without binding the owner to make a contract of sale to any person.—*Holland v. McCarthy*, 160 P. 1069.

⚡45 (Colo.) In action of replevin for automobile given as part of price of land, question of fraud practiced upon plaintiff in transaction held for jury.—Walker v. MacMillan, 160 P. 1062.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

⚡70 (Cal.) Where defendant agreed, as compensation for walnut trees, to pay a sum equal to ten times value of nut crop, held that, in computing value of crop, nuts eaten by hogs of defendant who was in possession, should be considered; plaintiff having no right or authority to keep hogs from ranging on that portion of land.—Edwards v. Arp, 160 P. 551.

Where defendant bought land on which walnut trees were growing, agreeing to pay ten times the value of the crop, and allowed his hogs to eat part of the nuts, held, that such nuts were to be taken into consideration in fixing the crop's value, despite contention that such was not contemplated.—Id.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Purchaser.

⚡117 (Colo.) Where plaintiff contracted to buy land for \$4,500, delivering his automobile as part payment to extent of \$2,000, he could not maintain replevin to recover such automobile, as having been obtained by false representations, and retain the land.—Walker v. MacMillan, 160 P. 1062.

⚡122 (Colo.) Where party has been induced to contract by fraud, he has two remedies, to rescind and be reimbursed for money expended, or, waiving right to rescind, to have action for damages resulting from the fraud; but an election to waive the fraud is irrevocable, and a rescission must be in toto.—Walker v. MacMillan, 160 P. 1062.

IV. PERFORMANCE OF CONTRACT.

(D) Payment of Purchase Money.

⚡181 (Wash.) Where a vendor sold real property for a price named, to be paid by assumption of local improvement assessments, and certain mortgages, transfer of other property, and balance in cash, the purchaser is not liable to the vendor for that portion of the mortgage debt which he was not required to pay.—Tetzner v. Wulf, 160 P. 289.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

⚡229(1) (Cal.) Mere assertion by a third person to a purchaser of land that he owned an interest therein is not notice of an implied or resulting trust.—Kowalsky v. Kimberlin, 160 P. 673.

⚡229(10) (Cal.) One authorized to close by payment a deal for purchase of land if the vendor's record title was good is not such an agent of the purchaser that information to it of a secret trust is notice to the purchaser.—Kowalsky v. Kimberlin, 160 P. 673.

One having a contract for purchase of land is not agent of one buying his interest, as regards notice of a secret trust in the land.—Id.

⚡230(2) (Kan.) Purchaser of realty, recorded deed to whose grantor excepts a certain mortgage, is not an innocent purchaser against such mortgage, though it is not recorded and he has no actual notice thereof.—Bacon v. Lederbrand, 160 P. 1029.

⚡231(15) (Or.) Record of mortgage, certificate of acknowledgment of which fails to name acknowledging party, where reference is made in certificate to executing party, is sufficient to

impart constructive notice to subsequent purchaser.—Coates v. Smith, 160 P. 517.

⚡242 (Cal.) Any notice, without which Civ. Code, § 856, provides that no implied or resulting trust can prejudice the rights of a purchaser of real estate for value, being matter outside the record title, the one asserting the trust has the burden of proving the notice.—Kowalsky v. Kimberlin, 160 P. 673.

VENUE.

See Divorce, ⚡62, 91; Execution, ⚡59.

II. DOMICILE OR RESIDENCE OF PARTIES.

⚡24 (Kan.) Evidence held sufficient to show that the plaintiff resided in the county where the action was brought.—White v. City of Bonner Springs, 160 P. 1024.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

⚡66 (Cal.App.) An affidavit of merits and residence on change of venue, made by defendant's wife, who was familiar with facts of case, during his temporary absence from state, held a sufficient compliance with Code Civ. Proc. § 396.—Gardner v. Steadman, 160 P. 834.

⚡67 (Cal.App.) An affidavit of merits and residence, made by another than defendant, which is defective because merely stating a conclusion of affiant as to defendant's residence, may be amended in the discretion of court.—Gardner v. Steadman, 160 P. 834.

Where an affidavit of merits and residence by defendant's wife was defective, a new affidavit by defendant's attorney held a sufficient compliance with an order of court, permitting an amended affidavit to be filed.—Id.

⚡84 (Ok.) Objection that under Rev. Laws 1910, § 4873, an action should have been brought in the county where the cause of action arose is waived by filing demurrers presenting other grounds, together with the objection to the venue.—Hume v. Cragin, 160 P. 621.

VERDICT.

See Appeal and Error, ⚡1000-1015; Criminal Law, ⚡1158, 1159; Judgment, ⚡248; New Trial, ⚡66, 70; Trial, ⚡355.

VERIFICATION.

See Pleading, ⚡292.

VESTED RIGHTS.

See Constitutional Law, ⚡103-107.

WAGES.

See Master and Servant, ⚡80, 83.

WAIVER.

See Criminal Law, ⚡105, 252, 629; Estoppel, ⚡52; Evidence, ⚡487; Habeas Corpus, ⚡49; Insurance, ⚡400; Justices of the Peace, ⚡141, 161; Landlord and Tenant, ⚡178; Mines and Minerals, ⚡78; Pleading, ⚡412; Sales, ⚡288; Tender, ⚡15; Venue, ⚡84.

WARDS.

See Guardian and Ward.

WARRANT.

See Municipal Corporations, ⚡485.

WARRANTY.

See Bills and Notes, ⚡296; Sales, ⚡274, 288.

WATERS AND WATER COURSES.

See Costs, ¶22; Drains; Evidence, 472; Navigable Waters.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

¶21 (Wash.) Under Remington's Code 1915, § 6333, enacted in 1890, where water rights were appropriated in 1903 before title to the land had passed out of federal government, a subsequent grant to the state was subject to the vested right acquired by the appropriation.—*Colburn v. Winchell*, 160 P. 1052.

Where landowner appropriated water on government land in 1903, and the state acquired title in 1905 and disposed of it in 1906, Remington's Code 1915, § 6844, does not apply, but under Comp. St. 1913, § 4647, the appropriator acquired right of way for ditch before title passed out of federal government.—*Id.*

II. NATURAL WATER COURSES.

(A) Riparian Rights in General.

¶39 (Cal.) The mere fact that a riparian owner whose lands may properly be irrigated from a stream conveys a right of way to a railroad does not cut off his riparian right, where the railroad embankment is cut and the stream permitted to flow through.—*Half Moon Bay Land Co. v. Cowell*, 160 P. 675.

That low-lying land slopes down from a creek bed by reason of deposits of torrential debris by the creek does not deprive the owner of his riparian rights.—*Id.*

¶40 (Cal.) The use by one riparian owner of the water of a stream in whole or in part cannot be interfered with by another riparian owner, not using the water himself.—*Half Moon Bay Land Co. v. Cowell*, 160 P. 675.

¶48 (Cal.) Whether a riparian owner having the right to use waters for irrigation has actually used them or not is immaterial, the right to such waters not being subject to acquirement by use or to loss by disuse.—*Half Moon Bay Land Co. v. Cowell*, 160 P. 675.

¶49 (Cal.) A decree apportioning waters of a stream among riparian owners modified so as to state the rule that each owner may use the whole or any part of the water on his land when such use does not interfere with actual use by the other owners.—*Half Moon Bay Land Co. v. Cowell*, 160 P. 675.

In apportioning waters for irrigation purposes, the court may consider the length of the stream, the volume and extent of riparian ownership, the character of soil, the area to be irrigated, the practicability of irrigation, the expense thereof, and the comparative profit of the different uses.—*Id.*

If a riparian owner is allotted a certain amount of water for irrigation purposes, he may nevertheless use it for any other beneficial use.—*Id.*

The mere fact that if one riparian owner consented another could construct a diversion dam and irrigate a greater acreage thereby does not warrant a finding that the greater acreage is irrigable, in the absence of a showing that the other owners' consent could be obtained.—*Id.*

(D) Diversion.

¶84 (Wyo.) The common-law right to sue for damages for wrongful diversion of water is not affected by the statutory remedy for distribution by the water commissioner, which gives no remedy for past diversion.—*Van Buskirk v. Red Buttes Land & Live Stock Co.*, 160 P. 387.

VI. APPROPRIATION AND PRESCRIPTION.

¶133 (Wash.) To make appropriation of water, there must be intent to appropriate a certain quantity and an actual use of that quan-

tity or reasonable diligence in preparing land for its use.—*Colburn v. Winchell*, 160 P. 1052.

¶138 (Cal.) Permissive use of waters for irrigation by obstruction and diversion to another watershed, does not create a right to continue such diversion, however long continued.—*Half Moon Bay Land Co. v. Cowell*, 160 P. 675.

¶143 (Wash.) Where for 20 years prior to the commencement of an action to determine riparian rights each of the parties diverted from a creek and used upon their respective tracts of land certain proportionate amounts of water, their continued use of water, by mutual consent, ripened into a binding agreement determinative of the rights of the parties.—*Villa v. Keylor*, 160 P. 297.

¶152(10) (Nev.) In action to determine water rights, where defendant's answer set up at least one allegation, which, uncontroverted and to be taken as true, established priority of appropriation in favor of defendant, plaintiff failing to establish allegations of complaint, court properly dismissed action on defendant's motion.—*Bernard v. Metropolis Land Co.*, 160 P. 811.

VII. CONVEYANCES AND CON-TRACTS.

¶156(9) (Cal.) Covenant in a deed to supply water when the land is cultivated, being consideration for the price above the land's value, is a present grant of a water right, not lost by mere failure to cultivate and demand water, or by cessation of cultivation and demand for water.—*Palermo Land & Water Co. v. Railroad Commission of State of California*, 160 P. 228.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

¶171(1) (Cal.) Rights of owners in Imperial Valley, during the Salton Sea overflow, cannot be measured by principles governing surface waters, recurrent flood waters, or attempted changes of natural conditions imposing greater servitude or positively injuring lower lands.—*Jones v. California Development Company*, 160 P. 823.

Under extraordinary water conditions, as at time of Salton Sea overflow, the landowner may use every reasonable precaution to prevent injury to his land, and whether his conduct is reasonable is determinable by existing conditions, and not consequences.—*Id.*

Owner in Salton Sea district at time of overflow held not entitled to recover for injuries by erosion from dynamiting channel and destroying hardpan with consequent rapid off-flow: the dynamiting being reasonable under the circumstances.—*Id.*

¶171(1) (Okla.) Where a railway attempts to alter the course of natural drainage, it must provide means for the flow of the water, and where it attempts to gather the water into ditches, it must take care to do no injury to an abutting landowner greater than would have resulted from the natural drainage.—*Kansas City Southern Ry. Co. v. Hurley*, 160 P. 910.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

¶208 (Wash.) Where the defective condition of a foundation under city water meter at a point where water pipe was reduced to a smaller pipe could readily have been ascertained by an inspection, the failure to inspect and replace the foundation was negligence on the part of the city.—*Imperial Candy Co. v. City of Seattle*, 160 P. 303; *Seattle Seed Co. v. Same*, *Id.* 304.

Breaking of water pipe improperly constructed, etc., held proximate cause of injury by water to defendant's property in basement, when such injury was the natural and probable con-

sequence thereof and was such as would reasonably be anticipated therefrom.—Id.

Under ordinance forbidding use of basement of a building without a drain, not forbidding a tenant's use of such basement, a tenant storing his property in such basement was not guilty of negligence preventing his recovery for damages from flooding by breaking of water main.—Id.

(B) Irrigation and Other Agricultural Purposes.

⚡256 (Cal.) Under Public Utilities Act, § 31, and St. 1913, p. 84, *held*, the Railroad Commission, being applied to for an order requiring service by a water company, has jurisdiction to determine whether applicant is in the class entitled to the service.—Palermo Land & Water Co. v. Railroad Commission of State of California, 160 P. 228.

⚡257(1) (Cal.) Covenant of company selling land to supply water at rates to be fixed by law *held*, relative to the company being a public utility, subject to jurisdiction of Railroad Commission to imply that the service is to be that of a public utility.—Palermo Land & Water Co. v. Railroad Commission of State of California, 160 P. 228.

Submission to the Railroad Commission, by a company selling land with covenant to supply water, of the establishment of its water rates, *held* to make the use a public one, and it a public utility.—Id.

⚡258 (Wash.) In action by irrigation company against landowner and others, complaint *held* to fairly disclose it was designed neither for specific performance nor damages, but was drawn on theory that contract between parties for purchase of water right was in nature of a mortgage, creating lien on the land and water right, and as such it was sufficient.—Fruitland Irr. Co. v. Thayer, 160 P. 1048.

While the Carey Act (Rem. Code 1915, § 6721), providing for reclamation of arid lands, is limited in its scope to water right under that act, and does not apply generally, irrespective of statute, parties may contract that a water right for irrigation shall be subject to a lien in favor of the irrigation company which sold the right.—Id.

Contract for sale of water right, which expressly charged price as lien on land and water right, in favor of irrigation company selling, possessed all elements of lien created by contract on specific property, enforceable in equity by irrigation company against landowner for any default, though it lacked essential elements of mortgage.—Id.

In irrigation company's action against landowner and others to foreclose lien created by landowner's contract to purchase perpetual water right, providing for foreclosure and sale of land and water right on enforcement of lien, a sale under the decree directing sale of both land and right would pass title to right, as against irrigation company, though it never tendered or brought into court a deed for the right.—Id.

WAYS.

See Highways.

WEATHER.

See Evidence, ⚡114.

WHARVES.

⚡9 (Or.) Under L. O. L. § 798, subd. 5, providing that tenant may not deny title of landlord, lessee of wharfage rights, by accepting written agreement, was estopped from controverting his landlord's title when retaining possession of the rights secured by the lease.—Treadgold v. Willard, 160 P. 803.

Wharf resting on piles driven into mud flats was a part of the realty, which could be held

under lease; so that taking possession of any part thereof under an agreement of lease created the relation of landlord and tenant.—Id.

Where lessee of wharfage rights, when notified his landlord's title was in litigation, tied raft on which he unloaded passengers and freight to another wharf, but it constantly rested against leased wharf, to which it was attached by gangplank, such lessee occupied the leased wharf.—Id.

WIDOWS.

See Dower; Executors and Administrators, ⚡176, 181.

WILLS.

See Charities; Descent and Distribution; Executors and Administrators; Jury, ⚡19.

II. TESTAMENTARY CAPACITY.

⚡55(1) (Kan.) Testimony in will contest *held* to sustain finding that testator had sufficient mental capacity.—Ahnert v. Ahnert, 160 P. 201.

III. CONTRACTS TO DEVISE OR BEQUEATH.

⚡66 (Mont.) Agreement to devise property *held* not satisfied by making a will and then revoking it, but to contemplate a will to remain effective.—Huffine v. Lincoln, 160 P. 820.

IV. REQUISITES AND VALIDITY.

(C) Execution.

⚡111(3) (Kan.) A will is not invalid because testator's name was written by another, he having made his mark, and his name being written by his direction in his presence.—Ahnert v. Ahnert, 160 P. 201.

(F) Mistake, Undue Influence, and Fraud.

⚡166(1) (Kan.) Testimony *held* to sustain finding that testator was free from undue influence.—Ahnert v. Ahnert, 160 P. 201.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) Probate and Revocation in General.

⚡207 (Cal.) Letters written by a person to relatives and a business agent *held* testamentary in character justifying their admission to probate as a will.—In re Cook's Estate, 160 P. 553.

Letters testamentary in character *held* properly admitted to probate as a will as against the objection that they did not become effective as a will.—Id.

⚡215 (Cal.) The court on petition for probate of writings claimed to constitute a will can only determine whether the writings constitute a will without construing the writings.—In re Cook's Estate, 160 P. 553.

(I) Hearing or Trial.

⚡333 (Kan.) Findings by the jury that testatrix was enfeebled by old age and sickness and partial paralysis at the time of execution of will, but did not act under influence amounting to coercion, and understood the business in which she was engaged, authorized a judgment sustaining the will.—Hladky v. Hladky, 160 P. 992.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(G) Debts of Testator and Incumbrances on Property.

⚡828 (Or.) Where note was payable in Colorado and will of maker thereof, whereby defendants became residuary legatees, was probated in that state, the payee's right of action, if any, to subject property in hands of legatees to payment of notes arose in Colorado, and

was governed by its law.—*Rainey v. Rudd*, 160 P. 1168.

§832 (Or.) At common law, no action can be maintained against a legatee upon a contract made by decedent, as the legatees take the property only after it has passed from administrator or executor, in whose hands alone it is liable for the debts of the deceased.—*Rainey v. Rudd*, 160 P. 1168.

§836 (Or.) The liability of devisees is confined to the real estate, with which the administrator or executor has nothing to do.—*Rainey v. Rudd*, 160 P. 1168.

§847(3) (Or.) Complaint, in an action on a note against legatees under will of the maker, silent as to statutory prerequisites of L. O. L. § 488, was demurrable.—*Rainey v. Rudd*, 160 P. 1168.

WITHOUT RECOURSE.

See Bills and Notes, §293.

WITNESSES.

See Appeal and Error, §904; Criminal Law, §628, 629, 742, 1170½; Depositions; Evidence, §539-558.

II. COMPETENCY.

(C) *Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.*

§146 (Wash.) Under Rem. & Bal. Code, § 1211, a husband and wife, claiming the gift of land by delivery of separate deeds before the donor's death, could not testify each on his or her own behalf in suit by an heir to quiet title to the land, but each could testify for the other.—*Showalter v. Spangle*, 160 P. 1042.

In states where the common-law right of dower exists, the wife, in a suit by an heir to quiet title as against the wife and husband of land embraced in deeds delivery of which was disputed, is not competent to testify on behalf of the husband.—*Id.*

§159(13) (Wash.) The payment of amounts due by defendant to decedent constituted transactions as to which defendant could not testify.—*Goldsworthy v. Oliver*, 160 P. 4.

§164(2) (Wash.) In action by executors, testimony by defendant as to lost receipt from decedent was inadmissible as showing transaction with decedent.—*Goldsworthy v. Oliver*, 160 P. 4.

§164(3) (Wash.) Identification of signatures to receipts does not come within Rem. & Bal. Code, § 1211, relating to testimony as to "transactions" with persons since deceased.—*Goldsworthy v. Oliver*, 160 P. 4.

In action by executors, receipts by decedent, the signatures to which are identified by defendant and other witnesses, are properly admitted in evidence.—*Id.*

III. EXAMINATION.

(B) *Cross-Examination and Re-Examination.*

§267 (Kan.) The extent to which cross-examination shall be allowed is determined by the circumstances of the case and rests largely in the discretion of the trial court.—*State v. Allen*, 160 P. 795.

§269(1) (Cal.) Sustaining of objection to question asked state's witness on cross-examination as to matter concerning which nothing had been asked on direct examination, held not erroneous in absence of any statement as to purpose of the question.—*People v. Wilt*, 160 P. 561.

§275(2) (Ok.) In action for injuries in runaway caused by fright of horse at escaping steam, cross-examination of plaintiff as to the

disposition of the horse was proper.—*Talliaferro v. Atchison, T. & S. F. Ry. Co.*, 160 P. 69.

(C) Privilege of Witness.

§304(4) (Utah) Under Comp. Laws 1907, § 912, as to immunity from prosecution, etc., of person testifying as to violation of election laws, such immunity is complete, and is not limited to cases where the witness himself may have been concerned in the offense charged against the accused.—*Beauregard v. Gunnison City*, 160 P. 815.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

§330(1) (Cal.App.) Question to witness as to whether he was as sure of his testimony on a particular matter as he was of any other part of his testimony was meaningless.—*People v. Martinez*, 160 P. 868.

(B) Character and Conduct of Witness.

§337(6) (Wash.) Under Rem. & Bal. Code, § 2290, defendant's conviction of an assault punishable under a city ordinance as a misdemeanor was a conviction of a "crime," and admissible only to affect the weight of his testimony in a civil action for damages for the same assault.—*Marshall v. Dunn*, 160 P. 298.

§344(2) (Ok.) Cr.App.) Testimony as to general character of witness offered to impeach him must be as to his reputation for truth, and testimony as to his reputation for being a bootlegger is incompetent.—*Upton v. State*, 160 P. 1134.

(C) Interest and Bias of Witness.

§374(1) (N.M.) Evidence of a meeting of state's witnesses to organize a mob to hang defendant is admissible to show bias and prejudice of the witnesses.—*State v. Pruett*, 160 P. 362.

(D) Inconsistent Statements by Witness.

§382 (N.M.) Where a witness testified as to the first difficulty a week before the homicide, and denied on cross-examination that he had said that defendant had said that the wife of deceased would be a widow within a week, rebuttal evidence that he had so stated was inadmissible on any theory.—*State v. Pruett*, 160 P. 362.

§392(1) (Kan.) In a prosecution for murder, where defendant's daughter testified that deceased had attempted criminal assaults on her and she hated him, her letters to him expressing friendship and affection were admissible as affecting her credibility.—*State v. Allen*, 160 P. 795.

Where defendant's daughter testified that at the time of shooting, deceased was attempting to drag her from a buggy, her signed statement a day or two after the homicide as to the position of deceased was admissible as affecting her credibility.—*Id.*

WOODS AND FORESTS.

See Logs and Logging.

WORDS AND PHRASES.

"Accomplice."—*State v. Edlund* (Or.) 160 P. 534.

"Account stated."—*Fee v. McPhee Co.* (Cal. App.) 160 P. 397.

"Actionable negligence."—*Chicago, R. I. & P. Ry. Co. v. Reinhart* (Ok.) 160 P. 51; *Kansas City Southern Ry. Co. v. Langley*, *Id.* 451.

"Actual value."—*Reclamation Dist. No. 730 v. Inglin* (Cal. App.) 160 P. 1098.

"Adequacy of price."—*Schader v. White* (Cal.) 160 P. 557.

"Adverse party."—*French v. McKean* (Or.) 160 P. 1151.

- "Adverse possession."—Cory v. Hotchkiss (Cal. App.) 160 P. 841.
- "Agent."—Myers v. Joseph A. Strowbridge Estate Co. (Or.) 160 P. 135.
- "Agents, employés, or persons working by, through, or under them."—Boyd v. Lambert (Okl.) 160 P. 586.
- "Agreement."—Carter v. Prairie Oil & Gas Co. (Okl.) 160 P. 319.
- "Alliance."—Lowery v. Westheimer (Okl.) 160 P. 496.
- "All others interested in the estate."—Sarbach v. Fidelity & Deposit Co. of Maryland (Kan.) 160 P. 990.
- "Amount."—State v. Hill (Nev.) 160 P. 772.
- "And wife."—Lowery v. Westheimer (Okl.) 160 P. 496.
- "Appropriation of water."—Colburn v. Winchell (Wash.) 160 P. 1052.
- "Arising out of and in course of employment."—Forman v. Industrial Acc. Commission (Cal. App.) 160 P. 857.
- "Assent."—Farmers' & Drovers' Bank v. Bashor (Kan.) 160 P. 208.
- "Assessment."—People's Water Co. v. Boromeo (Cal. App.) 160 P. 574.
- "Attempt to rape."—State v. Covington (Kan.) 160 P. 1009.
- "Authority."—People v. Howard (Cal. App.) 160 P. 697.
- "Bad faith."—Everding & Farrell v. Toft (Or.) 160 P. 1160.
- "Bale of cotton."—Chicago, R. I. & P. Ry. Co. v. Cleveland (Okl.) 160 P. 328.
- "Bearer."—Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins (Wyo.) 160 P. 1171.
- "Bill of lading."—Chicago, R. I. & P. Ry. Co. v. Cleveland (Okl.) 160 P. 328.
- "Burglary with explosives."—Howard v. People (Colo.) 160 P. 1060.
- "Charitable institution."—Bishop Randall Hospital v. Hartley (Wyo.) 160 P. 385.
- "Clerk."—People v. Howard (Cal. App.) 160 P. 697.
- "Close to."—Rantoul Rural High School Dist. No. 2, Franklin County, v. Davis (Kan.) 160 P. 1008.
- "Collection of illegal fees."—Parker v. Morgan (Utah) 160 P. 764.
- "Color of title."—Spaulding v. Beidleman (Okl.) 160 P. 1120.
- "Conditional subscription."—Natwick v. Terwilliger (Wyo.) 160 P. 338.
- "Consideration."—Butson v. Miss (Or.) 160 P. 530.
- "Construction, alteration, addition to, or repair of."—Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co. (Cal. App.) 160 P. 862.
- "Contest."—State v. Howell (Wash.) 160 P. 760.
- "Conversion."—Hushaw v. Dunn (Colo.) 160 P. 1037.
- "Coroner."—More v. Board of Supr's of San Bernardino County (Cal. App.) 160 P. 702.
- "County attorney."—Kytka v. Weber County (Utah) 160 P. 111.
- "Crime."—Marshall v. Dunn (Wash.) 160 P. 298.
- "Deceit."—Kelly v. Robertson (Okl.) 160 P. 46.
- "Defective."—Citizens' Bank & Trust Co. v. Limpricht (Wash.) 160 P. 1046.
- "Defect of parties."—Niblo v. Drainage Dist. No. 3 (Okl.) 160 P. 468.
- "Defendant."—Boyd v. Lambert (Okl.) 160 P. 586.
- "Delivery."—Showalter v. Spangle (Wash.) 160 P. 1042.
- "Direct attack."—Lieblin v. Breyman Leather Co. (Or.) 160 P. 1167.
- "Discharge."—Everding & Farrell v. Toft (Or.) 160 P. 1160.
- "District."—City of San Bernardino v. Horton (Cal.) 160 P. 231.
- "Due process of law."—Youtz v. Farmers' & Merchants' Nat. Bank of Los Angeles (Cal. App.) 160 P. 855.
- "Embezzlement."—People v. Howard (Cal. App.) 160 P. 697.
- "Estoppel by silence."—Farmers' State Bank of Jefferson v. Jordon (Okl.) 160 P. 53.
- "Expense of litigation."—Curtis & Gartside Co. v. Aetna Life Ins. Co. (Okl.) 160 P. 465.
- "Expense or cost of defense."—Curtis & Gartside Co. v. Aetna Life Ins. Co. (Okl.) 160 P. 465.
- "Express trusts."—Ward v. Buchanan (N. M.) 160 P. 356.
- "Factory."—Menke v. Hauber (Kan.) 160 P. 1017.
- "Fraud."—Kelly v. Robertson (Okl.) 160 P. 46; Wingate v. Render (Okl.) 160 P. 614.
- "General guaranty."—Mangold & Glandt Bank v. Utterback (Okl.) 160 P. 713.
- "Grabbots."—Chicago, R. I. & P. Ry. Co. v. Cleveland (Okl.) 160 P. 328.
- "Grounds."—People v. Preciado (Cal. App.) 160 P. 1090.
- "Hamlet."—Rantoul Rural High School Dist. No. 2, Franklin County, v. Davis (Kan.) 160 P. 1008.
- "Harbor areas."—Puget Mill Co. v. State (Wash.) 160 P. 310.
- "Harbor lines."—Puget Mill Co. v. State (Wash.) 160 P. 310.
- "Holder."—Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins (Wyo.) 160 P. 1171.
- "Holder in due course."—Everding & Farrell v. Toft (Or.) 160 P. 1160.
- "Homicide by misadventure."—State v. Hankins (Wash.) 160 P. 307.
- "Incapable."—In re Northcutt (Or.) 160 P. 801.
- "Indirect evidence."—Arundell v. American Oilfields Co. (Cal. App.) 160 P. 159.
- "Indorsee."—Mangold & Glandt Bank v. Utterback (Okl.) 160 P. 713.
- "Inference."—Arundell v. American Oilfields Co. (Cal. App.) 160 P. 159.
- "Injury arising out of employment."—Kimbol v. Industrial Accident Commission (Cal.) 160 P. 150.
- "Interstate commerce."—Kansas City v. Seaman (Kan.) 160 P. 1139; McBain v. Northern Pac. Ry. Co. (Mont.) 160 P. 654; Aldread v. Northern Pac. Ry. Co. (Wash.) 160 P. 429.
- "Invitation."—Gasch v. Rounds (Wash.) 160 P. 962.
- "Jeopardy."—Ex parte Myers (Okl. Cr. App.) 160 P. 939.
- "Join."—Lowery v. Westheimer (Okl.) 160 P. 496.
- "Joined by my wife."—Lowery v. Westheimer (Okl.) 160 P. 496.
- "Joint tenancy."—Equitable Life Assur. Soc. of United States v. Weightman (Okl.) 160 P. 629.
- "Jurisdiction."—Model Clothing Co. v. First Nat. Bank of Cushing (Okl.) 160 P. 450; Roth v. Union Nat. Bank of Bartlesville, Id. 505.
- "Larceny."—People v. Howard (Cal. App.) 160 P. 697.
- "Levy."—People's Water Co. v. Boromeo (Cal. App.) 160 P. 574.
- "Liquidated demand."—New York Life Ins. Co. v. MacDonald (Colo.) 160 P. 198.
- "Lucid intervals."—Roberts v. Pacific Telephone & Telegraph Co. (Wash.) 160 P. 965.
- "Maintaining."—Veatch v. Gibson (Idaho) 160 P. 1112.
- "Manufacturing, mechanical, or mercantile establishment, or other place of labor."—Williams v. Southern Pac. Co. (Cal.) 160 P. 600.
- "May."—Ex parte Cencinino (Cal. App.) 160 P. 167; Strong v. Day (Okl.) 160 P. 722.
- "Mayhem."—State v. Enkhous (Nev.) 160 P. 23.
- "Memorandum."—Holland v. McCarthy (Cal.) 160 P. 1069.
- "Mental capacity."—Magness v. Ditmars (Or.) 160 P. 527.

- "Misjoinder of parties."—*Nihlo v. Drainage Dist. No. 3 (Okl.)* 160 P. 468.
- "Moneyed capital."—*Miami Trust & Savings Bank v. Botts (Okl.)* 160 P. 727; *J. W. Wolverton Hardware Co. v. Porter (Okl.)* 160 P. 906.
- "Near."—*In re Hartung's Estate (Nev.)* 160 P. 782.
- "Negligence."—*New York Plate Glass Ins. Co. v. Wright (Okl.)* 160 P. 54; *Everding & Farrell v. Toft (Or.)* 160 P. 1160.
- "Negotiated."—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins (Wyo.)* 160 P. 1171.
- "Novation."—*Baxter v. Chico Const. Co. (Cal. App.)* 160 P. 1084.
- "On or about."—*Boscus v. Waldmann (Cal. App.)* 160 P. 180.
- "Operating property."—*Northern Pac. Ry. Co. v. King County (Wash.)* 160 P. 8.
- "Ordinary care."—*Talliaferro v. Atchison, T. & S. F. Ry. Co. (Okl.)* 160 P. 69.
- "Ordinary risks."—*Arundell v. American Oilfields Co. (Cal. App.)* 160 P. 159.
- "Or the bearer thereof."—*Capitol Hill State Bank v. Rawlins Nat. Bank of Rawlins (Wyo.)* 160 P. 1171.
- "Other contractors."—*Peterman v. Goss (Wash.)* 160 P. 432.
- "Permission."—*People v. Howard (Cal. App.)* 160 P. 697.
- "Pierhead lines."—*Puget Mill Co. v. State (Wash.)* 160 P. 310.
- "Pleadings."—*Treadgold v. Willard (Or.)* 160 P. 803.
- "Points."—*People v. Preciado (Cal. App.)* 160 P. 1090.
- "Police power."—*Ex parte Cencinino (Cal. App.)* 160 P. 167.
- "Power."—*Menke v. Hauber (Kan.)* 160 P. 1017.
- "Primarily liable."—*Everding & Farrell v. Toft (Or.)* 160 P. 1160.
- "Principal."—*State v. Edlund (Or.)* 160 P. 534.
- "Property."—*In re Assessment of First Nat. Bank of Chickasha (Okl.)* 160 P. 469.
- "Public charity."—*In re Hartung's Estate (Nev.)* 160 P. 782.
- "Public utility."—*Palermo Land & Water Co. v. Railroad Commission of State of California (Cal.)* 160 P. 228.
- "Qualified indorsement."—*Mangold & Glandt Bank v. Utterback (Okl.)* 160 P. 713.
- "Ratification."—*Blackwell v. Kercheval (Idaho)* 160 P. 741.
- "Record."—*O. K. Bus & Baggage Co. v. Cox (Okl.)* 160 P. 455; *Southern Surety Co. v. Turnham, Id.* 468.
- "Recoupment."—*Caples v. Morgan (Or.)* 160 P. 1154.
- "Repairing."—*Veatch v. Gibson (Idaho)* 160 P. 1112.
- "Residence."—*Jones v. Reser (Okl.)* 160 P. 58.
- "Sale at auction."—*State v. Miller (Mont.)* 160 P. 513.
- "Secondarily liable."—*Everding & Farrell v. Toft (Or.)* 160 P. 1160.
- "Servant."—*People v. Howard (Cal. App.)* 160 P. 697.
- "Servile labor."—*Krieger v. State (Okl. Cr. App.)* 160 P. 36.
- "Sheriff."—*More v. Board of Sup'rs of San Bernardino County (Cal. App.)* 160 P. 702.
- "Similar."—*Commercial Nat. Bank of Checotah v. Phillips (Okl.)* 160 P. 920.
- "Slit."—*State v. Enkhhouse (Nev.)* 160 P. 23.
- "Stock of merchandise."—*Swanson v. De Vine (Utah)* 160 P. 872.
- "Structure."—*Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co. (Cal. App.)* 160 P. 862.
- "Sum involved."—*Phillips v. Snowden Placer Co. (Nev.)* 160 P. 786.
- "Tax."—*Pohl v. Chicago, M. & St. P. Ry. Co. (Mont.)* 160 P. 515.
- "Teacher's certificate."—*Blanchard v. Keppel (Cal. App.)* 160 P. 690.
- "Tower."—*Arundell v. American Oilfields Co. (Cal. App.)* 160 P. 159.
- "Transaction."—*Carter v. Prairie Oil & Gas Co. (Okl.)* 160 P. 319.
- "Transactions."—*Goldsworthy v. Oliver (Wash.)* 160 P. 4.
- "Truant."—*State v. Will (Kan.)* 160 P. 1025.
- "Unavoidable casualty."—*Bucy v. Ardmore Brick & Tile Co. (Okl.)* 160 P. 1126; *Campbell v. Saratoga State Bank (Wyo.)* 160 P. 333.
- "Village."—*Rantoul Rural High School Dist. No. 2, Franklin County, v. Davis (Kan.)* 160 P. 1008.
- "Waiver."—*American Cent. Ins. Co. of St. Louis, Mo., v. Sinclair (Okl.)* 160 P. 60; *Parker v. City of Hood River (Or.)* 160 P. 1158; *O'Donnell v. Parker (Utah)* 160 P. 1192.
- "Worthy of its name."—*In re Hartung's Estate (Nev.)* 160 P. 782.
- "Written instrument as evidence of indebtedness."—*Texmo Cotton Exch. Bank v. Liston (Okl.)* 160 P. 82.

WORK AND LABOR.

See *Mechanics' Liens*; *Railroads*, ¶159.

¶9 (Or.) A newspaper which publishes a delinquent tax list under a contract fixing the amount of compensation pursuant to statute cannot recover a larger compensation on quantum meruit.—*Coos Bay Times Pub. Co. v. Coos County*, 160 P. 532.

¶14(2) (Cal.App.) Where plaintiff plumbing contractor was prevented from completing contract by defendant's abandonment of construction of buildings, plaintiff is entitled to recover the reasonable value of the work performed and materials furnished.—*Haub v. Coustette*, 160 P. 836.

¶29(2) (Nev.) Under a complaint on quantum meruit for services, where a specified contract is proved fixing the price therefor, the stipulated price becomes the quantum meruit in the case.—*Warren v. Glasgow & Western Exploration Co., Ltd.*, 160 P. 793.

WORKMEN'S COMPENSATION ACTS.

See *Master and Servant*, ¶356-419.

WRITS.

See *Attachment*; *Certiorari*; *Execution*; *Garnishment*; *Habeas Corpus*; *Injunction*; *MANDAMUS*; *Process*; *Prohibition*; *Quo Warranto*; *Replevin*.

TABLES OF PACIFIC CASES

IN

STATE REPORTS

VOL. 30, CALIFORNIA APPELLATE REPORTS

Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.	Cal.A. Rep.	Pac. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	159	736	112	157	524	251	157	1127	323	158	1063	457	158
3	157	548	114	157	619	252	157	817	332	159	178	460	158
8	157	547	123	156	1003	255	157	830	360	158	340	463	158
11	156	972	126	157	244	261	157	1141	363	158	549	466	158
18	157	523	135	157	7	265	157	1002	381	158	1059	471	158
19	156	969	140	157	247	267	157	1134	391	158	339	473	158
21	157	1003	144	157	516	274	157	1140	392	158	502	479	158
31	157	1005	157	157	500	277	157	1137	395	158	333	482	158
36	157	507	162	157	820	283	158	128	399	158	338	489	159
39	156	1005	165	157	828	285	158	335	402	158	336	489	159
41	157	561	170	157	623	288	158	335	405	158	768	495	158
52	157	537	183	157	640	289	158	1197	417	158	504	499	158
58	157	13	188	157	819	290	158	129	419	158	505	501	158
63	157	531	190	157	629	294	158	225	420	158	507	507	159
66	157	11	194	157	818	296	158	545	422	158	508	514	158
71	157	550	198	157	825	300	158	231	424	159	191	517	158
76	157	15	206	157	821	303	158	342	432	158	1063	523	158
81	157	509	209	157	630	305	158	341	435	158	506	528	158
85	157	528	217	157	823	306	158	226	439	158	508	535	158
87	157	20	223	157	634	308	158	1070	442	158	1056	542	159
91	157	615	231	156	626	315	158	239	460	158	505	547	158
101	157	13	237	157	833	319	158	227	462	158	557	556	159
107	157	512											

VOL. 30, CALIFORNIA APPELLATE REPORTS

	Page		Page
Akers v. Rappe (158 P. 129).....	290	De Liere v. Goldberg, Bowen & Co. (159 P. 197).....	612
Albers v. Superior Court of Humboldt County (159 P. 453).....	772	East San Mateo Land Co. v. Southern Pac. R. Co. (157 P. 634).....	223
Anderson v. Monticello S. S. Co. (158 P. 545).....	296	East Side Canal & Irrigation Co. v. Superior Court of Merced County (158 P. 773).....	528
Annesley v. Victorino (158 P. 507).....	420	Fairbanks, Morse & Co. v. Zimmerman (157 P. 509).....	81
Austin v. Strang (157 P. 1002).....	265	Federal Const. Co. v. Wold (158 P. 340).....	360
Banca Commerciale Italiana Di Genova v. P. Schlegel & Co. (158 P. 231).....	300	Ferrari v. Western Assur. Co. (159 P. 609, 611).....	489
Barry v. Jackson (157 P. 828).....	165	Flittner v. Equitable Life Assur. Soc. of United States (157 P. 630).....	209
Blood v. Industrial Acc. Commission of State of California (157 P. 1140).....	274	Fonts v. Southern Pac. Co. (159 P. 215).....	633
Blossom v. Waller (158 P. 509).....	439	Fox v. Windemere Hotel Apartment Co. (157 P. 820).....	162
Bradford v. Sunset Land & Water Co. (157 P. 20).....	87	Frede v. Justice's Court of Los Angeles Tp. (157 P. 528).....	85
Browne v. Commercial Union Assur. Co. of London, England (158 P. 765).....	547	Gambetta v. Gambetta (157 P. 1141).....	261
Bruschi v. Cooper (159 P. 728, 734).....	682	Gaskill v. Pacific Electric R. Co. (159 P. 200).....	593
Burr v. Board of Sup'rs of City and County of San Francisco (159 P. 458).....	755	Gates v. Cunningham (158 P. 227).....	319
California Central Creameries Co. v. Crescent City Light, Water & Power Co. (159 P. 209).....	619	Gordon v. Roberts (157 P. 15).....	76
Claxton v. American Casualty Co. (158 P. 544).....	457	Grace & Co. v. Levy (156 P. 626).....	231
Coelho v. Judson Mfg. Co. (156 P. 1005).....	39	Grosse v. Petersen (158 P. 511).....	482
Colm v. Francis (159 P. 237).....	742	Gwynn v. McKinley (158 P. 1059).....	381
Consolidated Music Co. v. Morrison (158 P. 342).....	508	Harpold v. Slocum (158 P. 1051).....	479
Cooley v. Brunswick Drug Co. (157 P. 13).....	58	Hassey v. Ruggles (156 P. 989).....	19
Crosby v. Fresno Fruit Growers' Co. (158 P. 1070).....	308	Havens v. Alameda County (157 P. 821).....	206
Crowley v. Savings Union Bank & Trust Co. (157 P. 516).....	144	Hay v. Casey (159 P. 726, 728).....	570
Crowley v. Savings Union Bank & Trust Co. (159 P. 194).....	535	Hicks v. Butterworth (159 P. 224).....	562
	160 P.	Hooper v. Smith (158 P. 556).....	460

(1299)

30 CAL. APP.—Continued.		Page		Page
House v. Fry (157 P. 500).....	157		People v. Wilkison (158 P. 1067).....	473
Huffman v. Knapp (159 P. 456).....	759		People ex rel. Smith v. Gunn (157 P. 619).....	114
Hunt v. Glassell (159 P. 227).....	676		People ex rel. Webb v. Marsh (159 P. 191).....	424
Innes v. Goldwater (157 P. 18).....	101		Peterson v. Superior Court of Butte County (158 P. 547).....	466
Jenkins v. Locke-Paddon Co. (157 P. 537).....	52		Poor v. W. P. Fuller & Co. (159 P. 233).....	650
Johnson, Ex parte (157 P. 560).....	792		Porter v. General Acc. Fire & Life Assur. Corp. (157 P. 825).....	198
June, Ex parte (159 P. 452).....	767		Porter v. Superior Court of Los Angeles County (159 P. 222).....	608
Kehrlein-Swinerton Const. Co. v. Rapken (156 P. 972).....	11		Porterfield v. City of Modesto (159 P. 205).....	598
King v. Johnson (157 P. 531).....	63		Preciado, Ex parte (158 P. 1063).....	323
Koch v. Wilcoxon (158 P. 1048).....	517		Pridham v. Lewis (158 P. 333).....	395
Lapique v. Ruef (158 P. 339).....	391		Priestley v. Stafford (158 P. 776).....	523
Linneweber v. Supreme Council Catholic Knights of America (158 P. 229).....	315		Rigdon v. Common Council of City of San Diego (157 P. 513).....	107
Long, Ex parte (158 P. 1056).....	442		Riley v. Evening Post Pub. Co. (158 P. 225).....	294
Lovejoy v. Hart (159 P. 170).....	664		Roberts v. Superior Court of Stanislaus County (159 P. 465).....	714
Lynip v. Alturas School Dist. of Modoc County (160 P. 175).....	794		Robinson v. Otis (159 P. 441).....	769
McCarthy v. Holland (158 P. 1045).....	495		Roche v. Superior Court of San Diego County (157 P. 830).....	255
McCarty v. Superior Court in and for Los Angeles County (159 P. 736).....	1		Rodemeyer v. Meger (158 P. 1047).....	514
MacGillivray v. Owen (159 P. 452).....	763		Rosenthal v. Bauer (157 P. 1137).....	277
McPherson v. Eberhard Tanning Co. (158 P. 1197).....	289		Rouillard v. Gray (159 P. 457).....	757
Manning v. Broadmoor Imp. Co. (157 P. 524).....	112		Rountree v. Montague (157 P. 623).....	170
Mettler v. Vance (158 P. 1044).....	499		Sage Land & Improvement Co. v. McCowen (157 P. 244).....	126
Moore v. Lauff (158 P. 557).....	452		St. Paul Fire & Marine Ins. Co. v. Southern Pac. Co. (157 P. 247).....	140
Morrell v. San Tomas Drying & Packing Co. (157 P. 818).....	194		San Dimas Quarry Co. v. American Surety Co. of New York (157 P. 548).....	3
Morris v. Winans (159 P. 213).....	575		San Joaquin & Kings River Canal & Irrigation Co. v. James J. Stevinson (158 P. 768).....	405
Morrow v. Wells (158 P. 226).....	306		Schneider v. Moncur (159 P. 459).....	734
Mortell v. Los Angeles College of Osteopathy (158 P. 508).....	422		Scott v. Superior Court of City and County of San Francisco (159 P. 225).....	793
Olson-Mahoney Lumber Co. v. Dunne Inv. Co. (159 P. 178).....	382		Simmons v. Superior Court of San Diego County (157 P. 817).....	252
Orchardson v. Christie (157 P. 547).....	8		Smith v. Reis (158 P. 1052).....	579
Pacific Portland Cement Co., Consolidated, v. Reinecke (158 P. 1041).....	501		Soule v. Wyatt (159 P. 447).....	778
Palmer v. Woodruff (157 P. 1137).....	251		Spreckels v. State (158 P. 549).....	363
People v. Anderson (159 P. 211).....	542		Standard American Dredging Co. v. City of Oakland (157 P. 833).....	237
People v. Bailey (158 P. 1036).....	581		Steinbroner v. Steinbroner (159 P. 235).....	673
People v. Bradfield (159 P. 443).....	721		Strauss v. Mowry (158 P. 341).....	305
People v. Cavanaugh (158 P. 1053).....	432		Swanton v. Jacks (157 P. 11).....	66
People v. Champion (158 P. 501).....	463		Thomas v. Anthony (157 P. 823).....	217
People v. Cherry (158 P. 335).....	285		Tischhauser v. Prentice (159 P. 226).....	699
People v. Chin You (157 P. 523).....	18		Tubbs v. Stone & Webster Const. Co. (159 P. 242).....	705
People v. Collis (159 P. 229).....	656		Union Trust Co. of San Francisco v. Dickinson (157 P. 615).....	91
People v. Day (159 P. 457).....	762		United Motor San Francisco Co. v. Calander (157 P. 561).....	41
People v. Deatrick (159 P. 175).....	507		Van Cott v. Frank (158 P. 505).....	450
People v. Fisher (157 P. 7).....	135		Weis v. Superior Court of San Diego County (159 P. 464).....	730
People v. Fowler (157 P. 540).....	183		Welch v. Santa Cruz County (156 P. 1003).....	123
People v. Hovis (159 P. 222).....	703		West v. City of Oakland (159 P. 202).....	556
People v. Joy (157 P. 507).....	36		Whitcomb v. Worthing (159 P. 613).....	629
People v. McInerney (158 P. 128).....	283		Williams v. Parker (157 P. 550).....	71
People v. McLeod (158 P. 506).....	435		Willis, Ex parte (157 P. 819).....	188
People v. Matson (158 P. 335).....	288		Wilson, Ex parte (158 P. 1050).....	567
People v. Maupins (158 P. 502).....	392		Wilson v. District Council of Sheet Metal Workers (157 P. 629).....	190
People v. Oakley (158 P. 505).....	419		W. R. Grace & Co. v. Levy (156 P. 626).....	231
People v. Pasqueria (159 P. 173).....	625			
People v. Phillips (157 P. 1003, 1005).....	31			
People v. Ponchette (158 P. 338).....	399			
People v. Rizotto (159 P. 199).....	616			
People v. Terramorse (157 P. 1134).....	267			
People v. Truax (158 P. 510).....	471			
People v. Vermillion (158 P. 504).....	417			
People v. Waugh (158 P. 336).....	402			
People v. Weir (159 P. 442).....	766			

VOL. 21, NEW MEXICO REPORTS

N. M. Rep.	Pac. Rep.	N. M. Rep.	Pac. Rep.	N. M. Rep.	Pac. Rep.	N. M. Rep.	Pac. Rep.	N. M. Rep.	Pac. Rep.	N. M. Rep.	Pac. Rep.	N. M. Rep.	Pac. Rep.	N. M. Rep.	Pac. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	151	463	115	152	1143	212	153	294	396	155	727	450	155	720	531
5	151	1014	135	153	258	239	153	262	411	155	719	453	155	905	548
14	153	76	146	153	74	264	153	303	413	155	721	485	155	1089	556
50	153	1041	151	153	69	275	153	615	422	155	732	496	155	1093	576
76	153	273	166	153	271	286	154	382	432	155	721	503	156	243	599
82	153	1032	173	153	256	313	154	705	435	155	732	510	156	407	606
83	153	1050	180	153	807	320	154	708	438	155	725	515	157	656	624
95	152	1140	188	153	68	327	154	704	445	155	724	517	157	141	632
104	152	1137	191	153	1036	330	154	691	448	155	719	521	157	652	647
110	152	1139	207	153	1034	373	155	356							

VOL. 21, NEW MEXICO REPORTS

	Page		Page
Albright v. Albright (157 P. 662).....	606	Moriarity v. Meyer (157 P. 652).....	521
Algodones Land & Town Co. v. Frank (153 P. 1032).....	82	Murry v. Belmore (154 P. 705).....	313
Arnold v. Wells (155 P. 724).....	445	New Mexico-Colorado Coal & Mining Co. v. Baker (157 P. 167).....	531
Atchison, T. & S. F. R. Co. v. Solorzano (156 P. 242).....	503	New Mexico-Colorado Coal & Mining Co. v. Eighth Judicial Dist. Court of New Mexico (158 P. 489).....	728
Baca, State ex rel., v. Board of Com'rs of Guadalupe County (158 P. 642).....	713	New York Life Ins. Co. v. Chaves (153 P. 303).....	264
Board of Education of City of Albuquerque v. School Dist. No. 5 of Bernalillo County (157 P. 668).....	624	Owen v. Terrell (157 P. 672).....	647
Board of Education of City of Santa Fé v. Astler (151 P. 462).....	1	Raton Waterworks v. City of Raton (157 P. 656).....	515
Bruton v. Sakariason (155 P. 725).....	438	Riverside Irr. Co. v. Cadwell (158 P. 644).....	666
Buss v. Dye (153 P. 74).....	146	Roswell v. Jacoby (158 P. 419).....	702
City of Roswell v. Jacoby (158 P. 419)....	702	Roswell v. Richardson (152 P. 1137).....	104
City of Roswell v. Richardson (152 P. 1137).....	104	Santa Fé Gold & Copper Mining Co. v. Atchison, T. & S. F. R. Co. (155 P. 1093).....	496
Cleveland v. Bateman (158 P. 648).....	675	Schwentker v. Hubbs (153 P. 68).....	188
Consolidated Liquor Co. v. Scotello & Nizzi (155 P. 1089).....	485	Stalick v. Wilson (154 P. 708).....	320
Dexter-Greenfield Drainage Dist., In re (154 P. 382).....	286	State v. Ascarate (153 P. 1036).....	191
Dow v. Irwin (157 P. 490).....	576	State v. Awalt (156 P. 407).....	510
Ellis v. Stone (158 P. 480).....	730	State v. Carter (153 P. 271).....	166
Enderstein v. Atchison, T. & S. F. R. Co. (157 P. 670).....	548	State v. Coppinger (155 P. 732).....	435
First Nat. Bank of Albuquerque v. Stover (155 P. 905).....	453	State v. Graves (157 P. 160).....	556
First Nat. Bank of Las Vegas v. Clark (153 P. 69).....	151	State v. Johnson (155 P. 721).....	432
Fullen v. Fullen (153 P. 294).....	212	State v. McDonald (152 P. 1139).....	110
Garcia, State ex rel., v. Board of Com'rs of Rio Arriba County (157 P. 656).....	632	State v. McKnight (153 P. 76).....	14
Harrington v. Atteberry (153 P. 1041)....	50	State v. Perkins (153 P. 258).....	135
Harrison v. Harrison (155 P. 356).....	372	State v. Pino (158 P. 131).....	860
Hill v. Winkler (151 P. 1014).....	5	State v. Riley (155 P. 720).....	450
Jaramillo v. Lovelace (155 P. 719).....	448	State v. Sakariason (153 P. 1034).....	207
Kelley v. Marron (153 P. 262).....	239	State v. Smith (153 P. 256).....	173
Kemp Lumber Co. v. Whitlatch (153 P. 1050).....	88	State v. Strickland (155 P. 719).....	411
Klutts v. Jones (158 P. 490).....	720	State ex rel. Baca v. Board of Com'rs of Guadalupe County (158 P. 642).....	713
Leonard v. Greenleaf (153 P. 807).....	180	State ex rel. Garcia v. Board of Com'rs of Rio Arriba County (157 P. 656).....	632
McMillin v. Boatright (154 P. 704).....	327	State Nat. Bank of Albuquerque v. Bank of Magdalena (157 P. 498).....	653
Melkusch v. Victor American Fuel Co. (155 P. 727).....	396	Strickland v. Johnson (157 P. 142).....	599
Michelet v. Board of Com'rs of Chaves County (152 P. 1140).....	95	Thayer v. Denver & R. G. R. Co. (154 P. 691).....	330
		Union Land & Grazing Co. v. Arce (152 P. 1143).....	115
		Veeder v. Boney (152 P. 1143).....	115
		Walters v. Battenfield (155 P. 721).....	413
		Watters v. Treasure Mining Co. (153 P. 615).....	275
		Wilkerson v. Badaracco (157 P. 141).....	517
		Wilson v. Robinson (155 P. 732).....	422
		Woodcock v. Cochran (153 P. 273).....	76

VOL. 79, OREGON REPORTS

Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.	Or. Rep.	Pac. Rep.					
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.					
1	154	399	133	154	578	260	154	410	384	154	884	454	155	705	526	144	1193	614	156	225
36	153	538	143	154	749	278	155	171	367	154	906	462	155	717	526	155	1195	617	154	276
38	153	786	146	154	750	281	155	175	367	155	364	467	155	974	534	154	426	618	154	577
38	154	121	155	154	887	293	155	179	379	155	365	473	154	534	534	155	1197	622	155	169
48	153	793	182	154	897	308	155	184	381	155	365	478	154	688	545	156	245	626	156	257
71	154	397	184	154	903	319	153	61	387	155	370	485	154	688	557	152	103	639	156	266
78	154	415	191	154	908	325	154	748	395	155	373	489	154	424	557	156	265	641	156	272
88	154	418	203	152	873	325	155	187	403	155	375	489	155	1192	563	146	94	646	156	277
91	154	419	205	153	47	333	154	766	411	155	378	498	154	763	563	156	264	653	156	279
101	154	422	223	153	56	338	155	194	421	155	169	506	155	1188	578	155	195	662	149	83
109	154	431	226	154	891	342	155	190	424	154	895	513	155	1190	579	156	250	662	156	281
114	153	800	247	152	103	347	155	189	430	154	897	517	155	1192	593	156	261	669	156	282
122	154	428	249	154	116	349	155	192	448	155	703	523	155	1194	606	156	274	674	156	286
129	154	430	249	155	173	355	154	767												

VOL. 79, OREGON REPORTS

	Page		Page
Albany v. McGoldrick (155 P. 717).....	462	Kay v. City of Portland (154 P. 750).....	146
Allen v. McNeelan (156 P. 274).....	606	Kimball v. Horticultural Fire Relief of Oregon (154 P. 578).....	133
Bamford v. Van Emon Elevator Co. (155 P. 378).....	395	Larrabee v. Bjorkman (155 P. 974).....	467
Barnes v. Spencer (153 P. 47).....	205	Leon v. Leon (155 P. 189).....	347
Beem v. Mays (152 P. 103).....	247	Leslie v. McNeil (154 P. 834).....	364
Bennie v. Portland Ry., Light & Power Co. (156 P. 266).....	639	Li Sai Cheuk v. Lee Lung (146 P. 94; 156 P. 254).....	563
Boyer v. Burton (149 P. 83; 156 P. 281).....	662	Logan v. Parson (155 P. 365).....	381
Brewster v. Springer (154 P. 418).....	88	Lombard v. Kies (154 P. 757).....	355
Cannon v. Hood River Irr. Dist. (154 P. 397).....	71	Lueddemann v. Rudolf (154 P. 116; 155 P. 172).....	249
Canuto v. Weinberger (155 P. 190).....	342	Lyons v. Chaffee (154 P. 638).....	485
Carlson v. O'Connor (154 P. 755).....	333	McGilchrist v. Portland E. & E. R. Co. (154 P. 419).....	91
Carson v. Schulderman (154 P. 903).....	184	McGowan v. Willamette Valley Irr. Land Co. (155 P. 705).....	454
Chan Sing v. City of Astoria (155 P. 378).....	411	Meek v. Meek (156 P. 255).....	579
City of Albany v. McGoldrick (155 P. 717).....	462	Molalla Electric Co. v. Wheeler (154 P. 686).....	478
City of Portland v. American Surety Co. of New York (153 P. 786; 154 P. 121).....	38	Mowrey v. Bouton (154 P. 897).....	182
City of Rainier v. Masters (154 P. 426; 155 P. 1197).....	534	Nicholas v. Title & Trust Co. (154 P. 391).....	226
Clark, In re (154 P. 748; 155 P. 187).....	325	Orr's Estate, In re (153 P. 61).....	319
Cone v. Gilmore (155 P. 192).....	349	Playman v. Commercial Underwriters at Commercial Inter-Insurance Exchange (156 P. 283).....	669
Cummins v. Jones (155 P. 171).....	276	Portland v. American Surety Co. of New York (153 P. 786; 154 P. 121).....	38
Darby v. Hindman (153 P. 56).....	223	Portland & O. C. R. Co. v. Ladd Estate Co. (155 P. 1192).....	517
Decker v. Jordan (154 P. 431).....	109	Potter Realty Co. v. Breitling (155 P. 179).....	203
Dickerson v. Eastern & Western Lumber Co. (155 P. 175).....	281	Purdy v. Winters' Estate (156 P. 285).....	614
Doolittle v. Pacific Coast Safe & Vault Works (154 P. 753).....	498	Rainier v. Masters (154 P. 426; 155 P. 1197).....	534
Dundas v. Grand View Land Co. (155 P. 365).....	379	Robinson v. McCart (156 P. 273).....	641
Gibson v. Payne (154 P. 422).....	101	Sabin v. Chrisman (154 P. 908).....	191
Guaranty Trust Co. v. Dinwiddie (156 P. 279).....	653	Salisbury v. Goddard (156 P. 261).....	593
Gustin v. Gustin (155 P. 370).....	387	Sanders v. Taber (155 P. 1194).....	522
Hadley v. Hadley (155 P. 195).....	573	Sink v. Allen (154 P. 415).....	78
Hague v. Hague (156 P. 277).....	646	Spady v. Spady (155 P. 169).....	421
Hanna v. Alluvial Farm Co. (152 P. 103; 156 P. 265).....	557	Stansbery v. First M. E. Church (154 P. 887).....	155
Hennigan v. Mathews (155 P. 169).....	622	State v. Brownell (154 P. 428).....	123
Hoy v. Gorst (154 P. 276).....	617	State v. Underwood (155 P. 194).....	338
Humason v. Orr (153 P. 61).....	319	State v. Wallace (154 P. 430).....	129
Humphry v. City of Portland (154 P. 897).....	430	State v. Ware (154 P. 906; 155 P. 364).....	367
Jacobs v. Jacobs (154 P. 749).....	143	State ex rel. v. Port of Astoria (154 P. 399).....	1
Jakel v. Seock (154 P. 424; 155 P. 1192).....	489	Stephens v. Oregon Nut & Fruit Co. (154 P. 577).....	618
Jenkins v. Carman Mfg. Co. (155 P. 703).....	448	Sterett & Oberle Packing Co. v. City of Portland (154 P. 410).....	280
Johnson v. Portland Ry., Light & Power Co. (155 P. 375).....	403		
Johnstone v. Chapman Timber Co. (156 P. 285).....	674		

79 OR.—Continued.		Page			Page
Stevens v. Taylor (154 P. 895).....	424		Thompson v. Thompson (155 P. 1190)...	513	
Strickler v. Portland Ry., Light & Power Co. (144 P. 1193; 155 P. 1195).....	526		Title Insurance & Trust Co. v. Home Tel. Co. (152 P. 873).....	203	
Sykes v. Proebstel Land & Adjustment Co. (153 P. 538).....	36		Tooze v. Heighton (156 P. 245).....	545	
Talbot v. Joseph (155 P. 184).....	308		Webb v. Isensee (153 P. 800).....	114	
T. B. Potter Realty Co. v. Breitling (155 P. 179).....	293		Wettersten v. Fisher (154 P. 534).....	473	
Thielke v. Albee (153 P. 793).....	48		Wheeler v. Nehalem Timber & Logging Co. (155 P. 1188).....	506	
			Wright v. Wimberly (156 P. 257).....	626	

VOL. 80, OREGON REPORTS

Or. Rep.	Pac. Rep.		Or. Rep.	Pac. Rep.		Or. Rep.	Pac. Rep.		Or. Rep.	Pac. Rep.		Or. Rep.	Pac. Rep.		Or. Rep.	Pac. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	148	477	104	156	578	183	156	797	256	156	1037	361	157	155	506	154	533
1	156	573	107	156	579	194	150	273	280	156	1038	369	157	157	511	157	791
16	154	759	118	156	583	194	156	1070	286	156	1040	378	154	117	513	157	791
16	156	431	124	156	584	213	155	367	271	156	1058	378	157	785	520	157	798
47	155	1186	132	156	590	213	156	794	308	156	1073	404	156	438	524	157	804
53	150	253	140	156	587	224	156	427	323	156	789	404	157	739	523	157	806
62	151	968	150	149	516	224	156	1034	323	157	146	412	156	1042	539	157	809
64	156	425	150	156	785	233	156	249	329	157	145	468	157	590	550	157	813
68	156	433	160	154	885	238	156	260	335	157	147	476	157	732	562	157	796
73	156	569	160	156	791	240	156	429	340	157	148	486	157	799	563	157	963
88	155	175	169	156	792	246	156	1034	345	157	150	502	155	197	574	157	965
88	155	1176	175	156	794	254	156	1037	354	157	153	502	157	738	583	156	267
93	156	435															

VOL. 80, OREGON REPORTS

Bertin & Lepori v. Mattison (157 P. 153)...	354	Kurtz v. Southern Pac. Co. (155 P. 367; 156 P. 794).....	213
Bessler v. Derby (157 P. 791).....	513	Lange v. Devlin (156 P. 260).....	238
Bond v. Ellison (157 P. 1103).....	634	Larkin v. Carstens Packing Co. (156 P. 578).....	104
Brewster v. Springer (156 P. 433).....	68	Lemler v. Bord (156 P. 427, 1034).....	224
Carlson v. First Nat. Bank (157 P. 809)...	539	McCamant v. Olcott (156 P. 1034).....	246
Carnahan Mfg. Co. v. Beebe-Bowles Co. (156 P. 584).....	124	McDaniels v. Harrington (157 P. 1068)...	628
Central Oregon Irr. Co. v. Public Service Commission (157 P. 1070).....	607	McMaster v. Ruby (157 P. 782).....	476
City of Portland v. Portland Gas & Coke Co. (150 P. 273; 156 P. 1070).....	194	Mattson v. Dresser (155 P. 1186).....	47
City of Portland v. Portland Ry., Light & Power Co. (156 P. 1058).....	271	Minter v. Minter (157 P. 157).....	369
City of Seaside v. Oregon Surety & Casualty Co. (157 P. 150).....	345	Mitchell v. Hughes (157 P. 965).....	574
Clark v. Morrison (156 P. 429).....	240	Muir v. Morris (154 P. 117; 157 P. 785)...	378
Cole v. City of Seaside (156 P. 569).....	73	Nordin v. Lovegren Lumber Co. (156 P. 587)	140
Crim v. Crim (155 P. 175, 1176).....	88	Oregon Lumber Co. v. East Fork Irr. Dist. (157 P. 963).....	568
Dahlstrom v. Hudelson (157 P. 798)....	520	Paulson v. Weeks (157 P. 590).....	468
Dailey v. Cremen (156 P. 797).....	183	Phipps v. Rogue River Valley Canal Co. (156 P. 794).....	175
Danby v. Starlight Irr. Co. (157 P. 1066)...	619	Pinder v. Wickstrom (156 P. 583).....	118
Dennis v. City of Willamina (157 P. 799)...	486	Portland v. Portland Gas & Coke Co. (150 P. 273; 156 P. 1070).....	194
De War v. First Nat. Bank (156 P. 1038)...	260	Portland v. Portland Ry., Light & Power Co. (156 P. 1058).....	271
Fellman v. Fellman (156 P. 792).....	169	Rice v. West (157 P. 1105).....	640
First Nat. Bank v. Manassa (150 P. 258)...	53	Rowell's Estate, In re (157 P. 1064)...	617
Flynn v. Davidson (155 P. 197; 157 P. 788).....	502	Rusk v. Montgomery (156 P. 435).....	93
Fones v. Murdock (157 P. 148).....	340	Sanford v. Hanan (156 P. 1040).....	266
French v. Columbia Life & Trust Co. (156 P. 1042).....	412	Sargent v. American Bank & Trust Co. (154 P. 759; 156 P. 431).....	16
Gilbert v. Sharkey (156 P. 789; 157 P. 146)	323	Schultz v. Selberg (157 P. 1114).....	668
Hansen v. Robbins (157 P. 1112; 158 P. 403).....	659	Seaside v. Oregon Surety & Casualty Co. (157 P. 150).....	345
Haworth v. Jackson (156 P. 590).....	132	Smith v. Dwight (148 P. 477; 156 P. 573)...	1
Hinkel v. Oregon Chair Co. (156 P. 438; 157 P. 789).....	404	Smythe v. Smythe (149 P. 516; 156 P. 785)	150
Hudson v. Brown Lumber Co. (154 P. 533).....	506	State v. Hamilton (157 P. 796).....	562
Hunter v. City of Roseburg (156 P. 267; 157 P. 1065).....	588	State v. Jacobson (157 P. 1108).....	648
Interior Warehouse Co. v. Dunn (157 P. 806)	528	State ex rel. v. Johnson (156 P. 579).....	107
Johnson v. McKenzie (154 P. 885; 156 P. 791).....	160	State ex rel. v. Nyssa-Arcadia Drainage Dist. (157 P. 804).....	524
		State ex rel. v. Stillwell (157 P. 970)...	610

80 OR.—Continued.		Page		Page
Steed v. Cavanaugh (151 P. 968).....	62		Verrell v. First Nat. Bank (157 P. 813)..	550
Stewart v. Rowell (157 P. 1064).....	617		Wadhams & Co. v. San Francisco & Port-	
Tucker v. Davidson (156 P. 1037).....	254		land S. S. Co. (156 P. 425).....	64
United States Fidelity & Guaranty Co. v.			Wagner v. Wagner (156 P. 1037).....	256
United States Nat. Bank (157 P. 155)..	361		Waterman v. Waterman (157 P. 791)...	511
Vermont Farm Mach. Co. v. Hall (156 P.			Wells v. First Nat. Bank (157 P. 145)..	329
1073)	308		Wilson v. Investment Co. (156 P. 249)..	233
			Zurcher v. Booth (157 P. 147).....	835

VOL. 91, WASHINGTON REPORTS

Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.	Wash. Rep.	Pac. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	156	845	118	157	20	221	157	859	314	157	866	441	157
4	156	849	118	157	459	232	157	864	315	157	881	446	157
9	156	858	121	157	467	235	157	868	324	157	893	454	157
20	157	44	126	157	478	238	157	887	333	157	898	463	157
30	157	47	130	157	482	241	157	888	342	157	896	467	157
35	157	42	136	157	474	244	157	884	354	157	848	470	157
40	157	23	140	157	480	246	157	874	358	157	875	475	158
43	157	31	146	157	472	248	157	889	363	157	872	478	158
56	157	84	151	157	470	253	157	892	371	157	879	481	158
60	157	38	157	157	476	260	157	879	376	157	896	490	158
71	157	467	164	157	485	268	157	846	383	157	870	498	158
81	157	223	169	157	460	279	157	877	387	158	107	500	158
86	157	217	170	157	464	284	157	890	400	157	1084	504	158
89	157	213	176	157	456	289	157	885	408	157	1090	507	158
94	157	215	179	157	460	294	157	875	415	157	1076	513	158
99	157	220	181	157	482	298	157	882	418	157	1086	516	158
104	157	213	187	157	488	302	157	898	428	157	1078	519	158
109	157	212	192	157	487	304	157	884	433	157	1077	534	158
113	157	222	196	157	850	307	157	877	437	157	1080	637	158

VOL. 91, WASHINGTON REPORTS

	Page		Page
Alexander v. Bennett (158 P. 534).....	688	Engstrom v. Edendale Land Co. (157 P. 683).....	241
Alexander v. Mentzer (158 P. 75).....	552	Evergreen Farm v. Attalia Land Co. (157 P. 487).....	192
Algoe v. Pacific Mut. Life Ins. Co. of California (157 P. 993).....	324		
Allen v. Jaffe (155 P. 1150).....	690	Fidelity & Deposit Co. of Maryland v. Spokane Merchants' Ass'n. (157 P. 464).....	170
American Sav. Bank & Trust Co. v. National Surety Co. (157 P. 877).....	307	First Nat. Bank of Monroe v. Snohomish County (158 P. 92).....	513
Anderson v. Hall (157 P. 996).....	376	First Thought Gold Mines v. Stevens County (157 P. 1080).....	437
Anderson v. Langford (157 P. 456).....	176	Fraser v. Home Telephone & Telegraph Co. (157 P. 692).....	253
Bacon's Estate, In re (156 P. 845).....	1	Gates v. Gregory (157 P. 470).....	151
Barager v. Arcadia Orchards Co. (157 P. 675).....	294	George v. Carstens Packing Co. (158 P. 529).....	637
Bartholomew v. Town of Springdale (157 P. 1090).....	408	Glaze v. Pullman State Bank (157 P. 488).....	187
Barton v. Van Gesen (157 P. 215).....	94	Gordon v. Hillman (158 P. 96).....	490
Bertschinger v. Campbell (158 P. 80).....	478	Griffith v. James (158 P. 251).....	607
Boehme v. Broadway Theater Co. (157 P. 218).....	104	Gwinn v. Ford (158 P. 536).....	498
Bowers v. Standard Fuel & Ice Co. (157 P. 1094).....	400	Gwinn v. Ford (158 P. 536).....	694
Bradford-Kennedy Co. v. Buchanan (158 P. 76).....	539		
Brenseth v. Brenseth (157 P. 462).....	691	Handley Inv. Co. v. Trenholme (157 P. 472).....	146
Briglio v. Holt & Jeffery (158 P. 347).....	644	Harry L. Olive Co. v. Meek (157 P. 460).....	169
Brown v. City of Walla Walla (157 P. 30).....	116	Harvey v. Richardson (157 P. 674).....	245
		Hawley v. Hawley (157 P. 1189).....	646
Cartier Van Dissel v. Holland-Horr Mill Co. (157 P. 687).....	239	Herring-Hall-Marvin Safe Co. v. Purcell Safe Co. (158 P. 477).....	662
Chute v. Attalia Land Co. (156 P. 849).....	4	Hill v. Calkins (158 P. 347).....	634
City of Seattle v. Puget Sound Traction, Light & Power Co. (158 P. 252).....	567	Holt Mfg. Co. v. Brotherton (157 P. 849).....	354
City of Spokane v. Great Northern R. Co. (158 P. 244).....	613	Holzman v. City of Spokane (157 P. 1086).....	418
Clark v. Pacific Power & Light Co. (157 P. 462).....	130	Hopkins v. American Fidelity Co. (158 P. 535).....	680
Cole v. Carruthers (158 P. 75).....	500		
Collins v. City of Ellensburg (157 P. 864).....	232	Ihrke v. Continental Life Insurance & Investment Co. (157 P. 866).....	342
Collins v. Terminal Transfer Co. (157 P. 1092).....	463	Interior Warehouse Co. v. Hays (158 P. 99).....	507
Cremidas v. Dallas (157 P. 1084).....	441	Irwin v. Rogers (157 P. 690).....	284
Cuschner v. Pittsburgh-Hickson Co. (157 P. 879).....	371		
		Johnson v. Arcadia Orchards Co. (157 P. 685).....	289
Davis-Kaser Co. v. Colonial Fire Underwriters' Ins. Co. (Agency) of Hartford, Conn. (157 P. 870).....	383		
Dickie v. City of Centralia (157 P. 1084).....	467	Kato v. Union Oil Co. of California (157 P. 688).....	302
Donahue v. Hardman Estate (157 P. 478).....	125	Kennedy v. Norton (157 P. 684).....	244
Duffy v. Blake (157 P. 480).....	140	Kilbourne v. Rathbun (157 P. 457).....	121
		King v. Ramsey (157 P. 1077).....	433
Easton v. Littooy (158 P. 531).....	648	Kuehl v. City of Edmonds (157 P. 850).....	195
Egerth v. City of Spokane (157 P. 859).....	221		
Engirbritson v. Tri-State Cedar Co. (157 P. 677).....	279	Latschaw v. Western Townsite Co. (158 P. 248).....	575
		Lindblom v. Hazel Mill Co. (157 P. 998).....	343
		Lyons v. Ingle (157 P. 460).....	179

91 WASH.—Continued.		Page	Page
McCann v. Chicago, M. & P. S. R. Co.	(158 P. 243).....	626	Shippen v. Shippen (158 P. 247)..... 610
McKinney v. Port Townsend & P. S. R. Co.	(158 P. 107).....	387	Simpson Logging Co. v. Chehalis County
Maskell v. Alexander (157 P. 872).....	363		(158 P. 342)..... 536
Mausoleum Sales Co. v. Brewer (158 P.	256).....	694	Smith v. Doty (157 P. 881)..... 32
Mausoleum Sales Co. v. Morgan (158 P.	255).....	617	Soboda v. Frederick Nolf & Co. (157 P.
Meehan v. Ingalls (157 P. 217).....	86		1100)..... 446
Merritt v. McLane (157 P. 220).....	99		Spokane v. Great Northern R. Co. (158 P.
Meyer v. Hodge (157 P. 42).....	35		244)..... 612
Mitchell v. Berlin-McNitt Co. (158 P. 264)	582		State v. Bates & Rogers Const. Co. (157
Morrison v. Gunning (157 P. 1199).....	693		P. 482)..... 18
Mutual Inv. Co. v. Walton Mach. Co. (157	P. 682).....	298	State v. Howard (158 P. 104)..... 42
Nichols v. City of Spokane (157 P. 863)...	235		State v. Kellogg (158 P. 344)..... 45
Nordlund v. Pearson (157 P. 875).....	358		State v. Roberts (158 P. 101)..... 20
Norman v. Meeker (158 P. 78).....	534		State v. Serwe (158 P. 81)..... 516
Northern Pac. R. Co. v. McDonald (157	P. 222).....	113	State v. Superior Court for Jefferson
Northwestern Equipment Co. v. Sote (157	P. 459).....	118	County (157 P. 1097)..... 44
Olive Co. v. Meek (157 P. 460).....	169		State v. Wilson (157 P. 474)..... 13
Olson v. Schulz (158 P. 90).....	475		State ex rel. Beach v. Olsen (157 P. 34)...
Olympia Light & Power Co. v. City of	Olympia (157 P. 1199).....	693	State ex rel. City of Olympia v. Olympia
Oregon-Washington R. & Nav. Co. v. City	of Spokane (157 P. 864).....	692	Light & Power Co. (158 P. 85)..... 23
Palmer v. Parker (158 P. 1017).....	683		State ex rel. Cummings v. Blackwell (157
Parker v. Brainard (157 P. 1078).....	428		P. 223)..... 91
Peninsula Nat. Bank v. Hans Pederson	Const. Co. (158 P. 246).....	621	State ex rel. Lopas v. Shagren (157 P. 31)...
Percival Application No. 92, to Lease	Harbor Area, City of Olympia, In re	(157 P. 1082).....	State ex rel. Preston Mill Co. v. Superior
Points v. Nier (157 P. 44).....	20		Court for King County (157 P. 639)..... 26
Post v. Tamm (158 P. 91).....	504		State ex rel. Rutter v. Superior Court for
Puget Sound Iron & Steel Works v. First	International Bank (157 P. 212).....	109	Spokane County (157 P. 684)..... 24
Quinn v. Mutual Life Ins. Co. of New York	(158 P. 82).....	543	State ex rel. State Capitol Commission v.
Robinson v. Steele (157 P. 845).....	208		Lister (156 P. 858)..... 3
Rose v. Kimball (157 P. 38).....	60		State ex rel. Williams v. Superior Court
Seattle v. Puget Sound Traction, Light &	Power Co. (158 P. 252).....	567	for Spokane County (157 P. 23)..... 4
Shafer v. Tacoma Eastern R. Co. (157 P.	485).....	164	Stertz v. Industrial Ins. Commission (158 P.
			256)..... 54
			Stoner v. Fryett (157 P. 213)..... 7
			Taylor v. City of Spokane (158 P. 473)...
			Toner v. Page (157 P. 866)..... 31
			Tronsrud v. Puget Sound Traction, Light
			& Power Co. (158 P. 348)..... 60
			Vansant v. Hartman (157 P. 461)..... 57
			Vaughan v. Fifer (158 P. 93)..... 11
			Viss v. Calligan (158 P. 1012)..... 7
			Wagner v. Alderson (157 P. 476)..... 17
			Welsh v. Spokane & I. E. R. Co. (157 P.
			879)..... 29
			Wenatchee Reclamation Dist., In re (157
			P. 38)..... 40
			Wilson v. Korte (157 P. 47)..... 2
			Wilson v. Mills (157 P. 467)..... 11
			Yanase v. Seattle Taxicab & Transfer
			Co. (157 P. 1076)..... 13

